Private Property Rights and the State
A Study of Regard and Increasing Disregard in
Western Australia: 1829–2016

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DECLARATION

The thesis is my own composition, all sources have been acknowledged and my contribution is clearly identified in the thesis. This thesis does not contain any work that I have published, nor work under review for publication.

William Rupert Johnson

8 August 2016
Abstract

Private property rights underpin Australian society and also are arguably human rights. State regard towards property rights, in particular, freedom from arbitrary expropriation expressed in *Magna Carta*, maintains a contemporary relevance. However, the WA parliament’s plenary power, the doctrine of tenure, the probable absence of common law principles requiring compensation upon land resumption, the qualified nature of fee simple estates and the Torrens principle of indefeasibility of title, together leave a landowner at the mercy of the legislature and executive.

Public and industry groups have deplored the State’s treatment of landowners’ property rights: some argue a fundamental shift has occurred in state regard for property rights, while others see no change. Despite parliamentary enquiries into State actions and processes and recommendations of law reform bodies, concerns about the State’s treatment of private property rights endure, particularly concerning compensation upon a state taking of private property rights.

This thesis studies the state’s treatment of property rights in WA, through prescriptive, historical and descriptive research methods. Attention is given to determining whether there has been an increased disregard for real property rights in WA by the State over time, having regard to the treatment of private property rights by the legislature and executive since 1829, and whether as a consequence of this treatment, law reform is now needed. Attention is focussed on state legislative provisions and relevant judicial determinations. The availability of just terms where property rights are taken is seen as a significant indicator of state regard for property rights, and its absence a significant indicator of state disregard. The traditional distinction between compensable resumption and non-compensable regulation of property rights is challenged. Limitations to this thesis include a focus upon the State’s treatment of freehold title, and no review of commonwealth laws or native title. Nor is this thesis a study of legal-political theories, such as the natural rights theory and utilitarianism, the focus instead being upon the legal doctrines that have shaped property rights such as land tenure, and relevant statutory provisions, common law principles and judicial determinations. Rather than seeking to identify a precise line beyond which compensation must be awarded to a landowner affected, this thesis considers past state laws, actions and processes to better understand and evaluate contemporary state laws, actions and processes.

Following a review of literature selected having regard to relevance, authority and currency, and which classifies literature according to private and public interest perspectives, key focus areas are discerned, being land tenure, mineral rights, water rights, resumption, compensation and injurious affection, planning and environmental laws, and finally confiscation laws. Little consensus is revealed on the State’s regard for property rights; general agreement is evident that compensation be awarded upon land resumption, but there is disagreement on e.g. whether compensation should be awarded for the mere regulation of property rights. Common deficiencies within the reviewed literature are identified.
Three periods of the State’s treatment of the above focus areas are identified; the first period is 1829–1899 where private and public interests are seen to be generally well balanced in the State’s treatment of a landowner’s property rights; the second period 1900–1977 where the treatment of private interests and public interests by the State is more mixed; and the third period 1978–2016 where the State’s construction of and focus upon public interest considerations is identified as a threat to private property rights. From this study, five common themes shaping the State’s treatment of property rights as a whole are identified, being (1) that state regard for property rights is more about sectional groups’ political influence than principle; (2) that the common law provides only limited protection of property rights; (3) that land tenure is increasingly insecure; (4) that public purpose limitations regarding resumption are commonplace, but (5) the legislature’s approach to compensation is flawed.

Guided by these five themes, the final chapter considers and evaluates the possibilities presented by non-entrenched reform (amendment acts, taking and human rights legislation, scrutiny committees, a Rights Council or Rights Charter), partially entrenched legislation with constitutional status, and entrenched state or commonwealth reform for securing just terms to land owners, in light of the conclusion that law reform is necessary to better secure landowners’ property rights.
Acknowledgements

My first and foremost acknowledgment is to my supervisor, Professor Richard H Bartlett, Faculty of Law, The University of Western Australia, for his ever prompt and constructive feedback on each chapter, feedback on argument and structure, guidance and advice; a personal thank you also for your steadfast belief in me, your mentorship, patience and encouragement. I also acknowledge other UWA Faculty of Law staff who have provided occasional support during my candidature including Winthrop Professor Peter Handford and Professor Alex Gardner.

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My final acknowledgment is to D Evans, P Gruba and J Zobel, How to Write a Better Thesis, (Melbourne University Publishing, 3rd ed, 2011), which text provided me with some helpful insight and guidance, particularly with respect to the structure of this thesis.
Dedication

This thesis is dedicated to the loving memory of my late grandmother Emily Morley Johnson (nee Leigh) (26 June 1904-18 December 1995).
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Chapter 1

The Problem of Determining the State’s Regard for Real Property Rights in Western Australia

1.1 Introduction

This thesis examines the State’s regard for a landholder’s private property rights in Western Australia since 1829, a study of which is particularly timely given the 800th anniversary of *Magna Carta* in 2015. This chapter introduces the context and motivation for this study. Concepts essential to the conundrum presented by the State’s treatment of property rights are introduced, including State plenary legislative power, common law limitations, and the statutory qualifications to land title. The critical question of whether there has been a paradigm shift in the relationship of the State to property rights is introduced. The aim, scope, arguments to be presented, limitations, and the significance of the thesis are established. The research method and thesis structure are also outlined.

1.2 Context

Freehold land comprises seven per cent of WA land. The balance of land comprises crown land that is either ‘unallocated or subject to reservation, dedication or leasehold.’ The small percentage of freehold land belies the significance of property rights attaching to that land, which have an importance beyond that land. Private land may provide a home, sustain a livelihood and income, and typically represents a person’s most valuable personal asset. Regard for private property rights is considered a key indicator of freedom, economic development and national prosperity.

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1 This equates to 17.7 million hectares: see www.landgate.wa.gov.au.
2 *Crown Land Administration & Registration Practice Manual* (Government of Western Australia, Department of Land, July 2013), Forward.
3 International Property Rights Index at http://www.internationalpropertyrightsindex.org/. This index assesses the degree to which a nation’s domestic laws protect private property rights and the extent to which its government enforces these laws. The Index reports that the protection of physical property rights has declined slightly to a score of 7.1 out of a possible 10 for 2015. Australia has a global ranking of 19 out of 129 countries for the protection of physical property rights, and an overall property index ranking of 12 out of 129 countries. For 2015, New Zealand was scored 8.3 out of a possible 10 for the protection of physical property rights and a global ranking of 10 out of 129 countries. Australia ranks 4 out of 20 regionally for the overall protection of property rights, while New Zealand ranks first regionally and 3 out of 129 globally. Finland is the highest ranked country globally for the protection of property rights.
may also constitute a fundamental human right.\textsuperscript{4} The High Court has stressed that the protection of private property rights is a policy of the common law.\textsuperscript{5}

\subsection*{1.3 Motivations for the Study}

Adjacent to WA’s Forrest Highway, several large signs protest against State Government “Land Grabbing”. Public concern was highlighted in 2010 by the ‘funeral for property rights,’ staged outside Parliament House.\textsuperscript{6} The Greater Bunbury Region Scheme was the main cause of disquiet.\textsuperscript{7} The Dampier to Bunbury natural gas pipeline corridor between Kwinana and Kemerton has also been a matter of public disquiet. These protestations motivated the writer to examine more broadly the State’s treatment of private property rights.\textsuperscript{8} A literature review indicated that central to wider public grievances was private property being rendered worthless through government-imposed land restrictions,\textsuperscript{9} often in response to changing community attitudes to heritage conservation and environmental management.\textsuperscript{10} Where compensation was afforded to the landholders, it was often alleged to be inadequate.

Of particular interest to the writer is the extent to which the State’s regard or disregard of property rights is a recent phenomenon. If the State has been disregarding property rights since 1829, then the significance of “Land Grabbing” is diminished, but if the phenomenon is only recent, there may be greater cause for concern and a stronger case for law reform.

\textsuperscript{4} See Preamble, \textit{Universal Declaration of Human Rights}, GA Res 217A (III), UN GAOR, 3\textsuperscript{rd} sess,183\textsuperscript{rd} plen mtg, UN Doc A/810, (10 December 1948), and Art 17(1) and 17(2).
\textsuperscript{5} \textit{Plenty v Dillon} (1991) 171 CLR 635, 647 (Gaudron and McHugh JJ); see also \textit{Halliday v Nevill} (1984) 155 CLR 1, 10 (Brennan J), referring in particular to the protection of a landholder’s right of possession.
\textsuperscript{7} The Scheme applies to 281,560 hectares of land in WA’s south west and has reserved nearly 17,000 hectares of that land for conservation and region open space. See http://www.mediastatements.wa.gov.au/Lists/Statements/DispForm.aspx?ID=125805. For the Scheme text and map, see http://www.planning.wa.gov.au/1224.asp.
\textsuperscript{10} Staley, above n 9, 2.
1.4 The conundrum presented by government ‘interference’ with real property rights

1.4.1 The plenary legislative power of the Parliament of WA

WA has an ‘uncontrolled’ constitution which affords to the State Parliament plenary power to enact laws\(^{11}\) which may take or acquire property without payment of compensation to the deprived owner.\(^{12}\) Except in limited circumstances,\(^{13}\) the Commonwealth Constitution has no application to the State acquisition of property.\(^{14}\) Property rights have never been beyond the executive’s reach through the legislature. For example, as early as 1854, provision was made for compensation for resumed town land,\(^{15}\) and a comprehensive statutory regime for the compulsory acquisition of land was enacted in 1890.\(^{16}\) Under the original conditions of crown grants of land, unimproved lands might be resumed.\(^{17}\) Indeed, State land resumption without compensation pursuant to crown grant terms was only expunged in 1997,\(^{18}\) which may suggest that real property rights are better secured today than previously.

1.4.2 The limited protection of property rights at common law

The common law provides some protection of property rights. Trespass and nuisance, conversion, detinue, passing off, misrepresentation and injurious falsehood,\(^{19}\) property-related criminal offences,\(^{20}\) intellectual property regimes, and natural justice, all indirectly protect property rights.\(^{21}\) However, whether land resumption by the State is...
compensable depends upon relevant statutory provision,\textsuperscript{22}\hspace{1em} and a favourable judicial interpretation of that statutory provision.\textsuperscript{23} Property rights are vulnerable in other respects. Land title has never conferred absolute ownership, and adherence to the doctrine of tenure has ensured that the fee simple estate has remained the greatest interest that can be held in land.\textsuperscript{24} It may also be that the concept of ownership comprises both rights and obligations, in which case environmental restrictions are not inconsistent with land title.\textsuperscript{25}

\subsection*{1.4.3 The historic statutory qualification to land title}

A further layer of qualification to property rights may also exist, depending upon whether a fee simple estate under the Torrens system remains an interest at general law,\textsuperscript{26} or instead constitutes a statutory interest.\textsuperscript{27} If the latter view is preferred,\textsuperscript{28} then the case for a statutory restriction of property rights not conflicting with the nature of the fee simple estate is sustained. Whatever construction is preferred, property rights are vulnerable to statutes of general application overriding the principle of indefeasibility of title.\textsuperscript{29} In 2004, Parliament acknowledged some 100 overriding statutory exceptions to a

\textsuperscript{22} Leppington Pastoral Co Pty Ltd v Commonwealth of Australia (1997) 76 FCR 318; Mandurah Enterprises Pty Ltd v Western Australian Planning Commission (2010) 240 CLR 409, [32] (French CJ, Gummow, Crennan and Bell JJ); but cf contra Battista Della-Vedova v The State Planning Commission, Supreme Court of Western Australia Compensation Court 2 of 1986, No 3 of 1986 BC8800828, 16 and France Fenwick & Co v R [1927] 1 KB 458, 467 (Lord Wright) in AS Fogg, \textit{Australian Town Planning Law Uniformity and Change} (University of Queensland Press, 1974) 196. Note that even if such a principle did apply at common law, Lord Wright stated that it did not apply to ‘a mere negative prohibition’. See further at chapter 2 of this thesis, especially paragraph 2.2.1 (d).

\textsuperscript{23} For a discussion of the principles of statutory interpretation, see chapter 2 at [2.2.1(d)] and chapter 7 at [7.3.2] of this thesis.

\textsuperscript{24} \textit{Mabo v Queensland} (No 2) (1992) 175 CLR 1, 80 (Deane and Gaudron JJ). Note, however, the changing nature of land tenure as a feature of property law: \textit{WA v Ward} (2000) 99 FCR 316, 521 (North J). For a more detailed discussion of land tenure, see chapter 2, [2.1.2] and chapter 3, [3.4.1] of this thesis.


\textsuperscript{26} See e.g. DJ Whalan, \textit{The Torrens System in Australia} (LBC, 1982) 22, citing IAC (Finance) Pty Ltd v Courtenay (1963) 110 CLR 550, 572 (Kitto J).

\textsuperscript{27} S Christensen, ‘Adapting the Torrens System for Sustainability–Can it be Better Utilised?’ (Paper presented at the 10\textsuperscript{th} Australasian Property Teachers Conference, Property and Sustainability, The University of Western Australia, 24–26 September 2010) 1, 15, citing Bone v Mothershaw [2003] 2 Qd R 600, 610 (McPherson JA). There is also support for such a construction in \textit{Public Trustee v Registrar-General of Land} [1927] NZLR 839, 841 (Skerrett CJ). As Whalan, above n 26, points out, (22, fn 4) that decision adopted and adapted the views of JE Hogg in \textit{The Australian Torrens System} (William Clowes, 1905).

\textsuperscript{28} This latter view is supported by Whalan, above n 26, 22–23. This construction is also supported by Christensen, above n 27, but cf contra IAC (Finance) Pty Ltd v Courtenay (1963) 110 CLR 550, 572 (Kitto J).

\textsuperscript{29} Whalan, above n 26,344.
landowner’s indefeasibility of title.\textsuperscript{30} Resumption statutes have long been recognized as an exception to indefeasibility of title.\textsuperscript{31} A proposition can accordingly be advanced that the nature of the fee simple estate has not been eroded by the State’s regulation and control of real property rights. The grant of a fee simple estate has never precluded the subsequent exercise of adverse legislative power.\textsuperscript{32}

The State erosion of property rights by a legislative continuum since 1829 might be advanced as a less extreme proposition. Regard may also be had to crown grant reservations and conditions.\textsuperscript{33} Furthermore, uncompensated State confiscation of resources this century\textsuperscript{34} is not new or novel. Petroleum rights were confiscated by the State in 1936\textsuperscript{35} and rights in relation to minerals, already protected from crown alienation from 1899, were arguably further retrospectively confiscated in 1978.\textsuperscript{36}

1.4.4 A contemporary paradigm shift away from private property rights?

Against the above propositions is the argument that the State’s current regard for real property rights is the manifestation of more fundamental changes within Australia’s political and economic landscape.\textsuperscript{37} In 2006, a paper published by the Institute of Public Affairs deplored the Government’s approach to property rights in response to changing attitudes towards heritage conservation and environmental management, describing it as ‘ad hoc and unfair’\textsuperscript{38} and maintaining that ‘Government regulatory intrusion in land use has become so great as to undermine previous notions of landowner rights.’\textsuperscript{39}

\textsuperscript{30} Western Australia, Parliamentary Debates, Legislative Assembly, Wednesday, 25 August 2004, 5627b–5641a (Ms AJ MacTiernan). This may not, however, be entirely a recent phenomenon. As noted by Whalan, above n 26, 344, such statutes ‘have always been endemic’.

\textsuperscript{31} See eg Hogg, above, n 27, cited in EA Francis, The Law and Practice Relating to Torrens Title in Australia (Butterworths, Vol 1, 1972) 624–625.

\textsuperscript{32} This proposition with regard to the nature of a fee simple estate, though without reference to the circumstances surrounding land grants in Western Australia, is advanced by Christensen, above n 27.

\textsuperscript{33} In relation to reservation regarding minerals, see the reservation of all minerals to the Crown; see the former s 15 Land Act 1898 (WA) and s 138 Mining Act 1904 (WA), considered in Worsley Timber Pty Ltd v Western Australia [1974] WAR 115.

\textsuperscript{34} Eg. Geothermal Energy Act 2007 (WA); see also s 9(1) Petroleum and Geothermal Energy Resources Act 1987 (WA).

\textsuperscript{35} S 9 Petroleum Act 1936 (WA).

\textsuperscript{36} See the definition of ‘minerals’ in s 8(1)(d) Mining Act 1978 (WA); M Hunt, Mining Law in Western Australia (Federation Press, 4th ed, 2009) [1.8.2, 1.9.1].

\textsuperscript{37} For example, the chief economist to the Australian Chamber of Commerce and Industry has similarly argued that a new social system is emerging within Australia where ‘…the right to use property freely are subordinated to state purposes…’: S Kates, ‘Private Property Without Rights’ (Summer 2001–2002) 17(4) Policy 32, 34, 36.

\textsuperscript{38} Staley, above n 9, 2.

\textsuperscript{39} Ibid, 2.
Several members of the High Court have recognized the twentieth century as an age in which governments sought ‘to make property rights precarious.’\(^{40}\) Surprise has been expressed that society has accepted the State expropriation of property rights without proper compensation, and indicated that public interest property restrictions should be a public expense.\(^{41}\) The property rights focus of the High Court itself\(^{42}\) may have also shifted.\(^{43}\) In 2008 the Court considered ‘private to private’ eminent domain\(^{44}\) as a legislative possibility.\(^{45}\)

Politicians have called for recognition that landholders have the right to own, use, enjoy and dispose of private property without unreasonable government impositions.\(^{46}\) A 2004 parliamentary enquiry enquired into the compulsory State acquisition of alienated land, the granting of mining tenements, and planning and environmental restrictions on the use of freehold and leasehold land.\(^{47}\) Public disquiet over the impact of heritage conservation, environmental management and planning laws on private property rights was also documented during the process of public consultation for a proposed Human Rights Act in 2007,\(^{48}\) resulting in recommendations that a Human Rights Act include the right not to be deprived of property otherwise than on just terms.\(^{49}\) In 2008, recommendations were made by the Law Reform Commission of WA on reforming

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\(^{40}\) *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, 211 (Heydon J).

\(^{41}\) See e.g. *Smith v ANL Ltd* (2000) 204 CLR 493, [156] (Callinan J).

\(^{42}\) See e.g. *Plenty v Dillon* (1991) 171 CLR 635, 655 (Gaudron and McHugh JJ): ‘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.’


\(^{45}\) *Ibid*, [134] (Kirby J).

\(^{46}\) See e.g. Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 August 2004, 5627b–5641a (Mr JPD Edwards).


\(^{49}\) Consultation Committee for a Proposed Human Rights Act, *ibid*, [4.3.3].
compensation for injurious affection.\textsuperscript{50} In 2014, a quite radical bill was tabled before Parliament for compensating landowners affected by State processes.\textsuperscript{51}

1.4.5 The need for further investigation

Conflicting findings between those who maintain that there is no State erosion of property rights and those who argue that property rights are unreasonably interfered with by the State reveals a legal problem. This problem is worth investigating given the fundamental importance of property rights to our society. However, views on the State’s regard for property rights are often parochial. Claims of erosion of real property rights must be considered with close attention to WA’s history of land grants, land settlement and resumption if claims of a new State subordination of private property rights to the public interest are to be given legitimacy.

1.5 Principal aim, scope, arguments and limitations

1.5.1 Principal aim

Legislation may impact upon a landowner’s property rights by imposing positive obligations, negative restrictions or extinguishing all or some of the property rights, with or without compensation. A principal aim of this thesis is to present a study of the State’s treatment of property rights. In so doing, this thesis will determine whether there has been an increased disregard for real property rights in WA by the State, having regard to the treatment of private property rights by the legislature and executive since 1829, and whether as a consequence of this treatment, law reform is needed to protect property rights better. This study is not limited to land resumption and extends to regulatory takings and the diminishment of property rights.

Consideration of the State’s treatment of property rights must be considered within historical contexts. For example, when considered within their historical context, conditions and reservations contained in original crown grants may not be evidence of an early State disrespect of property rights.\textsuperscript{52}

\textsuperscript{50} Law Reform Commission of Western Australia, \textit{Compensation for Injurious Affection Final Report} (Project No 98, July 2008), 17. The Commission recommended that this be similar to s 54(1) \textit{Land Acquisition (Just Terms Compensation) Act 1991} (NSW).
\textsuperscript{51} Taking of Property on Just Terms Bill 2014 (WA). For a consideration of this bill, see chapter 8 of this thesis, paragraph 8.2.1(b).
\textsuperscript{52} See chapter 4 of this thesis, paragraph 4.3(b)(ii); Battye, above n 17, 86, 87, 150.
1.5.2 Scope

A major focus of this thesis is the extent to which the State’s regard or disregard for the ‘bundle of rights’ of landholders has changed, if at all, since 1829. Although what rights are included in the bundle of rights may vary and its use as a tool of analysis is imperfect, this theory remains a useful measure when considering the State’s treatment of real property rights. The content of the bundle of rights to be applied in this thesis is established in chapter 2.

A literature review is undertaken in chapter 3 on the State’s regard for property rights. Six key areas of study are identified from that review, being land tenure, mining rights, water rights, State resumption and compensation laws, and planning and environmental laws. This thesis considers these six key areas across three identified periods, being 1829–1899, 1900–1977 and 1978–2016 (although a seventh key area is also identified for the final period). Each period is defined by the enactment of legislation which helps define the State’s regard for property rights in that period. The State’s regard for the rights associated with the fee simple estate is the focus of this thesis across these key areas and periods. WA’s historical circumstances are examined, particularly its early colonial history, in order that the State’s regard for property rights may be contextualised and better understood. From a study of each of these key areas across three historical periods, conclusions in relation to each period are made, and common themes relevant to the State’s regard for property rights identified, before finally considering various law reform options for the greater protection of property rights.

1.5.3 Arguments

An important argument advanced in this thesis is that an assessment of the State’s regard for property rights must be considered across the six identified key areas of study and studied with reference to the three distinct historical periods identified, from which common themes or differences in the State’s treatment of property rights can be discerned: through an understanding of what has come before, the contemporary treatment of property rights can be better understood and evaluated. As a guiding principle, the availability of just terms where property rights are taken by the State is seen as a significant indicator of State regard for property rights, and its absence as a significant indicator of State disregard. The State’s approach to compensation is one of

several grounds identified in chapter 7 that lead to suggestions for reform measures in the final chapter. The issue of when the holder of private property rights affected by State intervention should be awarded compensation for the loss or diminishment of property rights is one that historically rested on a distinction between an acquisition for which compensation will generally be afforded, and the mere restriction or taking of private property rights for which compensation will not be afforded. The validity of this distinction has been questioned on occasion by the High Court, and there is statutory precedent for compensation existing outside of the traditional requirement of an acquisition or resumption.

Compensation to a deprived owner whose property is resumed has been recognized as essential to the rule of law and supremacy of the law. History reveals ‘in a civilised society, the legal process for depriving an owner of property rights includes a requirement of compensation.’ The fundamental importance of a guarantee of just terms has been recognized as fundamental to economic investment, social welfare, justice and good government. Arguably, these considerations of economics, justice and good governance which necessitate the need for a constitutional guarantee of just

54 Bonyhady, above n 25, 51; on the general failure of the legislature to provide compensation for mere restrictions, see Bingham v Cumberland CC (1954) 20 LGR (NSW) 1, 26; Baker v Cumberland CC (1956) 1 LGRA 321, 333, discussed in Bonyhady, 49; see also Commonwealth v Tasmania (1983) 158 CLR 1, 145–146, 181, 248 (Mason, Murphy and Brennan JJ); cf contra 283, 286, 287 (Deane J); Belfast Corporation v O.D. Cars Ltd [1960] AC 490, 519 (Viscount Simonds); see also Mutual Pools and Staff Pty Ltd v Commonwealth (1994) 179 CLR 155, 194 (Dawson and Toohey JJ) that ‘The distinction between extinguishing rights in property and acquiring them is one that must be maintained in the application of s 51 (xxxi)’. Note, however, the doubt now cast over the weight to be given to the views of Mason, Brennan and Murphy on acquisition in the Tasmanian Dams Case in A Macintosh & D Wilkinson, ‘Evaluating the Success or Failure of the EPBC Act: A Response to McGrath’ (2007) 24 EPLJ 81, 82, citing Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513. This debate has been since summarised in Australian Law Reform Commission, Traditional Rights and Freedoms-Encroachments by Commonwealth Laws (Interim Report 127, 3 August 2015) [8.63–8.66].

55 See e.g. Commonwealth v WA (1999) 196 CLR 392, 488 (Callinan J); Kirby J (dissenting); see also Commonwealth v Tasmania (1983) 158 CLR 1, 286–287 (Deane J).

56 See e.g. s 19 (1) Aboriginal Heritage Act 1971 (WA) discussed in Bonyhady, above n 25, 58. Here, compensation may be payable where an Aboriginal site is declared to be a protected area, despite an affected landowner retaining title. Literature on extending compensation beyond acquisition and resumption is reviewed in chapter 3 of this thesis, paragraph 3.4(a)(i) et seq. The related planning issue of compensation for worsenment also challenges this distinction. On betterment and worsenment, see generally D G Hagman, ‘Betterment For Worsenment: The English 1909 Act and Its Progeny’ (1977) 10 U Qld LJ 29.


58 See Newcrest Mining WA (Ltd) v Commonwealth (1997) 190 CLR 513, 659 (Kirby J) that ‘…the prohibition on the arbitrary deprivation of property expresses an essential idea which is both basic and virtually uniform in civilised legal systems.’ However, this has not always been accompanied by notions one would expect in a civilised society. For example, it was the Fifth Amendment which upheld that slaves were property; Dred Scott v Sandford 60 US (19 How.) 393 (1856); see J Vishneski, ‘What the Court Decided in Dred Scott v Sandford’ The American Journal of Legal History 32 (4) 373–390.

terms at a Commonwealth level would also apply to the States. A case for possible State constitutional amendment is considered in chapter 8.

No case will be advanced that property rights are or should be absolute, immutable, or beyond the legislature. Instead, it will be argued that the provision of compensation upon just terms to landholders affected by adverse legislative regulation, control, expropriation or executive action is required as a principle of justice, and that present circumstances now faced by landholders warrant law reform to better protect a landowner’s property rights. Common law principles and statutory provisions are ultimately shown to provide inadequate redress to an affected landholder.

1.5.4 Thesis limitations

This thesis has limitations. Firstly, this thesis is concerned with the State’s treatment of private property rights, in particular rights which have as their origin English law as received and subsequently developed by Australian courts and the State legislature. The thesis is focussed upon the State’s impact on freehold property rights derived from the general law rather than statutory rights per se. Communal property rights and objects of public ownership are not considered, save to the extent that the State may cause private ownership to be shifted to public ownership. The State’s treatments of sui generis rights such as native title are not a focus of this thesis, nor are inter parte relationships. Only limited attention is given to quasi property rights created by the legislature; Commonwealth matters such as the impact of the Family Law Act 1975 (Cth) upon property rights are beyond the scope of this thesis, while s 51(xxxi) of the Constitution is relevant only to the extent that it better informs the study of the State’s treatment of property rights. The extent to which State revenue laws such as land tax and stamp duty may impact upon landowners is also beyond the scope of this thesis; some attention is given to statutory provision regarding betterment, but this is not studied in detail given this provision has not been invoked or applied by the State in WA. Although some observations on real property may also be applicable to aspects of personal property, this is coincidental.

Secondly, no appraisal will be undertaken of the many and varied legal-political theories either supporting or condemning the institution of private property. It has been said that the responsible discussion is not about whether the institution of private

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60 Note, however, that family law is sometimes characterized as a State process diminishing property rights: see e.g. A Zimmerman, ‘Without Restraint: the abuse of domestic violence orders’ News Weekly, 14 March 2015, 9, 10.
property should be maintained or abandoned, although responsible debate may concern ‘the determination of the precise lines along which private enterprise must be given free scope and where it must be restricted in the interests of the common good.’ This thesis does not seek to define any inviolable ‘precise lines’ determining the boundaries of compensation except to advance the proposition that where ongoing and increased State disregard of landholders’ property rights is evident when compared with past State practices, a case for providing greater protection of property rights exists, in particular through the provision of just terms to affected landholders.

The notion of property rights as human rights will be supported, and the foundations of land resumption will be examined, but again this thesis is less concerned with theories concerning the State’s relationship to property, other than to recognize the fundamental role that property rights occupy in defining the identity and character of our society, and constitutional arrangements. While Holmes’ study of the common law, and utilitarian theorists such as Bentham have influenced eminent domain jurisprudence in the United States and may offer much in relation to distilling the theoretical underpinnings of the State’s relationship to property, such studies arguably offer less practical insights into the realities State actions have presented to WA landholders. Rather, it is through a detailed study of Australian literature regarding the State and property rights, legislative provisions, executive actions and judicial pronouncements that the thesis seeks to draw conclusions in regard to the State’s treatment of property rights, and from which suggestions for reforming State policies and practices can be made.

A limited review of New Zealand literature is undertaken in chapter 3. The recognition of comparative law and methodology as a source for law reform and judicial activism is acknowledged. However, a comparative study of non-Australian jurisdictions is beyond the scope of this thesis. Property law regimes are very much shaped by the

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62 Ibid. However, see also G Williams, S Brennan and A Lynch Blackshield and Williams Australian Constitutional Law & Theory, Commentary & Materials (The Federation Press, 6th ed, 2014), [27.87] where it is suggested that whether the State’s taking of property in the public interest should be compensable is ‘a difficult policy question over which reasonable minds can differ…’.
63 See e.g. FL Michelman, ‘Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law’, (1967) 80 Harv L Rev 1165. After a detailed consideration of the contribution that the work of various legal theorists offers to eminent domain theory, Michelman offers little more than a ‘fairness machine’ and ‘administrative conscientiousness’ to the resolution of what state processes should be compensable: ibid, 1245–1257.
64 See generally P von Nessen, The Use of Comparative Law in Australia (LBC, 2006).
history and unique constitutional structures of their jurisdictions; as a model for reform, therefore, other jurisdictions may be unsuitable or not well received in WA.65

1.6 Significance of the study

Public concern over the impact of government regulation, control and expropriation of real property has already been the subject of a detailed parliamentary enquiry, as has the study of State Government actions and processes affecting the use and enjoyment of freehold land.66 The identification of this public concern and a study of State laws and processes is not, therefore, in itself significant, although it is noteworthy that, presently, reviewed academic literature on the question of State regulation, control and expropriation of property rights in Western Australia substantially fails to address the detailed parliamentary enquiries.67

The contribution of this thesis to legal scholarship on the impact of the State’s regulation, control, and expropriation of real property rights includes the following significant matters. The study of State regard for property rights has traditionally been focussed in tertiary law studies on a Commonwealth constitutional context despite property rights68 being far more affected by State than Commonwealth laws; the thesis therefore seeks to contribute to legal scholarship. The writer’s detailed consideration of WA’s early land grant schemes and policies provides a historical reference point from which to consider the subsequent impact of State Government regulation and control. This enables the impact of the State to be considered against local circumstances and conditions, rather than against ancient laws such as Magna Carta, as is often done by those asserting an unreasonable State interference over real property rights.69 Wherever possible, the writer considers the impact of State laws on private property rights through the decisions of WA courts, the High Court of Australia, and the comments of bodies such as the Law Reform Commission of Western Australia. Through a detailed study of common law and statutory provisions affecting property rights, this thesis analyses,

65 See e.g. the private ownership of minerals in the United States of America. This was rejected by the Select Committee into the Mining Amendment Bill 1985, Report of the Select Committee into the Mining Amendment Bill 1985 (1985) as a viable model for the reform of mineral rights in Western Australia.
66 Standing Committee on Public Administration and Finance, above n 47.
67 See chapter 3 of this thesis, especially at [3.6].
69 Eg L Staley, ‘Reshaping the Landscape-The quiet erosion of property rights in Western Australia’ (Discussion Paper, Institute of Public Affairs & Mannkal Economic Education Foundation Project Western Australia, December 2007) 10.
critiques and ultimately questions the legislative, executive and judicial treatment of property rights.

Despite one significant WA legal academic having concluded that ‘the problem of resumption is not susceptible of a right solution’, and that a search for ‘pure justice’ is impossible because of the State’s necessity to engage in the resumption of privately held land,\(^{70}\) the writer explores a variety of possible solutions to the problem of public concern over the State’s treatment of real property rights.

### 1.6.1 Contemporary significance

The thesis maintains a contemporary significance. Property rights have had and continue to have an important place in the Australian psyche and are the subject of Government attention from time to time. The Barnett Government long considered the possibility of a private property bill;\(^{71}\) in 2014, a government bill\(^ {72} \) and a private member’s bill\(^ {73} \) were tabled concerning the protection of property rights. The consideration of property rights has also been the subject of discussion and enquiry, particularly in relation to water rights,\(^ {74} \) and the potential impact of future coal seam gas extraction is a cause for concern.\(^ {75} \) A consideration of the encroachment of Commonwealth laws upon vested property rights forms part of a current federal review of Commonwealth laws.\(^ {76} \)

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\(^{71}\) See Western Australia, *Parliamentary Debates*, Legislative Assembly, Tuesday, 8 September 2009, 6528b–6528b; Western Australia, *Parliamentary Debates*, Legislative Assembly, Wednesday, 10 March 2010, 552b–553a; Western Australia, *Parliamentary Debates*, Legislative Council, Tuesday, 4 May 2010, 2222c–2223a.

\(^{72}\) Land Acquisition Legislation Amendment (Compensation) Bill 2014 (WA).

\(^{73}\) Taking of Property on Just Terms Bill 2014 (WA) (private member’s bill). For a consideration of this bill, see chapter 8 of this thesis, paragraph 8.2.1(b).


\(^{76}\) Australian Law Reform Commission, *Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges* (IP 46, 2014) [6], noting that the impact of state laws does not form part of that review. Two questions are raised; namely, (1), what general principles or criteria should be applied to help determine whether a law that interferes with vested property rights is justified, and, (2), which Commonwealth laws unjustifiably interfere with vested property rights, and why are these laws unjustified?; see also Australian Law Reform Commission, above n 54, ch 8. Note the ultimately unsuccessful support for the introduction of a Human Rights Act at a federal level also included property rights: National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009) Rec 25; see S Gamble, ‘New Human Rights Framework Falling Short of Effective Protection’ (August 2010) *Brief*, 14.
1.7 Method

Four research methods have been identified that may be applied to address any legal problem, and which may overlap.\(^{77}\) An historical account explains the development of the law through the law’s causal history, thereby informing understanding of contemporary laws.\(^{78}\) A prescriptive account measures the law against defined values.\(^{79}\) An interpretative account, often related to each of the above methods, emphasises the significance or meaning of certain features of the law and any interconnectedness of those features.\(^{80}\) A descriptive account merely describes the content of the law, but provides information which may then be applied by other methods.\(^{81}\) Each of the above methods may assist in the determination of whether the State legislature affords sufficient respect to real property rights. This thesis applies a combination of methods: a detailed historical and descriptive account is undertaken across chapters 4 to 6, with the historical method also going some way to addressing the deficiencies asserted in relation to existing literature. A prescriptive account is applied by also measuring the State’s regard towards property rights through the availability of just terms where a landholder’s property rights are affected by adverse legislative regulation, control, expropriation or executive action. This method is particularly relevant to chapter 8.

1.8 Thesis structure

This thesis consists of seven further chapters. Chapter 2 provides a discussion of key terms and concepts necessary to understand the writer’s subsequent consideration of the State’s treatment of property rights. Key terms and concepts include the bundle of rights theory, the doctrine of tenure, the nature of the fee simple estate, the place of property rights in the Australian psyche, and the relationship between State powers of resumption and parliamentary sovereignty. The meaning of concepts such as ‘just terms’ and ‘betterment’ are considered.

Chapter 3 reviews literature concerning the State regulation, control and expropriation of real property rights. Key sources of this literature are identified and then classified according to whether property rights are considered from private interest or public interest perspectives. This literature review enables the identification of common

\(^{76}\) SA Smith, *Contract Theory* (Oxford University Press, 2013) 3. I wish to thank my colleague Mr Martin Alcock, Lecture, Edith Cowan University, for bringing this article to my attention.

\(^{77}\) Ibid.

\(^{78}\) Ibid, 3, 4.

\(^{79}\) Ibid.

\(^{80}\) Ibid.

\(^{81}\) Ibid.
themes and key areas, as well as highlighting the importance of compensation extending beyond the State’s taking of land to injurious affection. Conclusions made by the literature are discussed, and shortcomings identified. Ultimately, a lack of consensus is revealed both on the State’s regard towards property rights and what additional measures should be implemented, if any, for the protection of property rights.

Each of chapters 4–6 is dedicated to a consideration of the State’s treatment of property rights within a distinct time period. The enquiry is focused on the six key areas identified from the literature review. Chapter 6 extends this examination to legislative provision regarding criminal property confiscation.

Chapter 7 identifies findings and implications from the study of the three periods identified above. Five common themes characterizing the State’s treatment of property rights across the three periods are identified and considered.

Chapter 8 considers non-entrenched, entrenched and partially entrenched reform models for the greater protection of private property rights. Non-entrenched reform is considered in the form of legislation amendment acts, taking legislation, the dialogue model of human rights legislation, scrutiny committees, and a property rights charter. Entrenched reform models are considered in the form of a State constitutional guarantee of just terms, and alternatively by the extension of existing Commonwealth constitutional provision. Partially entrenched reform in the form of a charter is also considered.
Chapter 2:
The State’s Regard for Private Property Rights

Key Terms and Concepts

2.1 Purpose of this chapter

Chapter 2 provides a background to the thesis problem and arguments by explaining the meaning and application of fundamental terms and concepts. The influence of some key terms and concepts shaping conflicting arguments on the State’s regard for property rights is explored. The concept of property as a bundle of rights is considered and the probability of property rights constituting a human right is established. The qualified nature of legal title to land is explored through the doctrine of tenure, the freehold estate, and indefeasibility of title, which are fundamental to the key areas of land tenure, mineral rights and water rights. The significance of this study is then contextualized through an examination of the relationship between property rights, society and the State. The vulnerability of property rights is revealed through the State legislature’s plenary power, the doctrine of parliamentary sovereignty, and the absence of any justiciable right to property compensation upon land resumption. The meaning of ‘just terms’ and key planning terms are considered.

2.2 Terms and Concepts

2.2.1 Property and property rights

(a) Objects and rights

‘Property’ ‘takes its meaning from its context’.¹ There are two aspects to the term, being objects and rights. At common law, property comprises ‘legal relations, not things’.² Property commonly denotes the objects over which proprietary rights are exercised, but jurisprudence applies ‘property’ to the rights themselves.³ Insofar as the concept of ‘property’ includes a ‘right’, the term ‘right’ means ‘a capacity residing in one man of

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¹ Nokes v Doncaster Collieries [1940] AC 1014, 1051 (Lord Parker).
³ McCaughey v Commissioner of Stamp Duties (1945) 46 NSWSR 192, 201 (Jordan CJ); see also Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation (1970) 121 CLR 154, 168 (Windeyer J); Minister of State for the Army v Dalziel (1944) 68 CLR 261, 276 (Latham CJ).
controlling, with the assent and assistance of the State, the actions of others...4 Whether a right is a property right often depends upon whether what is claimed ‘...falls within a recognized category to which legal or equitable protection attaches...’.5 The definition of a proprietary interest in land is dependent on the protection afforded by the tortious actions of trespass and nuisance.6 ‘Property’ also describes ‘...a range of legal and equitable estates and interests, corporeal and incorporeal.’7 The legislature may also fashion the concept of property to a statutory purpose.8 Rights created by statute may not be accorded the same respect as other property rights, particularly when resumed.9

Within the debate as to the State’s regard of property rights, in particular whether compensation should be afforded to a landowner affected by State controls, ‘property rights’ is often used in a broader sense than the rights strictly constituting ‘property rights’.10 The term may include mere privileges associated with land ownership but which do not constitute a property right, such as a landholder’s ability to clear native vegetation without State approval.11 The law has traditionally protected such privileges by merely preventing others from interfering with a landholder’s land use. State restrictions upon landholders clearing native vegetation12 do not strictly constitute a taking of property rights, rather a confiscation of a privilege. However, economists and the broader public debate include such privileges within ‘property rights’.13 This thesis generally applies the term ‘property’ to refer to proprietary rights, but also more broadly to include privileges attaching to land, since a landowner’s potential land use as a whole must be considered when considering the impact of State practices upon a landowner.

4 Bailey v Uniting Church in Australia Property Trust (Qld) [1984] 1 Qd R 42, 58 (McPherson J) citing Jowitt’s Dictionary of English Law, 2nd ed.
5 Victoria Park Racing and Recreational Grounds Company Ltd v Taylor (1937) 58 CLR 479, 509 (Dixon J).
7 Yanner v Eaton (1999) 201 CLR 351 [85] (Gummow J).
8 See Hepples v Commissioner of Taxation (1990) 22 FCR 1, 25 (Gummow J). Where the legislature has sought to invoke the concept of property, the term ‘takes its meaning from its context, and from its collocation in the document or Act of Parliament in which it is found and from the mischief with which that Act or document is intended to deal’; Nokes v Doncaster Collieries [1940] AC 1014, 1051 (Lord Parker). See also Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, 368 (Brennan CJ); 381(McHugh, Gummow, Kirby, Hayne JJ).
9 See e.g. ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140 on the replacing of bore licences with a new system of licences. This thesis is much less concerned with rights created by statute since those rights owe their existence to terms defined by the legislature.
11 Ibid, 6. This does not constitute a property right because it is merely a physical power enjoyed without aid of the law: 3.
12 See e.g. Regulation 4, Soil and Land Conservation Regulations 1992 (WA).
13 A Macintosh and R Denniss, above n 10, 4, 6.
Accordingly, the circumstances in which it may be considered that a landowner should be compensated when negatively impacted by State processes are potentially wider than might otherwise be considered.

(b) Property as a qualified bundle of rights.

The bundle of rights theory remains the dominant legal construct of property. It is applied by industry groups and by Parliament. Under the general law, property is ‘[u]sually…treated as a “bundle of rights”’. The bundle of rights theory ‘generally implies the right to use or enjoy, the right to exclude others, and the right to alienate’. This construction is not confined to Australian law; in Canada, for example, an inherent quality of property is that it may generally be ‘transferred, bought, sold, exchanged, gifted, intended or hypothecated.’

When considering the State’s regard towards real property rights, it is important to identify the nature of the relevant interest in land and affected property right. The right of possession is the most significant property right. Possession carries with it a corresponding right to exclude others. However, possessory rights are subject always to a superior right. The State’s power to take away property rights considered in chapters 4–6 can be characterized as a stick in the bundle of rights retained by the

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15 See Western Australia, Parliamentary Debates, Legislative Assembly, 25 August 2004, 5627b–5641a (Minister for Planning and Infrastructure, Ms AJ MacTiernan, to Mr JPD Edwards, member for Greenough).


19 See e.g. Minister of State for the Army v Dalziel (1944) 68 CLR 261, 285 (Rich J); Gatward v Alley (1940) 40 LR (NSW) 174, 180 (Jordan CJ, Davidson and Halse Rogers JJ). Possession may provide evidence of property, ownership and title: see Yanner v Eaton (1999) 201 CLR 351, [25] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); Mabo v Queensland (No 2) (1992) 175 CLR 1, 209 (Toohey J); Minister of State for the Army v Dalziel (1944) 68 CLR 261, 285 (Rich J).

20 See e.g. Mabo v Queensland (No 2) (1992) 175 CLR 1, 209 (Toohey J).

21 Ibid, 163 (Dawson J); 206 (Toohey J).
As the doctrine of tenure will demonstrate, the State will be seen to have distinct advantage over landowners when it comes to asserting superior rights.

The bundle of rights theory is not without criticism. The theory views land and land ownership in the abstract, removed from its social and environmental context. It has limitations when applied to sui generis rights such as native title. Most significantly, the bundle of rights theory may in practice transcend the traditional legal and equitable division of property rights. A broad construction of the bundle of rights theory is applied in this thesis; privileges are included within the bundle, but while always acknowledging that notions of property are not absolute or immutable.

(c) Property rights as human rights

The significance of the State’s treatment of property rights is heightened if property rights also constitute human rights. Therefore, a consideration of human rights at the outset of this thesis is critical. Traditional arguments generally reject property rights as a human right, while contemporary views favour the recognition of certain property rights as human rights.

(i) Human rights

Human rights are inalienable personal rights which restrain the exercise of a sovereign power in order to preserve a respect for human dignity and to ensure equality amongst

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24 *Western Australia v Ward* (2000) 99 FCR 316, 515 (North J dissenting); see also K Barnett, ‘Western Australia v Ward: One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis’ [2000] *MULR* 17; see also *Yanner v Eaton* (1999) 201 CLR 351, 365 (Gleeson CJ, Gaudron, Kirby and Hayne JJ) on the limitations of the theory as ‘an analytical tool or accurate description’ of property.

25 See e.g. *Uniting Church in Australia Property Trust (NSW) v Immer (No 145) Pty Ltd* (1991) 24 NSWLR 510, 511 (Meagher JA). In that case, the New South Wales Court of Appeal found that although transferable floor space did not constitute a legal or equitable estate or interest in land, it was nevertheless still ‘proprietary’ in character, because it was transferable, transmissible and of a large commercial value in the same way as goodwill, patents or company shares. Note the decision was reversed on appeal by the High Court but on grounds unrelated to the character of the space ‘rights’; *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 82 CLR 26; For a discussion of other similar decisions, see *Naval Military and Air Force Club of South Australia v Commissioner of Taxation* (1994) 51 FCR 154, 181 (French J).
human beings. Human rights exist independently of a particular society, legal regime, or special relationship with another person, and the duties created by human rights fall primarily on the State.

Their origin is uncertain. Contemporary international law instruments give human rights their international and domestic status and currency. The sources of human rights in Australia are limited express and implied Commonwealth constitutional provisions, limited statutory provisions, and very limited common law rights. Courts may apply international law in the construction of domestic statutory provisions, which may affect the interpretation of a landholder’s bundle of rights.

(ii) Property rights not traditionally human rights

Property rights have not traditionally been treated as human rights since property rights are not universal and transparent. Civil rights and property rights are seen as disparate, probably because of Montesquieu’s view that liberty is acquired through

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32 See e.g. Rouch v Electoral Commissioner (2007) 233 CLR 162 (right to vote).

33 See e.g. Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth), Disability Discrimination Act 1992 (Cth).

34 See e.g. Dietch v Queen (1992) 177 CLR 292.


36 See Nolan v MBF Investments Pty Ltd [2009] VSC 244.


38 See e.g. BJ Edgeworth, CJ Rossiter, MA Stone and PA O’Conner, Sackville & Neave Australian Property Law (Butterworths, 8th ed, 2008) [1.61] ‘...the emergence of modern societies is reflected in legal classifications by the separation of political rights on the one hand and property rights on the other...On many occasions civil and political rights will be in conflict with property rights.’ The authors cite Davis v Commonwealth (1988) 166 CLR 79.
public law and property is acquired through civil law.\textsuperscript{39} Property rights as the antithesis of human rights may appear unremarkable. Property rights include the right to exclude others from the enjoyment of the object of those rights, and at common law, property rights could be exercised maliciously and to the detriment of the public good.\textsuperscript{40}

Additional arguments against the recognition of property rights as human rights include that property rights perpetuate inequality, that the acquisition of property rights may be of questionable legitimacy, that it is futile, especially if applied to all objects of property, and that it may promote litigation disproportionate to the objects the subject of the litigation.\textsuperscript{41} A guarantee of property rights may also not be a human right.\textsuperscript{42}

(iii) Property rights are human rights

Property rights are arguably not incompatible with human rights. History reveals the unsatisfactory foundation of arguments which reject property rights as a human right. The origin of private property lies in the collective rights of particular groups’ rights.\textsuperscript{43} Property rights and civil rights share common historical roots.\textsuperscript{44} For Blackstone, property rights were the third absolute right created by the immutable laws of nature and the vanguard to tyranny; the divine property right was the right of all men to share the earth as common property.\textsuperscript{45} For natural law theorists, a division between property


\textsuperscript{40} See e.g. Mayor, Aldermen and Burgesses of the Borough of Bradford v Pickles [1895] AC 587 and M Taggart, \textit{The Story of Edward Pickles and the Bradford Water Supply} (Oxford University Press, 2002).

\textsuperscript{41} van Banning, above n 27, 176–180.

\textsuperscript{42} S Evans, ‘Should Australian Bills of Rights Protect Property Rights?’ (2006) 31 \textit{AltLJ} 19, 21.


\textsuperscript{45} RP Burns, ‘Blackstone’s Theory of the Absolute Rights of Property’ (1985) 54 \textit{U. Cin. L. Rev.} 67. See G Palmer, ‘Westco Lagan v A-G’ (2001) \textit{New Zealand Law Journal} 163. Palmer quotes Blackstone’s \textit{Commentaries on the Law of England}, Vol 1 (1765), 139 where Blackstone observes, ‘…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.’ However, Blackstone’s views may have carried more weight in the United States than in England. Furthermore, the view that there is a human property right derived from historical-entitlement theories of justice has been challenged: see Harris, above n 37, 79–84.
rights and what we now understand as human rights would have been unimaginable.46 A post-modern construction of the institution of private property also suggests that a conflict between private property rights and civil rights is not inevitable, and that ‘property’ can accommodate civil rights.47

Property rights are conducive to the enjoyment of political rights and the protection of other human rights.48 Property rights may be essential to the protection of a person’s autonomy, particularly against the power of the State.49 Property rights may also be the guardian of all other rights, because property rights empower individuals to be independent and capable of self-government, since property rights diffuse the concentration of political power, and because property rights stimulate productive relationships.50 A human rights foundation for property rights does not mean every person will have property, and a moral foundation to property equally supports measured limitations to property rights.51

International law and domestic law may also support the recognition of property rights as a human right. The Universal Declaration of Human Rights 1948,52 which identifies ‘fundamental human rights,’53 includes certain property rights.54 Further provisions are made under the International Covenant on Civil and Political Rights55 and the

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48 van Banning, above n 27, 181–183.
49 Ibid.
52 GA Res 217A (III), UN GAOR, 3rd sess,183rd plen mtg, UN Doc A/810, (10 December 1948); note the Declaration is not a treaty, and a treaty will not have the force of law ‘unless given that effect by statute’: Kioa v West (1985) 159 CLR 550, 570 (Gibbs CJ). However, Art 17 may provide a foundation for the protection of property rights by the enactment of legislation, under the Commonwealth external affairs power, but this is untested: see Castan Centre for Human Rights Law, Submission to the National Human Rights Consultation (Monash University, Melbourne) [6.19]. However, the submission did not support property rights for inclusion as a human right.
53 Preamble, UDHR, UN doc A/810.
54 Art 17 (1) recognises ‘the right to own property’, and Art 17 (2) provides that ‘no one shall be arbitrarily deprived of his property.’ Art 12 prohibits the ‘arbitrary interference with [the] home’ and provides a universal right ‘to the protection of the law against such interference or attacks.’
55 Art 7(1) of the International Covenant on Civil and Political Rights provides that ‘no-one should be subject to … cruel, inhuman or degrading treatment or punishment; Art 17(1) prohibits the ‘arbitrary or unlawful interference with [the] home.’ The Covenant further defines the legal obligations of the State towards its people in Art 2. Note, however, that the rights in this Covenant do not form part of Australian law until specific legislation is enacted which implements the Covenant: Dietrich v Queen (1992) 177
International Covenant on Economic, Social and Cultural Rights. These international human rights instruments have resulted in the protection of a person’s home from unlawful or arbitrary interference to be recognized as a fundamental human right.

As regards domestic laws, s 13 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) mirrors Art 17(1) of the Convention, and s 20 of the Charter provides that ‘A person must not be deprived of his or her property other than in accordance with law.’ The provisions of this Charter may represent contemporary Australian values.

Although Australia remains one of the few common law countries to have resisted any constitutionally entrenched Bill of Rights, state and national recommendations have endorsed the recognition of private property as a human right. Given the increasing recognition afforded to property rights under international and domestic laws, and the findings of state and national reports, the recognition of at least certain property rights, in particular the right not to be arbitrarily deprived of property, as human rights is the preferred view.

(d) The importance of the recognition of a right as a property right

Property rights are superior to personal rights in terms of the protection and remedies available. Property rights are generally enforceable against third parties, statutes are construed with a presumption against their abrogation, and their compulsory acquisition by the Commonwealth may bring into question the constitutional validity of that acquisition. It is often advantageous that a holder of rights has rights which are

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56 This Covenant recognized the right to adequate housing, and was ratified by Australia on 23 March 1976.
59 Note this arguably places Australia in breach of its obligations under the ICCPR. See N O’Neil, S Rice and R Douglas, Retreat from Injustice. Human Rights Law in Australia (The Federation Press, 2nd ed, 2004) 27.
62 Minister of State for the Army v Dalziel (1944) 68 CLR 261, 285 (Rich J).
63 Mandurah Enterprises Pty Ltd v Western Australian Planning Commission (2010) 240 CLR 429, [32].
64 See s 51(xxxi) Constitution (Cth), and chapter 3 of this thesis.
legally recognized as property rights. Any interference with property rights may dilute or remove that advantage.

2.2.2 The doctrine of tenure

There is no allodial title to land in Australia. Therefore, no landowner enjoys absolute land ownership. A person can own an estate in land, but not the land. The English doctrine of tenure underpinned the land laws of Australia and ‘applies to every crown grant of an interest in land’. Under this doctrine, the Crown’s radical title over all land gave the Crown ‘…. power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others.’ The doctrine has ‘allowed for the peculiarly modern concept of ownership of all land by the state’, and has facilitated State control over the allocation of land and its regulation. All rights of enjoyment of the holder of an estate in land derive from this doctrine.

(a) The fee simple estate

A fee simple estate is the greatest interest that an owner may hold in land. The fee simple estate is most commonly associated with land ownership. The fee simple estate

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68 Mabo v Queensland (No 2) (1992) 175 CLR 1, at 48 per Brennan J, but excluding sui generis rights.
69 Ibid. Note, however, that the doctrine of tenure no longer supports the vesting of beneficial ownership of unalienated Crown land in the Crown: See Bradbrook et al, above n 6, 42, citing Wik Peoples v Queensland (1996) 187 CLR 1, 127–129 (Toohey J), 233–235 (Kirby J), and 177–179 (Gummow J).
71 Ibid, 167. Note, however, that the existence of tenure rather than allodial title as the foundation for land title in Australia should not be overstated in any consideration of the state regard for the property rights of landholders. Where allodial title exists in other jurisdictions, it is also subject to limitations, does not alter the nature of property rights and would not deny the State the right to compulsorily acquire property: see S Hepburn, ‘Disinterested Truth: Legitimation of the Doctrine of Tenure Post Mabo’ (2005) 29 MULR 1, 32; J Deveux and S Dorsett, ‘Towards a Reconsideration of the Doctrine of Estates and Tenure’ (1996) 4 APLJ 30, 36.
73 Mabo v Queensland (No 2) (1992) 175 CLR 1, 80 (Deane and Gaudron JJ).
is recognized as always having conferred the right to commit any act of ownership. Common law rights of ownership conferred by the fee simple estate ‘primarily … carries with it everything both above and below the surface …’. The estate effectively amounts to absolute dominion. So extensive are the bundle of rights associated with the fee simple estate that the estate has been popularly but probably erroneously equated to absolute ownership. A populist and enduring social myth equating fee simple ownership with absolute dominion remains. This myth also provides a popular basis for resisting the State’s regulation of property rights.

(i) The qualified nature of the fee simple estate, and indefeasibility of title

The construct of the fee simple estate as one of absolute dominion goes too far, both legally and in a practical sense. This is firstly evident in the qualified rights attaching to the fee simple estate. The freehold ownership of all minerals was qualified. Water, light and air were also not regarded as amenable to private ownership, but are rather best vested in the State, although the common law recognized riparian rights in certain

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76 Commonwealth v New South Wales (1923) 33 CLR 1, 42 (Isaacs J).
77 See e.g. Nullagine Investments Pty Ltd v Western Australian Club Inc (1993) 177 CLR 635, 656 (Deane, Dawson and Gaudron J); see also Wik Peoples v Qld (1996) 187 CLR 1, 176 (Gummow J), and 250 (Kirby J); see also the argument that ‘ownership involves only rights, while restrictions on land use are better classified as part of social regulation, and hence an invasion of land ownership’ in T Bonyhady, above n 22, 44, citing J Waldron, ‘What is Private Property’ (1985) 5 Oxford Journal of Legal Studies 313, 320–321.
79 See e.g. S Johnston, ‘Property Rights in Australia’ (26 January 2005) at http://www.johnston-independent.com/property_rights.html; see also The Castle (Directed by Rob Sitch, Working Dog Productions, 1997). The film followed the story of the Kerrigan family, their plight to prevent the compulsory resumption of their family home by a nearby airport, and their eventual successful appeal to the High Court.
80 See e.g. Belfast Corporation v O.D. Cars Ltd [1960] AC 490, 518 (Viscount Simonds) who observed, ‘…from the earliest times the owner of property, and in particular of land, has been restricted in his free enjoyment of it not only by the common law maxim sic utere tuo alienum non laedas, but by positive enactments limiting his user or even imposing burdens upon him.’
81 See Commonwealth v New South Wales (1923) 33 CLR 1, 23 (Knox CJ and Starke J), cited in M Hunt, Mining law in Western Australia (Federation Press, 4th ed, 2009), [1.9.1], fn 143.
82 See Cadia Holdings Pty Ltd v State of New South Wales (2010) 269 ALR 204; s 9 Mining Act 1978 (WA); see also Wade v NSW Rutile Mining Co Pty Ltd (1969) 121 CLR 177, 185 (Windeyer J).
Secondly, the rights attaching to the estate in fee simple are liable to statutory abrogation, qualification or variation. Even Blackstone’s archaic construction of the exclusive dominion of the owner accepted that the legislature could ‘oblige the owner to alienate his possessions for a reasonable price.’ Since ‘property’ is not absolute, so ‘regulatory machinery is not antithetical to the concept of property…’ Therefore, any literature which seeks to elevate the status of the fee simple estate absolutely must be viewed with caution.

The qualified rights attaching to the fee simple estate may also apply to Torrens title, which defines the character of Australian real property law. The Torrens system ‘… is not a system of registration of title but a system of title by registration’. At the core of this distinctly Australian land title registration system is the concept of indefeasibility of title. Indefeasibility of title ‘… refers to a title which cannot, in general, be defeated or annulled.’ However, indefeasibility ‘does not mean, and has never meant absolute indefeasibility’. A registered proprietor’s title may be qualified or overridden by

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84 Usufructuary rights were recognized in the freehold owner of banks adjoining surface water in certain natural watercourses and lakes: Knezovic v Shire of Swan-Guildford (1968) 118 CLR 468, 475 (Barwick CJ). Note the watercourse must have a defined bed and exhibit ‘features of continuity, permanence and unity’: See Rapoff v Velios [1975] WAR 27, 31; see also the former s 8(2) Rights in Water and Irrigation Act 1914 (WA).


86 See Wily (1998) 84 FCR 423, 431 (Finkelstein J). Finkelstein relies on W Hohfeld’s construction of property.

87 Blackstone, above n 45, 1–2. Note the populist construction of Blackstone’s writings is probably an erroneous construction anyway: See Burns, above n 45, who argues that Blackstone did not elevate property rights above their civil regulation.

88 R & R Fazzolari Pty Ltd v Parramatta City Council; Mac’s Pty Ltd v Parramatta City Council (2009) 237 CLR 603, [41]; see also e.g. Holmes’ qualifications to notions of ‘civilisation’ discussed by FL Michelman, ‘Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law’, (1967) 80 Harv L Rev 1165, 1166.


90 See e.g. Bradbrook et al, above n 6, [1.25].

91 Breskvar v Wall (1971) 126 CLR 376, 385 (Barwick CJ).


statute. The Torrens system ‘is not a fundamental or organic law to which other statutes are subordinate’. Nevertheless, the exact nature of Torrens land title is uncertain. It may be that registration creates ‘a new statutory estate in land’, and that ‘a transferee seeking registration of a transfer seeks State affirmance of his position’. By implication, this would tie the fee simple estate more closely to the legislature than to the common law’s construction of the fee simple estate. If a fee simple estate is no more than a statutory tenure or title giving access rights to land, and the accompanying bundle of rights are no more than a statutory usufruct, then laws restricting a landowner’s property rights may be merely one aspect of the legislature’s decision to enact legislation for the allocation of interests in land. The case for a State disregard for property rights is then substantially weakened.

Although the legislature’s influence in shaping the fee simple estate is acknowledged, the above construction of land title is not preferred. At least one member of the High Court is supportive, regarding Torrens title as simply ‘… a legal interest, acquired by a statutory conveyancing procedure …’. To treat Torrens title as a new statutory estate

95 See Burton v Arcus (2006) 32 WAR 366, [139] (Buss JA), and s 68 Transfer of Land Act 1893 (WA) as amended. On express exceptions to indefeasibility of title within the Transfer of Land Act 1893 (WA) as amended, see Burton v Arcus, ibid, [135] (Buss JA), citing ss 52, 63, 67, 68, 76, 134, 188(ii), 199, 202, 222 and 231 of the Transfer of Land Act 1893 (WA).
96 Travinto Nominees Pty Ltd v Vlattas (1970) 129 CLR 1, 35 (Gibbs J).
97 Hemmes Hermitage Pty Ltd v Abdurahman (1991) 22 NSWLR 343, 344 (Kirby P). It has been suggested that this construction of a registered estate in fee simple should be preferred: see DJ Whalan, The Torrens System in Australia (LBC, 1982) 22. However, this is contrary to IAC (Finance) Pty Ltd v Courtenay (1963) 110 CLR 550, 572 (Kitto J).
99 See S Christensen, ‘Adapting the Torrens System for Sustainability-Can it be Better Utilised?’ (Paper presented at the 10th Australasian Property Teachers Conference, Property and Sustainability, University of Western Australia, 24–26 September 2010), 15–16.
100 See DE Fisher, Australian Environmental Law Norms, Principles and Rules (Lawbook Co, 2nd ed, 2010) [7.20]; see also Bonyhady, above n 22, 44, that ownership involves both rights and obligations with the consequence that ‘the restrictions on land use imposed by environmental legislation are part and parcel of being a landowner…’, citing AM Honore, ‘Ownership’ in AG Guest, Oxford Essays in Jurisprudence (Oxford University Press, 1961) 123.
101 Some of the essential characteristics of the estate in fee simple are, themselves, the product of successive Imperial and state legislative enactments. The right of free alienation was the product of the statute Quia Emptores 1290 (Imp), the Statute of Wills 1540 (Imp) affirmed the right to devise an estate, and the Tenures Abolition Act 1660 (Imp) abolished archaic incidence of tenure such as fines for alienation: See C Harpum, Megarry & Wade: The Law of Real Property (Thomson, 6th ed, 2000) [2-040]-[2-041] and [2-045]-[2-046]. In Western Australia, there was a statutory conversion of the estate in fee tail to an estate in fee: S 23 (1) Property Law Act 1969 (WA).
102 IAC (Finance) Pty Ltd v Courtenay (1963) 110 CLR 550, 572 (Kitto J), cited in Whalan, above n 97, 22; see also Wik Peoples v Qld (1996) 187 CLR 1, 90 (Brennan CJ) that ‘[t]o regard interests derived from the Crown as a mere bundle of statutory rights would be to abandon the whole foundation of land law applicable to Crown grants.’
arguably goes beyond the purpose of the Torrens system, which was merely to create certainty by proof of title and to eliminate the doctrine of notice and consequent infirmities of land title. It would also present a curious position when considered alongside the existence of unregistered equitable property rights which may exist in Torrens land. Finally, and most significantly, such a construction would reduce property rights to little more than whatever the legislature determines property rights to be. The contextualisation of property rights below suggests that property rights, if not in theory, extend beyond this construct in reality. Conflicting perspectives on land tenure are further considered in chapter 3.

2.3 Property rights contextualised

To contextualize the significance of this thesis, an appreciation of the place of private property in Australian society is required. Without this, the significance of the regulation, control and expropriation of property rights by the State is uncertain. Property rights underpin our economic and social organization, despite their state regulation and control. Property rights ‘define the nature of political and economic systems, and their economic performance’. Property rights are one of the six pillars of western ascendancy. The alienability of property rights is ‘…one of the most important indicia of liberal (capitalist) private property’. Property also ‘serves to define one’s simultaneous relationship to others and to resources’.

103 Wilson, above n 93, 416. See also RR Torrens, A handy book on the Real Property Act of South Australia: containing a succinct account of that measure, compiled from authentic documents with full information and examples for the guidance of persons dealing; and also an index to the Act (Advertiser and Chronicle Offices, 1862); D Kerr, The principles of the Australian Land Titles (Torrens) System (LBC, 1927) 165.

104 See e.g. Barry v Heider (1914) 19 CLR 197.

105 The logical end to this argument may even be that property does not exist at all: see Yanner v Eaton (1999) 201 CLR 351, [17] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

106 For a review of the case for the institution of private property and the functions and policies of modern property law, see eg Ziff, above n 89, Ch. 1; see also M Davies, Property: Meanings, histories, theories (Routledge Cavendish, 2007), Ch 1.

107 Grinlinton, above n 94, 7.

108 Velianovski, above n 14.

109 N Ferguson, Civilization: The Six Killer Apps of Western Power (Penguin Books, 2012) 12–13. Ferguson defines property rights (13) as ‘the rule of law as a means of protecting private owners and peacefully resolving disputes between them, which formed the basis for the most stable form of representative government.’ Ferguson’s focus is, however, largely limited to the Americas.


111 A Freedman and E Mensch, ‘Property’ in JP Greene and JR Pole (eds), The Blackwell Encyclopaedia of the American Revolution (Blackwell, 1991) 620. Property rights may also have ancient and significant roots. For example, the invention of writing as an instrument of administration in ancient civilizations has been attributed to property rights. On cuneiform and classical Sumerian civilization, see EA Speiner, ‘The Beginning of Civilization in Mesopotamia,’ Supplement to the Journal of the American Oriental Society, (December 1939) 27, in LS Stavrianos, The World to 1500: A Global History (Prentice Hall, 1988) 49.
rational for the recognition accorded to private property rights has been explained by the
High Court in terms of freedom, the maximization of social wealth, and reward for
effort.112

Freedom from the arbitrary deprivation of property is ‘…an essential idea which is both
basic and virtually uniform in civilised legal systems’.113 A failure to uphold the
sanctity of private property rights would ‘… invite anarchy and…breeds social
disorder.’114 The protection of property rights is a feature of English legal history. The
Great Charter entrenched a man’s freedom from being ‘disseised…except by the lawful
judgement of his peers and by the law of the land’ as part of the due process of law.115
Magna Carta has been accepted as the foundation for protection against the arbitrary
deprivation of property,116 and has maintained some contemporary relevance in the
consideration of property rights.117 Australian society has attached importance to the
protection of property rights.118 Interference with private property rights, therefore, is a
matter of significance which may have serious implications for society as a whole, well
beyond any landholders affected by State disregard of their property rights.

There may be a negative side to property rights. Property rights may be an impediment
to the implementation of public policy because of the costs associated with State land
resumption,119 but as this thesis suggests in chapter 8, there may be ways to alleviate
this through betterment charges. Some political theories deplore the very existence of
private property rights, but conflicting theories may be explained by the differing

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112 Zhu v Treasurer of the State of New South Wales (2004) 218 CLR 530, 576 (Gleeson CJ, Gummow,
Kirby, Callinan, and Heydon JJ).
113 Newcrest Mining (WA) Ltd v Commonwealth of Australia (1997) 190 CLR 513, 659 (Kirby J); Wilson
v Anderson (2002) 213 CLR 401, 458 (Kirby J); see also ICM Agriculture Pty Ltd v Commonwealth
114 Plenty v Dillon (1991) 171 CLR 635, 654 (Gaudron and McHugh JJ).
declarations followed. See, for example, the list of ‘undoubted Rights and Liberties’ of the English people in
The Declaration of Rights 1689, which included the right to trial by jury before forfeiture of property.
116 See Newcrest Mining (WA) Ltd (1997) 190 CLR 513, 659 (Kirby J); see also Mabo v Qld (No 2)
(1988) 166 CLR 186, 226 (Deane J). Magna Carta is arguably affirmed by the Commonwealth
constitutional limitation to acquire property, except on just terms: Australian and Apple Pear Marketing
Board v Tonking (1942) 66 CLR 77, 104 (Rich J); see also Bank of NSW v Cth (1948) 76 CLR 1, 349–
350 (Dixon J).
117 See eg R McClelland, ‘The Magna Carta’, speech to the Constitutional Law Conference, Parliament
House, Sydney, 20 February 2009, in Bar News: Journal Of The NSW Bar Association (Winter 2009) 7–
9, 8; but note the limitations to the protection afforded by Magna Carta: See D Clarke, ‘The icon of
liberty: the status and role of Magna Carta in Australian and New Zealand law’ (2000) 24 (3) Melbourne
University Law Review 866, 887, fn 126, citing Fisher v Westpac Banking Corporation (1992) FCA 390,
118 Durham Holdings Pty Ltd v NSW (2001) 205 CLR 399, 441 (Kirby J).
[6.37]. For a modern critique of land ownership, see A Linklater, Owning the Earth, The Transforming
History of Land Ownership, (Bloomsbury, 2013).
historical period that each proponent lived in. The debate that property has generated may also be explained by the role of private property in society, and its economic significance.

2.3.1 Parliamentary sovereignty

An understanding of parliamentary sovereignty is fundamental to a consideration of the State’s regard for real property rights. Parliamentary sovereignty is ‘the most fundamental rule of English constitutional law’. The basis of this rule is that courts have ‘no power to declare enacted law to be invalid’, although its’ legal foundations may be questionable and without legal authority. Parliamentary sovereignty does not technically apply to Australia. However, the High Court’s adherence to parliamentary sovereignty has ensured that State Parliaments, including WA’s Parliament, have ‘…an extensive grant of legislative power.’ That extensive power is considered below, together with an examination of the consequences of parliamentary sovereignty for property rights. The principle of parliamentary sovereignty is also an argument advanced against a proposed bill of rights, which argument is critically reviewed in chapter 8.

(a) State plenary legislative power

The States derive constitutional status from the Commonwealth Constitution. However, each State enjoys the conferral of general legislative power to a sovereign parliament. WA has an ‘uncontrolled’ constitution with a sovereign Parliament

122 J Clarke, P Keyzer and J Stellios, Hank’s Australian Constitutional Law, Materials and Commentary (LexisNexis, 8th ed, 2009) [1.4.7], citing De Smith (1981) 73.
123 British Railways Board v Pickin [1974] AC 765, 798 (Lord Simon); see also789 (Lord Morris) and 793 (Lord Wilberforce); see also R v Public Vehicles Licensing Appeal Tribunal (Tas); ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207, 226.
125 This is because legislative, executive and judicial power is divided between the Commonwealth and the States, and the Commonwealth legislature is afforded only such powers as have been expressly conferred or are implied within that conferral of power: See D Meagher, ‘Taking Parliamentary Sovereignty Seriously With a Bill of Rights Framework’(2005) 10(2) Deakin Law Rev 686, 687; Minister of State for the Army v Dalziel (1944) 68 CLR 261, 284 (Rich J). However, parliamentary sovereignty exists in a diluted form within ss 51 and 52 of the Commonwealth Constitution; see G Williams, Human Rights Under the Australian Constitution (Oxford University Press, 1999) 39.
127 Durham Holdings Pty Ltd v NSW (2001) 205 CLR 399, [74] (Kirby J).
128 S 2(1) Constitution Act 1889 (WA); see also s 5 Constitution Act 1902 (NSW), s 2 Constitution Act 1867 (Qld), s 5 Constitution Act 1934 (SA). A power to enact laws in accordance with the Constitution is
with plenary powers, which includes the enactment of laws for the ‘peace, order and
good government’ of the State.\textsuperscript{130} Laws which are iminical to peace, order and
good government will not be unconstitutional. There is no separate power vested in the
judicature which cannot be usurped by the executive or legislature,\textsuperscript{131} and a State
Parliament may enact \textit{ex post facto} law and \textit{ad hominem} law.\textsuperscript{132} Unlike the
Commonwealth, there is also no constitutional right to a fair trial before the deprivation
of property.\textsuperscript{133} Thus, the State legislature’s power is not generally subject to
limitation.\textsuperscript{134} A State may also entrench constitutional provisions and parliamentary
powers and procedures, which is a recognised exception to parliamentary
sovereignty.\textsuperscript{135}

Limitations nevertheless do exist upon State power. Territorial limitations on State
legislative power derive from the ‘text and structure’ of the Commonwealth
Constitution, rather than the wording of the power itself.\textsuperscript{136} The Commonwealth may
have exclusive legislative power;\textsuperscript{137} a Commonwealth law will prevail where a State
law is inconsistent;\textsuperscript{138} or there is a prescribed manner and form provision.\textsuperscript{139} An
acquisition of property by the State may also be inoperative.\textsuperscript{140}

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\textsuperscript{129} Where a constitution is ‘uncontrolled’, it is observed that ‘… the consequences of its freedom admits
of no qualification whatever’: \textit{McCawley v V King} (1920) 28 CLR 106, 115; see also [1920] \textit{AC} 619, 712.
\textsuperscript{130} See s 2 \textit{Constitution Act 1889} (WA). The High Court considered that the constitutional power to make
laws for the peace, order and good government of the colony of Western Australia conferred ‘a plenary
power of legislation, except so far as their effect may be cut down by an enactment of eq
ual authority’: \textit{Moore and Scroope v State of WA} (1907) 5 CLR 326, 338 (Griffith CJ).
\textsuperscript{131} See \textit{Nicholas & Ors v WA & Ors} [1972] \textit{WAR} 168, 175 (Burt CJ).
\textsuperscript{132} S Ratnapala and J Crowe, \textit{Australian Constitutional Law Foundations and Theory} (Oxford University
Press, 3rd ed, 2013) [15.5.3]. On the restraint against the legislative exercise of judicial power. see
\textit{Duncan v NSW} [2015] \textit{HCA} 13, [43].
\textsuperscript{133} Ratnapala and Crowe, above n 132, [15.5.1]. Note, however, the view of the authors that ‘there are
grounds for thinking that derogation from the most basic of due process may be beyond the competence
of the State legislatures.’
\textsuperscript{134} See \textit{Union Steamship Co of Australia Pty Ltd v King} (1988) 166 CLR 1.
\textsuperscript{135} See s 6 \textit{Australia Act} (Cth) and \textit{Australia (Request and Consent) Act} 1985 (Cth) discussed in O’Neil et
al, above n 59, 40.
\textsuperscript{136} Blackshield and Williams, above n 124, 433, citing \textit{BHP Billiton v Schultz} (2004) 221 CLR 400.
\textsuperscript{137} S 52 \textit{Commonwealth of Australia Constitution Act}.
\textsuperscript{138} Ibid, s 109; see also \textit{Nicholas & Ors} [1972] \textit{WAR} 168, 173 (Jackson CJ). For a detailed consideration
of state constitutional manner and form issues, refer to chapter 8 of this thesis.
\textsuperscript{139} See s 73 \textit{Constitution Act 1889} (WA); see also \textit{Electoral Distribution Act 1947} (WA); see also
generally, RS French, ‘Manner and Form in Western Australia: an historical note’ (1993) 23 (2) \textit{UWA
Law Rev} 335.
\textsuperscript{140} See e.g. \textit{P.J. Magennis Proprietary Limited v The Commonwealth} (1949) 80 CLR 382,404 (Latham
CJ).
(b) Land Resumption

(i) Resumption, acquisition and eminent domain

The State taking of land has traditionally been described as ‘resumption’, but the term ‘compulsory acquisition’ has also become common.141 A ‘taking’ at common law refers to a substantial ‘interference with the incidents of ownership, rather than the loss of economic value’.142 The focus is on the substantive effect of the restriction on the landholder,143 and no benefit or entitlement need be conferred on any other party.144 It does not include merely negative State imposed prohibitions.145 The common assumption that a restriction is not an acquisition, however, is questionable. The imposition of a restriction may be likened to the acquiring of the benefit of a restrictive covenant.146 As Callinan J observed, ‘…there is little or no significance to be attached to any apparent shade of difference in meaning between the two words, ‘take’ and ‘acquire’.’147 Nevertheless, the existence of an acquisition or resumption remains often critical to the question of whether a landowner negatively affected by State processes is entitled to receive compensation.

The term ‘taking’ has found legislative expression in WA but refers to the extinguishment of an interest in land, or of every interest in that land.148 The term ‘eminent domain’ is generally confined to the United States. The term ‘expropriation’ is applied in Canada and South Africa.149 This thesis will use ‘resumption’ more generally but apply the relevant statutory language when referring to those provisions.

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141 D Brown, Land Acquisition (LexisNexis, 6th ed, 2009) [1.6].
143 See Grape Bay Ltd v Attorney-General of Bermuda [2000] 1 WLR 574, 583G (Lord Hoffman), cited in Gray, above n 142, 172.
147 Smith v ANL Ltd (2000) 204 CLR 493, 546 (Callinan J). Other superior courts overseas, such as the Indian Supreme Court, have also found that a deprivation of property is no different from an acquisition of property: Saghir Ahmad v State of Uttar Pradesh (1955) (1) SCR 707 discussed in AJ van der Walt, Constitutional Property Clauses. A Comparative Analysis (Klewar Law International, 1999), 210.
148 See s 151(2)(a) and (b) Land Administration Act 1997 (WA).
149 Brown, Land Acquisition, above n 141, [1.6].
Parliamentary sovereignty and other theoretical foundations for State land resumption

The dominant underlying foundation of land resumption is parliamentary sovereignty. The sovereignty of a State Parliament empowers it to take or acquire property without necessitating payment of compensation.\textsuperscript{150} This is ‘a power inherent in sovereignty,’\textsuperscript{151} which power ‘by the [Commonwealth] constitution is neither withdrawn from the states nor exclusively vested in the Commonwealth’.\textsuperscript{152} Therefore, resumption is ‘the proprietary aspect of sovereignty’.\textsuperscript{153} By virtue of this plenary power, there is no constitutional impediment to the exercise of legislative authority over freehold land.\textsuperscript{154} A crown land grant cannot by its terms reduce legislative authority; once granted the land is subject to constitutional provision and exposed to the legislature.\textsuperscript{155} Parliament is also free to change the common law ‘as it sees fit’.\textsuperscript{156}

Constructions of parliamentary sovereignty with respect to land resumption have not been uniform, nor do they offer the only explanation of the State’s power to resume land. Sovereignty may be considered ‘unrestricted’ if the resumption is viewed merely as a necessary function of government.\textsuperscript{157} Closely allied to ‘unrestricted sovereignty’ is the ‘original proprietary theory,’ whereby a crown land grant reserved to the Crown the right of resumption without being bound ‘to pay for it’.\textsuperscript{158} Under this theory, any right to compensation is determined by the terms of the land grant.\textsuperscript{159} However, recognition, that the legislature may be politically unable to enact laws which expropriate land for non-public purposes without payment of just compensation leads to an alternative construction of ‘restricted sovereignty’.\textsuperscript{160} Thus, just terms finds expression in the Commonwealth Constitution, and a presumption of compensated taking is an accepted canon of statutory interpretation.\textsuperscript{161} A fourth though perhaps less persuasive theory is

\begin{itemize}
\item See \textit{New South Wales v Commonwealth} (1915) 20 CLR 54, 77; see also \textit{Minister of State for the Army v Dalziel} (1944) 68 CLR 261, 284 (Rich J).
\item \textit{NSW v Cth} (1915) 20 CLR 54, 66 (Latham CJ).
\item \textit{Minister of State for the Army v Dalziel} (1944) 68 CLR 261, 284 (Rich J).
\end{itemize}

\textsuperscript{150} \textsuperscript{151} \textsuperscript{152} \textsuperscript{153} \textsuperscript{154} \textsuperscript{155} \textsuperscript{156} \textsuperscript{157} \textsuperscript{158} \textsuperscript{159} \textsuperscript{160} \textsuperscript{161}
the English compulsory purchase theory, which disregards matters of sovereignty and instead treats resumption simply as a contract for the sale of land between the landowner as vendor and the State as purchaser.\textsuperscript{162} This has as its explicit justification for acquisition the ‘public good’,\textsuperscript{163} but the theory has not been adopted in any State’s resumption laws, nor have Australian courts adopted this construction.\textsuperscript{164}

\begin{enumerate}
\item[(iii)] **No justiciable right to property**
\end{enumerate}

Parliamentary sovereignty has prevented the acceptance of any justiciable right to property.\textsuperscript{165} The ‘…orbit of written constitutional laws and political realities…’\textsuperscript{166} within which the common law operates has further prevented the rise of any common law right to property fettering parliamentary supremacy. The Crown may not be able to take property for State purposes without compensation.\textsuperscript{167} There is no ‘deeply rooted right of property which is beyond the legislative competence of a State Parliament to deprive a citizen of’,\textsuperscript{168} since this would involve a change to State constitutional arrangements.\textsuperscript{169}

Constitutional law may possibly provide redress against ‘…extreme departures from fundamental rights in the form of state legislation…’\textsuperscript{170} However, the uncompensated deprivation of property rights is not an extreme departure.\textsuperscript{171} Only limited rights have

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\textsuperscript{162} Ibid, 135.
\textsuperscript{166} *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, [62] (Gaudron, McHugh, Gummow and Hayne JJ).
\textsuperscript{167} See dicta in e.g. *France Fenwick & Co v R* [1927] 458, 467 (Lord Wright). Note that even if such a principle did apply at common law, Lord Wright stated that it did not apply to ‘a mere negative prohibition’.
\textsuperscript{168} *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399, [13] (Gaudron, McHugh, Gummow and Hayne JJ); see also Clarke et al, above n 122, [10.10], discussing *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.
\textsuperscript{169} See s 106 Constitution; *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399, [13] (Gaudron, McHugh, Gummow and Hayne JJ).
\textsuperscript{170} *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399, [70] (Kirby J). A law made by the State must be a law of a kind envisaged by the federal Constitution; *ibid*, [74].
\textsuperscript{171} *Ibid*, [76].
been implied into WA’s constitution.\textsuperscript{172} \textit{Magna Carta} and the Bill of Rights 1689 (Imp) have been cited in defence of property rights.\textsuperscript{173} These instruments do limit the Crown’s power.\textsuperscript{174} \textit{Magna Carta} has denied the Crown prerogative power to forfeit assets or otherwise deprive a party of proprietary rights.\textsuperscript{175} Courts, however, are ultimately unwilling to accept \textit{Magna Carta} as grounds for protecting property rights.\textsuperscript{176} The Bill of Rights upholds the rule of law,\textsuperscript{177} but an executive power is construed ‘as being confined within the scope of what is granted’ ,\textsuperscript{178} as opposed to a plenary grant of legislative power.\textsuperscript{179} Neither \textit{Magna Carta} nor the Bill of Rights render invalid inconsistent Commonwealth legislation,\textsuperscript{180} and both instruments can be affected or repealed by Commonwealth and State Parliaments.\textsuperscript{181}

\textbf{(c) No inherent right to compensation}

Compensation for compulsory acquisition must be founded on statutory provisions,\textsuperscript{182} although statutory provisions may themselves draw upon common law concepts such as injurious affection,\textsuperscript{183} leading to speculation as to whether statutory provisions or the common law are the underpinnings of land resumption.\textsuperscript{184} Unlike the Commonwealth,\textsuperscript{185} the States and Territories have no constitutional limitation to compulsory acquisition, which may, therefore, be exercised without compensation.

\textsuperscript{172} See s 73 Constitution Act 1889 (WA); Stephens \textit{v} West Australian Newspapers Ltd (1994) 182 CLR 211, 233 (Mason CJ, Toohey & Gaudron JJ) regarding the freedom of communication, on the basis of representative democracy.

\textsuperscript{173} See e.g. Johnston, above n 79; L Staley, ‘Reshaping the Landscape. The quiet erosion of property rights in Western Australia’ (Discussion Paper, Institute of Public Affairs & Mannkal Economic Education Foundation Project, Western Australia, December 2007).

\textsuperscript{174} \textit{Australian Communist Party v Commonwealth} (1951) 83 CLR 1, 231 (Williams J). Authority that \textit{Magna Carta} does not apply in Western Australia (Vincent \textit{v} Ah Yeng (1906) 8 WALR 145, 146 (Parker CJ) is not thought to be correct, at least today: see Clark, above n 117, 871, footnote 23.

\textsuperscript{175} \textit{Ibid}, 230–231 (Williams J).


\textsuperscript{177} See P Johnston, ‘Forward to the Past: Recent Encounters with the Bill of Rights 1689’ Brief (August 2009) 8, citing s 36 Constitution Act 1889 (WA).


\textsuperscript{179} \textit{Ibid}, noting that ‘an executive power of acquisition of land for a public purpose is different in nature to a legislative power of a national Parliament to make laws with respect to the acquisition of land for a purpose in respect of which the Parliament has power to make laws’.


\textsuperscript{181} Blackshield & Williams, above n 124, 73.


\textsuperscript{183} Brown, ‘The Grundnorms of Resumption’, above n 155, 139.

\textsuperscript{184} \textit{Ibid}, 138–139.

\textsuperscript{185} See s 51 (xxxi) Constitution Act 1889 (WA).
provided that the acquisition is otherwise effected according to law.\textsuperscript{186} This is so whether the ‘relevant property arises under statute or general law’.\textsuperscript{187} Therefore, any right to compensation depends ‘upon principles of sound legislation.’\textsuperscript{188}

The common law may possibly recognize a right to compensation where land is resumed.\textsuperscript{189} A statutory power of resumption in WA may not, for example, have abrogated a common law limitation on the Crown taking possession of property for reasons of state without payment of compensation.\textsuperscript{190} However, the existence of a common law principle of compensation appears ultimately doubtful.\textsuperscript{191} There is no common law right to compensation for ‘injurious affection’ due to planning restrictions.\textsuperscript{192}

The common law assists a landowner only to the extent of preventing an intention to take property without compensation from being imputed to the legislature, without an unequivocal expression of that intent.\textsuperscript{193} A statutory presumption against a legislative intention to interfere with vested property rights exists\textsuperscript{194} except where that intention is

\textsuperscript{186} Halsbury’s Laws of Australia (LexisNexis Butterworths, Vol 22) [355–7005], citing Durham Holdings Pty Ltd v New South Wales. The High Court has observed ‘The Parliament of the State, if its sense of justice allows it to do so, can authorize people’s property to be taken or their services to be conscripted without just compensation or indeed without any recompense at all’: Minister for Land (NSW) v Pye (1953) 87 CLR 469, 486 (Dixon CJ, McTiernan, Williams, Fullagar and Kitto JJ); see also New South Wales v Commonwealth (1915) 20 CLR 54, 55 (Barton J). However, cf contra Queen v Eastern Counties Railway (1841) 2 QB 347, 359 (Lord Denman CJ).


\textsuperscript{188} Bone v Mothershaw [2002] QCA 120, 612 (McPherson J), citing Jerusalem-Jaffa District Governor v Suleiman Murra [1926] AC 321, 328 and also noting that ‘…it cannot be the duty of the court to examine (at the instance of any litigant) the legislative and administrative acts of the Administration, and to consider in every case whether they are in accordance with the view held by the Court as to the requirements of natural justice’.

\textsuperscript{189} See Battista Della-Vedova v State Planning Commission, Supreme Court of Western Australia Compensation Court 2 of 1986 No 3 of 1986, BC8800828, 16, citing AG v De Keyser’s Royal Hotel [1920] AC 508 . It has been suggested that the common law includes a right similar to the Fifth Amendment to claim compensation for taking: G Mcleod, ‘The Commonwealth Tobacco Packaging Law, Property Rights and the Environment’ Brief, April 2013, 36, citing R v Compensation Court (1990) 2 WAR 243, 253. However, given the earlier discussion of the absence of any justiciable right to property, these suggestions are unconvincing.

\textsuperscript{190} R v Compensation Court of Western Australia; Ex Parte State Planning Commission (1990) 2 WAR 243, 253 (Wallace J) on the Public Works Act 1902 (WA) as amended; see also dicta in e.g. France Fenwick & Co v R [1927] 458, 467 (Lord Wright). Note that even if such a principle did apply at common law, Lord Wright stated that it did not apply to ‘a mere negative prohibition’.

\textsuperscript{191} Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority (2007) 233 CLR 259, 270 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) that reference to common law principles can only refer to the body of case law developed around resumption statutes.

\textsuperscript{192} Mount Lawley Pty Ltd v Western Australian Planning Commission (2004) 29 WAR 273, [329]–[331]. This is hardly surprising given that planning schemes are themselves a creature of statute.

\textsuperscript{193} See Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd [1919] AC 744, 752 (Lord Atkinson); cf contra suggestions that the common law includes a right similar to the Fifth Amendment to claim compensation for taking: Mcleod, above n 189.

\textsuperscript{194} Mandurah Enterprises Pty Ltd and Others v Western Australian Planning Commission (2010) 240 CLR 409, [32] (French CJ, Gummow, Crennan and Bell JJ), citing Clissold v Perry (1904) 1 CLR 363.
‘unambiguously clear’.

Whether a resumption has been legally effected often turns on the application of this statutory presumption. Where a statute may have multiple constructions, the construction least interfering with property rights will apply. From the perspective of the courts, ‘any significant disturbance of such… rights is…ordinarily a matter for the legislature…’ since ‘courts are concerned with the extent of legislative power but not with the wisdom or expedience of its exercise.’

Property taken under State law is therefore ‘constitutional only in the political and not in the legal sense’ since the presence or absence of statutory provision for compensation within a resumption statute is irrelevant to the legal authority of the legislature to legislate with respect to resumption.

The lack of any constitutional limitation to the plenary power of a State Parliament to acquire property without any obligation to afford compensation has been thought not to matter. Where land is resumed, property owners may be considered to be normally compensated justly. Moreover, it may be politically impossible for the executive to resume land without compensating landowners, and public outrage over inadequate compensation may force legislative redress. It may make little difference in practice that there is no constitutional requirement on State Parliaments to afford compensation. The examination of the State’s treatment of property rights in chapters 4–7 does not sustain this viewpoint.

(d) Just terms

An understanding of just terms is critical to this thesis, given the assertion that the availability of just terms to a landholder affected by State actions and processes is

373. Interestingly, a statutory presumption will also apply ‘that a statute does not divest the Crown of its property…unless that is clearly stated or necessarily intended’: see Cth v Western Australia (1998) 196 CLR 392, 410 (Gleeson CJ and Gaudron J). For a further consideration of the limited protection afforded to property rights by the rules of statutory interpretation, see chapter 7 of this thesis, [7.3.2].

196 Fazzolari Pty Ltd v Parramatta City Council (2009) 237 CLR 603, 619 (French CJ).  
198 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1, 44 (Brennan J).  
199 New South Wales v Commonwealth (1915) 20 CLR 54, 77 (Barton J).  
200 Durham Holdings Pty Ltd (2001) 205 CLR 399, 441 (Kirby J). This view, however, is not supported by chapters 4–7 of this thesis, and Kirby J provides little authority for this position.  
201 See Bonyhady (ed), above n 22, [6.37]. This point has also been made with respect to environmental laws and property rights: [6.29].  
203 GL Fricke QC, Compulsory Acquisition of Land in Australia (LBC, 2nd ed, 1982) 2.
indicative of State regard for property rights, and its absence an indicator of the lack thereof.

'Just terms’ has been the subject of varied judicial pronouncement within the context of s 51(xxxi) of Australia’s constitution. 'Just terms’ has been considered a matter for 'legislative judgement and discretion,' and has required a judicial balancing between what is fair for the community and the affected property owner. The High Court’s traditionally conservative stance in this regard can be explained by many of these decisions concerning the acquisitions of property during wartime, where the High Court ensured the paramountcy of s 51(vi). 'Just terms’ may not require the payment of market value, though generally the terms provided should reflect the market value of property acquired. Just terms may only require that a scheme provide adequate procedures for determining fair compensation, as opposed to actually presenting compensation as part of the acquisition.

'Just terms’ now appears closer to narrower notions of ‘just compensation.’ Unlike ‘just terms’, ‘just compensation’ connotes ‘full money equivalence’ and refers to ‘the value of the land taken and the damage, if any, to land not taken.’ The concept ensures ‘a full and perfect equivalent for the property taken.’ The need to balance the interests of property owners with the larger community may be rejected in favour of requiring full compensation to the property owner. This approach has received some endorsement, even where the expropriation serves a wider public interest.

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205 Minister of State for the Army v Dalziel (1944) 68 CLR 261, 291 (Starke J), in P Hanks et al, Constitutional Law in Australia (LexisNexis, 3rd ed, 2012), [10.89]. However, the High Court was still prepared to set aside the assessment of compensation by ministerial decision: see Australian Apple and Pear Marketing Board v Tonking (1942) 66 CLR 77. Cf contra PJ Magennis Pty Ltd v Cth (1949) 80 CLR 382, 397 (Latham CJ), noted in Ratnapala and Crowe, above n 132, [15.4.3].

206 Nelungaloo Pty Ltd v Commonwealth (1948) 75 CLR 495, 569 (Dixon J); see also Grace Bros Pty Ltd v Cth (1946) 72 CLR 269, 279–280 (Latham CJ).

207 See Ratnapala and Crowe, above n 132, 294, citing Minister of State for the Army v Dalziel (1948) 75 CLR 495; See also Nelungaloo Pty Ltd v Commonwealth (1948) 75 CLR 495. In Wurridjul v Commonwealth (2009) 237 CLR 309, Kirby J, 425, also gives wartime acquisitions as an example of where just terms might not require payment of any monetary compensation.

208 See Blackshield and Williams, above n 124, 1250.

209 Clarke et al, above n 124, citing Nelungaloo v Cth (1948) 75 CLR 495, 507 (Williams J).

210 See Blackshield and Williams, above n 124, 1251.

211 Nelungaloo Pty Ltd v Commonwealth (1948) 75 CLR 495, 569 (Dixon J).

212 Jacobs, above n 163, [17.55], citing Seales, Eminent Domain: A Kaleidoscope View, Real estate Valuation and Condemnation, 1979, 13–14.; see also Brown, Land Acquisition, above n 141, [1.11].

213 See Australian Apple and Pear Marketing Board v Tonking (1942) 66 CLR 77, 106 (Rich J) on the US Fifth Amendment.


Accordingly the dominant construct of just terms is now a requirement of full compensation. This current approach sits well as a measure of appropriate compensation for a landowner affected by State processes.

Notwithstanding reinterpretations with respect to just terms, just terms is open to the possibility of dilution by judicial revisionism, depending on the background against which an acquisition of land has occurred. From a private interest perspective, it is tempting to argue for just compensation rather than just terms to ensure that full compensation is a legal requirement. There may be persuasive arguments in support of this position. The circumstances in which the wider enquiry of just terms become significant, as opposed to the narrower enquiry of just compensation, typically relate to special Commonwealth matters such as defence and native title and may be less relevant to State considerations. There may, therefore, be less justification for the States than the Commonwealth in not applying a standard of full monetary equivalence when it comes to the awarding of compensation for the taking of property. There are also practical advantages to the incorporation of a standard of just compensation, because the monetary value to be awarded will be objectively ascertainable in most instances.

There are counterarguments to the adoption of ‘just compensation’ over ‘just terms.’ The adoption of just terms in New South Wales and the Territories’ resumption legislation brings advantages of consistency and coherence in applying just terms only. ‘Just compensation’ may risk aligning reforms to better protect property rights from State disregard with more absolute notions of property rights. Indeed, if protection of property rights is to extend beyond land resumption to restrictions, just compensation

The guarantee contained in s 51(xxxi) is there to protect private property. It prevents expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by s 51(xxxi) it must pay for them, or in some other way provide just terms of acquisition.

216 Georgiadis v Australian and Overseas Telecommunications Corporation (1994) 179 CLR 297, 310–311 (Brennan J); see also Smith v ANL Ltd (2000) 204 CLR 493, 500 (Gleeson CJ). ‘Full compensation’ is also consistent with the English principle of equivalence: see Jacobs, above n 163, [17.70].


218 s51(vi) Commonwealth of Australia Constitution Act. With defence, the acquisition may be only temporary: see ibid.

219 The recognition to be accorded to native title is prescribed by the Native Title Act 1993 (Cth). This legislation is supported by s 51 (xxvi) Commonwealth of Australia Constitution Act; see Western Australia v Commonwealth (1995) 183 CLR 373, 462–463, discussed by Butt, above n 75, [25.29]. With native title, the affection with which that interest is held by Aboriginal people may be different to the affections of the broader community for property rights: Butt.


221 s 3(1) Land Acquisition (Just Terms Compensation) Act 1991 (NSW); s 5 Lands Acquisition Act 1978 (NT); s 78 Lands Acquisition Act 1994 (ACT).
may also be more problematic due to the problem of betterment, and the requirement of full compensation likely leading to increased taxation.\textsuperscript{222} The suitability of ‘just terms’ as a model for reform is further considered in chapter 8.

2.4 Planning laws

The impact of the State upon property rights is not confined to the power of resumption. Property rights may also be affected by regulation and control, typically in the name of the public interest, of which planning and environmental laws are the most significant. The meaning of a number of key planning law terms are relevant to an understanding of planning laws considered in later chapters. The term ‘planning’ is intended to make the development of land subject ‘to discretion and restraint.’\textsuperscript{223}

Planning laws may create property rights, such as a development approval,\textsuperscript{224} and also result in land values increasing, for example through rezoning or local government expenditure. The positive impact of planning laws on land values will be considered through the concept of ‘betterment’.\textsuperscript{225} The negative impact of planning laws will be considered through the concept of ‘worsenment’,\textsuperscript{226} in particular the concept of ‘injurious affection’. ‘Injurious affection’ in planning law refers to the decrease in value to a landholder’s land as a consequence of a planning scheme.\textsuperscript{227} In the context of the exercise of the power of eminent domain, it may also describe ‘the adverse effects of the activities of a resuming authority upon a disposed owner’s land.’\textsuperscript{228}

Two assumptions underpin planning laws\textsuperscript{229} and relate to the earlier discussion of the legislature’s plenary power. Firstly, the legislature can implement planning goals through the imposition of statutory controls over land use, and secondly, that statutory

\textsuperscript{222} T Allen, ‘The Acquisition of Property on Just terms’ (2000) 22 Sydney L Rev 351, 371. Note, the writer questions whether landholders would seek compensation for minor deprivations, especially when their claim could be met by a charge for betterment.

\textsuperscript{223} DJ & KH Gifford, \textit{Town Planning Law and Practice} (LBC, 1987) [2–3], citing \textit{Tooth & Co Ltd v Parramatta CC} (1955) 97 CLR 492, 497.

\textsuperscript{224} See \textit{Low v Swan Cove Holdings Pty Ltd v City of Subiaco} (2003) 127 LGERA 36.

\textsuperscript{225} For a discussion of the concept of betterment, see Fogg, above n145; in Western Australia, see the former s 11(2) \textit{Town Planning and Development Act 1928} (WA), and s 36 \textit{Metropolitan Region Town Planning Scheme Act 1959}. The term ‘enhancement’ has also been used in Western Australia; see the former s 63(b) \textit{Public Works Act 1902} (WA). Charging for betterment is a notable complement to funding reforms to compensation regimes considered in chapter 8.

\textsuperscript{226} For a discussion of the concept of worsenment, see Fogg, above n 145, p 490.

\textsuperscript{227} See e.g. s 173 \textit{Planning and Development Act 2005} (WA).

\textsuperscript{228} \textit{Marshall v Director-General, Department of Transport} (2001) 205 CLR 603, [32], cited in \textit{Kettering Pty Ltd v Noosa Shire Council} (2004) 134 LGERA 99, [23]; see also s 241(7) \textit{Land Administration Act 1997} (WA); Brown, \textit{Land Acquisition}, above n 141, [3.32]. For a history of the term ‘injurious affection’, see \textit{Folkestone v Metropolitan Region Planning Authority} [1968] WAR 164, 166–167 (Virtue J). For a review of the use of the term, see also Law Reform Commission of Western Australia, above n 152, 7.

controls constitute an acceptable intrusion into private property rights.\textsuperscript{230} Parliament may be ‘a means of controlling and balancing the two interests.’\textsuperscript{231} Courts are precluded from making any determination of what is for the common good.\textsuperscript{232} Planning laws are ultimately ‘concerned with fundamentally more important objectives than the rights of those with various interests in land inter se…the ultimate focus of planning regulation law is the land itself. It is not, as such, merely the ephemeral possession or ownership of land.’\textsuperscript{233}

\subsection*{2.5 Conclusions}

This chapter considered the meaning and content of key terms and concepts fundamental to this thesis. The concept of real property rights is introduced through a broadened bundle of rights theory. The contemporary view of property rights as a human right establishes a significance of the State’s regard for property rights beyond a significance to landowners. The qualified nature of land ownership is acknowledged through the doctrine of tenure and possibly by indefeasibility of title, but the construction of Torrens land title as nothing more than a statutory title is rejected.

Property rights are contextualised, in particular through an examination of the relationship between property rights and society. The significance of property rights extends well beyond the object over which the rights attach. Adherence to parliamentary sovereignty has ensured that property rights remain subject to State plenary legislative power. That power may be exercised by the State to take away property rights. The State may enact laws such as with respect to planning, which consider public interests over private interests and which may benefit or burden landowners. There is no justiciable right to property, and the interpretation applied to statutory provision will ultimately determine what compensation a landholder may receive upon a resumption. The State may also enact laws which ultimately consider the public interest rather than private interests to be paramount. The significance of property rights to our society is established, along with the vulnerability of property rights to the State.

\begin{footnotes}
\item[230] Ibid, 1, 12; see also Ludwig v Coshott (1994) 83 LGERA 22, 35 (Bryson J).
\item[232] See generally King v Jones (1972) 128 CLR 221, 224 (Barwick CJ); Clark King & Co Pty Ltd v Australian Wheat Board (1978) 140 CLR 120, 153-154 (Barwick CJ), cited in P Ryan, Urban Development Law and Policy (LBC, 1987) [1.20]; see also Westminster Bank Ltd v Beverley Borough Council [1969] 1 QB 499, 533 (Salmon LJ).
\item[233] Hillpalm Pty Ltd v Heaven’s Door Pty Ltd (2004) 220 CLR 472, 496 (Kirby J dissenting).
\end{footnotes}
Chapter 3: A Review of Literature on the State’s regard for Australian real property rights, with a focus on parliamentary enquiries and Western Australia

3.1 Introduction

3.1.1 Approach, structure and method

This chapter reviews the approach and method of literature on the impact of State regulation and resumption on Australian real property rights, with a particular focus on Western Australia. The chapter begins by identifying the need for a broadly focussed enquiry on the State’s regard for property rights. Various sources of literature, its chronology, and context are established. Six key areas common to the literature are identified which then form the basis of chapters 4–6. These areas are land tenure, mining rights, water rights, resumption and compensation, and planning and environmental laws. A seventh area, criminal property confiscation, is identified in chapter 6. Within each area, private and public perspectives are identified, revealing areas of consensus and disagreement concerning the State’s regard for property rights. Chapter 3 also seeks to better contextualize the significance of chapters 4–8. Tentative conclusions are presented regarding the literature, and some limitations of the literature are identified.

Literature has been selected based upon three criteria—relevance, authority and currency—although individual literature may not satisfy all three criteria. Because s 51(xxxi) of the Commonwealth Constitution does not apply to acquisitions by the States, literature on the Constitution has not been included in this chapter. A consideration of ‘just terms’ is limited to matters of State compensation. Limited reference to New Zealand literature is made for comparative purposes.

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1 Edith Cowan University, *Literature review Academic Tip Sheet*, 2008, 2
2 See e.g. *Pye v Renshaw* (1951) 84 CLR 58 at 79-80; see also *WA Planning Commission v Furfaro* (2007) 49 SR (WA) 165, 169.
3.1.2 A more broadly focussed enquiry is required

Literature on the State’s regard for real property rights often arises in the treatment of subject areas such as environmental law, planning law, constitutional rights and freedoms, and human rights law. The subject of compensation for land resumption is also a recognized area of study in its own right. However, the consideration of the State’s regard for property rights within these disciplines is secondary to their core focus. The literature is generally concerned with more narrowly defined issues. For example, the State’s regard for property rights might be considered within the context of the principles of statutory interpretation operating to establish a presumption against the uncompensated State taking of property rights or preventing the establishment of a public interest exception when construing statutory provisions. A study of statutory interpretation is relevant when considering the extent to which the State may shape property rights, as is the consideration of property rights within environmental, planning, constitutional and human rights law. However, narrowly focussed studies cannot of themselves draw meaningful conclusions on the State’s regard of property rights. This requires a more broadly focussed enquiry, of which there has been only one detailed enquiry undertaken so far.

3.2 Literature sources, chronology and context

State regard for a landowner’s bundle of rights has been the subject of some study within Australia, although the sources of the literature are many and varied. The literature may be a product of particular politics of the period. Appropriate context must be considered when reviewing relevant literature.

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9 See e.g. G McLeod and A McLeod, ‘The importance and nature of the presumption in favour of private property’ (2009) 15 LGLJ 97.
Few studies have been broadly focussed. In 1952, a State royal commission examined land compensation and betterment.\textsuperscript{11} From the 1960s, matters of compensation and the conflict between planning legislation and property rights were examined by the legal profession.\textsuperscript{12} The impact of planning, environmental and resumption laws on the fee simple estate was the subject of conflicting commentary.\textsuperscript{13} From the 1970s onwards, narrowly focussed State parliamentary enquiries were undertaken regarding the State’s treatment of aspects of property rights, such as mining.\textsuperscript{14} The only exception to the narrowly focussed literature during this period was the federal parliamentary enquiry into land tenure in the 1970s, which recommended a fundamental reshaping of Australian land tenure.\textsuperscript{15}

From the 1980s, the terms of reference of State parliamentary inquiries into property rights broadened,\textsuperscript{16} culminating in the wide-ranging 2004 Standing Committee on Public Administration and Finance report on the impact of State Government actions and processes on a landholder’s bundle of rights.\textsuperscript{17} This report included a consideration of land tenure, resumption and compensation, and environmental and planning restrictions, and reviewed extensive submissions from landholders and government agencies. Of all reviewed literature, this report has the most relevance to this thesis. The

\begin{thebibliography}{9}
\bibitem{11} Honorary Royal Commission on the \textit{Town Planning and Development Act Amendment Bill 1951, Report} (Government Printer, 1952) [67].
\bibitem{12} See e.g. EF Downing QC, ‘Some Aspects of Compensation’ (1966) 7(3) \textit{University of Western Australia Law Review} 352. This article was prepared from a paper read at the 1966 Law Summer School held at The University of Western Australia; see also TR Morling QC, ‘Conflict of Planning Legislation with Private Interests: Litigation likely to arise from the Implementation of a Planning Scheme’ (1970) 9(4) \textit{UWA Law Review} 303. This article was read at the Annual Summer School at the Law School of The University of Western Australia, February 1971.
\bibitem{14} See Western Australia, Committee of Inquiry appointed to inquire into, and report on, the operation of the Mining Act of the State and to report on whether any and what amendments should be made to the Mining Act 1904, \textit{Report} (Parliament of Western Australia, 1971); \textit{Report of the Committee of Inquiry, (1973).} See also Standing Committee on Government Agencies, \textit{Resumption of Land by Government Agencies: Final Report} (Parliament of Western Australia, June 1987) 13. This report was largely based upon the 9\textsuperscript{th} report of the Standing Committee on Government Agencies, \textit{Resumption of Land by Government Agencies: Proposals for Reform} (Parliament of Western Australia, August 1986); Standing Committee on Public Administration and Finance, above n 10.
\bibitem{16} Standing Committee on Government Agencies, \textit{Final Report}, above n 14, 13. This report was largely based upon the 9\textsuperscript{th} report of the Standing Committee on Government Agencies, \textit{Proposals for Reform}, above n 14.
\bibitem{17} Standing Committee on Public Administration and Finance, above n 10.
\end{thebibliography}
report triggered a formal response from the Government. However, the Committee’s recommendations did not represent any substantive legal or philosophical shift, and although wide-ranging, neither the report nor the Government’s response considered all relevant issues, nor dealt with them conclusively.

The State’s regard for property rights in WA has received close attention from industry over the last decade. An industry Working Party considered key areas of unprecedented State erosion of property rights over the previous decade. The Working Party argued that property rights had been increasingly regulated and subject to compulsory acquisition since settlement, and identified town planning laws as most significant. Two similar papers published by the Institute of Public Affairs closely followed the Working Party. The chief economist from the Australian Chamber of Commerce and Industry also commented on the increasing regulatory taking of property by the subordination of property rights to State purposes, but no examination of State laws or practices was undertaken.

18 Government of Western Australia, Response Of The Western Australian Government to The Western Australian Legislative Council Standing Committee on Public Administration and Finance in Relation to the Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia.

19 See Standing Committee on Public Administration and Finance, above n 10, 255, Recommendation 23, on mining interests, which merely recommended the publication of an updated code of conduct; see also 349, Recommendation 24, on land clearing restrictions, which merely recommended all applicants for land-clearing permits be provided with details of the content of public submissions received on their application; but note, 384, Recommendation 27, on tax incentives for the preservation of natural vegetation. The only major shift represented in the Report was the recommendation that a legislative requirement be introduced that any policy, strategy, plan or other document impacting on administrative decision-making with respect to land-use that affects any title to land be of no effect unless registered under the Torrens system: see 530, Recommendation 35.

20 For example, the Committee was ‘precluded under its standing orders from making findings on the merits of individual cases’: Standing Committee on Public Administration and Finance, above n 10, ii. The Committee also dealt with numerous matters by merely recommending further review by the State Government: 135, Recommendation 12; 163, Recommendation 13; 351, Recommendation 25; 384, Recommendation 27; 385, Recommendation 28; 403, Recommendation 29; 412, Recommendation 30; 416, Recommendation 31. Regarding the government response, see above n 18. The Government’s response merely agreed with the ‘general thrust’ of the Committee’s recommendations: see generally Government of Western Australia, above n 18, 2–3.

21 See e.g. L Staley, ‘Property Rights in Western Australia: Time for a changed direction’ (Institute of Public Affairs Occasional Paper, July 2006); L Staley, ‘Reshaping the landscape. The quiet erosion of property rights in Western Australia’ (Discussion Paper, Institute of Public Affairs & Mannkal Economic Education Foundation Project Western Australia, December 2007).

22 Working Party on the Erosion of Property Rights, ‘Property Rights Under Attack in Western Australia. A Paper Addressing the Erosion of Property Rights in Western Australia’ (Discussion Paper, February 2004). The working party comprised the Property Council of Australia, the Real Estate Institute of Western Australia, the Urban Development Institute of Australia, and ‘other interested individuals’.


24 Ibid, 9–10

25 Staley, above n 21.

Contemporary Australian thinking on property rights has been explored by government only over the last decade, with attention largely focussed on water and environmental issues. The Australia Institute published a discussion paper on whether farmers should be provided with compensation when their property rights over land and water were restricted or extinguished by environmental controls. State Government attention often reflects this narrowly focussed reform. Examples include water access entitlements from 2006. In 2007, a State Consultation Committee considered the protection of property rights under a proposed Human Rights Bill, and similar action occurred at a federal level. Debate over the State’s treatment of property rights continues to be topical.

Law reform has largely remained narrowly framed and compensation focussed. The Commission’s report on the principles, practices and procedures concerning compensation for injurious affection in 2008 made some substantive recommendations relevant to this thesis. The Commission stressed the continuing importance of

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27 C Mobbs and K Moore, *Property: Rights and Responsibilities, Current Australian Thinking* (Land & Water Australia, 2002). The aim of this publication was to improve the sustainable management of land, water and vegetation.


29 A Macintosh and R Denniss, ‘Property Rights and the Environment, Should Farmers have a right to Compensation?’ (Discussion Paper 74, The Australia Institute, November 2004), v.


32 See *National Human Rights Consultation Report* (September 2009). Recommendation 25 simply refers to ‘the right to property.’ However, the Committee, (369), recommended that ‘[a]t the very least, the provision should provide for just compensation and due process for the compulsory acquisition of property by the Commonwealth of property required for public purposes.’ The introduction of a federal Human Rights Act was later rejected by the Commonwealth Attorney General: see Commonwealth of Australia, *Australia’s Human Rights Framework* (April 2010); see also S Gamble, ‘New Human Rights Framework Falling Short of Effective Protection’ August 2010, Brief, 14. See also Human Rights and Anti-Discrimination Bill 2012 (Cth), Note cl 203 which concerns compensation for the acquisition of property. This provision is ‘designed to ensure that the Bill does not interfere with a person’s property rights in a way that contravenes s 51(xxxi) of the Constitution’: see Explanatory Memorandum (November 2012).

33 See e.g. emerging issues such as fracking and coal seam gas extraction in M Weir and T Hunter, ‘Property rights and coal seam gas extraction: The modern property law conundrum’ (2012) 2 *Prop L Rev* 71; K Galloway, ‘Landowners’ vs Miners’ Property Interests: The unsustainability of property as dominion’ (2012) 37(2) *AltLJ* 77.


35 Law Reform Commission of Western Australia, *Final Report*, above n 34. See also Law Reform Commission of Western Australia, (Discussion Paper), above n 34.
Parliament retaining oversight of the purposes for which land may be resumed.\textsuperscript{36} Commonwealth law reform has also been narrowly framed and compensation focussed,\textsuperscript{37} although in 2014 a review of Commonwealth laws encroaching on traditional rights, freedoms and privileges was undertaken.\textsuperscript{38} An interim report acknowledged some Commonwealth laws may interfere with property rights.\textsuperscript{39} Complaints with respect to State laws were noted, but State laws did not form part of the review.\textsuperscript{40} Of particular interest is the suggestion that consensual arrangements might achieve policy outcomes while at the same time addressing concerns with respect to property rights.\textsuperscript{41}

WA’s legal profession continues to write extensively on State planning, environmental and criminal laws which impact on a landowner’s property rights.\textsuperscript{42} Legal scholars have for some time considered the State’s regard for property rights within specific discipline areas, such as mining law\textsuperscript{43} and water law\textsuperscript{44}, and more broadly in relation to

\textsuperscript{36} Law Reform Commission of Western Australia, \textit{Final Report}, above n 34, 28. On the Government’s response to this report, see eg Government of Western Australia, Department of Planning, \textit{Planning makes it happen: phase two Review of the Planning and Development Act 2005} (September 2013) 4 et seq.

\textsuperscript{37} Australian Law Reform Commission, \textit{Lands Acquisition and Compensation} (Australian Government Publishing Service, Canberra, Report No 14, 1980). Note (151) that the Commission was not concerned with ‘the wide implications of the effect of all government activity on individual landowners nor the issue of who should receive the benefit of windfall gains or bear the burden of losses which occur as a result of public development and planning generally.’

\textsuperscript{38} Australian Law Reform Commission, \textit{Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges} (IP 46, 2014) [6].


\textsuperscript{40} \textit{Ibid}, [8.139].

\textsuperscript{41} \textit{Ibid}, [8.141]. No consideration, however, is given to the content of the ‘consensual arrangements’ or how such arrangements might be secured, and ‘further investigation’ is called for. Some attention has been given to the impact of High Court cases to highlight a fundamental disregard by the Commonwealth of private property rights: see A Moran, ‘How a railway in remote WA is slowing down your internet’ (March 2009) 61(1) \textit{IPA Review} 40–43. This article considers the background to the decision in \textit{BHP Billiton Iron Ore Pty Ltd v National Competition Council} [2008] HCA 45.

\textsuperscript{42} See e.g. D McLeod, ‘Compensation Issues–Snatch & Grab Land Acquisition & Compensation’ (The Law Society of Western Australia Seminar, 27 November 2002); D McLeod, ‘The Fairness of Environmental Control–A New Decade: Economic opportunity vs environmental awareness’ (Law Society of Western Australia Winter Conference, Broome, 1990); A Musikanth, ‘Acting on behalf of a commercial client with an interest in the asset’ in \textit{Seizure of Client’s Assets by the State}, (Law Society of Western Australia, 18 March 2009) Topic 3.


\textsuperscript{44} See RH Bartlett, A Gardner and B Humphries (eds), \textit{Water Resources Law and Management in Western Australia} (The University of Western Australia, 1995) [2.2.2]; RH Bartlett, A Gardner and S Mascher, \textit{Water Law in Western Australia: Comparative Studies and Options for Reform} (The University of Western Australia, 1997) [4.4.1]–[4.4.2].
environmental and planning law. However, the consideration by legal scholars of the State’s regard for property rights in WA has been the subject of only one recent study. Only limited attention has been afforded by Australian academics to whether a bill of rights should include property rights.

Within New Zealand, the government has considered whether compensation should be afforded to landowners affected by regulation, and the relationship of property rights to environmental policy. New Zealand lawyers have focussed on legislation relevant to the protection of property rights, while industry groups have focussed on the issues of takings and compensation. New Zealand scholars have more recently considered the State’s regard for property rights within the context of the rule of law and human rights. At an international level, the International Property Rights Index has measured the degree to which domestic laws protect private property rights and the degree to which governments enforce those laws.

46 The impact of planning laws was closely considered by AS Fogg, Australian Town Planning Law: Uniformity and Change (University of Queensland Press, 1974). For a more recent consideration by the former chairman of the WA Town Planning Appeal Tribunal, see Stein, above n 5, 12–22; see also generally R French, ‘Property, Planning and Human Rights’, (Speech delivered at the Planning Institute of Australia National Congress, 25 March 2013).
47 L Finlay, ‘The Attack on Property Rights’ (Paper presented at the Annual Conference of the Samuel Griffith Society, 28 August 2010); see also L Finlay, ‘The Erosion of Property Rights and its Effect on Individual Liberty’ in S Ratnapala and GA Moens (eds), Jurisprudence of Liberty (LexisNexis Butterworths, 2011) Ch 20. Note, however, that Finlay considers the State’s disregard for property rights as part of a paper which focussed largely on interstate matters, such as the Wild Rivers Act 2005 (Qld).
48 See e.g. S Evans, ‘Should Australian Bills of Rights Protect Property Rights?’ (2006) 31 (1) AltLJ 19; see also Castan Centre for Human Rights Law, ‘Submission to the National Human Rights Consultation on a Bill of Rights for Australia’ (Monash University, Melbourne) [6.19]. Castan questions the constitutional power of the Commonwealth to pass legislation which includes a ‘right to property’, except perhaps using the external affairs power, and argues that s 51 (xxxi) provides adequate protection of property rights at a federal level.
52 See e.g. B Wilkinson, ‘A Primer on property rights, takings and compensation’ (Paper prepared for Business New Zealand, Federated Farmers, the New Zealand Business Roundtable and the New Zealand Chambers of Commerce, Wellington, 2008). A particular focus was given to the Public Works Act 1981 (NZ) and the need to extend the principle of compensation for takings beyond land to all forms of property, the New Zealand Bill of Rights Act 1990 and its disregard for property rights, and the restrictions on land use and disposal and provision dispensing a landowner to compensation for land controls under the Resource Management Act 1991 (NZ).
53 Evans and Quigley, above n 3, 233; see also Huang, above n 3; L Evans, N Quigley and K Counsell, ‘Protection of Private Property Rights and Just Compensation: An Economic Analysis of the Most Fundamental Human Right Not Provided in New Zealand’ (unpublished and undated).
54 See http://www.internationalpropertyrightsindex.org. The Index reports that the protection of physical property rights has declined slightly to a score of 7.9 out of a possible 10 for 2012. Australia has a global
3.3 Literature classification

The classification of literature assists in identifying underlying reasons for different perspectives, and identifies areas of consensus and disagreement. The literature broadly falls into two categories, although there is some overlap between these categories, and the literature may contain elements of both categories. The Government may seek to position itself as bringing a balance to these often competing perspectives.55

3.3.1 Private interest perspectives

The first category comprises literature which considers the State’s regard for property rights through an examination of the impact of State Government actions and processes on a private landholder’s property rights.56 This perspective typically focuses upon the impact of regulations and controls which operate to limit a landowner’s property rights, and the adequacy of compensation. A recurrent theme is the importance of compensating landowners affected by government processes, while the matter of betterment is often overlooked. A core feature of private interest perspectives is the focus on common law notions of land and the fee simple estate.

3.3.2 Public interest perspectives

A second category comprises literature which considers the challenges presented by property rights to the public interest. A public interest perspective typically focuses upon securing the public interest. Property rights are often afforded only secondary consideration, and may be seen as an impediment.57 The related problem of capturing betterment by the State from landholders is often considered. A core feature of the public interest perspective is the focus on the notion of land title as a statutory concept, a perspective already challenged in chapter 2.

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55 See e.g. Government of WA, *Response*, above n 18, 8.
56 See e.g. Staley, ‘Reshaping the landscape’, above n 21; Finlay, ‘The Attack on Property Rights’, above n 47, 5; see also Finlay, ‘The Erosion of Property Rights’, above n 47.
57 See e.g. the burden that broadly based compensation regimes would present when seeking to implement environmental management policies: Bates, above n 4. [6.34].
3.4 Literature focus

Six common areas of focus exist across private interest and public interest perspectives on the State’s regard for property rights. These areas are not discrete, so the division between the six areas is somewhat artificial. The six areas, and accompanying private and public interest perspectives, are considered below.

3.4.1 Land tenure

Land tenure is the first common area of focus across the literature. At its core is a debate over whether the regulation of property rights constitutes a taking. The literature reveals conflicting private interest and public interest perspectives on the source and qualities of land tenure, particularly in relation to the fee simple estate.

A private interest perspective consider the fee simple estate from its common law origins. Common law notions of ‘land’ and ‘fee simple’ are seen as having lost much of their original content from statutory intrusions. The impact of the State on a landowner’s property rights is regarded as a taking of property rights. The fee simple estate is even seen as reduced by the legislature to something akin to medieval copyhold. State land resumption destroys the otherwise perpetual duration of the estate in fee simple, while restraints on alienation imposed by town planning schemes impose a form of user at odds with ownership. The private interest perspective looks to economics to include within the notion of land ownership rights not normally associated with ownership, such as freedom from arbitrary constraints on use. The wider rights of ownership are construed, the greater the perceived infraction of property rights by the State. Private interest perspectives may have been driven by the State’s

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58 For example, a consideration of land resumption must include a study of injurious affection arising from that resumption, while a study of the impact of planning laws also requires attention to injurious affection arising from planning laws.
59 Baalm, above n 13, 5.
60 Ibid. Respectfully, this assertion may not be correct. Copyhold: … was tenure by villeinage… its form and characteristics changed depending upon the traditions of the manor… the tenant … had to do what his lord demanded and had no rights in the property beyond those which the lord acknowledged in his own manorial court… the Crown would only interfere at the behest of a free man… the tenant in villeinage had no seisin and could not transfer his interest without his lord’s consent… the copyhold tenant could not sue or be sued in the common law courts in respect of his holding…
AR Buck, The Making of Australian Property Law (The Federation Press, 2006), 68. In any event, as Buck confirms, copyhold tenure was never introduced into the colony of New South Wales.
61 Baalm, above n 13, 6.
62 Evans and Quigley, above n 3, 236; but cf contra Huang, above n 3, 621.
shift from reliance on crown grant reservation to secure public interest considerations to the less visible statutory regulation of land ownership.\textsuperscript{63}

Private interest perspectives are not without criticism. Common law notions of ‘land’ and the ‘fee simple estate’ may not be conclusive that the legislature has manifestly changed the nature of land ownership. If regard is had to the qualified nature of the fee simple estate, then regulatory controls may not be at odds with the freehold estate.\textsuperscript{64} Nor has it been accepted that planning laws operate to convert the fee simple estate from an interest in land to an interest in a particular use of land.\textsuperscript{65} Furthermore, the State’s power of resumption may even have enlarged rights associated with the estate in fee simple with a corresponding diminution of crown rights, if regard is had to how compensation has been assessed upon a resumption.\textsuperscript{66}

A public interest perspective qualifies a landowner’s property rights to overriding public interest perspectives,\textsuperscript{67} and may relegate the fee simple title to a mere product of statute.\textsuperscript{68} On this view, public interest obligations through crown reservation (an almost constant feature of WA land tenure) and statutory restrictions are not at odds with land ownership, nor do they constitute a taking of those rights.\textsuperscript{69} Regulatory controls may be characterized as akin to the restricted rights of enjoyment that a lessee enjoys over demised land.\textsuperscript{70} However, the portrayal of restrictions on property rights attaching to the fee simple estate as akin to private leasehold covenants is not only to confuse what are

\begin{itemize}
\item \textsuperscript{63} S Christensen, P O’Connor, W Duncan and R Ashcroft, ‘Early Land Grants and Reservations: Any Lessons from the Queensland Experience for the sustainability Challenge to Land Ownership’ (2008) 15 James Cook U L Rev 42, 44.
\item \textsuperscript{64} BH Davis, ‘Legal Aspects of the History and Background of Town and Country Planning (an Historical Jurisprudence of Planning)’ (1969) 3 NZ Uni Law Rev 310, 322. Davis argues that given the medieval incidents of tenure which restricted the full exercise of the right of possession in favour of the landholder’s immediate lord, planning laws simply represent a ‘twentieth century incident of tenure’.
\item \textsuperscript{66} Else-Mitchell, above n 13, 6. Mr Justice Else-Mitchell was a judge of the Supreme Court of NSW and the Land and Valuation Court of NSW. His Honour went on to chair the Federal Commission of Inquiry into Land Tenures discussed below. It is no doubt significant that the publication of his Honour’s article occurred in the same year as the Report of the Royal Commission of Inquiry into Rating, Valuation and Local Government Finance (New South Wales, May 1967). That Report recommended a development or betterment charge on land value increments arising from planning schemes. For a consideration of this Report, see JM Pullen, ‘The Betterment Levy’ (April 1968) APIJ 43. For a consideration of the subsequent betterment legislation in NSW, see J Pullen, ‘The NSW Land Development Contribution Act 1970’ (January 1971) Royal Aust Planning Institute Journal 5.
\item \textsuperscript{67} See D Grinlinton, ‘Property Rights and the Environment’ (1996) 4 APLJ 1, 4–7.
\item \textsuperscript{68} See e.g. S Christensen, ‘Adapting the Torrens System for Sustainability–Can it be Better Utilised?’ (Paper presented at the 10\textsuperscript{th} Australasian Property Law Teachers Conference, Property and Sustainability, The University of Western Australia, 24–26 September 2010). Christensen concludes that the public interests should be afforded an in rem status over a landholder’s title.
\item \textsuperscript{69} Ibid. Christensen concludes that the public interests should be afforded an in rem status over a landholder’s title.
\item \textsuperscript{70} Macintosh and Denniss, above n 29, 52.
\end{itemize}
very different property rights, but also to ignore the legal, political and economic significance attaching to the fee simple estate.

In its most radical expression, a public interest perspective regards private property rights as inconsistent with the public interest, and recommends a radical reshaping of land tenure. Traditional assumptions associated with land tenure are challenged. A Commonwealth parliamentary commission recommended that ownership and possession be replaced with enjoyment and use as ‘the dividing line between public and private rights over land’. Although it accepted that fee simple grants should continue to be the basis of residential land use, crown grants of a fee simple estate for industrial or commercial purposes were to be replaced by a fixed-term lease, with existing non-residential estates in fee simple to be converted to crown leasehold through a persuasive process of taxation concessions to landowners. A national land policy directed to social welfare and economic prosperity was at the core of these recommendations. The Commission eventually recommended that legislation reserve to the Crown all future land development rights, and that development restrictions be secured by covenants in favour of public authorities. For land made available by the Crown for income-

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71 Commission of Inquiry into Land Tenures, Final Report, above n 15. The Final Report considered that ‘an individualistic approach to property rights and land ownership is incompatible with the public interest, unless individual rights are restricted to the use and enjoyment of land’: Recommendations 4(a) and (f), 2, and [2.8].

72 Commission of Inquiry into Land Tenures, First Report, above n 15. The First Report challenged traditional assumptions that Australian land tenure fell into two discrete categories of freehold and leasehold, [6.7]–[6.9]. The Commission argued that both forms of tenure were based on limited freehold, a title dependent upon the performance of conditions, and referred to SH Roberts, History of Australian Land Settlement 1788-1920 (MacMillan, South Melbourne, 1968) 409. At a state level, a failed attempt to transition from freehold to leasehold tenure in 1912 is briefly considered in Chapter 5.

73 Commission of Inquiry into Land Tenures, First Report, above n 15, [2.13]. The Commission of Inquiry into Land Tenures, Final Report, above n 15, considered that ‘an individualistic approach to property rights and land ownership is incompatible with the public interest, unless individual rights are restricted to the use and enjoyment of land’: Recommendations 4(a) and (f), 2, and [2.8].

74 Commission of Inquiry into Land Tenures, Final Report, above n 15. [7.30], [7.57], [7.69(a) and (c)]. A number of advantages were identified by the Commission in relation to leasehold over fee simple, such as the relative ease with which pollution control might be addressed through leasehold covenants, as opposed to the statutory regulation required to restrict fee simple usage: [7.58]; see also Else-Mitchell, above n 13, 10. His Honour acknowledged that this would mean that the value of an owner’s interest in land would diminish year by year, as would land speculation. For a discussion of his Honour’s proposed case by industry, see R Collier, ‘Unto John Doe His Heirs and Assigns Forever—An Appraisal by a Real Estate Consultant’ (July 1967) APIJ, 73. Collier considers a number of alternative proposals for securing contributions towards the cost of public works.

75 Commission of Inquiry into Land Tenures, Final Report, above n 15, [2.4]. Two evaluative criteria were to be applied to land policy. Efficiency was the first criterion, including a requirement that land development, use, and re-development be controlled in the public interest: [2.7(f)]. The second criterion, equity, required that landholders be limited to gains from the development or use of land and be excluded from gains associated with passive land ownership.

76 Commission of Inquiry into Land Tenures, Final Report, above n 15, [2.35]. ‘Development rights’ consisted of ‘rights to convert land from rural to urban use or from one urban use (or intensity of use) to
producing purposes, all capitalized benefits derived from land location were to be retained for the benefit of the Crown. Although these recommendations can be best understood within the radical politics of the early 1970s, the notion that freehold tenure might be replaced with leasehold tenure retains some currency.

Common law notions of land and ownership, or the alignment of the public good with a State’s regard for property rights, have form the basis of criticisms of the public interest perspective. As regards the Commission’s proposed reforms to land tenure, these attracted strong criticism, particularly in relation to the proposal that capital gains associated with changes in the permitted land use vest in the Crown.

### 3.4.2 Mineral rights

The State’s regard for a landowner’s mineral rights is the second common area of focus across the literature. The assertion of prerogative rights to royal metals and reservations in crown grants has brought about public rather than private ownership of minerals.

Crown reservations of title to minerals have permitted the Crown to empower miners to conduct mining upon private land. The almost complete abolition of private mineral ownership by crown reservations has been asserted following changes to terms of land grants from 1 January 1899.

A private interest perspective regard the common law concept of ‘land’ as having been fundamentally altered by crown reservations of title to minerals and statutory rights to conduct mining upon private land. Attention is often focussed upon the impact of mining on agricultural land. A Committee of Inquiry recognized that mining is a ‘drastic invasion of traditional common law rights attaching to ownership of freehold

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77 Commission of Inquiry into Land Tenures, *Final Report*, above n 15, [2.17(c)]
79 See e.g. Baalman, above n 13; Finlay, ‘The Erosion of Property Rights’, above n 47, Ch 20, 26.
81 Forbes and Lang, above n 43, [202].
82 Hunt, *Mining Law in Western Australia*, above n 43, [1.9.3], citing s 15 *Land Act* 1898 (WA); see also Hunt, ‘The Mining Act of 1978’ above n 43, 324.
83 Baalman, above n 13, 6. The common law vested in the landowner ownership of all minerals excluding royal metals which were owned by the Crown: see *Commonwealth v New South Wales* (1923) 33 CLR 1, 23 (Knox CJ and Starke J); *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 242 CLR 195. For a consideration of common law title to minerals, see chapter 4.
Public submissions to the Standing Committee on Public Administration and Finance in 2004 included concerns on the impact of the grant of a mineral tenement over freehold or leasehold land. Mining is blamed for curtailing property rights, with criticisms being levelled at conflicting administrative and judicial functions of the Warden’s Court, the limited rights of appeal for litigants, and uncertainty over mining claims created by the poorly resourced court.

A public interest perspective focuses upon the qualified ownership of minerals at common law by crown reservations, and the public benefits of State royalties, which provide the State with revenue. The Crown’s right to resume land for the purpose of mining is considered appropriate, and challenges to private property rights may be downplayed. A study by the Public Administration and Finance Committee was unconvinced of ‘significant problems with conflict between mining companies and freehold landholders…’

The common assumption that the state withholding of mineral rights is necessarily productive of loss to the landowner is challenged by some New Zealand literature. There also remains ongoing debate as to whether public ownership of minerals serves the broader interests of the community.

### 3.4.3 Water rights

The State’s regard for a landowner’s water rights is the third common area of focus across the literature. The limiting of common law riparian rights by crown reservation

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84 Committee of Inquiry into Mining Act 1904, above n 14, 71.
85 Standing Committee on Public Administration and Finance, above n 10, ch 6, 248–254. Concerns were not limited to private landholders and (248–249) included those expressed by government departments such as the Water Corporation.
86 Staley, ‘Reshaping the landscape’ above n 21, 4.
88 Committee of Inquiry into Mining Act 1904, above n 14, 71–72.
89 Standing Committee on Public Administration and Finance, above n 10, [6.46]. The Committee reported that such issues ‘appear to the Committee to stem primarily from changing expectations as to land use from parties locked into long term contractual arrangements.’
90 Evans and Quigley, above n 3, ch 12; cf contra Huang, above n 3, 627–629. The authors questioned whether the nationalisation of petroleum for economic and defence purposes, without compensation being afforded to affected landholders, resulted in private losses to landowners from confiscation having exceeded the share of national benefits landowners derived from the expropriation. However, the assumption that the detriment to landowners from the regulation of property rights are less than the benefits received from regulation has also been rejected: Huang, above n 3, 628.
91 See D Mather, J Saavedra and R Kilian Polanco, ‘Mineral Property-Rights, Royalties and Rents’ (Sustainable Mining Conference, Kalgoorlie WA, 17–19 August 2010). The authors argue that governments should not own mineral rights merely to collect revenue, and that the state should only own minerals if the deposit displays public good characteristics. The authors acknowledge the role of the state in the registration and protection of private property rights to minerals; see also e.g. S Hepburn, Mining and Energy Law (Cambridge University Press, 2015) 11.
and their further displacement by statutory provision are notable features of private interest perspectives on a landowner’s water rights. Statutory interference with water rights is seen as having fundamentally altered the common law concept of ‘land’ and the bundle of rights. A frequent theme is concern over State intrusion on a rural landholder’s water entitlements. Private interest perspectives are not without necessary qualification. The limited non-exclusive nature of riparian rights must be acknowledged, and assertions of the statutory abrogation of a landowner’s property rights must be considered against the speculation as to whether declarations of crown ownership of water amount to crown ownership or are merely to be equated with State sovereignty.

A public interest perspective commonly involves a rethinking of accepted notions of property rights as part of ecologically sustainable development. A consequence is an unbundling of the water rights away from the landholder to improve the water use efficiency and value. Recent literature reflects the dividing up of water rights into component parts instead of attaching it to land, as part of the National Water Initiative.

However, there is no consensus that water rights should be separated from real property rights. Although the Government was initially neutral, there is agreement across

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92 See Bartlett, Gardner and Humphries (eds), above n 44, [2.2.2], [3.1.2]. See also Bartlett, Gardner and Mascher, above n 44, [4.4.1]–[4.4.2]; note, however, the speculation as to whether declarations of crown ownership of water actually amount to crown ownership or are merely to be equated with state sovereignty: [3.5], [4.5.1]–[4.5.2]. For a consideration of the water rights, including common law riparian rights, see paragraph 4.6.1 of this thesis.

93 Baalman, above n 13, 6.

94 Staley, ‘Property Rights in Western Australia’ above n 21, 5–6.

95 See A Gardner, R Bartlett and J Gray, Water Resources Law (LexisNexis, 2009) [8.61]. The common law doctrine of riparian rights recognizes usufructuary rights in the owner of banks adjoining surface water in natural watercourses and lakes, provided that the watercourse has a defined bed and exhibits ‘features of continuity, permanence and unity.’: Knezovic v Shire of Swan-Guildford (1968) 118 CLR, 475 (Barwick CJ). Riparian rights are shared and provide only limited rights of control and transfer, with the result that Gardner et al regard riparian rights as having ‘lesser proprietary status’. See chapters 4–6 of this thesis for a further consideration of riparian rights.

96 See Bartlett, Gardner and Mascher, above n 44, [3.5], [4.5.1]–[4.5.2].

97 See e.g. T Gleeson and K Piper, ‘Institutional Reform in Rural Australia: Defining and Allocating Property Rights’ in Mobbs and Moore, above n 27, 110.

98 Tasman, above n 28, [3.2.3]–[3.2.4]. Note this report stopped short of making any recommendation in relation to compensation to those whose entitlements to water might be affected.

99 For an overview, see S Stoeckel, R Webb, L Woodward and A Hankinson, Australian Water Law (LawBook Co, 2012) [4.700]. Interestingly, it was earlier said that Western Australia’s initial decision not to enter the National Water Initiative was sound in light of the State’s vulnerability to the availability of water from the impacts of global warming: see Macintosh and Denniss, above n 29, 32, fn 61.

100 See e.g. Staley, ‘Property Rights in Western Australia’ above n 21, 6. While Staley argues that any water policy must be built around the protection of a landowner’s existing rights and practices, she accepts that water rights should be separated from real property rights by the creation of tradeable water titles.

101 Tasman, above n 28, [3.2.3]–[3.2.4].
some private interest and public interest perspectives that where a landowner is divested of water rights, the landholder must be compensated.\textsuperscript{102}

3.4.4 Resumption, compensation and injurious affection

At the heart of the literature is the fourth area of common focus—the power of the State to resume land, and compensation either for the resumed land or for injurious affection arising from that resumption. The literature is focussed on the vexed issue of when a right to compensation should arise, and how compensation should be assessed with respect to resumptions and injurious affection. The common law approach has been that, excluding taxation or ‘overarching changes to property rights structures’, a taking of physical property, similar rights, and those essential for economic incentive, must be compensated. \textsuperscript{103} However, this is qualified by express statutory provision to the contrary.

(a) Resumption and compensation

The overriding goal of compensation legislation with respect to resumptions is to compensate owners for actual losses suffered upon resumption, but within limits.\textsuperscript{104} The literature focuses on where those limits should be drawn. The principles governing the award of compensation for the compulsory acquisition of property have traditionally represented a compromise between competing desires to award generous compensation to individuals to stem public resistance to resumptions, and the need to keep the cost of public works reasonable.\textsuperscript{105} Perhaps because of this comprise, the legal principles applied in the calculation of compensation have attracted substantial criticism across both the private interest and public interest perspectives.

A private interest perspective may argue that property rights are of no less relevance today than previously.\textsuperscript{106} While property rights are not absolute, it is argued that

\textsuperscript{102} Working Party on the Erosion of Property Rights, above n 22, 8; Bartlett, Gardner and Humphries (eds), above n 44, 7; but cf contra A Gardner, ‘Water Resources Law Reform in Western Australia–Implementing the CoAG Water Reforms’ (2002) 19(1) EPLJ 6, 15, who appears to question the need to compensate the taking away of statutory water rights. The question of compensation for loss of water rights is most closely considered by Macintosh and Denniss, above n 29, 54, who concluded that the provision of additional statutory rights of compensation for the restriction of water rights (but not land restrictions) might increase net social welfare. However, the authors are highly critical of the compensation framework proposed under the National Water Initiative.

\textsuperscript{103} Guerin, above n 49, 14.

\textsuperscript{104} Law Reform Commission of Western Australia, \textit{Final Report}, above n 34; see also Discussion Paper, above n 34, 30.

\textsuperscript{105} Standing Committee on Public Administration and Finance, above n 10, [3.36].

\textsuperscript{106} Finlay, ‘The Attack on Property Rights’ above n 47, 8.
governments should ‘err on the side of restraint’. These perspectives often stress that secure property rights remain essential to the rule of law and economic prosperity.

Academics have paid much attention to the State’s failure to compensate for the taking or restriction of property rights, which is considered unfair to the affected landowner and demonstrative of poor governance. A common focus of lawyers has been on the taking of property rights without fair compensation in the name of the public interest.

(i) **Compensation beyond resumption: where to draw the line?**

Governing will invariably affect property rights from time to time, as will many laws. Where the line should be drawn between a compensable and non-compensable State interference is not a new problem and has been identified as ‘one of the most difficult questions of modern law’. In 1942, the English Uthwatt Report noted:

> …the essence of the compensation problem as regards the imposition of restrictions appears to be this—what point does the public interest become such that a private individual ought to be compelled to comply, at his own cost, with a restriction or requirement designed to secure that public interest? The history of the imposition of obligations without compensation has been to push that point progressively further on and to add to the list of requirements considered to be essential to the well-being of the community.

Although the Committee accepted that ‘…ownership of land does not carry with it an unqualified right of use, and so restrictions based on duties of neighbourliness may be

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108 *Ibid*, 5; see also Finlay, ‘The Erosion of Property Rights and its Effect on Individual Liberty’ above n 47, Ch 20. It is worth noting that a concern that landholders be afforded fair compensation upon a resumption of their land is curiously not limited to landholders, with the resuming bodies themselves having on occasion expressed a reluctance to pursue resumption procedures that do not afford fair compensation to the affected landowner: see Law Reform Commission of Western Australia, *Compensation for New Street Alignments*, above n 34. This Report concerned compensation issues relating to landowners affected by new street alignments as a result of proposed revisions to s 364 of the *Local Government Act 1960* (WA). The matter was referred to the Commission because the Act was ‘little used’ by councils to prescribe new street alignments, for the reason that councils felt that this process did not afford fair compensation to an affected landowner. However, no formal recommendations for legislative action were made by the Commission.


111 See e.g. *George Hudson Ltd v Australian Timber Workers’ Union* (1923) 32 CLR 413, 434 (Isaacs J) that ‘There is no remedial act which does not affect some vested right…’.

112 Gray, above n 45, 175.

imposed without depriving the owner of any proprietary right or interest,’\textsuperscript{114} the Committee recognized that ‘the point might be reached wherein the restrictions extended beyond neighbourliness and amounted to ex-appropriation of proprietary rights or interest, giving the right to claim for compensation.’\textsuperscript{115} Although the Committee’s arguments have been endorsed in WA by a Working Party,\textsuperscript{116} that endorsement may have been selective; the Working Party appears to have overlooked the Uthwatt Committee further opinion that ‘compensation should only be paid where restrictions resulted in hardship.’\textsuperscript{117}

Other tests proposed are that a landholder should not suffer where the regulation causes a ‘loss of reasonably beneficial use’.\textsuperscript{118} Australian constitutional law regarding s 51(***x)** suggests that where the line should be drawn between non-compensable and compensable State intrusion will be determined by whether there is ‘an effective sterilization of the rights constituting the property in question’,\textsuperscript{119} as opposed to ‘merely an impairment of the bundle of rights constituting the property’.\textsuperscript{120}

A public interest perspective is generally hostile to compensation, particularly where State intrusions fall short of resumption. With mere regulation, no net loss is identified to the affected landholder because individual property rights are simply exchanged for the community’s greater enjoyment of the environment.\textsuperscript{121} Privileges of ownership are said to have always been curtailed by community obligations,\textsuperscript{122} and that effective government necessitates freedom to legislate without every minor regulatory act giving

\textsuperscript{114} Honorary Royal Commission on the \textit{Town Planning and Development Act Amendment Bill 1951}, above n 11, 9.
\textsuperscript{115} \textit{Ibid.} It has been said that these comments of the Uthwatt Committee supports the judgement of Deane J in the \textit{Tasmanian Dam’s case}: see \url{http://www.cornerstonelegal.com.au/property4.html}.
\textsuperscript{116} The WA Working Party put forward that restriction on property rights which go ‘...beyond the obligations of neighbourliness...become equivalent to an expropriation of a property right or interest and therefore (it will be claimed) should carry a right of compensation as such’; above n 22, citing the \textit{Uthwatt Report} (1942). However, the Working Party appears to construe ‘obligations of neighbourliness’ as a duty merely not to commit pollution or social disruption. The effect of this could be to set the right to compensation at a very low threshold.
\textsuperscript{117} Cullingworth & Nadin, above n 113, 160, citing \textit{Uthwatt Report}, [33].
\textsuperscript{119} \textit{Newcrest Mining (WA) Ltd v Commonwealth} (1997) 190 CLR 513, 635 (Gummow J); see Gray, above n 45, 176 for a review of the various common tests applied by courts in the United Kingdom, United States, Canada and Ireland.
\textsuperscript{120} \textit{Ibid}, 635 (Gummow J); note, however, that it has been suggested in the United Kingdom that ‘the threshold of constructive deprivation is reached long before regulatory intervention converts an asset into a valueless shell’; Gray, above n 45, 176, citing as authority \textit{La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius} (unreported PC, 13 December 1995).
\textsuperscript{121} Gray, above n 45, 163. Gray (at fns 9 and 10) cites almost entirely United States case law in support of this proposition.
\textsuperscript{122} \textit{Ibid}, citing \textit{Re Ellis and Ruislip-Northwood Urban DCs} [1920] 1 KB 342, 372 (Scrutton LJ).
rise to an obligation of compensation, since such costs would be prohibitive.\textsuperscript{123} Gray suggests that uncompensated taking of property rights by the State for the benefit of the community is the price of citizenship, and that only in ‘…rare instances, regulatory intervention may have an effect that is so overwhelming as to constitute a taking of property…’\textsuperscript{124}

Counterpoints to public interest perspectives on compensation can be made. A perspective that environmental regulation (which may deprive a landholder of the most beneficial uses to which rateable land may lawfully be put)\textsuperscript{125} has no net cost to the affected landholder is surely a lawyer’s or economist’s fiction if any weight is to be given to individual rights. A public interest perspectives that private property rights have always been subject to ‘positive enactments limiting…user or even imposing burden’\textsuperscript{126} overlook that only from the mid-twentieth century did regulations begin to be applied for purposes for which acquisition with compensation would have been previously adopted.\textsuperscript{127} A public interest perspective may also fail to recognize that ‘…the value and use of private property may be modified by regulation nearly as extensively as by purchase.’\textsuperscript{128}

Public interest fears that governments could not function if any reduction in property values consequent upon any general law were compensable\textsuperscript{129} may be wrong. For example, this literature review did not reveal any suggestion that the availability of compensation for injurious affection for landowners affected by planning schemes\textsuperscript{130} has materially affected the Government’s ability to implement planning schemes,\textsuperscript{131} and the State has measures available to fund such costs anyway.\textsuperscript{132} Requiring the State to purchase land where there has been a reduction in reasonably beneficial use may not impose any significant financial burden upon the State.\textsuperscript{133} Finally as to arguments on

\textsuperscript{123} Ibid, 165.
\textsuperscript{124} Ibid, 181; see also Gray’s comments at 178, fn 141.
\textsuperscript{125} See eg Bone v Mothershaw [2003] 2 Qd R 600, [23].
\textsuperscript{126} See eg Belfast Corporation v OD Cars Ltd [1960] 1 AC 490, 518 (Viscount Simonds).
\textsuperscript{128} Ibid.
\textsuperscript{129} Pennsylvania Coal Co v Mahon (1922) 260 US 393, 413.
\textsuperscript{130} S 173(1) Planning and Development Act 2005 (WA).
\textsuperscript{131} Cf contra the suggestion by Bates in relation to environmental policies generally: above n 4, [6.37].
\textsuperscript{132} See eg s 184(1) Planning and Development Act 2005 (WA).
\textsuperscript{133} See eg the experience in Britain considered in National Trust of Australia (Victoria), ‘Response to Proposed Changes to Victoria’s Town Planning Compensation Legislation with Respect to Historic Buildings’ (Melbourne, 1980), cited in Bonyhady (ed), above n 118, ch 3, 51. But cf contra the cost of
citizenship, citizenship involves ‘reciprocal rights and obligations’\textsuperscript{134} between citizen and State, which arguably requires compensation for the taking of property. To argue otherwise is to place upon the individual costs of the community.

(ii) Compensation inadequate

A Parliamentary Committee recognized that ‘private citizens should, as far as possible, be indemnified against loss resulting from the compulsory acquisition of their land.’\textsuperscript{135} The inadequacy of compensation to a dispossessed landowner was one of four key areas of unprecedented State erosion of property rights identified by the Working Party.\textsuperscript{136} Lawyers deplore the disadvantage to a private landowner seeking compensation upon resumption by government agencies,\textsuperscript{137} and have criticised the legislative shift to more limited rights regarding compensation.\textsuperscript{138} The Australian Law Reform Commission (‘ALRC’) recognized that the rise of owner-occupation had made Commonwealth and State legislative frameworks for resumption antiquated,\textsuperscript{139} and a product of hardship.\textsuperscript{140}

Major government recommendations have nevertheless tended to focus on structural rather than substantive changes.\textsuperscript{141} There has been some support for the proposition that an agreed State purchase of land for a public purpose be compensated on the same basis as resumption.\textsuperscript{142}

\textsuperscript{134} See Australian Citizenship Regulations 2007 (Cth), Sch 1.
\textsuperscript{135} Standing Committee on Government Agencies, Final Report, above n 14, [1.7(a)].
\textsuperscript{136} Working Party on the Erosion of Property Rights, above n 22, 12.
\textsuperscript{137} D McLeod, ‘Compensation Issues—Snatch and Grab—Land Acquisition and Compensation’, above n 42. McLeod identified five interrelated issues which disadvantaged landowners seeking compensation for resumed land as follows: the fragmentation of the taking process between government agencies, blight caused by telescoping the intention to take, the double whammy of regional reservations, the popularisation of expropriation without fair compensation resulting from the abuse of the public interest principle, and more limited rights to compensation.
\textsuperscript{139} Australian Law Reform Commission, Lands Acquisition and Compensation, above n 37, 19.
\textsuperscript{140} Ibid, 138. Particular hardship has been identified where a resumption displaces an owner of low-value housing.
\textsuperscript{141} See g that all resumptions of land by government agencies should be made pursuant to a single statute, Law Reform Commission of WA, Compensation for New Street Alignments, above n 34, [2.17]. The report recognizes this recommendation as the major recommendation: [1.6]. A further Standing Committee in 2004 also recommended the enactment of a single Act dealing exclusively with resumption: see Standing Committee on Public Administration and Finance, above n 10, recommendation 3, 80. However, a consolidation of legislative power into one Act was not supported by the Law Reform Commission of Western Australia: Final Report, above n 34, 64.
\textsuperscript{142} Standing Committee on Public Administration and Finance, above n 10, recommendation 22, 239. The Government subsequently indicated that it supported the spirit of the Committee’s recommendation on compensation for voluntary acquisitions: Government of Western Australia, Response, above n 18, 2–3.
Compensation principles are often extended by private interest perspectives. A Parliamentary Report recommended that resumption statutes ‘contain an exclusive list of those criteria upon which compensation for land resumed…should be assessed’.\textsuperscript{143} Key recommendations of the ALRC included the adoption of a statutory list to measure compensation, and that where a homeowner was dispossessed following resumption, a discretionary loan also be given to the owner.\textsuperscript{144} The Commission noted that WA made limited provision for a householder’s solatium, but that this should be by a lump sum rather than a percentage payment.\textsuperscript{145} The Commission further recognized that compensation is undermined by inflation and delay between the gazettal of a resumption notice and the compensation payment date.\textsuperscript{146}

Within New Zealand, private interest perspective has even gone so far as to challenge the power of resumption, arguing that property rights should only be taken when an essential public interest makes that taking necessary.\textsuperscript{147}

Public interest perspectives generally support compensating a landowner affected by resumption and curiously share some sentiments common to private interest perspectives. This shared perspective establishes compensation as a key accepted factor in determining the State’s regard for property rights. It may also indicate that private and public interest perspectives may not always be opposed. Even the radical federal Commission of Inquiry conceded the necessity for compensation, although it identified three inherent deficiencies in existing compensation laws.\textsuperscript{148} Firstly, no provisions existed for the independent review of a decision to expropriate land.\textsuperscript{149} The Commission noted the courts’ role in reviewing compulsory acquisition was limited to acquisitions made either \textit{ultra vires} or in bad faith, both of which were rarely established.\textsuperscript{150} Secondly, the Commission was critical of an affected landowner not receiving immediate payment of that portion of a claim which may be undisputed until the total

\textsuperscript{143} Standing Committee on Government Agencies, \textit{Final Report}, above n 14. This report was largely based upon the Ninth Report of the Standing Committee on Government Agencies, \textit{Proposals for Reform}, above n 14, [4.27], Recommendation 15.

\textsuperscript{144} Australian Law Reform Commission, \textit{Lands Acquisition and Compensation}, above n 37, 120, 142.

\textsuperscript{145} \textit{Ibid.}, 143–144. The Commission noted the then current provisions of s 63(c) \textit{Public Works Act 1902} (WA); \textit{Cf contra} the generous allowance considered in chapter 6.

\textsuperscript{146} \textit{Ibid.}, 21.

\textsuperscript{147} Guerin, above n 50, 24.

\textsuperscript{148} Commission of Inquiry into Land Tenures, \textit{Final Report}, above n 15, Ch VI. The Commission included within its consideration the then present legislation the \textit{Public Works Act 1902} (WA).

\textsuperscript{149} \textit{Ibid.}, S 17 of the \textit{Public Works Act} merely made provision for the lodging of written objections.

\textsuperscript{150} \textit{Ibid.}, [6.5]. This was because the legislature had drafted the powers of acquisition widely and bad faith was difficult to establish.
amount of the claim had been determined.\textsuperscript{151} Thirdly, the Committee was critical of compensation to a dispossessed homeowner being based upon fair market value at the time of acquisition, rather than a right of reinstatement, which might cause substantial loss in times of a rising market.\textsuperscript{152}

The Commission called for compensation to include a lump sum for a ‘removal solatium’ for persons who acquired their home prior to a draft development scheme being released,\textsuperscript{153} interest on compensation payments at current bank overdraft rates,\textsuperscript{154} and adequate provisions to enable recovery of the reasonable costs of claiming compensation.\textsuperscript{155} A key recommendation was that when determining compensation based on existing use value, no regard should be paid to the sale price of other land unless, at the time of that sale, there was no expectation of a change in land value due to a possible change in permitted land use.\textsuperscript{156}

Public interest perspectives are ultimately, however, more temperate in supporting compensation than private interest perspectives. This is because compensation payments may frustrate State attempts to acquire land for better planned settlement.\textsuperscript{157} For example, the Stephenson/Hepburn Report on Perth acknowledged that the potential payment of compensation had been a major obstacle to constructive planning in WA.\textsuperscript{158} Criticism of compensation comes from a public interest perspective. For example, the compensation principle of ‘value to the owner,’ which allows for additional compensation for any loss or special disadvantage to the owner, and the notion of ‘retention value,’ where the market might be regulated, was criticised for distorting true market land value.\textsuperscript{159} The public purpose requirement of resumption might frustrate redevelopment or resale of the land.\textsuperscript{160} In addition, even if a prospect of profit by development or resale of the land exists, this potentiality would be recognized as a

\begin{itemize}
\item \textsuperscript{151}Ibid, [6.6]. The Commission noted that the legislature had addressed this problem in some states such as New South Wales, Victoria, Queensland and South Australia.
\item \textsuperscript{152}Ibid, [6.7]. The Commission noted that the legislature had taken limited steps to address this problem in Victoria and South Australia, but such steps remained inadequate. Only in Ontario had this problem been properly addressed: [6.8–6.9].
\item \textsuperscript{153}Ibid, [6.11–6.16].
\item \textsuperscript{154}Ibid, [6.17].
\item \textsuperscript{155}Ibid, [6.18].
\item \textsuperscript{156}Ibid, [2.35], [6.32].
\item \textsuperscript{157}Else-Mitchell, above n 13, 8.
\item \textsuperscript{158}See Fogg, above n 46, 428.
\item \textsuperscript{159}Else-Mitchell, above n 13, 8. In relation to ‘value to the owner’ Else-Mitchell cites \textit{Pastoral Finance Association v The Minister} (1913) 13 SR (NSW) 179; in relation to ‘retention value’ his Honour cites \textit{Commissioner of Success Duties v Executor Trustee and Agency Co of South Australia} (1947) 74 CLR 358, 373–374 (Starke J).
\item \textsuperscript{160}Ibid, citing \textit{Thompson v Randwick Municipal Council} (1950) 81 CLR 87.
\end{itemize}
possible benefit to be exploited by the owner had the land not been resumed and which must be afforded compensation. Finally, compensation which is extended to those holding lesser interests in land, such as squatters, is dismissed.

(iii) **Statutory and constitutional provision for just compensation**

Private interest perspectives lack consensus on how best to secure property rights from State intrusions. Disagreement surrounds whether a guarantee of just terms should be afforded. Staley concludes that State constitutional reform is required to match its federal counterpart in relation to ‘just terms’, together with legislation with constitutional effect which would entitle a landowner to compensation from the State when land-use restrictions reduce land value.

The Law Reform Commission of WA (‘LRCWA’) recommended that ‘just’ compensation be required when determining compensation for land resumed under s 241 of the *Land Administration Act 1997*, that an entitlement to compensation extends to affected lessees as well, and that no express cap on compensation be applied. The ALRC also previously recommended that a statutory requirement be included within resumption legislation and that the amount of compensation be ‘such amount as will justly compensate the person.’ This thesis considers reform for the adoption of just compensation in chapter 8.

There appears to be only in principle support for just compensation at a State level. The 1987 Parliamentary Committee was opposed to the inclusion of any overriding statutory requirement that compensation be ‘just’. The 2004 Committee was less resistant. The issue of a guarantee that private landholders receive ‘fair’ or ‘just’ compensation upon a

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163 Staley, ‘Property Rights in Western Australia ’ above n 21, 7. A landholder would also have a right of appeal to a Private Property Tribunal to determine the reasonableness of compensation.
164 Law Reform Commission of Western Australia, Discussion Paper, above n 34, recommendation 1, 17.
167 Australian Law Reform Commission, *Lands Acquisition and Compensation*, above n 37, 120. The Commission also recommended that the statutory formulae also include reference to market value, severance damage and special value, and disturbance (but with a requirement that only a compensable loss result from a natural and reasonable consequence of the acquisition, rather than directly from the resumption): 120–126. In this regard, the Commission noted that in Western Australia, severance was already included within s 63(b) *Public Works Act 1902* (WA) and that s 63(aa) of this Act already included detailed provision for disturbance payments. For a discussion of the distinction between ‘just’ compensation and ‘just’ terms, see chapter 7.
168 Standing Committee on Government Agencies, *Final Report*, above n 14, [4.28]. The Committee felt this was unnecessary and could invite judicial interpretation beyond that intended by the legislature.
land resumption was considered within the context of constitutional reform. The Committee recommended:

any future review by the State Government of the Western Australian constitutional legislation should include detailed consideration as to whether a ‘just terms’ or ‘fair’ compensation provision needs to be incorporated into the legislation with respect to the acquisition by the State Government for public purposes of privately-held property.

While the Government agreed with the Standing Committee’s recommendation on ‘just terms’, it cautioned that a State constitutional provision to require just terms could have unintended consequences. The Government opined that such a constitutional requirement might apply to acquisitions of property by way of taxation, penalty, criminal forfeiture or confiscation of profits, and argued ‘there are occasions when the WA Parliament considered it appropriate to enact laws that would have contravened a ‘just terms’ provision’.

The Government’s more recent willingness to consider the adoption of ‘just terms’ is considered in chapter 8. Within New Zealand, the taking of property rights without just compensation has been arguably facilitated by a lack of statutory or constitutional protection for broadly defined property. The Government has considered the security of property rights from the perspective of constitutional principle and the importance of the security of property rights from the perspective of investors. However, unlike Australian literature, international economic and legal perspectives have been a key focus when considering compensation as a protective instrument against State takings. There has been support for a requirement that just compensation be paid by

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169 Standing Committee on Public Administration and Finance, above n 10, [5.79].
170 Ibid., [5.84], recommendation 16. This was despite state government departments having expressed a contrary position to the Committee that existing legislative provisions and practices were satisfactory: [5.79].
171 Government of Western Australia, Response, above n 18, 15. The State Government’s concern was that such an amendment ‘may not be appropriate’: 18.
172 Ibid, 17. The Government thought that it might be that the Environmental Protection Act 1986 (WA) preventing land clearing or other development on private land could attract just compensation: 16–17.
174 Ibid. Curiously, the Government noted the Yallingup Foreshore Land Bill 2002 (WA) by way of example. The Yallingup Foreshore Land Act 2006 (WA) is discussed in chapter 4 of this thesis. The writer does not agree that the estate of the former landholder in this instance should have been denied compensation, and agrees with noted comments of D.F. Barron-Sullivan recorded in Hansard.
175 Evans and Quigley, above n 3, 239.
177 Ibid, 1. The author suggests that a strict focus on efficiency in determining when compensation should be afforded, while not without value, is impractical: 6–7, 22.
those who benefit from a government taking.\textsuperscript{178} Public interest arguments used to justify the uncompensated restraint of property rights are seen by some to allow minority interest groups to exercise a disproportionate influence over government action.\textsuperscript{179} Writers such as Wilkinson have favoured a requirement of just terms.\textsuperscript{180} Evans and Quigley similarly conclude that the protection of property rights should not be limited to ownership, but should extend to all property rights by a broadly based legislative provision restraining Parliament from taking or constraining property rights without just compensation.\textsuperscript{181} Government authorities may be opposed to any entrenched protection of property rights. Many State Government departments considered that existing legislative provisions and practices were satisfactory, with no need for just terms, although the CEO of the Department of Land Administration (now Landgate) considered it an anomaly that just terms should be guaranteed only by the Commonwealth.\textsuperscript{182} A particular focus of some public interest perspectives is whether a bill of rights should include property rights. Views differ on this issue.\textsuperscript{183} A Consultation Committee recommended that a human rights act be enacted by the State legislature, which included the recognition of ‘the right not to be deprived of property other than in accordance with the law, and on just terms.’\textsuperscript{184} However, there is some uncertainty in

\begin{footnotesize}
\begin{enumerate}
\item Chen, above n 51, 25.
\item Evans and Quigley, above n 3, ch 12.
\item Wilkinson, above, n 52.
\item Evans and Quigley, above n 3, 236, 260–261. The authors are also supportive of the Regulatory Responsibility Bill.
\item Standing Committee on Public Administration and Finance, above n 10, [5.80]–[5.84]. The Water Corporation expressed the view that ‘most legal opinion has it that the State Act [the Land Administration Act 1997(WA)] better addresses the compulsory acquisition process than does the Commonwealth Act which refers to ‘just terms’. The problems that arise appear mainly to be related to issues where enabling legislation relating to specific government authorities overrides the LAA.’ The writer finds the suggestion from the Water Corporation curious, given that there is no provision for compensation to an affected landowner for injurious affection upon the taking of an easement for water.
\item See eg S Evans, above n 48; see also Castan Centre for Human Rights Law, above n 48, [6.19]. Castan questions the constitutional power of the Commonwealth to pass legislation which includes a ‘right to property’, except perhaps using the external affairs power, and argues that s 51 (xxxi) provides adequate protection of property rights at a federal level.
\item Consultation Committee for a Proposed Human Rights Act, above n 31, [4.3.3]. ‘Otherwise than in accordance with the law’ suggests a reference to procedural fairness. It has also been recommended in Tasmania that protection for property rights be recognized within proposed human rights legislation; In Tasmania, the Tasmania Law Reform Institute has recommended that there should be a right not to be deprived of property except on fair and just terms, which right should be expressed in general terms to ensure that it covers deprivations of property by any means and in relation to all forms of property, and without any inbuilt specific limitations: Tasmania Law Reform Institute, A Charter of Rights for Tasmania (Report No 10, October 2007) [4.16.21]. The recommendation provides ‘every person has a right not to be deprived of his or her property except on fair and just terms’. The Tasmanian Department of Justice recently released a consultation paper to promote public discussion, which included this property right.
\end{enumerate}
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the recommendation, given the Committee states that such a right could be modelled on s 20 of the Victorian Charter, which affords procedural fairness only to the holder of private property rights faced with a deprivation of those rights, while at the same time stating that there should be an express right to compensation.

Constitutional guarantees of property rights are contentious, particularly concerning whether a bill of rights should include property rights. Critically, literature on property rights appears to overlook the constitutional problem of whether it is even possible to entrench a State bill of rights regarding property rights. This issue is addressed in chapter 8, with this chapter instead addressing some of the key arguments presented against the adoption of a bill of rights with respect to property. Five basic objections to entrenched property rights have been identified. Huang resists the notion of any entrenched right to property on the basis that this transfers decision-making from Parliament to unelected judges. Evans, who has undertaken much work in Australia, similarly opposes an entrenched property bill of rights. Firstly, Evans argues that such guarantees ask courts to ‘second guess Parliament’s judgment that legislation strikes an appropriate balance between private rights and the public interest’. He regards this as a ‘line drawing exercise’ requiring the consideration of economic, social and political factors which courts have no particular expertise in.

A counterpoint to his argument, however, is the doctrine of proportionality, which has often been applied by the High Court in finding that a law is disproportionate to its object and therefore invalid in relation to the Constitution. If the High Court can find

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185 S 20 provides ‘A person must not be deprived of his or her property other than in accordance with the law.’
186 Consultation Committee for a Proposed Human Rights Act, above n 31, [4.3.2]. Of interest is the Committee’s view that ‘protection of property rights in line with that provided in the Constitutions of the Commonwealth, Northern Territory and ACT governments could be a valuable addition to the draft Bill’:
187 See eg S Evans, above n 48.
188 See J Nedelsky ‘Should Property be Constitutionalised? A Relational and Comparative Approach’ in J McLean, Property and the Constitution (Hart Publishing, 1999), 114. Nedelsky argues that:
(1) property rights will be insulated in a regulation-free private enclave; (2) the tendency of property to create and support power inequalities will be reinforced; (3) the entrenchment of property will upset and even invert constitutional hierarchies of rights; (4) constitutional litigation about property will result in a waste of resources; and (5) important issues will be removed from the public sphere and converted into legal debates.
189 See Huang, above n 3. He cites (648) the International Property Rights Index in support of his position. Note the New Zealand Bill of Rights Act 1990 does not contain any protection of property rights or a doctrine of eminent domain: see Waitakere City Council v Estate Homes Ltd [2007] 2 NZLR 149. The writer thanks Trevor Duya-Winterbottom for drawing this case to the writer’s attention at the 10th Australasian Property Law Teachers Conference, 2010.
190 S Evans, above n 48, 22.
that a law goes too far in eroding such a delicate matter as freedom of expression, why can it not also decide that a law effects an acquisition of property for a public purpose and requires the payment of compensation? Evans places much faith in the parliamentary process and cites the Victorian parliamentary debates concerning property rights in respect to the national firearms buyback agreement as evidence of Parliament’s careful consideration of property rights. However, as will be shown in the following chapters of this thesis, Parliament will sometimes exercise its power to expropriate property without payment of compensation, and such exercise is not generally confined to minority groups, which can be remedied by laws against discrimination, as suggested by Evans. An affirmative to Sackville & Neave’s question of whether Evans is ‘too sanguine about the parliamentary process as a mechanism for effectively protecting property rights’ seems appropriate. The constitutional entrenching of the protection of private property rights may mean that a dispute concerning compulsory acquisition requires the court to resolve tensions between the State and an individual, but that is hardly a task unknown to courts.

Evan’s presents a second argument that ‘the courts have not been able to reach satisfactory and stable interpretations of the property rights guarantee’. He refers to s 51(xxxi) as a ‘good example’. In particular, Evans sees property rights jurisprudence as ‘almost universally incoherent’. Evans appears to see problems associated with any constitutional guarantee clause as inevitable, because property rights issues in reality involve political questions which are not ‘amenable to legal solutions’. Is this to suggest that cases concerning s 51(xxxi), for example, are not amenable to solution by our High Court? It may be that a contextualisation of property rights suggests that property rights cannot be divorced from political, social and economic issues, but surely the same could also be said for other rights which are justiciable, such as the implied freedom of political communication. As to Evans’ claim that jurisprudence is almost ‘universally incoherent’, differences between jurisdictions is hardly remarkable, and as Kirby J has observed, ‘…prohibition on the arbitrary deprivation of property expresses

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195 G McLeod and A McLeod, above, n 9, 106.
196 S Evans above, n 48, 23.
197 Ibid.
198 Ibid.
199 See eg *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
an essential idea which is both basic and virtually uniform in civilised legal systems… Kirby J further identifies constitutional guarantees of property and just terms from other jurisdictions as a reflection of ‘universal and fundamental rights by now recognised by customary international law.’

A third point argued by Evans is that ‘a strong property rights guarantee would not reflect Australia’s political traditions’. The writer suggests otherwise. Australia’s political traditions may not be grounded in any objection to the protection of property rights per se. Evans elsewhere acknowledges that the failure of the Framers of the Constitution to adopt Tasmania’s proposal that a bill of rights similar to the 14th Amendment to the US Constitution be included, which would have protected property rights from deprivation without just terms within the Constitution, ‘…was defeated, not out of any lack of solicitude for property rights but largely out of concerns that it would prohibit racially discriminatory state legislation.

While racism appear to have been dominant in this State at the time, with the enactment of the Racial Discrimination Act 1975 (Cth) these objections to a bill of rights seem antiquated and antithetical to Australia’s more contemporary political traditions. On the other hand, while a bill of rights may have been anathema to the Framers’ Westminster traditions, more recent studies may suggest that Australia’s contemporary landscape may be becoming more amenable to a property rights guarantee.

Evans’ final argument is that ‘the existing common law presumption that the legislature does not intend to take or limit property rights without compensation provides appropriate protection.’ It is acknowledged that the principles of statutory interpretation against interference of private property rights involve the courts in considering presumptions as to fundamental rights, and affords some protection to

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201 Ibid, 660.
202 S Evans, above n 48, 23
205 See generally Williams, above n 194, Ch 3, especially 31.
207 S Evans, above n 48, 23.
208 See McLeod and McLeod, above n 9, 105–106.
property rights. However, the protection afforded is limited. Even Evans acknowledges that the presumption that the legislature did not intend to interfere with property rights without compensation ‘can be displaced by clear statutory language’. His perceived risk of judicial interpretation of bills of rights beyond an unambiguous meaning may be of little relevance to WA, given his reliance on jurisdictions where the normal presumptions with respect to statutory interpretation have been modified by legislative direction. Evans’ argument is also respectfully curious, given that human rights-consistent approaches to statutory interpretation have strengthened the argument that bills of rights do not erode democracy.

(b) Compensation for injurious affection from resumption

This section addresses injurious affection arising from resumption for public works. At its core is the problem of how to balance landowners’ interests with State interests. At common law, an occupier adversely affected by private works on neighbouring land might sue in nuisance, but where affected by a public work, the landowner may be helpless due to the defence of statutory authority. The literature reveals greater disagreement between private interest and public interest perspectives in relation to the payment of compensation for injurious affection than for resumption.

Private interest perspectives on injurious affection range from the cautious to the extreme. The distinction between compensation for injurious affection where part of the landowner’s land had been resumed, and no compensation for injurious affection where

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209 See eg R & R Fazzolari Pty Ltd v Parramatta City Council (2009) 237 CLR 603, [40]–[43] (French CJ). However, note the limitations of protection afforded by the principles of statutory interpretation in chapter 7 of this thesis, especially [7.3.2].

210 S Evans, above n 48, 24.

211 S Evans, above n 48, 24, citing Ghaidan v Godin-Mendoza [2004] 2 AC 557, [32] (Lord Nicholls). However, note the dissent of Lord Millet, [66].

212 See ibid. Evans cites by way of example New Zealand and the United Kingdom. However, see s 6 New Zealand Bill of Rights Act 1990 (NZ), s 3 Human Rights Act 1989 (UK). See also H Charlesworth, ‘Human Rights and Statutory Interpretation’ in S Corcoran & S Bottomley (eds), Interpreting Statutes (The Federation Press, 2005) 103–107. In Western Australia, it has been proposed that an interpretative clause requiring an unclear law to be interpreted compatibly with human rights be limited to laws that are ambiguous, obscure, or lead to a result that is ‘manifestly absurd or is unreasonable’: see s 34(3) Human Rights Bill 2007 (WA) (draft).

213 Charlesworth, above n 212, 102.


215 The availability of relief to an affected landowner will depend upon factors such as whether the injury was the inevitable result of the public work, and whether the legislative power is permissive; see generally Halsbury’s Laws of Australia, Volume 14 (1993) [225-720]. The defence of statutory authority is presumed to create a balance between private and public interests, but this balance has been challenged: see C Sappideen and P Vines, Flemings’s The Law of Torts (LBC, 10th ed, 2011), [21.220]. For a further discussion of the defence of statutory authority, see in particular chapter 7 of this thesis.
no land had been resumed, may be regarded as unfair, anomalous and unjust. The treatment of injurious affection is also regarded as unjust since it forces individual landowners to bear a disproportionate share of public work costs for society’s benefit. Lawmakers have hesitated to substantially alter injurious affection laws, despite much criticism of the inadequacy of the law’s treatment of injurious affection. A Parliamentary Committee regarded the limitation of compensation for injurious affection resulting from land resumptions for public works as inequitable, but only recommended that injurious affection be examined by ‘an appropriate body’. The Government acknowledged that compensation entitlements for injurious affection varied between statutes and from work to work. The Government agreed that the matter of ‘injurious affection’ be referred to the LRCWA. The LRCWA recommended amendments to clarify compensation entitlements for injurious affection and to broaden those entitlements. Amendments were also recommended to the agreed acquisitions process and the controversial election to acquire processes.

The ALRC has been more critical of the limited availability of compensation for injurious affection. After finding that the cost of providing compensation for injurious affection, measured by depreciation in land value was ‘quite low’, the Commission recommended that where loss in land value occurred from works or use of Commonwealth land, that loss in value measured by diminished market value should be

216 Australian Law Reform Commission, _Lands Acquisition and Compensation_, above n 37, 23, 166, 176.
218 Standing Committee on Public Administration and Finance, above n 10, [5.16].
219 Ibid, [5.19], Recommendation 22; see also Recommendation 23 which provided that the new single statute on resumption of land should not make provision for injurious affection until an independent examination of injurious affection was completed; see also Recommendation 12, 135; see page 132 in relation to the concerns expressed by Mr T Dix, licenced valuer.
220 Government of Western Australia, _Response_, above n 18, 10.
221 Ibid, 9, 13, noting that the Government added that a consideration of betterment also needed to be included.
222 Law Reform Commission of Western Australia, _Final Report_, above n 34, eg Recommendation 16, 39.
223 Ibid, e.g. Recommendation 18, 43, that in certain circumstances, such as in respect of the reduction in value of adjoining land, where a reservation of land has been made.
224 Ibid, Recommendations 24 and 25, 57. See chapter 6 of this thesis for a further consideration of this process.
225 Ibid, Recommendations 26 and 27, 61–62. See chapter 6 of this thesis for a further consideration of these processes. On the Government’s response to these recommendations, see Government of Western Australia, ‘Planning makes it happen’, above n 36.
226 Australian Law Reform Commission, _Lands Acquisition and Compensation_, above n 37, 176.
compensated. However, the Commission also recommended that statutory provision be made for at least a partial contribution by a landowner related to the betterment of the land by public works (this being the Commission’s view of the effect of public works in the majority of cases) upon a sale of the land, though as a Commonwealth tax, this would not capture the value of enhanced State land.

It has also been suggested that a right to compensation be recognized when the State’s activities constitute a private nuisance, with damages being available based on nuisance principles, unless the relevant State authority has immunity from suit. Such an approach has been supported by New Zealand writers.

Public interest perspectives are not consistent in their treatment of compensation for injurious affection, although compensation for injurious affection is generally not treated as generously as compensation for resumption. The Commonwealth Commission of Inquiry thought that compensation rights should be widened to allow compensation for injurious affection from both public and private development.

3.4.5 Planning laws

The most complex and perhaps most controversial question raised by planning laws (and to a lesser extent environmental laws) is a determination of when statutory regulation amounts to a taking of land such as to trigger the statutory presumption against the uncompensated taking of property, and how compensation should be treated when planning laws impact negatively upon a landholder’s bundle of rights but without resumption of the affected owner’s land. The cornerstone of contemporary Australian planning and environmental law is ecologically sustainable development.

The literature reveals significant disagreement on the question of compensation to a landowner affected by State-imposed restrictions on property rights. This may be due to compensation not being an accepted principle in relation to mere restrictions, rather than resumption. For example, it has been suggested that there is a ‘rough symmetry of costs

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228 Australian Law Reform Commission, Lands Acquisition and Compensation, above n 37, 182.
229 Butt, ‘Moot Point Injurious affection’, above n 227. By way of a postscript, Butt notes that the Australian Law Reform Commission disagreed with the notion that nuisance should be the measure for determining entitlement to compensation.
230 Guerin, above n 49, 5.
231 Commission of Inquiry into Land Tenures, Final Report, above n 15, [6.35]–[6.36]. Note, however, that the Commission declined to make any firm recommendation.
and benefits’ when urban planning laws restrict land use; the imposition of the restriction is offset by the benefit of a neighbour not being able to similarly diminish the amenity of his neighbour’s land.\textsuperscript{233} However, planning and environmental land-use restrictions have also been attacked on the basis that they do not result in ‘uniform increases in value’ to the owners.\textsuperscript{234}

The extent to which planning laws should be able to or do displace property rights has been a concern in WA since the early 1970s.\textsuperscript{235} A common core proposition within a private interest perspective is that regulation for the public interest at the expense of the landowner should be paid for by the public.\textsuperscript{236} Such perspectives often regard the problem of compensating affected landowners as a political as well as a legal issue. The broader social and economic consequences of increased regulatory control over land are stressed, which include increased land prices and low housing affordability.\textsuperscript{237} Rarely is consideration given to whether landowners should make contributions towards betterment.

Private interest perspectives often stress the destruction of land value rather than the diminution of the bundle of rights as the real detriment to landowners.\textsuperscript{238} Three negative impacts in WA have been suggested. These are a reduction in land value, an increased perception of risk by investors with consequent reduced investment and economic growth, and substitution of the rule of law with the rule of bureaucrats.\textsuperscript{239} Inflexibility of land use through planning laws may have increased urban land values in areas zoned for housing, while elsewhere it often prevents housing development, thereby contributing to a shortage of housing and inflating housing costs.\textsuperscript{240}


\textsuperscript{234} Wilkinson, above n 52, 3.

\textsuperscript{235} See e.g. Morling, above n 12; more recently, see eg C Ireland, ‘Should private rights trump the public interest in renewal of the urban environment’ (2009) 15 \textit{LGLG} 86. However, note that the issue often arises within a narrower consideration of the extent to which regulatory provisions may constitute exceptions to indefeasibility of title: see e.g. B Edgeworth, ‘Planning law v property law: Overriding statutes and the Torrens system after Hillpalm v Heaven’s Door and Kogarah v Golden Paradise’ (2008) 25 \textit{EPLJ} 82.

\textsuperscript{236} See eg Staley, ‘Property Rights in Western Australia’, above n 21, 3.

\textsuperscript{237} \textit{Ibid}, 4–5; Staley, ‘Reshaping the Landscape’, above n 21, 4.

\textsuperscript{238} Stein, above n 5, 13; this concern may be universal: R Alterman, Symposium, ‘Regulatory Takings in Land-Use Law A Comparative Perspective on Compensation Rights’ (2006) 5 (3) \textit{Washington University Global Studies Law Review} 469.

\textsuperscript{239} Staley, ‘Property Rights in Western Australia’, above n 21, 3.

\textsuperscript{240} \textit{Ibid}, 5.
The ALRC acknowledged that town planning has created compensation problems for landowners.\textsuperscript{241} The Commission observed that the problem of blight was increasing, and that affected landowners typically had neither the experience nor the financial resources to contest the adequacy of compensation.\textsuperscript{243}

Concern over the impact of land-use restrictions has received some attention from government.\textsuperscript{244} Planning laws have been most closely considered by government within the context of enquiring into the structure, efficiency, effectiveness and economic management of the State’s public administration, and the existence, adequacy of merit and judicial review of administrative acts or decisions.\textsuperscript{245} Attention has been focussed on planning restrictions on the use of land, including the imposition of conditions on development applications,\textsuperscript{246} heritage listing as a ground for planning restrictions,\textsuperscript{247} and the regulation of land use by way of policy documents.\textsuperscript{248} Subdivision and development controls (in particular the number of conditions applied to approvals, and the rejection of approvals without a consideration of project’s merits) also constituted two of the four major concerns identified by the Working Party.\textsuperscript{249} The Standing Committee recommended that where land is required for a public purpose which will downgrade the permissible land use, that the State compensate fairly or acquire the land,\textsuperscript{250} which the Government is in principle in agreement with.\textsuperscript{251}

Vigorous arguments for compensating injurious affection are presented by Finlay, who recognizes that regulation may sometimes amount to an effective acquisition, for which compensation should be paid.\textsuperscript{252} She attacks the floodgates argument on the

\textsuperscript{241} Australian Law Reform Commission, \textit{Lands Acquisition and Compensation}, above n 37, 20.
\textsuperscript{242} Ibid, 20–21. The Commission defined ‘blight’ as occurring (20) ‘when land becomes unsaleable, or devalued, because of a belief that it will be required for, or affected by, some public project.’ The Commission provides by way of an example the Perth airport experience: 78. The problem of blight has been identified by WA legal practitioners: see e.g. D McLeod, above n 42, 27–29, and a complaint of landowners: Standing Committee on Public Administration and Finance, above n 10, [8.405].
\textsuperscript{243} Australian Law Reform Commission, \textit{Lands Acquisition and Compensation}, above n 37, 22.
\textsuperscript{244} Government of Western Australia, \textit{Response}, above n 18, 24.
\textsuperscript{245} See Standing Committee on Public Administration and Finance, above n 10, Terms of Reference and Chapters 7 and 8. For a more recent consideration, see Government of Western Australia, ‘Planning makes it happen’, above n 36.
\textsuperscript{246} Standing Committee on Public Administration and Finance, above n 10, Ch 8, 425–429.
\textsuperscript{247} Ibid [8.217]–[8.242]; see also Staley, ‘Property rights in Western Australia’, above n 21, 4.
\textsuperscript{248} Standing Committee on Public Administration and Finance, above n 10, [8.332]. Examples of this include the policy \textit{Bush Forever}; see [8.337] et seq.
\textsuperscript{249} Staley, above n 21, 23. The requirement that a landowner surrenders land, as a condition of the subdivision of other land, was a particular concern of the Working Party on the Erosion of Property Rights, above n 22, 12.
\textsuperscript{250} Standing Committee on Public Administration and Finance, above n 10, Recommendation 26, 384. Government of Western Australia, \textit{Response}, above n 18, 24.
\textsuperscript{252} Finlay, ‘The Erosion of Property Rights and its Effect on Individual Liberty’, above n 47, [24].
impossibility of compensating all persons injuriously affected by regulation by arguing that if the State cannot afford to compensate an affected owner, then it should not regulate that property right. She dismisses the view that merely because property rights are not absolute, this justifies uncompensated regulation.

As regards appropriate protection against the taking of private property through regulatory restraint, and the role of compensation as a protective device, the New Zealand Government identified that non-essential takings might be further restricted without any negative impact on policy. However, the Government was more cautious on whether compensation should be expanded. While not dismissing arguments that compensation for regulatory takings would improve regulatory behaviour, it did not endorse them.

The treatment of betterment is not consistent within the literature. Introducing a betterment charge may be ‘eminently reasonable’. Australian planning law academic Fogg points to the problems that have beset betterment charges, in particular the problem of demonstrating the extent to which an increase in property value arises from a planning instrument. Fogg proposed that injurious affection be abandoned in favour of a concept of loss in value arising from reservation for public purpose. His solution to public interest restrictions adversely affecting land was simply that a landowner be entitled to insist that the State acquire the land. This thesis leaves the matter of charging for betterment open as a possibility for funding the various law reform options considered in chapter 8, but acknowledges the recovery of betterment requires further study.

A private interest perspective may seek to reverse the impact of planning laws. Staley argues that landowners must be consulted about changes to land regulation, with associated rights to appeal and compensation when regulations erode land values. She argues for a review of State planning laws, water entitlements, the treatment of farmland vegetation under environmental laws, and heritage laws, but predetermines the outcomes of that review; new legislation must consider whether voluntary programs

253 Ibid., [77].
255 Guerin, ‘Protection against Government Takings: Compensation for Regulation?’ above n 49, [6.3].
256 Ibid, [4.5].
257 Butt, ‘Some aspects of injurious affection: a case for reform’, above n 214, 82.
258 Fogg, above n 46, 520.
259 Ibid, 484.
260 Staley, ‘Property rights in Western Australia’, above n 21, 2.
rather than prescriptive regulations would be effective to achieve stated goals, that a mandatory benefit-cost analysis be introduced across government which determines economic, environmental and social benefits and costs from proposed property regulation, that compulsory acquisition be limited to acquisitions for public purposes, and that non-legislative policies restricting land use be prohibited. Zoning restrictions on new housing developments would also be progressively removed, and a central register would disclose all land restrictions. A later paper by Staley again called for a system based upon compensation, consistency, openness and right of appeal, although she abandoned her call that zoning restrictions on new housing developments be progressively removed.

The Working Party argued for a commitment by politicians to a charter of property rights which included a requirement that planning processes support property development and that property owners be fairly compensated for any loss of property rights. However, legal effect of this Charter was unclear. The Working Party also proposed the use of private easements and restrictive covenants to restrict the use of land considered significant, but with compensation to the affected landholder. Finlay rejects a charter of rights or other legislation which protects property rights themselves. Instead, she noted that legislation which automatically afforded compensation when property rights were restricted would be a ‘positive step’.

Public interest perspectives have generally focussed upon the public benefit of planning laws through orderly planning. Moderate perspectives play down the negative impact of planning laws and argue that the law of existing use, supported by sympathetic courts, has enabled landowners to continue land uses that would otherwise be illegal. Betterment charges are generally supported, although others have suggested that a

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262 Staley, ‘Reshaping the landscape’, above n 21, 1.
264 Ibid, 7.
265 Finlay, ‘The Attack on Property Rights’, above n 47, 22. Note Finlay’s consideration of Western Australia is largely confined to a study of the impact of heritage registers on private property rights and native vegetation legislation: 11–14, 19–21; See also Finlay, ‘The Erosion of Property Rights and its Effect on Individual Liberty’, above n 47, [80].
266 Honorary Royal Commission on the Town Planning and Development Act Amendment Bill 1951, above n 11, [85]; see also Stein, above n 5, 12; LA Stein, Urban legal Problems (LBC, 1974), 239.
268 See e.g. Honorary Royal Commission on the Town Planning and Development Act Amendment Bill 1951, above n 11, [77]–[79].
site revenue tax would better deal with the problems of betterment and worsenment when balancing public and private interests affected by planning instruments.\textsuperscript{269}

A Royal Commission opined that compensation should apply only where restrictions caused hardship, since ‘to pay compensation in all cases would be to pay two or three times the actual loss.’\textsuperscript{270} The Commission recognized that better planning required that there be State power to control development, including the power to force into use serviced vacant land. A solution to the joint problem of compensation and betterment was identified as critical to better planning,\textsuperscript{271} something that is often absent from private interest perspectives. The Commission observed that although landowners demanded compensation arising for restrictions imposed by planning schemes with a corresponding resistance to any collection of betterment, in theory betterment should create a liability for landowners to contribute to development costs, since betterment should more than cancel compensation.\textsuperscript{272} However, the Commission found that provisions for charging betterment were ill-defined and ineffective.\textsuperscript{273} The Commission concluded that only where restrictions went beyond neighbourliness and expropriated property rights should a right of compensation arise, and compensation should apply only where those restrictions caused hardship.\textsuperscript{274} However, the Commission merely recommended ‘further serious investigation into measures for achieving a better balance between compensation and betterment’.\textsuperscript{275} A betterment charge was also recommended for collection from local authorities.\textsuperscript{276}

\textsuperscript{269} DW Spain, ‘Betterment & Worsenment: Balancing Public and Private Interests’ (unpublished, University of Queensland Law School, July 1994).

\textsuperscript{270} Honorary Royal Commission on the Town Planning and Development Act Amendment Bill 1951, above n 11, [74]. This report was presented to both houses of State Parliament, following the then newly constituted State Planning Authority.

\textsuperscript{271} Ibid, [67].

\textsuperscript{272} Ibid, [70].

\textsuperscript{273} Ibid, [67].

\textsuperscript{274} Ibid, [74]. Interestingly, the Working Party on the Erosion of Property Rights, above n 22, also cites the findings of the Uthwatt Report in support of its arguments for compensation: 5. The Uthwatt Report (Expert Committee on Compensation and Betterment, Final Report (Cmd 6386, September 1942)) had recognized that land ownership did not afford to the owner an unqualified right of user, such that restrictions based upon duties of neighbourliness might be imposed without depriving the landowner of any proprietary right or interest: see also Honorary Royal Commission on the Town Planning and Development Act Amendment Bill 1951, above n 11, [74]. For an extract of the general principles underlying payment of compensation for state interference with the use and enjoyment as set out in the Uthwatt Report, see Folkestone v Metropolitan Region Planning Authority [1968] WAR 164, 166 (Virtue J). The recommendations of the Uthwatt Report were not implemented. For an excellent overview of the historical experiences on betterment, see Fogg, above n 46, ch 17; also Butt, ‘Some Aspects of Injurious Affection: a Case for Reform’ above n 214.

\textsuperscript{275} Honorary Royal Commission on the Town Planning and Development Act Amendment Bill 1951, above n 11, [77].

\textsuperscript{276} Ibid, [77]–[78].
A more radical public interest perspective may consider planning laws to have failed the public interest and betterment charges to be unsatisfactory, since increasing land value unrelated to the landowner, arising from factors such as rezoning, should be State property. Justice Else-Mitchell noted the inadequacy of statutory provisions on betterment and advocated for the Crown’s retention of development rights and the compulsory conversion of freehold title to leasehold estates of about 50 years to reduce the cost of redevelopment schemes and public projects. Whenever land use was to be redesignated, such land should revert to public ownership and control until the land was available for its new use, without payment of compensation. Upon the issue of a development order, the landowner could then either comply with the development order and pay for that right, have the land resumed and receive compensation, or sell the land to a purchaser prepared to discharge the development order and pay for the development right.

3.4.6 Environmental laws

The shift from private rights to the public interest is a key theme within environment law literature. A consequent shift is the dominion of the individual to centralized State control of land. A common focus is the anomalies presented by statutory provisions concerning which environmental restrictions entitle compensation to the affected landowner. At least one scholar has suggested that such compensation

277 Commission of Inquiry into Land Tenures, First Report, above n 15, [5.4].
278 Ibid, [4.41].
279 Ibid, [4.14]. Private gains from land-use decisions were also to be eliminated.
280 Else-Mitchell, above n 13, 10. His Honour acknowledged that this would mean that the value of an owner’s interest in land would diminish year by year as would land speculation. For a discussion of his Honour’s proposed case by industry, see Collier, above n 74. Collier considers a number of alternative proposals for securing contributions towards the cost of public works.
281 Commission of Inquiry into Land Tenures, First Report, above n 15. By limiting the expropriation to future development rights, the Commission argued that the need for a compensation fund could be avoided. This was in contrast to the approach taken by the Uthwatt Report: see [4.37]–[4.39].
282 Ibid, [4.28].
283 The Commission accepted that where land was expropriated, full compensation should be paid which included development values already embodied in market values, but did not include future increments in compensation values: see ibid [4.24]–[4.26].
284 Ibid, [5.12]. The findings of the Commission are of no surprise in this regard, given the chairman of the Commission, Justice Else-Mitchell, had previously noted that compensation for the expropriation of land by the Crown in Australia, along with rising land values, were often responsible for frustrating attempts by the State to acquire land to achieve better planned settlement: Else-Mitchell, above n 13, 8.
285 See eg Grinlinton, above n 67.
287 Bonyhady, above n 270, Ch 3.
should rarely apply. It has been similarly argued that compensation for regulatory intrusions threatens the availability of government funding of environmental programs.

A private interest perspective may see environmental laws as having fundamentally changed the common law concept of property ownership, and may sometimes even challenge their need. The Standing Committee on Public Administration and Finance examined private interest perspectives on the impact of agricultural land-clearing restrictions. A depression in land values has also been attributed to environmental restrictions.

Within New Zealand, the return of sensitive land to crown conservation estates has been criticised. Other examples of the diminution of property rights include the taking of rights to carbon sequestration from forest owners, and statutes devolving the ability to take property rights to administrators, thereby increasing the ability of special interest groups to constrain property rights.

Environmental jurisprudence shapes public interest perspectives and may present radical arguments which reconceptualise the nature of real property rights and tenure. Rather than exploiting land for profit subject only to the tort of nuisance, which is seen as untenable, affirmative duties are advocated which may require landowners to use their land in the service of a habitable planet.

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288 See e.g. Gray, above n 45, 164. Gray argues that entitlements to compensation for minor regulatory acts would threaten the progress of civilized society.
289 Bates, above n 4, [2.45].
290 Grinlinton, above n 67, 7. For example, environmental laws may show a ‘scant respect’ for the rights of owners which are ‘trampled on’: see Bone v Mothershaw [2003] 2 Qd R 600, 613 (McPherson JA).
291 For example, existing prescriptive regulation such as heritage listings and measures to protect native flora and fauna in practice may have operated as a disincentive to landowners, many of whom would likely have otherwise acted responsibly: Grinlinton, above n 67, 2, 5.
292 Standing Committee on Public Administration and Finance, above n 10, ch 7; see also Staley, above n 21, 5.
293 Staley, ‘Reshaping the Landscape’, above n 21, 12; Staley, ‘Property Rights in Western Australia’, above n 21, 3.
297 This thesis will not enter this debate; however, see eg LK Caldwell, ‘Rights of Ownership or Rights of Use? The Need for a new Conceptual Basis for Land Use Policy’ (1974) 15(4) Will & Mary LR 759, 769–775. Caldwell argues that land title should merely grant qualified usufructuary rights. For recent views on property and the human environment, see eg J Page, ‘Reconceptualising property: Towards a sustainable paradigm’ (2011) 1 Prop L Rev 86.
property rights may be presented as the only practical government response to the effects of climate change. A public interest perspective can regard environmental restrictions as a necessary constraint on the exercise of property rights, and is more reluctant to compensate the curtailment of property rights. Whether farmers should have additional rights to compensation when their bundle of rights over land and water are restricted or extinguished to address environmental problems has been considered by the Australia Institute. The authors considered that environmental problems broadly could be resolved by either ‘beneficiary pays’ policies (ie farmers are compensated for State restrictions upon their bundle of rights), or by ‘polluter pays’ policies (i.e. farmers internalise production costs). The ‘beneficiary pays’ policies were thought to be problematic. A significant perceived risk was that additional statutory rights of farmers to compensation for land restrictions would impact negatively on net social welfare by diverting scarce resources away from other needs, thereby increasing the likelihood of wasteful litigation and threatening the adoption of sustainable farming practices without producing significant improvements to agricultural productivity. The same findings were not extended to compensation for loss of water entitlements, which might bring modest economic benefits. Importantly, ‘equity’ arguments raised by the judiciary and farm lobby groups who favoured the ‘beneficiary pays’ principle, were critiqued. Such arguments were found to be persuasive only in the abstract, because of the government’s need to regulate land usage to effect socially desirable outcomes. The authors argued it would be inequitable to afford farmers additional compensation for regulatory restrictions over and above urban landholders, noting farmers already

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Ramsay and GC Rowe, Environmental Law and Policy in Australia, Text and Materials (Butterworths, 1995) [6.3].
299 See J Bell, Climate Change & Coastal Development Law in Australia (The Federation Press, 2014) [4.2]–[4.6] on rising sea levels, erosion and inundation. Bell considers various options as an alternative to resumption, such as rezoning and transferable development rights.
301 Macintosh and Denniss, above n 29, v. Note, however, the Eastern States focus of this paper.
303 For example, beneficiary policies might distort the market through subsidies, and could exacerbate problems associated with the overuse of natural resources: Ibid, 23–24.
304 Ibid, 41–42.
306 Macintosh and Denniss, above n 29.
received agricultural subsidies and benefits. The continued currency of ‘beneficiary pays’ policies was explained through the disproportionate influence of rural communities on electoral outcomes, and that ‘polluter pays’ policies may be no more economically efficient than ‘beneficiary pays’ policies. The authors concluded that the Commonwealth Constitution already made adequate provision for compensation to maximize social welfare. However, arguments that compensation for restrictions can be discounted on market considerations are not conclusive. In New Zealand, compensation for the taking of property rights has not been regarded as an impediment to market efficiency within some literature; in fact, it has been regarded as complementary.

3.5 Conclusions from the literature

This literature review suggests a number of conclusions concerning the State’s regard for property rights. Firstly, the literature reveals a lack of consensus on the State’s impact upon a landowner’s property rights. Declared positions are shaped by whether a landowner’s rights are considered from the perspective of common law notions of ‘land’ or from the perspective of statutory ‘title’, the former suggesting the State’s diminution of landowners’ bundle of rights, while the latter suggests that the State’s resumption and restriction of the bundle of rights is not at odds with land ownership. Limited areas of agreement do emerge, as with mineral rights and water rights, where the literature suggests strong public interest perspectives in the State’s shaping of mineral and water rights. However, as regards the impact of planning and environmental laws upon landowners, which has been the source of much disquiet in Western Australia, the literature reveals a lack of consensus on the impact of these laws, and critically whether a restriction imposed upon a landowner might or should amount to a compensable State taking of property.

Secondly, with the exception of Justice Else-Mitchell’s desire to revert fee simple estate to leasehold, the literature reveals a general consensus that upon a resumption of land, the dispossessed landowner should be compensated. Both perspectives are critical of the principles applied in determining the terms of compensation, in particular from a landowner’s perspective, but occasionally also from the public interest perspective. A

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307 Ibid, 45.
308 Ibid, 56. The writer finds this comment odd, given that the discussion paper fails to point out that s 51(xxxi) does not bind the states.
309 Evans and Quigley, above n 3.
A considerable body of literature indicates that any system of compensation in which the resumption of land is a precondition to the recovery of compensation and which does not afford compensation for injurious affection is fundamentally flawed. However, there is disagreement on the compensation which should be afforded to a landowner affected by State-imposed restrictions, particularly in the case of injurious affection arising from planning laws. There appears to be a lack of agreement on the cost of compensating injurious affection or whether such compensation is consistent with sound economic principles.

Private interest perspectives focus upon the negative impact of land restrictions and stress the importance of the security of property rights, but typically ignore betterment. Public interest perspectives regard compensation as an impediment to implementing public interest policies and have consistently declined to consider compensation without also considering betterment. The literature suggests that the proper treatment of injurious affection also requires that betterment be addressed. However, the practicality of betterment charges remains contentious. Nevertheless, arguments advancing compensation without dealing with betterment must be considered deficient.

Thirdly, there is no consensus, even within the literature categories, on what measure of additional protection should be afforded to landowners against State intrusions. Where the security of property rights is considered from the perspective of the rule of law, the need for the State to compensate any taking of property rights is more apparent, while if property rights are considered from a public interest perspective, compensating takings of property rights often becomes a burden on public policy. The literature tends to simply reflect this divide. Where reform is considered for the protection of property rights, there is also little weighing up of the benefits and burdens of alternative measures that might be adopted. There is increasing ‘in principle’ State Government support for an overriding requirement that compensation following a resumption be on ‘just terms’. A statutory requirement of just compensation upon land resumption is recommended by law reform bodies, but the Government has historically declined to implement ‘just terms’ on the grounds of possible unintended consequences. Other possibilities for the protection of property rights include a charter of rights to guide political decision-making or a bill of rights, but these are also not without controversy. There appears to be much consensus that compensation regimes for injurious affection remain unsatisfactory, but its consideration is frustrated by the matter of betterment, which is often ignored, or its consideration deferred.
3.6 Literature criticisms

This literature review identifies common issues surrounding the State’s relationship with private property rights, where consensus exists and where it does not, and why that might be so. However, there are arguably some major weaknesses in aspects of the reviewed literature, thereby bringing into question some of the conclusions presented by the literature.

Firstly, it is very difficult to assess the State legislature’s regard for real property rights in Western Australia solely from a review of literature. The most wide-ranging 2004 report was constrained by its terms of reference, and when it came to considering critical issues, such as the extent to which land had been resumed by the Crown without compensation, the Committee did not go beyond advice from the Department of Land Administration. Similarly, the Committee’s consideration of whether State constitutional provision was needed to guarantee just terms was based entirely on submissions from government agencies and bodies. As to the Government’s subsequent view on the impracticalities of constitutional provision for ‘just terms’, a range of counterarguments are presented in chapter 8. The reduction of a State’s regard for property rights to an index is also problematic. Despite the International Property Rights Index results suggesting that Australian property rights are well protected, the methodology does not reveal any analysis of the State’s regulation of property rights. The Index methodology and data source information on physical property rights was drawn from the World Economic Forum Global Competitiveness Report and from surveyed participants who were asked to define how well property rights were defined...

310 Standing Committee on Public Administration and Finance, above n 10. The function of the Standing Committee did not include any inquiry into the merits of administrative acts or decisions, or a decision made by any person acting judicially: see Legislative Council Standing Orders (Parliament of Western Australia) Schedule 1.

311 Standing Committee on Public Administration and Finance, above n 10, [3.111]–[3.114]. The Department of Land Administration advised the Committee that ‘the payment of compensation for all forms of land acquired by the Crown was the norm for many decades prior to 1998.’

312 Ibid, [5.79]–[5.84].

313 http://www.internationalpropertyrightsexchange.org/userfiles/Data%20Sources.pdf. Indeed, the Index itself acknowledges ‘….objective data that reflects a country’s strength in property rights protection is almost impossible to obtain beyond a narrow scope of parameters….Perception based measures often contain information that is not reflected by objective measures…’

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and protected in their country.\textsuperscript{314} Thus, this data is of little value in answering the questions posed by this thesis.

The State’s regard for property rights also cannot be properly considered without considering the possibility that property rights are human rights. If property rights are human rights, as argued in chapter 2, then property rights may warrant greater protection. Save for Evans, French, and the consideration of property rights within the context of a proposed human rights bill by the Consultation Committee, the literature largely fails to address the issue of property rights as human rights. If property rights are human rights, those rights need to be considered alongside the impact of planning and environmental laws, rather than quarantining the consideration of property rights as a human right to a discussion of only human rights.

Secondly, where the literature argues that the State has eroded property rights, the literature is neither precise nor clear or consistent on when the erosion of property rights occurred, at least when property rights are considered as a whole. Finlay refers to an erosion of property rights having occurred in ‘recent years.’\textsuperscript{315} Staley sees the erosion of property rights as having been a quiet erosion by incremental change, but notes that today’s planning restrictions represent a marked change from the rights enjoyed by property owners as recently as 1962.\textsuperscript{316} The Working Party argued that property rights have been increasingly regulated and subjected to compulsory acquisition since settlement,\textsuperscript{317} but identified unprecedented erosion of real property rights by the State in the last decade. The Standing Committee considered some government actions and processes against previous practices, revealing that while some government restrictions and controls were entirely new, others may not be.\textsuperscript{318} Reference to case law was also sometimes quite limited.

Whether the State has less regard for property rights today than previously requires a detailed examination of the State’s treatment of property rights from 1829, with a study of the legal content of the six common areas identified in this literature review, and the

\textsuperscript{314} Ibid.
\textsuperscript{315} Finlay, ‘The Attack on Property rights’, above n 47, 1.
\textsuperscript{316} Staley, ‘Reshaping the Landscape’, above n 21, 8 refers to Lloyd v Robinson (1962) 107 CLR 142. However, for the reasons set out herein, the writer respectfully disagrees with her appraisal of this case, and the correctness of her proposition that in 1962, the High Court held that ‘landowners possessed the proprietary right to subdivide without approval.’
\textsuperscript{317} Working Party on the Erosion of Property Rights, above n 22, 6.
\textsuperscript{318} Standing Committee on Public Administration and Finance, above n 10, [7.52]. Some present restrictions on land clearing are only considered after noting that until 1986, there was no state land clearing controls. The Standing Committee noted that present law on compulsory acquisition had developed over the last 150 years: [3.36].
application of those laws, wherever possible through case law. The State’s regard for property rights through examination of its laws also cannot be considered in isolation from its historical surrounds. It is extraordinary that in considering the State’s regard for property rights, the literature fails to give any attention to the works of major Australian historians on land tenure and resumption.\textsuperscript{319} The writer will seek to assess the treatment of property rights in WA by considering relevant laws with reference to surrounding historical circumstances, particularly as regards the Swan River Colony.

Thirdly, arguments and legal propositions are often advanced without legal authority. Where authority is provided, that authority may not always accord with the propositions advanced. For example, the Working Party\textsuperscript{320} makes much of the Supreme Court’s decision in \textit{Temwood}\textsuperscript{321} in favour of the landholder, but no mention is made that application for special leave to appeal to the High Court had already been lodged.\textsuperscript{322} Had that been done, the reader would have been alerted to the possibility of the decision being reversed, as indeed occurred some months after the release of the industry paper.\textsuperscript{323} Staley’s starting point appears predicated on the position that at some time previously, a Western Australian’s home was his or her ‘castle’.\textsuperscript{324} As regards whether property rights should receive constitutional protection, both perspectives reveal a surprising disengagement with constitutional considerations such as manner and form when considering the question of constitutional provision for the protection of property rights.\textsuperscript{325}

Use of authorities is also largely limited to secondary sources, with little examination of case law or statutory principles, despite frequently advancing propositions on laws and government practices and procedures in relation to those laws. Staley advances the

\begin{itemize}
  \item See e.g. IS Battye, \textit{Western Australia: A History from its Discovery to the Inauguration of the Commonwealth} (Clarendon Press, 1924); Roberts, above n 72.
  \item See Working Party on the Erosion of Property Rights, above n 22, 11; \textit{Hill \& Anor v Western Australian Planning Commission} (2000) 107 LGERA 229 is stated as having decided that compensation for land acquired under s 36(2)(b) of the \textit{Metropolitan Region Town Planning Scheme Act 1959 (WA)} was limited to ‘the market value for the land and nothing more’. The writer disagrees. Scott J held (236) that ‘...in assessing market value in this case, a valuer should properly take into account not only the value of the plaintiff’s land but also the fixtures attached thereto and the use that is presently being made of it...’.
  \item Working Party on the Erosion of Property Rights, above n 22, 12, citing \textit{Temwood Holdings Pty Ltd v Western Australian Planning Commission} (2002) 25 WAR 484.
  \item See the editor’s note in (2002) 25 WAR 484.
  \item \textit{Western Australian Planning Commission v Temwood Holdings Pty Ltd} (2004) 211 ALR 472; in addition, at 7, although reference is made to the decision of the Tribunal reported at (2001) WATPAT 4, no mention is made of the subsequent decision of the Supreme Court at first instance, reported at (2001) 115 LGERA 152.
  \item Staley, ‘Property Rights in Western Australia’, above n 21, 1.
  \item On manner and form, see chapter 8 of this thesis, [8.2.2(b)].
\end{itemize}
proposition that in 1962, the High Court held that landowners possessed the proprietary right to subdivide without approval, citing *Lloyd v Robinson* as authority, but the writer’s own reading of this case does not accord with her interpretation. Elsewhere, the use of American case law, while interesting, is of little relevance as a matter of *stare decisis*. Literature must address WA’s regard for property rights with reference to Australian case law and statutory provisions wherever possible to give any meaningful perspective of WA’s treatment of property rights. Again, the State’s regard for property rights also needs to be considered with reference to the historical circumstances of the time.

Finally, most literature within each category presents a very narrow perspective on the State’s regard for property rights in two ways. Firstly, as argued at the outset of this chapter, narrowly defined enquires are unable to present any conclusions beyond a treatment of the particular area of law considered. Secondly, literature within private interest perspectives rarely considers relevant arguments from the public interest perspective and vice versa. For example, Finlay and Staley condemn the State’s erosion of property rights, but fail to address betterment, while the Commission of Inquiry into Land Tenures considers the resumption of development rights to land from a public interest perspective only. Rather than revealing a balanced consideration of the competing private and public interests that are reflected in planning and environmental laws, the literature too often reflects a bias towards private or public interests, to the exclusion of the other. Wherever possible, literature should address the State’s regard for property rights in terms which can satisfactorily accommodate both private interest and public interest perspectives.

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326 Staley, ‘Reshaping the Landscape’, above n 21, 8.
327 In *Lloyd v Robinson* (1962) 107 CLR 142, Kitton, Menzies and Owen JJ held (at 154), with reference to the *Town Planning and Development Act 1928* (WA), that ‘the Act at its commencement took away the proprietary right to subdivide without approval, and it gave no compensation for the loss…there is no room for reading the Act down in some fashion by appealing to a principle of construction that has to do with confiscation.’ Nor in the writer’s opinion would Staley’s comments be supported by *Robinson v Lloyd* [1962] 168 because Virtue J did not refuse to uphold the setting aside of land for public purposes as a condition of subdivision approval on the basis of a landholder’s proprietary rights. Virtue J did so because ‘the conferring by Parliament on a public authority of a power to exact from the subject the involuntary transfer of property without compensation as a condition of authorizing what in the absence of the statute he would be legally entitled to do would require a similar unequivocal expression of legislative intention’ (174).
3.7 **Concluding comments**

The literature reveals a great division in perspective on the regard the State has and should have towards property rights. While there appears to be consensus on State intrusions having occurred in relation to mineral and water rights, the circumstances which should entitle a landowner adversely affected by the State to compensation remain contentious. Although compensation upon resumption is in principle accepted, the same cannot be said for injurious affection, particularly where that arises from planning laws. On occasion, judicial and parliamentary bodies have been prepared to recommend that fundamental changes be made to land tenure and without necessarily compensating landowners. There is a lack of consensus as to whether any additional measures are required to better protect property rights in Western Australia.

The State’s regard towards real property rights in WA will now be considered in chapters 4–6 through a detailed examination of State laws across the six areas of focus identified by this literature review. A seventh area, criminal property confiscation, is introduced in chapter 6. This will attempt to address some of the criticisms made of the existing literature, and enable some conclusions and common themes arising from the State’s treatment of property rights to be identified in chapter 7. Proposed law reform identified in this literature review provides a background to the reform considered in chapter 8.
Chapter 4: Real Property Rights in Western Australia:  
The State’s regard and disregard 1829–1899

4.1 Introduction

This thesis considers the State’s regard towards private property rights. Critical to this consideration is the availability and terms of compensation afforded by the State when private property rights are disturbed by the State. A study of the State’s treatment of property rights since settlement, with particular attention to the areas of focus identified by the literature review, assists in identifying the extent to which the State’s regard or disregard for property rights forms a legislative continuum. It also provides a background to and point of comparison with the study of the State’s later treatment of property rights considered in chapters 5 and 6. This first period is defined by Stirling’s 1829 proclamation, through to the commencement of the Land Act 1898. The challenges presented in researching Western Australia’s colonial laws are acknowledged at the outset, given the limited resources available for the research of this period.

Chapter 4 considers the State’s regard for property rights through an examination of the six key areas of land tenure, resumption and compensation, mineral and water rights, and planning and environmental laws. It is argued that the State generally showed a high regard for property rights, and that when it came to public interest considerations, it sought to balance these interests.

The chapter begins with an examination of how, through the selective treatment of history, land laws and literature, conflicting perspectives of the State’s regard for property rights may be constructed. This approach is discounted in favour of attention to the six key areas of focus.

The foundations of land tenure are considered through the reception of English laws which revealed the Crown as the absolute land owner, and the possible existence of

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2 The Land Act 1898 (WA) was assented to on 28 October 1898, and commenced on 1 January 1899. The Act consolidated and amended the laws relating to the sale, occupation and management of crown lands.
3 See G Greenleaf, P Chung, A Mowbray and B Salter, ‘Digitising and Searching Australasian Colonial Legal History, Part 2 Australian Law Librarian, 20(4) 2012, 223, 230. For this reason, the use of secondary sources is relied upon more heavily in this chapter for the study of early primary materials than elsewhere in this thesis.
4 See eg Attorney-General v Brown (1847) 1 Legge 312,316, but cf contra Mabo v Queensland (No 2) (1992) 175 CLR 1, 48 (Brennan J), 60 (Deane and Gaudron JJ), 142 (Toohey J) on native title as a burden on the Crown’s radical
entrenched common law protections against State resumption without compensation. Populist sentiments which may characterize the State as disregarding private property rights are evaluated through crown grant reservations and location duties. Legal scholarship which characterizes early colonial land grants and reservations as evidence of an early public interest perspective of a landowner’s rights being subordinate to the public interest is also challenged. The negative effects of pastoralism on the freehold estate are explored. Detailed attention is then given to land resumption by crown grant reservation and by later statutory provision, and the availability of compensation.

The State’s regard for property rights is further examined through a consideration of the initial inclusion of all minerals, excluding precious metals, in crown grants. Public interest perspectives of property rights are considered within the context of the later reservation of minerals in favour of the Crown, and new statutory provisions for the mining of crown minerals on certain private land. Water rights are considered, which reveal some limitation of common law rights in the public interest. Planning laws are reviewed, with attention to the transition from free selection to survey, and the policy of closer settlements through voluntary purchases. Environmental laws are examined but found to be few.

4.2 Private and public interest perspectives: the danger of selective attention to history, land tenure and policy

The promise of crown grants of land to colonists provided the foundation for the settlement of Western Australia. At the outset, subject to specific purpose reservations, all land within the colony would be available for sale. Steps were taken to facilitate and simplify conveyancing. The promotion of generous land grants to settlers was a key title. The disregard of the State towards lands traditionally held by Aboriginal peoples during this period may have been to avoid subverting the underpinnings of the property rights of the settlers: see RH Bartlett, Native Title in Australia (LexisNexis, 2nd ed, 2004) [1.4]. There was no litigation with respect to native title rights during this period, and no protection from the seizure of traditional land by the states: [1.20]. Note, however, the provision for Aboriginal peoples under the various Land Regulations with respect to pastoral leases, the power to create reserves under the Aborigines Protection Act 1889, and provision for the grant or lease of land to Aboriginal people by the 1887 Land Regulations and s 6 Land Act 1898: see Russell, above n 1, 320. The history of the colony was ultimately found not to have extinguished native title: Western Australia v Commonwealth (1995) 183 CLR 373, 421–434(Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ); Western Australia v Ward (2002) 213 CLR 1, 117 (Gleeson CJ, Gaudron, Gummow, Hayne JJ).

5 The term ‘location duties’ refers to the conditions of improvement attaching to a crown land grant.
8 2nd Gulielmi IV No 7 1832. Note also steps taken to provide for more effectual and accurate land boundaries: see 4 & 5 Vic No 20. 1841.
early feature of the colony. Land policy shaped the social and political landscape and the State’s regard for property rights, and the content, development and application of land regulations defined the character of successive administrations of the colony.

Crown conditions and reservations attached to crown land grants. Public interest perspectives might identify these reservations as evidence that property rights have always been qualified, while private interest perspectives might deplore the onerous nature of these conditions. The sale of crown land at a ‘sufficient price’ formed the foundation of the Wakefield Theory, which shaped colonial policy during the period 1830–1850. Land reform was also the platform of the West Australian Committee dedicated to advancing the colony’s interests. The rise of yeomanry settlements from 1850 can also be directly attributed to land policy. The State’s promotion of land ownership is further evidenced by the first Agricultural Bank, which aimed ‘to encourage persons to improve their holdings’, and which granted generous finance terms to settlers.

Land was also central to political and constitutional affairs. The State embraced an electoral system in both houses of Parliament, and an upper house designed to protect private property. The control of crown land shaped debate on responsible government between 1887 and 1890. Following responsible government, legislative reform extended the institution of private property and its attendant benefits, with the improved

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10 See the importance of land regulations in characterising the administrations of Sir James Stirling (1831–1838) and Governor Hut (1839–1842), the transition period (1850–1853) and the later administrations of Governor Weld (1869–1875) and Governor Bloom (1883–1890) in Battye, *Western Australia: A History from its Discovery to the Inauguration of the Commonwealth*, above n 6, chapters v, vi, viii, xii, and xiv.


13 Roberts, *ibid*, ch 12. The theory advocated that a balance between land, labour and capital was essential to address economic depression within the Australian colonies: 84; on the WA Committee, see 154; Battye, *Western Australia: A History from its Discovery to the Inauguration of the Commonwealth*, above n 6, 142, 152.


15 See *Agricultural Bank Act 1894* (WA).

16 See Roberts, above n 12.

17 For an extract from what Sir John Forrest had to say when introducing the Agricultural Bank Bill into the Parliament of Western Australia, see F Crowley, *A Documentary History of Australia, Volume 3, Colonial Australia, 1875–1900* (Thomas Nelson Australia Pty Ltd, 1980) 436–438.

18 SR Davis, *The Government of the Australian States* (Longmans, 1960) 408. Davis notes that the State was particularly reliant upon rural landholders. HJC Phillips, *Electoral Law in the State of Western Australia: An Overview* (WA Electoral Commission, 2nd ed, 2008), 4, observes that ‘…one of the roles of the Legislative Council was to help maintain the rights of property’.

19 JS Battye (ed), *The Cyclopedia of Western Australia (Illustrated) in Two Volumes, Vol. II* (Hussey & Gillingham Ltd, 1913) 317; see also Roberts, above n 12, 329.
position of women being noteworthy. In 1892, statutory provision provided that a married woman could separately acquire, hold and dispose of real and personal property, and seek remedies for the protection of that property, something which was not recognized at common law. The later constitutional provision for minimal property qualifications for electors, and privileges for the propertied, ensured that most property owners, including women, were enfranchised, and that the propertied retained voting advantages.

The land policy and legislative developments outlined above can be interpreted in support of a State most respectful of property rights, and there is evidence indicating this interpretation is sound. Property rights underpinned the colony’s establishment, with the State keen to promote the taking up of land by settlers. This is the conclusion that a prospective settler would likely have reached after reading Sempill’s Handbill of 1829, which was designed to attract colonists. This described the colony as:

…highly suited for…production…with excellent soil…well adapted for wool-growing and the raising of stock…Settlers will have no purchase money to pay for their lands, nor will they be chargeable FOR ANY RENT WHATSOEVER; their grants will be conveyed to them in fee simple, and will descend to their assignees or heirs forever, in the same manner and way as any Freehold in England.

Settlers also brought with them accepted notions that privately held land could be resumed only for public purposes and upon payment of a fair sum, which provided the

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20 S 1(1) Married Women’s Property Act 1892 (WA). Note, however, that the Act limited a married woman’s contract capacity: see s 1(2) Married Women’s Property Act 1892 (WA) and Cleary v Ayles (1903) 6 WALR 38; see also A Dickey, ‘Contractual capacity of married women in New South Wales and Western Australia’ (1991) 65 ALJ 98, 99. The Act also had the effect of abolishing a tenancy by entireties. On the transfer of interests in land by married women in the early years of this period, see Gulielmi IV Regis No VII, 1832, s IV. Requirements included a deed jointly executed by the husband.

21 S 12 Married Women’s Property Act 1892 (WA).

22 Note, however, that the Married Women’s Property Act 1870 (Imp) was received into the Swan River Colony as part of imperial law: see A Cowie, ‘A History of Married Women’s Real Property Rights’ (2009) Australian Journal of Gender and Law, Vol 1, 7. For a discussion of the position of married women and property prior to legislative reform, see J Hardingham and MA Neave, Australian Family Property Law (Law Book Company, 1984), Ch 1.

23 See s 15 Constitution Acts Amendment Act 1899 (WA); B de Garis, ‘Self-Government and the Emergence of Political Parties 1890-1911’ in D Black (ed), The House on the Hill: A History of the Parliament of Western Australia 1832–1990 (Parliament of Western Australia, 1991), 69–72. Western Australia was the second colony to extend suffrage to women. However, the reasons for this may have had more to do with attempts to dilute the votes of the goldfields: see B de Garis, ‘Self Government and the Evolution of Party Politics 1871–1911’ in CT Stannage (ed), A New History of Western Australia (University of Western Australia Press, Nedlands, 1981) 346. Upon responsible government, both electors and members were bound by a property qualification: see Phillips, above n 18, 2. Note, however, the later removal of property qualifications for Legislative Assembly members in 1893: de Garis, ‘Self Government and the Emergence of Political Parties 1890-1911’, ibid, 69. A property qualification in the Legislative Council was required: Black, ibid, 4.

24 Sempill’s Handbill is set out in V Fitch, Eager for Labour: The Swan River Indenture (Hesperian Press, Carlisle, 2003) 39; see also Peel and Levey’s Handbill on ‘Terms and Conditions upon which Lands will be granted to Individuals by the Association’, 44.
foundations against which subsequent land resumption powers were formed and measured.\textsuperscript{25} A private interest perspective might, therefore, readily conclude that the State held property rights in high regard, particularly when compared with later periods. However, such perspectives apply a narrow and highly selective treatment of history, laws and literature. Without attention to the six key areas identified earlier, these constructs and conclusions are premature and ultimately unsound.

Perspectives promoting the State’s high regard for property rights present a paradox against colonial history, which records that land policy was the principle source of colonists’ discontent, particularly in the first half of this period.\textsuperscript{26} Indeed, Swan River land grants may suggest less regard for landholders, at least when compared with other colonies of the period. Although crown land alienation upon conditions of residence and improvement was not limited to Western Australia,\textsuperscript{27} the mode of alienation was not identical. In New South Wales, crown grant conditions were conditions \textit{subsequent},\textsuperscript{28} while in Western Australia, crown grant conditions were conditions \textit{precedent}, such that the estate did not vest in the landholder until performance of the conditions.\textsuperscript{29} Crown land grants were also discriminatory. The first land regulations contained express limitations on the holding of land by indentured servants,\textsuperscript{30} and even in 1893 favourable terms for land acquisition applied only to adult males or the head of a family.\textsuperscript{31} By 1894, extensive State powers of resumption existed,\textsuperscript{32} as well as legislation to promote the exploitation of crown minerals by interference with private land.\textsuperscript{33} Nor did the colony lead in embracing property rights. The colony was late in adopting the 1872 land


\textsuperscript{27} Moore and Scoop v State of Western Australia (1907) 5 CLR 326, 340 (Griffith CJ).

\textsuperscript{28} See P Butt, \textit{Land Law} (Thomson Reuters, 6th ed, 2010) [23 02], citing Cooper v Stuart (1889) 14 App Cas 286, 290. For a discussion of the history of land grants in New South Wales, see North Ganalanja Aboriginal Corporation v Queensland (1995) 132 ALR 565, 609–611 (Hill J). A breach of a condition attaching to a crown grant in New South Wales only rendered the grant voidable, not void: Butt, above, citing Fisher v Gaffney (1884) 5 LR (NSW) 276.

\textsuperscript{29} See eg Colonial Office Circular A; land regulations. For a reproduction of the terms of Circular A, see Battye, \textit{Western Australia: A History from its Discovery to the Inauguration of the Commonwealth}, above n 6, 75–76. For example, the regulations of 13 January 1829 required that a prescribed amount of money be spent in cultivation or permanent improvement before grant of the fee simple; see also M Pitt Morison and J White, ‘Builders and Buildings’ in \textit{A New History of Western Australia} (University of Western Australia Press, 1981), 516.

\textsuperscript{30} Battye, \textit{ibid}, 76, 95.

\textsuperscript{31} See e.g. s 4 Homesteads Act 1893 (WA).

\textsuperscript{32} Lands Resumption Act 1894 (WA).

\textsuperscript{33} See Wade v New South Wales Rutile Mining Co Pty Ltd (1969) 121 CLR 177, 188–189 (Windeyer J). Although Windeyer J’s discussion relates to the \textit{Mining on Private Lands Act} 1894 (NSW), his Honour’s observations may be also applied loosely to the 1897 Act (WA).
regulations compared with other colonies. A cynic might conclude that a shift in the State’s regard towards property rights occurred from the moment that property qualifications for Legislative Assembly members was abolished in 1893. Private interest perspectives within contemporary literature may suggest that the State showed a disregard for property rights from settlement. More surprisingly, public interest perspectives have interpreted colonial land grants and reservations as evidence of the early acceptance that a landowner’s property rights were qualified by community obligations. These conclusions are challenged, because of the frequent lack of detailed examination of the six key areas identified by the contemporary literature. Only an examination of the six key areas will properly reveal the State’s regard for property rights. This is undertaken below.

4.3 Key Area 1-Land tenure

Settlers’ dissatisfaction regarding land policy was a hallmark of this period. Debate over the control of crown land and Imperial land policy were also recurrent themes. Similarly, most of the later debate over representative self-government concerned the question of the control of crown land, which was resolved in favour of the colony over the Colonial office. Analysis of land regulations is required to distil whether the terms of land tenure are suggestive of State regard or disregard for property rights. This period saw numerous sets of regulations governing the granting and later the sale of land. Rather than presenting an analysis of each set of regulations, an analysis of key features of the regulations is presented. The imperial foundation of Western Australia’s land tenure is firstly considered. A detailed consideration of crown land grants is then undertaken, with attention to the performance of location duties (note in relation to a consideration of location duties and resumption for non-performance, resumption is also further considered at paragraph 4.4). In undertaking this study of tenure, an important

34 M Barnard, *A History of Australia* (Angus & Robertson, Australian Classics edition, 1978) 295. Note, however, that attempts had been made earlier to create land dealings more certain through the deeds registration system: see *Registration of Deeds, Wills, Judgements and Conveyances Affecting Real Property Ordinance 1832; Registration of Deeds Ordinance 1856 (WA)*, now *Registration of Deeds Act 1856 (WA)*; see also the *Settled Land Act 1892 (WA)*.

35 See Roberts, above n 12, 330.


38 See Christensen et al, above n 11, 44.

39 Battye (ed), *The Cyclopedia of Western Australia*, above n 19, 317. However, note although even with the introduction of Representative Government, the ultimate control of land remained vested with the Colonial Secretary: AC Staples, *They Made Their Destiny. History of Settlement Shire of Harvey 1829-1929* (Shire of Harvey, 1979) 138.

40 For example, at the time of the first land grants, there were four sets of government land regulations and a private code operating for the grant of land: see Roberts, above n 12, 49.
qualification must be made. In 1830, much of the southern part of the colony had been
granted to the Western Australian Company, thereby effectively establishing a private
land agency which conducted land sales alongside the government but for which the
various land regulations were almost irrelevant.41

4.3.1 Imperial foundations

The imperial foundation of the colony’s system of real property rights provides an
explanation of the structure of the colony’s system of land laws. It also reveals
something of the State’s early regard for property rights. Stirling’s Proclamation
contained two significant declarations.

(a) The Crown as absolute landowner

The first declaration concerned the reception of English law:42

Laws of the United Kingdom as far as they are applicable to the Circumstances
of the Case …do….immediately prevail and become security for the Rights,
Privileges, and Immunities of all His Majesty’s Subjects found or residing in
such Territory….43

The structure of the colony’s system of land ownership was accordingly formed by
reception of the doctrine of tenure,44 which enabled ‘the English system of private
ownership of estates held of the Crown to be observed in the Colony.’45 The
establishment of the colony and its post-settlement history was seen by the State as
establishing the Crown as the absolute land owner,46 and may be interpreted as an
affirmation of the public interest perspective of property rights.

41 Staples, above n 39, 134; for a consideration of company land sales, see chapter 10.
42 For a detailed examination, see AC Castles, ‘The Reception and Status of English Law in Australia (1963-1966)’ 2
Adel L Rev 1.
43 Russell, above n 1, Appendix III, Captain Stirling’s proclamation of 18 June 1829, 334. Local laws were later
enacted to apply Imperial Acts to the colony, although there were relatively few Imperial Acts on real property which
applied to Western Australia; see Russell, 248; also see eg Gul IV Regis No 4.
44 See Cooper v Stuart (1889) 14 App Cas 286, 291. Although this case dealt with New South Wales, Enid Russell
suggests that the remarks of the Judicial Committee were ‘equally applicable to Western Australia’: above n 1, 247.
At this time, the doctrine of tenure was considered to vest absolute beneficial title of all land in the Crown: Attorney
General (NSW) v Brown (1847) 1 Legge 312. See generally AJ Bradbrook, SV MacCallum, AP Moore and S Grattan,
Australian Real Property Law (Thomson Reuters, 6th ed, 2016) [2.25].
45 Mabo v Queensland (No 2) (1992) 175 CLR 1, 81 (Deane, Gaudron JJ).
46 Western Australia v Commonwealth (1995) 183 CLR 373, 429 (Mason CJ, Brennan, Dean, Toohey, Gaudron and
McHugh JJ).
(b) The common law protection of property rights

The reception of English law also supports a private interest perspective on property rights. Possession was preserved as a source of property rights against the Crown. Most importantly, English laws extended to colonists the protections of English law. Common law applied to the colony by Imperial statute. Magna Carta and the Bill of Rights formed part of English laws brought to the colony. It may have been possible to import from received English law the principle that the State could only resume property for a public purpose and upon payment of compensation. This notion operated to limit the powers of colonial legislatures in some British colonies. Until 1865, the argument that resumption required compensation is a possibility, although the apparent absence of any Australian case law on this point lends some doubt to the principle or its application, particularly given land title disputes were a notable occurrence. The possible application of these common law protections was later discounted by the Colonial Laws Validity Act 1865 (Imp), which provided:

[n]o Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order, or Regulation as aforesaid.

This Act was not directed at facilitating the erosion of the security of private property rights. Nevertheless, the operation of the common law doctrine of repugnancy was

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47 Russell, above n 1, 250, citing Imperial Act, 9 Geo III, c16 of 1768. Adverse possession of crown land was required for a period of 60 years.
48 Note, however, that although it was a common practice within the colony to adopt English statutes regarding property law, from 1 June 1829, Imperial statutes did not apply unless expressly adopted within the colony or by direction of the Imperial Parliament: see Russell, above n 1, 61, 248.
49 See Australian Courts Act 1828 (Imp) noted in Cowie, above n 22, 7.
50 See chapter 2 of this thesis, paragraph 2.2.1.
52 Ibid, 16, 38. Allen observes: ...the governing principle of constitutional law held that no colonial legislature had the power to pass legislation repugnant to the law of England. Although the extent of this doctrine was uncertain, it was assumed that fundamental laws, such as the Magna Carta and the principle that property could not be expropriated without payment of compensation, did extend to the colonies. However, Allen appears to rely chiefly on the example of Canada and the British North America Act 1867. See also Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399, [54] (Kirby J). For an example of where a colonial act dealing with property rights was disallowed by royal prerogative, see 6 Vic, No 6 which concerned grazing rights over crown land: Russell, above n 1, 45–46.
53 A Davidson and A Wells, ‘The Land, the Law and the State: Colonial Australia 1788-1890’ (1984) 2 Law in Context 89, 94.
54 Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399, [54] (Kirby J), citing Colonial Laws Validity Act s 3.
55 The historical reasons for the passing of this legislation appear, however, to have been to free South Australian colonial legislatures from the frequent judgements of Boothby J, who between 1853–1867 had struck down many Acts of the South Australian legislature on the grounds of 'repugnance', i.e. inconsistency with fundamental principles of English common law: see J Clarke, P Keyzer and J Stellios, Hanks’ Australian Constitutional Law
curtailed by the time the legislature occupied Parliament,\textsuperscript{56} thereby potentially exposing property rights to disregard by the State.

\begin{itemize}
\item[(c)] **Common law content of property rights**
\end{itemize}

The common law provided the content of property rights established under English law. For example, rights of ownership to alienated land extended above\textsuperscript{57} and below\textsuperscript{58} the land surface,\textsuperscript{59} and a landowner’s water rights were governed by riparian rights.\textsuperscript{60} Any limitation to these rights, therefore, may demonstrate a disregard for property rights, particularly if without compensation. These considerations are considered later.

\begin{itemize}
\item[(d)] **Colonial land policy**
\end{itemize}

The Proclamation contained a second declaration, which granted Stirling power to ‘grant unoccupied Lands within the aforesaid Territory under such Restrictions as are or may be contained in the several Instructions issued or to be issued by authority of His Majesty’s Government’…\textsuperscript{61} Letters Patent and Commission of Stirling as Governor vested in him:

\begin{quote}
...full power and authority...to agree for such Lands Tenements and hereditaments as shall be in our power to dispose of...to grant to any person...upon such Terms and services and acknowledgements to be thereupon reserved unto us according to such instructions as shall be given...
\end{quote}

Thus, in Western Australia, subject to restrictions imposed by instructions, Stirling ‘intended to exercise the power which a Sovereign possesses to dispose of land within the Sovereign’s territory by such means as the law of the Sovereign prescribes.’\textsuperscript{63} This

\begin{itemize}
\item[56] Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399, [54] (Kirby J), citing Colonial Laws Validity Acts s 3.
\item[57] See Bury v Pope (1586) Cr Eliz 118. Blackstone accepted the authority of the ‘cuius est solum’ maxim: see Butt, above n 28, [206].
\item[58] See e.g. Wilkinson v Proud (1843) 11 M & W 33 noted by Bradbrook et al, above n 44, [16.150].
\item[59] However, the Crown retained by royal prerogative ownership of precious metals and the right to mine such metals: Case of Mines (1568) 1 Plowd 310. In Woolley v Attorney-General (Vic) LR 2 App Cas 163, it was subsequently affirmed that the Crown’s prerogative mineral rights applied to Victoria. For a discussion of the reception of this prerogative right as part of the common law of the colonies, see Cadia v New South Wales (2010) 242 CLR 195, 206–211 (French CJ).
\item[60] See Marshall v Cullen (1914) 16 WAR 92 on the reception of riparian rights into the laws of Western Australia.
\item[61] ‘Captain Stirling’s Proclamation of 18\textsuperscript{th} June 1829’ in Russell, above n 1, Appendix III, 335.
\item[63] Western Australia v Commonwealth (1995) 183 CLR 373, 117 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), citing 5 & 6 Vict c 36, the \textit{Waste Lands Act} 1842 (Imp), 9 & 10 Vict c 104, the \textit{Waste Lands Act} 1846
second declaration is significant, particularly concerning the early years of this period, for several reasons. Firstly, it evidenced that land policy would be based on English principles of tenure. Secondly, it was not contemplated that the granting of land would be a democratic process. The position of Governor also gave effective control of the first Legislative Council, although Council itself was subject to restrictions. Land policy was controlled by the Colonial Office. Only in 1842 did the making of land regulations for the colony pass from the Colonial Secretary of State to the Imperial Parliament. Imperial Acts regarding the colony’s waste lands were repealed in 1855 and the regulation of crown lands in Western Australia was vested in the Crown. Land policy was then the subject of successive Imperial Acts until responsible government.

Thirdly, the vesting of sovereign power in the Governor, while subject to Imperial instructions, meant that colonial land regulations issued for the grant of land were liable to later disallowance by contrary Imperial instructions, which occasionally happened. Such problems were exacerbated by a Colonial Office apt to quickly change its mind, the delay in receipt of instructions, and Imperial authorities being out of touch with and often unsympathetic to the colony’s requests. Colonial judges felt frustrated in the

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See for example Stirling’s failure to secure reforms regarding the sale of land when he returned to England in 1832: de Garis, ibid, 28.


See for example Steere v Minister for Lands [1904] WAR 178, 180.

See s 4(1) Constitution Act; Western Australia v Ward (2002) 213 CLR 1, 117 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); see also Steere v Minister for Lands [1904] WAR 178, 182 (Parker J).

See, for example, the June 1841 land regulations, which provided for a minimum acreage of 160 acres with rights of commonage over land within a radius of 10 miles as provided in the Government Gazette, 18 June 1841. Twelve months later, notice was received that such regulations were disallowed to the extent that the minimum acreage was fixed at 320 acres, with no rights of commonage, as provided in Government Gazette, 22 July 1842: R Richards, The Murray District of Western Australia (Shire of Murray, 1978) 200.

Following the issue of the first land regulations in 1828, it was only 6 weeks before a new set of land regulations were issued on 13 January 1829, which imposed more restrictive conditions in relation to crown grants; see A Hasluck, Thomas Peel of the Swan River (Oxford University Press, Melbourne, 1965) 167.

See e.g. the delay in operation of the change in policy from free grant to sale. The decision was published in England in March 1831 but did not come into operation until January 1832: Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 108.

See e.g. the response of the Colonial office upon Stirling’s return to England in 1832 to request a change in the new policy of land sale. Instead, Stirling was ordered to strictly enforce the land regulations: de Garis, ‘The First Legislative Council, 1832–1870’, above n 65, 28.
interpretation of land regulations by a distant Privy Council, ignorant of local circumstances.74

4.3.2 Crown land grants

The reality of the available crown land was an early source of settlers’ dissatisfaction.75 On 5 December 1828, Colonial Office Circular A confirmed free grants of land in fee simple would be made to settlers in proportion to their invested capital.76 However, the ‘Swan River Mania,’ which gripped early settlers’ high hopes, was fuelled not by the State (there had been no official statement on the true position of the colony), but by the propaganda of speculators.77

Monopolies over land grants caused strong protestations to the Colonial Board.78 Contemporary accounts recorded that ‘the distribution of land…helped the misfortunes of the settlement’.79 Predetermined priority, nepotism and even deception80 shaped the granting of the best lands, despite regulations stipulating that land was to be granted based on the date of arrival of settlers.81 Leading officials secured priority over vast tracts of land from the Colonial Office,82 and Governor Stirling perpetuated this practice by the granting of further available good land to military officers.83 Until the enactment of the Australian Waste Lands Act 1842 (Imp), the alienation of land remained ‘a matter of grace and favour.’84

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74 See generally P Finn, Law and Government in Colonial Australia (Oxford University Press, Melbourne, 1987) 70, citing Ryan v The Queen (1872) 3 VR (Eq) 126, 134 (Molesworth J).
75 See for example the early account of James Henty in Richards, above n 70, 64. The Henty family subsequently left the colony in 1831 as a result of perceived unfairness in the allocation of land grants: Fitch, above n 24, 107.
76 Battye (ed), The Cyclopedia of Western Australia, above n 19, 118. For a reproduction of the terms of Circular A, see Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 75–76, and A Hasluck, above n 71, Appendix A, 247; note the original power of the Crown to sell waste lands was conferred by s 7 of Act 18 and 19 Vic, c56: see Steere v Minister for Lands (1904) 6 WAR 178, 180. On the objectives of the December 1828 ‘Conditions of Settlement’, see Statham, above n 9, 183.
77 See M Uren, Land Looking West: The Story of Governor James Stirling in Western Australia (Oxford University Press, 1948) 77, 82.
78 Ibid, 81.
79 E Millett, An Australian Parsonage or, the Settler and the Savage in Western Australia (Edward Stanford, London, 1872) 316. Millett refers to the good land being scarce and the vesting of good land beyond the lower classes to those with no knowledge of agriculture.
80 Roberts, above n 12, 49.
81 Fitch, above n 24, 109.
82 Roberts, above, n 12, 48–49; Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 77, 79. For details of the land allotted to various office holders before the settlers left England, see H Colebatch (ed), A Story of a Hundred Years, Western Australia 1829-1929 (Government Printer, Perth, 1929) 272.
83 Uren, above n 77,106. A dispatch from the Secretary of State to Captain Stirling dated 30 December 1828 had vested in Lieutenant Governor Stirling ‘the power of making all necessary locations of land’: Battye, ibid, Appendix 1, 455. Of Stirling, it has been said that he enjoyed the power of a dictator in the first 30 months of his administration: Uren, 121.
84 M Barnard, above n 34, 286.
The State was more generous in terms of the quantity of land offered to settlers than the ‘philanthropic’ settlement schemes offered by speculators, and efforts were made to share out the remaining good land to settlers by the fragmentation of grants and subdivision of the land. However, crown land grants did not curb the settlers’ remonstrations concerning land policy. The terms upon which land was granted under the first regulations of January 1829 caused confusion, encouraged settlers to take up land beyond their means, and lessened the productivity of the land by the requirement that every acre be improved before title was granted. Thomas Peel, among others, failed to secure the land granted to him on account of his late arrival to the colony.

(a) Free grant to sale

New land regulations were issued in March 1831 which discontinued the previous free granting of land and which instead put up for sale ‘‘all lands in the colony not hitherto granted and not appropriated for public purposes.’ The change to the sale of crown land from 1832 by the ‘Ripon Regulations’ occurred because Imperial authorities wished to limit the size of landholdings and to increase revenue. This led to an unsuccessful petition to the Governor in 1837. However, such concerns were not so much motivated by colonists concerned by the State’s regard for their property rights,

85 Fitch, above n 24, 47.
86 Ibid, 47. Note, however, the significant administrative delays in land allocation: Statham, above, n 9, 187.
87 Fitch, above n 24, 107–108. Roberts notes that the chief land grievance of the 1830s was the inability to have improvements carried out on river blocks credited to the more useless interior blocks held by settlers: Roberts, above n 12, 153. However, this system was less prescriptive than later Wakefield systems within the colonies because it allowed the purchasers of land, rather than Government, to determine how to allocate the required expenditure: see Holland et al, above n 26, 211. On the problems that the requirement of improving every acre brought for the settlers, see Statham, above n 9, 184, noting that ‘setlers were thereby effectively prevented from averaging over their whole grant the value of intensive investment on any specific portion.’ On the confusion as to which land regulations might apply and which affected the State’s powers of land resumption, see Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 155; on the likely confusion caused by the proximity of the multiple land regulations, see M Bignell, The Fruits of the Country. A History of the Shire of Gnowangerup Western Australia, (University of Western Australia Press, 1977), 113.
88 See Hasluck, above n 71, 71; see also Uren, above n 77, 127 et seq. While this might be read as evidence of the treating of all settlers equally, it is more likely a result of home politics which had conspired against Peel: see Hasluck, above n 71, 71. The failure to secure the land granted to Peel was the first step in the tragedy which befell the Peel settlement.
89 Colonial Office Circular, 1 March 1831, 2nd paragraph: Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 108. Lands to which regulations were to later apply for the disposal of crown land were defined as ‘waste lands’: see s 9 Waste Lands Act 1846 (Imp). The priority accorded to identifying lands for the public interest is evident in the second paragraph of the Circular. Of the first land regulations, it has been said that the regulations enabled settlers to hold large tracts of land at little cost: NT Jarvis (ed), Western Australia: An Atlas of Human Endeavour, 1829–1979 (Government Printer, 1979) 57.
90 Statham, above n 9, 188; de Garis, ‘Political Tutelage 1829–1870’, above n 9, 316; Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 108. Note, however, a subsequent memorandum of instructions issued by Governor Stirling suggests that the free granting of town lots continued for some time, subject to conditions as to possession and improvement: see Battye (ed), The Cyclopedia of Western Australia, above n 19, 119. For a judicial discussion of the new policy of sale rather than grant, see Western Australia v Commonwealth (1995) 183 CLR 373, 428.
91 Battye, ibid, 152.
92 Ibid, 140. Historians record these regulations as being unsuitable to the circumstances of the colony: see eg de Garis, ‘Political Tutelage 1829-1870’, above n 9, 316.
but by a fear that such a change would add to the burden of labour shortage by reducing immigration. Only those who had failed to lodge claims for land based on the value of their belongings brought to the colony lost accrued rights to obtain free land grants. Indeed, the shift away from the free crown grant of land may have complemented property rights by increasing private land values. The excessive government prices did not prevent the taking up of further landholdings. Extensive free grants of crown land ensured a ready supply of land at a lower price, and eventually the government price of land was lowered.

Crown grants of land might also be made in return for the performance of public works, such as in the case of railways. The legal interpretation to be afforded to the land regulations concerning such grants, however, was revealed only in the second period.

(b) Crown grant reservations and location duties

The threat to property rights by crown grant reservations received early condemnation. Nathaniel Ogle observed:

The power invested…in the government (and consequently their officials), is far too great, and so undefined as to greatly diminish the value of the free tenure of the estate, and, moreover, operates as a perpetual and undefined charge on the property...trees surrounding a house, or ornamental timber, may be cut down by the order of an official, without compensation, and without appeal… The same extraordinary right extends to stone and other materials…. It is not prudent to be thus left at the mercy or caprice of successive governors or officials. This

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93 Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6,140, 177. Note a shortage in labour would have made conditions attaching to crown grants more difficult to satisfy so the concern may be linked to property rights. On the need for labour and the land regulations promoting indentured labour, see Statham, above n 9, 184.
94 Richards, above n 70, 63.
95 See G Blainey, The Tyranny of Distance (Macmillan, Melbourne, 1968) 156; see also Roberts, above n 12, 119–120. However, this advantage should not be over emphasized. Settlers were unable to raise capital from their land despite it now having a value, unless they enjoyed a clear title: de Garis, ‘Political Tutelage 1829-1870’, above n 9, 316. Note also that along with leasing conditions, the setting of a price for town land prevented land speculations up to the time of the gold rush; Pitt Morison and White, above n 29, 516. Benefits such as the remission of purchase money for land grants continued to be afforded to military officers and officials: Battye (ed), The Cyclopedia of Western Australia, above n 19, 317.
96 Richards, above n 70, 64.
97 K Buckley and T Wheelwright, No Paradise for Workers: Capitalism and the Common People in Australia 1788-1914 (Oxford University Press, Melbourne, 1988) 74; Reference to the sale of private land in lieu of crown grants is made by N Ogle, The Colony of Western Australia: A Manual for Emigrants, 1839 (James Fraser, London, 1839) 137. He suggested private land might be purchased at half the government price.
98 See Richards, above n 70, 202, citing Government Gazette, 14 February 1860. Note the price of land was prescribed by statute under the Australian Land Sales Act 1842.
99 For an example, see Midland Railway Co of WA v State of Western Australia [1957] 1 WALR 1.
100 See chapter 5 of this thesis, paragraphs 5.2(c) (ii) and (iii).
extraordinary reservation of right and power has its origin in that violation of a principle of a free constitution, namely municipal legislation...\textsuperscript{101}

 Preconditions to the grant of title which caused concern were location duties. These required improvements to the land within a prescribed period. The frequent impossibility of completing the duties was an enduring concern.\textsuperscript{102} Stirling administered the conditions of alienation from the settlers’ point of view,\textsuperscript{103} and ignored Imperial instructions to exact penalties.\textsuperscript{104} However, a review of the land regulations reveals that the time afforded to satisfy the conditions was shortened over time. In a colony where labour was in short supply, such a policy would have made acquiring a freehold estate more difficult.

The first land regulations provided that land granted would revert to the Crown if not brought under cultivation or otherwise satisfactorily improved within 21 years;\textsuperscript{105} it was also stipulated that conditions attaching to the free grants of land would be ‘strictly maintained.’\textsuperscript{106} New regulations of 13 January 1829 allowed only 10 years in which to cultivate the land, and imposed a fine if one-third of the land was not cultivated within three years.\textsuperscript{107} Regulations of 3 February 1829 allowed resumption of uncultivated land even within the 10-year grace period.\textsuperscript{108} In July 1830, Colonial Office Circular C, which applied to settlers who arrived after 1830, reduced the quantity of land to be given by half, doubled fines, and reduced the time for cultivation or improvement. If land were not cultivated or satisfactorily improved within two years, the settler would be liable to a quit rent, and if not improved within a further two-year period, the land would revert

\textsuperscript{101} Ogle, above n 97, 90–91. Although Mr Nathaniel Ogle’s critique of the land regulations appears justified, his own proposals for establishment of a settlement had been rejected by the Imperial Government, which may have coloured Mr Ogle’s subsequent criticisms of the colony’s administration: see Battye, \textit{Western Australia: A History from its Discovery to the Inauguration of the Commonwealth}, above n 6, 78–79.

\textsuperscript{102} De Garis, ‘Political Tutelage 1829–1870’, above n 9, 316; Roberts, above n 1, 153; Battye, \textit{ibid}, 150-151; Statham, above n 9, 187.

\textsuperscript{103} Battye, \textit{ibid}, 148; Battye(ed), \textit{The Cyclopedia of Western Australia}, above n 19, Volume 1, 120. Note further the government’s ‘liberal interpretation of the value of assets submitted for land entitlement and the alienation of more land than was warranted on the strict principle of assigning land in direct proportion to the productive assets and labour introduced for land improvement’: Statham, above n 9, 183.

\textsuperscript{104} de Garis, ‘Political Tutelage 1829–1870’, above n 9, 317. The reason for conditions of improvement was to promote the productive use of land and to avoid land speculation and absenteeism: Statham, above n 9, 183. A public interest perspective is evident in this objective.

\textsuperscript{105} Battye (ed), \textit{The Cyclopedia of Western Australia} , above n 19, 118. For a reproduction of the terms of Circular A, see Battye, \textit{Western Australia: A History from its Discovery to the Inauguration of the Commonwealth}, above n 6, 75–76. Roberts notes that the objects of location duties included enabling the resumption of uncultivated land: Roberts, above n 12, 156, fn 6.

\textsuperscript{106} Battye, \textit{Western Australia: A History from its Discovery to the Inauguration of the Commonwealth}, above n 6, 76.

\textsuperscript{107} Roberts, above n 12, 53, fn 40.

\textsuperscript{108} \textit{Ibid}, 53, fn 40.
to the Crown or be liable to a further quit rent. Local laws were enacted to secure payment of crown debts, which included provision for execution against land.

The conditions of alienation to bona fide settlers were treated generously by Stirling’s successor, Governor Hutt. However, the failure of many settlers to bring lands into production could not be ignored by Hutt, and in February 1838, the Crown gave notice of the imposition of fines where landholders had failed to complete their location duties. Settlers saw this as a calculated policy to re-possess their lands. Their fears were not without foundation. Wakefield theorists had motivated the State to pursue a policy of re-possessions of lands held under conditional grants where the settlers had defaulted in discharging location duties, as part of a revision of land policy. Fines and confiscation were applied to break up the vast estates created by early crown grants. Many colonists remained dissatisfied despite new measures considered below to address location duties. The government encountered bitter resistance in the collection of fines and the enforcement of resumptions for the non-performance of location duties. However, this policy represented no more than a strict enforcement of the conditions of alienation, although it has been suggested that settlers may have thought that with the express reservation clauses in their land grants, the government could not completely dispossess them. The conditions of crown grants were freely accepted by settlers.

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109 Battye (ed), The Cyclopedia of Western Australia, above n 19, 119. These regulations came into effect from January 1831: Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 108; see also Roberts, above n 12, 54, fn 60.
110 S Gul IV No 5 Debts due to the Crown. The English mode of enforcing payment of debts due to the Crown had been found to be unsuited to the Colony’s circumstances.
111 Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 141. Battye observes ‘This was one of the wisest moves made during the infant years of the settlement, as it tended to increase the revenue at the expense of other than bona fide settlers, and throw open to them good land which was not being used. This was the view taken by the public when the notice was issued…’
112 Battye, ibid, 149, referring to Perth Gazette, 9 February 1839.
113 See Roberts, above n 12, 153. Note the complaints in the Perth Gazette of settlers being ‘victims to theoretical schemes’ in WB Kimberley, History of Western Australia: A Narrative Of Her Past Together With Biographies Of Her Leading Men (FW Niven, 1897) 114. Note also the fears of land resumptions in Leschenault arising from the non-fulfilment of location duties within the 10-year period prescribed by the second land regulations and complicated by the issue of land title from the Colonial Office conflicting with local regulations: Kimberley, 126.
114 Holland et al, above n 26, 22, 227. On resumptions, see Kimberley, ibid, 112, who observes that ‘[a] few grants of land were resumed in 1839, and in 1840 the Governor scheduled more than 100,000 acres as liable. On further consideration he had placed a liberal construction on the conditions of alienation, and though he resumed large areas he allowed privileges under extenuating circumstances.’ Roberts, above n 12, 153 refers to the Attorney General’s report (1840) of up to 100,000 acres of land to be resumed located in the very best districts.
116 Ibid, 319. The amount of land resumed was small: Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 151; see also Ogle, above n 97, Appendix X on allotments resumed by the Crown. However, by 1840, a quarter of the original holdings had been ceded, whether or not the location duties had been performed: Roberts, above n 12, 154.
118 This was a point argued by the Colonial Land and Emigration Commissioners: see Roberts, above n 12, 154. For the point of view of the settlers, see 157, fn 14.
and save for the retrospective reduction in lands with a river frontage, at no time did the Crown seek more than the fulfilment of those conditions. Unlike with statutory regulation, public interest considerations could not affect the terms of existing crown grants. There appear to be no reported cases in which the Crown dealt with land except in accordance with operative regulations.

Legal scholars have since argued that the system of crown land grants based on reservations evidences the early recognition that a landowner’s property rights were qualified by broader community obligations, such that colonial land ownership was in fact more closely aligned to more modern public interest perspectives of land ownership and concepts such as environmental sustainability. These perspectives, however, are respectfully historical revisionism. The association of colonial land tenure with modern public interest perspectives conflicts with then dominant private interest perspectives of property rights, which prioritised private interests. It also overlooks the colonial administrators’ preparedness to consider private interests alongside public interest considerations.

(c) Balancing public and private interests

Compromise generally prevailed in addressing the liberal crown alienation of land and the inability of many settlers to improve their lands, despite the spectre of fines and resumption. Local laws promoted the performance of conditions. By 1841, the first printed land regulations gave a landholder an alternative option to performing location duties. These regulations reveal a colony keen to promote the acquisition of fee simple estates by those already possessing land under previous regulations. The 1841 regulations concerned:

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119 Roberts, above n 12, 152 and fn 5. Roberts notes that by 1833, all land grants on the Swan which exceeded 5000 acres had been reduced.
120 Ibid, 150.
121 Christensen et al, above n 11, 45.
123 Christensen et al, above n 11, 66.
125 Eg the fencing of town and suburban lots Trespass (Fencing) 4 GUL IV No 4, 1834. Local laws also operated to land grants made to deceased persons: Transfer of Real Property, 1857, 21 Vict No 8.
126 Battye (ed), The Cyclopedia of Western Australia, above n 19, 120, citing Colonial Secretary’s Office, Perth, 28 January 1841 and a notice dated 11 May 1841, on the commuting of location duties by payment of money or the surrender of two-thirds of the land.
affording facilities to persons who may desire to obtain the fee simple of lands, held under primary regulations, but upon which the necessary location duties have not been effected… 127

The regulations recognized that the scarcity of labour had rendered performance of the conditions of grant ‘all but impracticable’. 128 By payment of prescribed duties, a settler could purchase a freehold estate at a prescribed price without performance of the location duties, or elect to surrender two-thirds of the possessed land in exchange for a freehold grant of one-third of the land possessed. 129 Eventually, fee simple as to one-fourth of unimproved lands was offered. 130 This was generous, having regard to the terms of the conditional grants which bound the settlers to their lands, and was effective in resolving many land disputes with the State. 131

By 1843, the first complete set of Imperial land regulations provided for crown grants without conditions as to improvement. 132 New Imperial land regulations, each replacing the former, followed in 1860, 1864, 1872, and 1887. 133 Principal features of the 1872 regulations included the introduction of 10-year occupation licences, which permitted conditional land purchase by deferred payment and the performance of required improvements within a 10-year period. 134 Free grants of small holdings were also issued. The satisfaction of conditions attaching to land grants, however, remained an enduring concern. 135

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127 Ibid, 120.
128 Ibid.
129 Ibid; see also the less generous recommendation of the Land and Emigration Commissioners discussed by Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 151; see also Roberts, above n 12, 153.
130 Battye, ibid, 151.
131 For example, by June 1843, of the 1.5 million acres originally in dispute within the State, less than 1,000,000 acres remained contested: see De Garis, ‘Political Tutelage 1829-1870’ , above n 9, 319.
132 See 6 Vict, No 36, set out in Government Gazette, 30 June 1843 in Battye (ed), The Cyclopedia of Western Australia, above n 19, 120. Note, however, that a system of ‘no alienation without conditions of improvement’ remained the hallmark of the land regulations to the end of this period: see e.g. FK Crowley, Forrest 1847-1918, Apprenticeship to Premiership (University of Queensland Press, 1971) 171.
133 See Battye (ed), ibid, 120–121. It has been said that the 1860 land regulations showed ‘a marked change in land policy’ by a reduction in the minimum price and area of country lands. The regulations also newly provided for the inclusion of mineral lands, and for licences for the removal of timber: see Battye (ed), ibid, 121. Note the 1887 Land Regulations and subsequent Land Act 1898 included provision for the grant or lease of land to Aboriginal peoples of crown land not exceeding 200 acres upon such terms and conditions as the Governor thought fit: see Russell, above n 1, 320.
134 Battye (ed), The Cyclopedia of Western Australia, above n 19, 121–122.
135 See e.g. Bignell, above n 87, 115.
4.3.3 Torrens and indefeasibility of title

Western Australia was the last colony to adopt the Torrens system to simplify land title and dealings. Studies have left open whether the Torrens system created a new legal code or merely a new mode of conveyancing. Nevertheless, the system now protected a registered proprietor from the potentially unfair operation of the doctrine of notice, but left the interest of a registered proprietor defeasible to not only the reservations, exceptions, conditions and powers contained in a grant, but also other interests, including public rights of way and unpaid rates and assessments. The significance of statutory exceptions to a registered proprietor’s indefeasibility of title is a theme of later chapters. Of significance here was that the Torrens system provided a means to obtain a documented title for possessory title holders and for many land occupiers who had secured lands from the Western Australian Land Company by parole or who no longer had documentary evidence of their title.

4.3.4 The Land Act 1898

Responsible government vested in WA’s legislature ‘the entire management and control of waste lands…’ Following the grant of constitutional government, further acts and land regulations were made until all laws for the sale, occupation and management of crown lands were consolidated under the Land Act 1898. This was the first comprehensive colonial Act dealing with land grants. It did not affect any rights or interests already granted.

(a) Classification of land tenure and attaching conditions

The Act provided 12 different means for the acquiring of land. The variety of land tenures was intended to promote economic development. The Act provided that a

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136 See Transfer of Land Act 1874 (WA). For a consideration of the introduction of the Torrens system into Western Australia, see G Taylor, ‘Last but not least: The Torrens System’s Path to Western Australia’ (2009) 17 APLJ 279.
137 See PR Adams, ‘The Law of Real Property and Conveyancing in Western Australia’ (unpublished thesis, The University of Western Australia) chapter 1, 5; see also the conflicting perspectives noted in chapter 2 of this thesis, paragraph 2.1.2(a)(l).
139 S 48 Transfer of Land Act 1873; see also s 68 Transfer of Land Act 1893 (WA).
140 Staples, above n 39, 148, 150.
141 S 3 Western Australian Constitution Act 1890 (Imp). Note however that the repeal of existing power to make land regulations was subject to saving provisions, and the accrued rights of licensed occupants and lessees of Crown land were expressly preserved : s 4 Western Australian Constitution Act 1890 (Imp).
142 See Homesteads Act 1893 (WA). Note ss 8 and 12 on conditions as to improvements and residence before issue of a crown grant, and s 10 which rendered any assignments before issue of a crown grant void. Provision was also made for the crown grant of land improved under a homestead lease (s 33 (7)).
143 S 2 Land Act 1898 (WA).
144 See Part IV Purchase by Auction–Town and Suburban Lands; Part V Conditional Purchases–Agricultural Lands; Part VI Conditional Purchases–Grazing Lands; Part VII Conditional Purchases–Poison Lands; Part VIII Free
fixed-term lease or licence would be issued, during which time the holder had to pay rent half-yearly in advance and to fulfil the prescribed conditions. This lease or licence could not be transferred without the minister’s written approval. No crown grant would issue until all conditions precedent had been fulfilled or dispensed with, to the minister’s satisfaction.

All applications were subject to the approval of the minister, who could ‘insert such conditions and reservations as to him may appear necessary in the public interest’.

The conditions attaching to land depended on the classification of the land, as did the time period for performance of conditions, the minimum and maximum area of land that could be held, the price and payment terms, whether residence conditions applied or could be avoided, the conditions as to improvements, cultivation and maintenance (including whether the conditions could be dispensed with), and how long the applicant might have to wait until issue of the fee simple estate. Certain

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147 S 136 Land Act 1898 (WA).
148 S 135 Land Act 1898 (WA).
149 S 21 Land Act 1898 (WA). A corresponding power was also afforded to the Minister ‘at his discretion to insert in any lease, license, or occupation certificate such conditions and clauses as may seem to him to be required for the public interest’: s 25 Land Act 1898 (WA).
150 For example, in relation to town and suburban lots, fencing and other prescribed improvements had to be performed within two years of the land purchase (s 51 Land Act 1898). The lease or licence period varied from eg three years for agricultural land outside of agricultural areas (s 60(3) Land Act 1898), seven years for the conditional purchase of land within an agricultural area not for residence (s 57(3) Land Act 1898) and free homestead farms (s 75 Land Act 1898(WA)), to 10 years for working men’s blocks (s 88(3)), 20 years for the conditional purchase of land within an agricultural area for residence (ss 55(3) and Ninth Schedule) and 30 years for the conditional purchase of grazing land.
151 On the conditional purchase of land within an agricultural area for residence or not for residence, see ss 55(2) and 57(2) Land Act 1898 (WA). The prescribed areas were 1000 acres (maximum) and 100 acres (minimum). But note also s 55(7) and s 57(7) on additional applications and s 67 on close settlement. The prescribed area for agricultural lands outside of Agricultural areas was much smaller: see s 60(2) Land Act 1898(WA), but also see s 60(7) on additional applications. The prescribed area for poison lands was more generous: see s 71(2) and s 71(7) Land Act 1898 (WA).
152 For example, 10% of the purchase price was payable at the time of sale regarding the purchase of town and suburban lots (s 52 Land Act 1898 and Seventh Schedule), while the conditional purchase of land within an agricultural area for residence prescribed that 1/20th of the total purchase price was payable half yearly (s 55(1)). The payment terms for land within an agricultural area not for residence were less generous, and required payment within 12 months (s 57(1)) by quarterly instalments (s 57(4)).
153 Five-year residence conditions applied to the purchase of land within an agricultural area for residence (s 55(4)) and also for grazing lands (s 68(5), but note s 68(6)); see also s 76 regarding residence and free homestead farms.
154 SS 56, 64 Land Act 1898 regarding the conditional purchase of land within an agricultural area for residence.
155 See e.g. fencing and other improvements set out in ss 51, 55(5), 60(5), 68(7), 71(5), 78, Land Act 1898 (WA).
156 S 66 Land Act 1898 permitted unprofitable improvement conditions to be dispensed with in relation to land within an agricultural area.
157 For example, the estate of a free homestead farm might issue after only 12 months of possession (s 82), despite the prescribed normal period of seven years and performance of all conditions(s 81), while the estate for agricultural land for residence would not issue until the expiration of 5 years and the performance of all conditions, s55(6); see also s 68(8) regarding grazing leases.
assignments prior to the issue of a crown grant were void, transfers and mortgages of leases were subject to ministerial approval, and rights of mortgagees were limited.

Some provisions for acquiring land appear generous. For example, free homestead farms were available by the grant of an estate in fee simple or conditional purchase to every adult male or head of a family who did not already own more than 100 acres of land, while other land could be purchased by deferred payment. The approved applicant of a free homestead farm was entitled to possession for seven years. A crown grant would issue upon the minister’s satisfaction of all conditions having been performed. The applicant’s interest in the land was protected from being taken in execution prior to the issue of a crown grant. However, conditions as to residence, fencing and improvements applied, and forfeiture was the prescribed penalty for not taking possession or failing to satisfy conditions as to improvement.

(b) A positive assessment of land tenure

Eventually, public condemnation of colonial land policy appears to have abated. An account of homestead farms by a local barrister in 1897 described the colony’s system of land grant with enthusiasm:

We now draw attention to the wonderful liberality of the Western Australian Government, by which any settler can acquire a homestead and get money advanced by the Agricultural bank to improve and cultivate it… These are the objects of the Homesteads Act of 1893 and the Agricultural Bank Act of 1894. They indicate sympathy with the new arrival… He gets his homestead practically for nothing. He is advanced money to improve and cultivate on the

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158 S 80 Land Act 1898 (WA).
159 S 90 Land Act 1898 (WA).
160 Ss 139–140 Land Act 1898 (WA).
161 Note a ‘conditional purchase’ is not a ‘true sale’: see Moore and Scroope v State of Western Australia (1907) 5 CLR 326, 329.
162 S 74 Land Act 1898 (WA). Note also that additional lands might be applied for: see s 83; see also s 85 (village allotments). Free homesteads had been first introduced under the Homesteads Act 1893 (WA).
163 S 75 Land Act 1898 (WA). This required the issue of an occupation certificate.
164 See s 81 Land Act 1898 (WA) on issue of a crown grant after 7 years. Note that a crown grant might be issued as early as 12 months after possession: s82 Land Act 1898 (WA).
165 S 75 Land Act 1898(WA).
166 S 76 Land Act 1898 (WA).
167 S 78 Land Act 1898(WA). Note extensions of time for fencing and improvements might be granted: ss 29, 30 Land Act 1898.
168 S 76 Land Act 1898 (WA). The selector was required to reside on the land for at least 6 months each year for the first 5 years, although the Minister could grant an exemption. Forfeiture could also be waived in special circumstances such as disability: see s 77.
169 S 79 Land Act 1898 (WA); see also s 32 generally on forfeiture for non-satisfaction of prescribed conditions.
Innovative land regulation effectively enabled those without money to acquire land by conditional purchase, also enabling the full cost of purchase to be avoided before occupation.  

4.3.5 Pastoralism

This period saw shifting concerns among settlers from the freehold estate to the leasehold, and a shift in the State’s regard to the use of crown land.  

(a) A new Australian land tenure

The recognition of crown leasehold developed distinctly Australian property rights, which contributed to the emergence of a uniquely Australian colonial capitalism. English law recognized no right to occupy crown land without licence, and during the 1830s every effort had been made by the Crown to remove squatters. Although the Imperial Government disallowed local regulations giving a right of commonage over crown land adjacent to private land, and the unauthorized occupation of crown land remained illegal, limited recognition was soon granted by occupation licences. The licences included the grant of pre-emptive rights and provision for compensation if renewal was not granted.

In 1850, small agricultural leases were regulated and afforded the lessee pre-emptive rights for purchase or renewal. These regulations, supplementary to the 1843

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170 EO MacDevitt, *Handbook of Western Australia, Being a short account of its history, resources, scope for settlement and land laws* (Sands & McDougall Ltd Printers, Perth, 1897) 25.
171 staples, above n 39, 138–139.
173 See Buck, above n 124, 83, referring to the *Crown Land Sales Act* 1846 (Imp) and pastoralists’ tenure in New South Wales.
174 Davidson and Wells, above n 53, 89–117.
175 Note, however, the *Crown Suits Act* 1769 (Imp) and adverse possession.
176 Roberts, above n 12, 198.
177 Richards, above n 70, 200; see also Roberts, above n 12, 198. The local regulations were made in 1841.
178 Richards, *ibid*.
179 See e.g. 6th Vict No 6 1842; 7th Vict No 14; 6 Vict No 8 *Crown Lands (Trespass)* 1872.
180 Roberts, above n 12, 198.
181 See 6th Vict No 6 1842; see also 7 Vict No 14, s 1, cited in *Western Australia v Ward* (2002) 213 CLR 1, 118 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
182 Roberts, above n 12, 199, citing *WA Government Gazette* 17/12/50 and 26/8/51; see also 281. For a discussion of these provisions, see Battye, *Western Australia: A History from its Discovery to the Inauguration of the Commonwealth*, above n 6, 231–232; Richards, above n 70, 201–202.
regulations, introduced provision for pastoral leases,183 which along with alienation in fee simple became the other key system for land disposal. By September 1878, new regulations extended generous terms to squatters, with 14-year leases and certain rights of pre-emption.184 To discourage speculation, conditions regarding stock were attached, which if not performed within two years made the lease subject to forfeiture.185 By 1897, pastoral leases for a fixed term were well recognized as an established second system of land tenure.186

(b) Pastoralism as a State disregard for property rights

It is tempting to attribute the State’s willingness to afford squatters property rights as evidence of the State’s high regard for property rights. However, the contrary may be the case, both from a leasehold and freehold perspective. Provision for squatters’ rights, which was first addressed in New South Wales, was motivated not by a desire to afford squatters property rights but to secure their recognition of crown title so as to facilitate any later land resumption.187 Furthermore, the widespread adoption of crown grants by leasehold may have been as a result of a greater acceptance of leasehold over freehold conditions.188 Unauthorised occupation of crown land was penalized by hefty fines from 1872.189

From a freehold owner’s perspective, the State’s regard for squatters was a negative experience. The affording of pre-emptive rights of purchase and renewal often enabled pastoralists to trump prospective purchasers, afforded the squatters a land monopoly,190 and enabled them to ‘pick out the best lands’.191 Later regulations published in 1878 and revised in 1882 were deplored by the Commissioner for Crown Land, who in 1883 noted that permitting the free selection of lands permitted leaseholders to buy up the

183 Roberts, ibid, citing Order-in-Council dated 22 March 1850. For a review of the history of land regulations relating to pastoral leases in Western Australia, see Western Australia v Ward (2002) 213 CLR 1, 117–122 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
184 Roberts, above n 12, 286.
185 See Ward v State of Western Australia (1998) 159 ALR 483, 489 (Lee J), discussing the Land Regulations for the Kimberley District 1880(WA).
186 See MacDevitt, above n 170, 18–21.
187 See Buck, above n 124, 75 on similar New South Wales provisions of 1836. While the writer can find no record of similar sentiments in Western Australia, it is noted that there was much reference to NSW regulations in Western Australia in considering how the Legislative Council should address squatting: see De Garis, ‘Political Tutelage 1829–1870’, above n 9, 319.
188 Bradbrook et al, above n 44, [6.135].
189 Unauthorised Occupation of Crown Lands Act (36 Vic, No 8).
190 Roberts, above n 12, 281–282. Note, however, that in the early years of settlement, it was the landholders who sometimes penalized squatters: 199.
191 Ibid. Tension between leasehold and freehold, however, should not be overstated, given that vast tracks of land were often leased by settlers as a complement to their own lands, with farmers slowly purchasing the leasehold surrounding their farms: See Richards, above n 70, 202.
springs and waterholes on their leasehold to protect their runs from other purchasers, resulting in the establishment of scattered small agricultural fee simple tenements.192 Only with the shift to selection within surveyed areas in the 1887 Regulations did agricultural interests represented by the freehold estate and pastoral interests represented by the leasehold estate become more evenly provided for.193 A comparison between provisions of the Land Act 1898 regarding grazing leases and provisions of the earlier Land Regulations 1887 regarding pastoral leases suggests a shift in favour of the freehold.194

4.4 Key Area 2 - Land resumption and compensation

Land resumption was provided for by either crown grant reservations or statutory provision. Resumption by crown reservation lends to a private interest perspective of property as the resumption is merely the exercise of a contractual right, whereas resumption by statute supports a public interest perspective of property rights through the prevailing of the public interest. Particular attention is focussed on railways, which accounted for increased land resumptions. The related matter of compensation and contemporary sentiments are considered.

4.4.1 Resumption by crown grant reservations

Crown grant reservations provided the initial crown power for land resumption.195 This power was exercisable only where the landowner failed to complete improvements within the prescribed period.196 Limited powers of resumption were the Government’s

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192 Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 317.
193 Roberts, above n 12, 329. This was as a direct result of a concerted campaign by John Forrest: see Crowley, Forrest 1847-1918, above n 132,143–144, 170–172. For a consideration of the shift from free selection to survey of freehold land, see ‘planning laws’ considered at [4.6] of this chapter.
194 The 1898 Act was more favourable in relation to a selector desirous of acquiring an estate in the land, having regard to the price of the land and the extent of the land which could be acquired by conditional purchase: see Steere v Minister for Lands (1904) 6 WAR 178. Land held under a pastoral lease was also vulnerable to selection: s 148 Land Act 1898. The compensation provisions for the pastoralist’s improvements were unwieldy: see eg Dagety v Murphy (1900) 2 WALR 97 regarding compensation for improvements under the Land Act 1898. The provisions also created difficulties for the selector; see Dagety v Murphy, 102 (Stone J); see also Chapman v Meagher (1903) 6 WALR 5, 7 (Parker J).
195 Note Western Australia was not alone in the inclusion of reservations in crown grants. Crown grant reservations in New South Wales were regarded as within the Crown’s prerogative power, prior to the replacement of the Crown prerogative with statutory provision: See D Brown, Land Acquisition: An examination of the principles of law governing the compulsory acquisition or resumption of land in Australia and New Zealand (Butterworth, 1972) 28–29, discussing Lord v Sydney City Commissioners (1856) 2 Legge 912, 920 (Stephen CJ) and on appeal (1859) 14 ER 991 (PC), 1001 (Clericrige J). Note no procedure was prescribed for the resumption of land under the terms of a crown grant: Brown, 28–29.
196 See Roberts, above n 12, 152, fn 4. Under the Land Regulations 1828, the period was initially 21 years, but later regulations in 1828 thereafter provided for 10 years. But note all land grants for the Perth and Fremantle town sites, which were leasehold for a term of 21 years, would become freehold only if the land was not resumed by the Crown
undoing when it tried to recover alienated land in the 1830s. Had more ample powers of resumption been available, this may ‘have saved much friction and benefited the people greatly.’

Crown grants expressly reserved the right to resume lands for public works. Such reservations permitted resumption for various prescribed public purposes (at any time within 21 years of the grant regarding town and suburban lands) without compensation to the affected landowner, except in the case of improved lands. Land regulations throughout this period also permitted the forfeiture of land where conditions attaching to land were unperformed. The power of resumption could be exercised multiple times over land liable to be resumed. Of the unique historical circumstances of this period, it has been said:

Having regard for the limited means available to the colony, the abundance of Crown land, and the nature of the feudal system of English land law, early grants of land made by the Crown had to provide for compensation free resumption of land, hence the inclusion of this provision in certificates of title.

### 4.4.2 Resumption by statutory provision

From 1854, legislation was enacted to regulate the award of compensation for town lands resumed by the Governor on behalf of the Crown. The ordinance provided for public purpose within that period, and compensation was provided in that event: Battye, *Western Australia: A History from its Discovery to the Inauguration of the Commonwealth*, above n 6, 86.

Battye (ed), *The Cyclopedia of Western Australia*, above n 19, 301.

See *Land Act 1898* (WA) s 15 and Second Schedule (Town and Suburban Lands), Third Schedule (Rural Lands). Note with rural lands, the resumption was not to exceed 1/20th and no resumption of land upon which buildings had been erected could be resumed without compensation.


Note in the case of rural lands, resumption was limited to 1/20th of the land: *Land Act 1898* (WA), Third Schedule.

See *Land Act 1898* (WA), Second Schedule (Town and Suburban Lands) and Third Schedule (Rural Lands). In the case of rural lands, the exclusion from resumption specified ‘lands upon which any buildings may have been erected or which may be in use as gardens, or otherwise…’

See e.g. s 32 *Land Act 1898*.


See 17 Vic No 6, Resumption of Town lands (Compensation)(1854), cited in GL Fricke (ed) *Compulsory Acquisition of Land in Australia* (LBC, 2nd ed, 1982), 215. Note also a series of land vesting ordinances which vested specific lands held by local authorities in the Crown: see e.g. 27 Vic No 13, (1863); 28 Vic No 9 (1864). See also the Crown’s reservation of limited powers of resumption noted in Ogle, above n 97, 90.
the award of compensation; where the compensation was not accepted, the decision of three Commissioners was final.207

The Lands Resumption Act 1894 established procedures for land resumption for certain public purposes208 and the vesting to the Crown of that land and all property rights upon the resumption.209 This is significant, because, like the Railway Acts considered below, it reveals a recognition that public interest perspectives of property required that the State be able to resume private property. However, a statutory right to compensation was afforded to all affected landowners whose land was resumed,210 but critically this right did not apply where the Crown already had power to resume pursuant to a crown grant.211 In a test case of the time,212 where the Crown resumed land for a purpose not provided for in the crown reservation but provided for under the Act, the Supreme Court held that the statutory right of compensation applied since to find otherwise was ‘repugnant to justice and sense. I think this court will always adhere to a course which is just and equitable.’213

The Act further provided that in estimating the amount of compensation to be paid, regard was to be had solely to the probable and reasonable price at which such land may be expected to sell at the time when taken, and any damage sustained by the owner due to the severance of the resumed land from other adjoining land held by the owner or by other lands of the owner being injuriously affected by the resumption.214 Provision was soon made for the payment of six per cent interest from the resumption until compensation was paid,215 but a short limitation period was prescribed for making compensation claims.216

207 Where the compensation was not accepted, the decision of three Commissioners was final: s 4 17 Vic No 6, Resumption of Town Lands (Compensation) (1854). One Commissioner was nominated by the Governor, another Commissioner was nominated by the landowner, and a third by the two aforesaid Commissioners, who together constituted a Board.
208 S 2(a)–(h) Lands Resumption Act 1894 (WA). Note the Act did not derogate from powers of resumption already reserved to the Crown by crown grant: see s 3.
209 S 6(2) Lands Resumption Act 1894 (WA).
210 S 8 Lands Resumption Act 1894 (WA).
211 S 9(1) Lands Resumption Act 1894 (WA). But note s 9(2) which provided for compensation where resumed land exceeded the quantity of land the Crown was entitled to resume by crown grant reservation. Compensation was payable in respect of ‘the difference in area between such quantity and the whole quantity taken.’
212 Dixon v Throssell [1899] 1 WAR 193, 196 (Hensman J). The writer respectfully disagrees with the interpretation of this case by Brown, Land Acquisition, above n 195, 30 where Brown states that ‘the Supreme Court of Western Australia held as a matter of law that land taken for a botanical garden came within the reservation clause…’
213 See ‘Resumption of Crown Grants’ Bunbury Herald, Saturday, 30 September 1899, 3.
214 S 10(a) and (b) Lands Resumption Act 1894 (WA).
215 S 8, Lands Resumption Act (1896) (WA).
216 S 3, Lands Resumption Act (1896) (WA). The prescribed period was 60 days from receipt of notice or 4 months from the publication of a resumption order, where a notice had been served on the landowner. Note also the limitation period of 1 month in s 6 where the matter was caught by the Railways Act 1878. If the limitation period was not satisfied, the Commissioner was entitled to appoint a sole arbitrator: S 5 Lands Resumption Act (1896) (WA).
Under the *Land Act* 1898, land held as a homestead farm or leased from the Crown with a right to purchase might be resumed if it was deemed necessary in the public interest. Upon resumption, the owner had a choice of receiving comparable land or a refund of the purchase moneys paid with interest; compensation for improvements was also made.

(a) **The Railway Acts**

The State secured extensive powers of entry upon land for railway construction, together with powers of resumption. Entitlement to compensation initially depended upon the reservations contained in the crown grant. An overriding right to full compensation was later provided. Full compensation was to be made to the owner of resumed land. Arbitration was provided for in the event of disagreement over compensation. However, where resumption was affected by the Commissioner pursuant to a crown grant issued to a landowner’s predecessor in title, that resumption would not be deemed to be a resumption under the *Railways Act* 1878, thereby denying compensation under that Act. Reservations in crown grants, therefore, might enable the State to avoid compensation obligations that would apply were the State to resume land pursuant to a statutory power, rather than by a contractual right.

(b) **Positive public opinion on resumption**

Land resumption was the subject of much local report, in particular the quantum of compensation or the failure to agree on compensation awards. Although occasional

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217 S 9 *Lands Act* 1898 (WA).
218 S 9 *Lands Act* 1898 (WA). The interest rate prescribed was 10%.
219 The State secured extensive powers of entry upon land for railway construction, and in particular the powers of resumption.
220 Entitlement to compensation initially depended upon the reservations contained in the crown grant.
221 An overriding right to full compensation was later provided.
222 Full compensation was to be made to the owner of resumed land.
223 Arbitration was provided for in the event of disagreement over compensation.
224 However, where resumption was affected by the Commissioner pursuant to a crown grant issued to a landowner’s predecessor in title, that resumption would not be deemed to be a resumption under the *Railways Act* 1878, thereby denying compensation under that Act.
225 Reservations in crown grants, therefore, might enable the State to avoid compensation obligations that would apply were the State to resume land pursuant to a statutory power, rather than by a contractual right.
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227 See s 7 *Railways Act* 1873, 37 Vict No 20; see also ss 8, 12 *Railways Act* 1878. Note that with respect to the exercise of such powers, ‘as little damage as may be shall be done’: s 12. It was an offence to obstruct or interfere with this process.
228 See ss 7, 8, 11 *Railways Act* 1873, 37 Vict No 20; see also ss 16–19, 21, 23, 25 *Railways Act* 1878; see also s 2 *Railways Amendment Act* 1882 and ss 3–7 *Railways Amendment Act* 1893; for the application of these provisions where compensation was payable under the *Lands Resumption Act* 1894 (WA), see s 11. There were 9 railway acts enacted between 1878 and 1897 which contained power to resume land and provision for compensation to the affected landowner.
229 See s 9 *Railways Act* 1873, 37 Vict, No 20.
230 S 14 *Railways Act* 1878, 42 Vict, No 31. The intention of this legislation was that ‘any person who is damnified or injured by reason of land being taken to which he has any legal or equitable interest, should receive compensation’: Miller v Commissioner for Railways (1900) 2 WAR 38, 40 (Hensman J).
231 S 14 *Railways Act* 1878. In estimating the compensation payable, regard was to be had to the value of such land at the time of the resumption, and without reference to any alteration in value arising from the establishment of the railway, and to any damage sustained by severance of such land from other land or by injurious affection: see s 22 *Railways Act* 1878.
232 S 17 *Railways Act* 1878.
233 Thomas v Sherwood (1884) 9 App Cas 142, 149 (Sir Barnes Peacock).
235 See e.g. ‘Land Resumption’ *The Daily News*, Saturday, 28 August 1897, 6; ‘Land Resumption’ *The Inquirer & Commercial News*, Friday, 8 October 1897, 9; ‘Land Resumption Arbitration Court’ *The Daily News*, 20 December 1897, 3.
dissatisfaction is reported regarding the resumption of city properties by the railway authorities, contemporary reports reveal a government keen to assist affected landowners in circumstances of hardship. Where criticism was directed at the land resumption process, there was outcry not at the adequacy of the compensation, but at the cost to the State of large compensation payments. Land may have caused little emotional upset and represented simply a change of investment from land to monetary compensation.

4.5 Key Area 3 - Mineral rights

4.5.1 Common law ownership

At common law, a freehold estate included all minerals in that land, except those minerals belonging to the Crown. Although the scope of the doctrine upon which this ‘elementary principle’ is based may be doubtful, the ownership of minerals entitled the landholder to extract minerals and to prevent others from interfering with those minerals. However, the Crown retained a prerogative right to mine gold and silver, although this did not extend to base metals and may not have afforded the

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228 ‘Land Resumption’ The Inquirer & Commercial News, 18 November 1898, 12. The number of claims determined by arbitration, however, appears to be very small: see ‘Land Resumption and its methods. An Official Reply’ The West Australian, Saturday, 16 July 1898, 5.

229 See ‘Land Resumption For Railway Purposes’ Banbury Herald, Tuesday, 28 July 1896, 3.

230 See Observer, ‘Land Resumption and its Methods. Unbusinesslike Methods’, The West Australian, Friday, 15 July 1898, 7. The observer also refers to the annual report of Mr Jull, Under Secretary for the Public Works Department, submitted to Parliament. The observer argues that the cost of resumption could have been greatly reduced by purchasing required lands before they were used or occupied. The observer also is critical of ‘high handed conduct’ by public works officials in their dealings with landowners; but cf contra, ‘Land Resumption and its Methods. An Official Reply’ The West Australian, Saturday, 16 July 1898, 5. The official notes that the Public Works Department dealt only with claims arising under the Railways Act and not claims arising under the Land Resumptions Act 1894.


232 See Wade v New South Wales Rutile Mining Co Pty Ltd (1969) 121 CLR 177, 185 (Windeyer J).

233 Ibid.

234 ‘Cujus est solum ejus est usque ad coelum et ad inferos’: see Commonwealth v New South Wales (1923) 33 CLR 1, 23 (Knox CJ and Starke J).

235 See AJ Bradbrook, ‘The Relevance of the Cujus Est Solum Doctrine to the Surface Landowner’s Claims to Natural Resources Located Above and Beneath the Land’ (1987–1988) 11 Adel L Rev 462, 463. Bradbrook states that the Case of Mines (1568) 1 Plow 310 did not grant all minerals excluding royal metals to the landowner, that the cujus est solum doctrine may have only limited downward application. However, Bradbrook concedes that the doctrine has afforded landowners effective ownership of minerals, excluding royal metals.

236 Bulli Coal Mining Co v Osborne [1899] AC 351, 361 (Lord James of Hereford); see also Butt, above n 28, [2 16].

237 Case of Mines (1568) 1 Plow 310, discussed in Cadia Holdings Pty Ltd v State of NSW (2010) 242 CLR 195, 203–204 (French CJ). Note that although the Crown’s ownership of gold extended to alienated land (see Wade v New South Wales (1969) 121 CLR 177, 186 (Windeyer J)), unless conveyed by ‘patent precise words’ (see Case of Mines (1568) 1 Plow 310, discussed in Cadia Holdings Pty Ltd v State of NSW (2010) 242 CLR 195, 204 (French CJ)) it did not prevent a landowner extracting royal metals, which were then liable to claim by the Crown: SA Hutchinson & Anor v Scott (1905) 3 CLR 359, discussed in JRS Forbes and AG Lang, Australian Mining and Petroleum Laws (Butterworths, 2nd ed, 1987) [212].

238 Case of Stannaries (1606) 12 Co Rep 9. For a discussion of the situation where precious metals and base metals were found together, see Cadia Holdings Pty Ltd v State of NSW (2010) 242 CLR 195, 205–206, 208 (French CJ). By imperial statute, the landowner could mine base metal mines containing royal metals, but those royal metals were to be sold to the Crown.

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Crown a right of entry without the landowner’s consent. The ownership of minerals could be qualified by express grant or reservation in the original crown land grant. The possibility of ownership of minerals, separate to ownership of the land surface, was recognized.

4.5.2 Ownership of minerals in the colonies: from private to public reservation

The colonies inherited the common law position on ownership of minerals and the Crown prerogative regarding royal metals, and continued the practice of neither relinquishing crown ownership of royal metals nor reserving other metals from crown grants until the last quarter of the century when colonial legislatures began reserving all minerals from future crown land grants. In 1870, the Imperial government declared that the Crown waived all rights to minerals if gold were discovered, thereby transferring the regulation of base and precious metals from the Imperial Government to the colony.

In WA until 1887, crown grants had only reserved ‘gold, silver and other precious metals’. Accordingly, private ownership of all minerals, including copper, iron and lead, was extensive, excluding royal metals. From 1887, legislative change saw a shift away from the dominance of private interest perspectives to a new public interest perspective regarding minerals. Land regulations now made the scope of crown reservations a matter for the Governor’s discretion. Statutory provision was made that all gold on or below the surface of all land, whether or not alienated by the Crown, was

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239 See Plant v Rollston (1894) QLJ 98, 102 (Griffith CJ); but c.f. contra AG v Great Cobar Copper Co (1900) 21 LR (NSW) 351 as discussed in Forbes and Lang, above n 237, [203]. However, the authors note that it was not the practice of the Crown in any event to disturb the landowner, and cite Wade v New South Wales Rutile Mining Co Pty Ltd (1969) 121 CLR 177, 187 (Windeyer J) as authority. In Cadia Holdings Pty Ltd v State of NSW (2010) 242 CLR 195, 204–205 (French J) and 229 (Gummow, Hayne Heydon, and Crennan JJ), the High Court noted that at the time of the Case of Mines, the royal prerogative extended to entry upon private land to extract royal metals.

240 See Bradbrook, above n 235, citing Williamson v Wootton (1855) 3 Drew 210.

241 See Bradbrook et al, above n 44, [16.150], citing Cox v Glue (1848) 5 CB 533.

242 See e.g. Woolley v Attorney-General of Victoria (1877) LR 2 App Cas 163; but note the earlier doubt as to whether this doctrine would apply; see Mayor of Lyons v East India Co (1836) 1 Moore Ind App 175, 281, discussed in Forbes and Lang, above n 237, [203].

243 M Crommelin, ‘Resources Law and Public Policy’ (1983) 15 UWA L Rev 1, 3. The practice of the Crown moved from the alienation of lands known to be valuable for minerals other than gold, to the leasing of that land in accordance with the Mineral Lands Act 1892 (WA): see M Hunt, Mining Law in Western Australia, (The Federation Press, 4th ed, 2009) [1.2.1].

244 Russell, above n 1, 278, citing Government Gazette, 19 April 1870.

245 Forbes and Lang, above n 237, [212]. Hunt, above n 243, [1.9.3]. But note that a few land grants were even made where the Crown granted ownership of royal metals: Russell, above n 1, 280, 289.

246 Russell, above n 1, 289, citing Government Gazette, 10 December 1847.

247 Forbes and Lang, above n 237, [212].

248 See also Crommelin, above n 243, 3. There remain significant tracts of pre-1899 land in the south west of Western Australia between Bunbury and Albany: see M Hunt, above n 243, [1.9.3].

249 Forbes and Lang, above n 237, [212], referring to Land Regulations, 1887.

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and remained crown property. Crown land might be occupied for mining purposes, but this was limited to a miner’s right of occupancy, thereby further preventing the permanent ownership of mineral lands. The grant of responsible government saw the Crown’s dominion over mines and minerals pass from the Imperial authorities to the local legislature. The legislature’s power of disposition meant that questions of prerogative rights to minerals were now irrelevant in relation to future crown grants; the Crown would remain the owner of the minerals. From 1 January 1899, all crown grants were required to reserve to the Crown all gold, silver, copper, tin and other metals, minerals, gems or precious stones, and coal or mineral oil, but a right to enjoy wells and springs of water on the land and to bore and sink wells for water was granted to the applicant. Depth limits to crown grants were also introduced. While it was expressly provided that the new Land Act did not derogate from rights and interests previously granted, all crown grants now reserved the right to resume lands to search for minerals. The shift to State ownership of minerals has been described as having great constitutional significance, on the basis that it established the State as the collector of economic rent and provided a basis for State control over natural resources. It also represented a rejection of the common law doctrine of accession and significantly reduced the rights of landowners to subsurface strata that otherwise existed at common law and which would not apply to future Crown land grants.

4.5.3 Mining crown minerals on private land.

The shift of the legislature to a public interest perspective of mineral rights is also evident in the treatment of mining on private land, although attempts to strike a balance between competing public and private interest perspectives is also evident. The earliest

250 S 4 Mining on Private Property Act 1898 (WA). Note, however, that this provision was soon repealed: s 2 Mining on Private Property Act, 1898, Amendment Act 1898 (WA).
251 Russell, above n 1, 280.
252 S 3 Western Australia Constitution Act 1890 (Imp).
253 Western Australia v Ward (2002) 213 CLR 1, 186 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), referring to s 3 of the Western Australia Constitution Act 1890 (Imp).
254 S 15 Land Act 1898 (WA) and Second and Third Schedules.
255 A depth limit of 40 feet was provided for land within the Goldfields and Mining Districts: Government of Western Australia, Department of Lands, Registration Practice Manual (July, 2013) [2.3.6.1] citing s 15 Land Act 1898, and Regulations published in the Government Gazette, 17 March 1899 which operated from 1 January 1899; prior to 1 January 1898, crown grants did not contain limitations as to depth: ibid.
256 S 2 Land Act 1898 (WA). Note, however, Worsely Timber Pty Ltd v State of Western Australia [1974] WAR 115 considered in chapter 5 of this thesis.
257 See Land Act 1898 (WA) s 15 and Second Schedule (Town and Suburban Lands), Third Schedule (Rural Lands). Note with rural lands, the resumption was not to exceed 1/20th and no resumption of land upon which buildings had been erected could be resumed without compensation.
258 Crommelin, above n 243, 6. Economic rent is the ‘difference derived from the production of a natural resource and all costs necessarily incurred in that production’: 6–7.
259 See A Gardner, above n 145, 136.
statutory provisions on ‘the Preservation of Order in cases of any Discovery of Gold’ excluded the granting of mining licences over fee simple land. Although statutory provision was made for mining minerals, this had so far only regulated mining on crown land. The introduction of the Torrens system in 1874 also did not provide for the defeasibility of a landowner’s title to a mining lease or licence until 1893. In 1897, statutory provision was enacted for the mining of precious metals on certain private land. A right to mine on private land could be acquired by either resumption, proclamation of the land as an alluvial goldfield, or a compulsory mining lease.

Although no firm steps were made to apply the 1897 provisions, the statutory provision for mining precious metals upon private land nevertheless represented a new idea. The idea was applied in 1898, when rights in minerals not reserved by crown grant pre-1899 were caught. Key features of the 1897 and 1898 Acts are considered below.

(a) Mining restriction to certain private land

The 1897 Act applied to certain private land. The 1898 Act had a more limited scope, because Parliament wished to provide for mining on private land, while protecting the landowner ‘in every possible way.’ Limitations prevented the granting of mining leases of a depth of more than 100 feet over land on or sometimes near certain improved

261 Gold Regulations Ordinance 1854.
262 See Land Regulations 1887, Part VI. See also Mineral Lands Act 1892 (WA), which extended mining from gold to all other minerals reserved to the Crown: AG Lang and M Crommelin, Australian Mining and Petroleum Laws: An Introduction (Butterworths, 1979) [108], citing also Bowen v Stratigraphic Explorations Pty Ltd and Kay [1971] WAR 119, 127.
265 Mining on Private Property Act, 1897 (WA), assented to on 23 December 1897. ‘Private lands’ was defined to include all land which was not crown land: s 2 Mining on Private Property Act 1897 (WA). However, by s 3 of the Act, the scope of the Act was limited. It did not extend to private land within 200 yards of any well, artificial reservoir, dam, dwelling-house, manufactory or building. Note also the exclusion of land contained in the schedule to the Act: see s 62.
266 See Western Australia, Parliamentary Debates, Legislative Assembly, 13 October 1898, (Mining on Private Property Act Amendment Bill, Second Reading, Minister for Mines, Hon HB Lefroy) 2385.
267 Battye (ed), The Cyclopedia of Western Australia, above n 19, 301. The 1897 Act was based upon the Mining on Private Property Act (SA).
268 See Wade v New South Wales Rutile Mining Co Pty Ltd (1969) 121 CLR 177, 188–189 (Windeyer J). Although Windeyer J’s discussion relates to the Mining on Private Lands Act 1894 (NSW), his Honour’s observations may be also applied loosely to the 1897 Act (WA).
269 S 2 Mining on Private Property Act 1898 (WA) repealed the Private Property Act 1898 (WA). The new provisions were based upon legislation from Victoria.
270 M Gerus, ‘Mining and Water Resources’ in RH Bartlett, A Gardner and B Humphries (eds), Water Resources Law and Management in Western Australia (The Centre for Commercial and Resources Law, University of Western Australia, Perth, 1996) 312, fn 23.
271 ‘Private lands’ was defined to include all lands which was not crown land: s 2 Mining on Private Property Act 1897 (WA). However, by s 3 of the Act, the scope of the Act was limited. It did not extend to private land within 200 yards of any well, artificial reservoir, dam, dwelling-house, manufactory or building. Note also the exclusion of land contained in the schedule to the Act: see s 62.
272 See Western Australia, Parliamentary Debates, Legislative Assembly, 13 October 1898, (Mining on Private Property Act Amendment Bill, Second Reading, Minister for Mines, Hon HB Lefroy) 2385.
land or within townsites without compensation for the deprivation of the land surface and damage thereto. The Governor might except land.

(b) Resumption of private land without compensation for precious metals

The Crown might provisionally resume the ownership of certain private lands for mining purposes after written application to the minister, certification that payable precious metals existed, and the owner had failed to satisfy the minister that the land was being continuously and genuinely mined. The provisional resumption could be made absolute. Protections for landowners are evident in the requirement that any applicant for a mining license over private land provisionally resumed pay upfront a sum sufficient to meet the compensation payable in the event that the provisional resumption was not made absolute. Compensation was payable to a landowner for any loss or damage suffered where a provisional resumption was later revoked. If the resumption became absolute, compensation was to be assessed as a resumption under the Lands Resumption Act 1894, but no allowance was to be made for any removal of precious metals, nor for any precious metals expected to be on the land. However, provision was made for payment of royalties to the former landowner, once the Crown had received its prescribed royalty.

Although a gold mining lease rather than resumption was provided for mining on private land in the 1898 Act, a miner was entitled to purchase the freehold of any land within, adjoining or abutting the mining lease upon payment of the purchase price.

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273 S 6(1) Mining on Private Property Act 1898 (WA), (gardens, orchards, vineyards), s 6(3) (hospitals, public buildings), s 6(4) (churches, cemeteries), s 6(5) (springs, reservoirs, dwelling house).
274 S 6(2) Mining on Private Property Act 1898 (WA), (land within municipalities and townsites).
275 S 7 Mining on Private Property Act 1898 (WA). The compensation was to be paid by the miner or agreed with the landowner.
276 S 11 Mining on Private Property Act 1898 (WA); see also s 53 (compensation for loss or damage to land or buildings in vicinity of leased land).
277 S 46 Mining on Private Property Act 1898 (WA).
278 Note that the scope of the Act over private land was limited. It did not extend to private land within 200 yards of any well, artificial reservoir, dam, dwelling-house, manufactory or building: see s 3 Mining on Private Property Act, 1897 (WA).
279 See S 6, Mining on Private Property Act 1897 (WA). This was based upon legislation from South Australia. For a detailed discussion of the arguments advanced for this Act, see Western Australia, Parliamentary Debates, Legislative Assembly, 21 December 1897 (Mining on Private Property Bill, Second Reading) 1240–1247. For a detailed discussion of the three prescribed methods for the resumption of private land for mining, see Western Australia, Parliamentary Debates, Legislative Assembly, 21 December 1897 (Mining on Private Property Bill, Second Reading) 1240, 1241 (Attorney General, Hon RW Pennefather).
280 S 7 Mining on Private Property Act, 1897 (WA).
281 S 10 (iv) Mining on Private Property Act, 1897 (WA).
282 S 9 Mining on Private Property Act, 1897 (WA).
283 S 8 Mining on Private Property Act, 1897 (WA).
284 S 15 Mining on Private Property Act, 1897 (WA).
285 S 14 Mining on Private Property Act, 1897 (WA).
286 S 22(1) Mining on Private Property Act 1898 (WA). Any land containing a church was excluded from this section: s 22(4) Mining on Private Property Act 1898 (WA).
Any person wishing to obtain a mining lease had limited rights of entry upon private land to take possession of that land for mining.\textsuperscript{287} Private landowners could have their possession of land interrupted by other entries associated with mining.\textsuperscript{288}

Public interest perspectives were not without recognition of the need to consider the fair treatment of private property rights. Parliament was keen to ensure no injustice was done to landowners.\textsuperscript{289} However, it was argued that there was no injustice to landowners in subjecting private lands to mining, since by crown reservation, all precious metals were crown property anyway.\textsuperscript{290} The 1898 Act secured compensation for deprivation of possession of the land surface and any damage thereto, and for severance of the land from other land and for all consequential damages.\textsuperscript{291} Importantly, compensation was to be paid or agreed upon before mining.\textsuperscript{292}

(c) Proclamation of private land as an alluvial goldfield

Upon written application to the minister, an inspector’s certification of the existence of payable alluvial gold, and the owner’s failure to satisfy the minister that the land was being continuously and genuinely mined, private lands could be proclaimed an alluvial goldfield; the private land was deemed crown land during the period of that proclamation.\textsuperscript{293} The owner could require that the land be resumed absolutely.\textsuperscript{294} Alternatively, the owner could elect to hold the land and receive half of the rents resulting from that mining.\textsuperscript{295} The owner was afforded a right to repurchase resumed land where the minister determined that the land be sold.\textsuperscript{296} The 1898 Act did not contain any provision for the proclamation of private land as an alluvial goldfield.\textsuperscript{297}

\textsuperscript{287} S 8 Mining on Private Property Act 1898 (WA). Note the limitations placed on entry to certain lands without the owner’s consent: s 8(4) and (5), Mining on Private Property Act 1898 (WA). Entry also required the written authority of the warden: s 8(6).

\textsuperscript{288} See e.g. s 50 (licences).

\textsuperscript{289} Western Australia, Parliamentary Debates, Legislative Assembly, 21 December 1897, (Mining on Private Property Bill, Second Reading), 1240, (Attorney General, Hon RW Pennefather).

\textsuperscript{290} Ibid, 1242, (Mr Moran)

\textsuperscript{291} S 11 Mining on Private Property Act 1898 (WA).

\textsuperscript{292} S 9 Mining on Private Property Act 1898 (WA).

\textsuperscript{293} S 16 Mining on Private Property Act 1897, (WA).

\textsuperscript{294} S 17 Mining on Private Property Act 1897, (WA).

\textsuperscript{295} S 17 Mining on Private Property Act 1897, (WA).

\textsuperscript{296} S 18 Mining on Private Property Act 1897, (WA).

\textsuperscript{297} Note the exclusion of land under the Goldfields Act 1895 from the definition of ‘private land’: s 3 Mining on Private Property Act 1898 (WA).
Compulsory mining leases

A landowner could not refuse the grant of a mining lease, and in the absence of agreement with the landowner, lease terms were prescribed, which included the payment of rent and a royalty of 2.5 per cent. The 1898 Act also made provision for the grant of gold mining leases, but payment of compensation had to be made by the miner or agreed with the landowner before mining commenced. It was not obligatory that a mining lease or license be granted.

Key Area 4 - Water rights

Although a study of riparian rights reveals active steps by the Crown to control the acquiring of water rights, the treatment of riparian rights can overall be characterized as a ‘common law property rights-based system of water resources management’. This is in contrast to Victoria, which from 1865 began a shift to the State control of water resources, which by 1886 had prevented the further accrual of riparian rights. There was no declaration of State rights and control over water in WA.

Common law riparian rights

Water rights at common law are determined by whether the water was groundwater or surface water, and whether the water is flowing. Although riparian rights were ‘incidents of property’, riparian rights were not transferable or divisible from the land, and do not confer ownership in water. The common law afforded some protection of riparian rights against state intrusion by the principles of statutory interpretation, but these rights were vulnerable to variation by statute. However, there

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298 S 21 Mining on Private Property Act 1897, (WA).
299 S 23 Mining on Private Property Act 1897, (WA). This included a lease term of 28 years and prescribed rent.
300 S 5 Mining on Private Property Act 1898 (WA).
301 SS 9, 13 Mining on Private Property Act 1898 (WA).
304 See AC Castles, An Australian Legal History, (Law Book Company Ltd, Sydney, 1982) 466, citing the Mining Act 1865(Vic), and the Irrigation Act 1886 (Vic); see also R Bartlett, ‘A Comparative Examination of Crown Rights and Private Rights to Water in Western Australia: Ownership, Riparian Rights and Groundwater’ in RH Bartlett, A Gardner and S Mascher, Water Law in Western Australia: Comparative Studies and Options for Reform (The Centre for Commercial and Resources Law, University of Western Australia, Perth, 1997) [4.1.3].
305 H Jones and Company Pty Ltd v Wardens, Councillors and Electors of the Municipality of Kingbrough (1950) 82 CLR 282, 322 (Dixon J).
307 Bartlett, ibid.
308 H Jones and Company Pty Ltd v Wardens, Councillors and Electors of the Municipality of Kingbrough (1950) 82 CLR 282, 312 (Dixon J).
was no statutory interference with riparian rights per se.\textsuperscript{309} Colonial courts applied the common law without variation,\textsuperscript{310} despite these rules on water having been formulated in England where different conditions of settlement, climate and geography existed.\textsuperscript{311}

(a) Groundwater

Groundwater formed part of the rights associated with ownership of the land surface.\textsuperscript{312} Therefore, a landholder enjoyed a right to exploit groundwater absolutely, subject only to the tort of nuisance.\textsuperscript{313} This is significant given that, even in towns, settlers were reliant on wells for their water.\textsuperscript{314}

The right to capture groundwater could not be transferred, except with the surface land, and furthermore, the exclusive right to use the groundwater was illusory, since the water was liable to be also expropriated by neighbouring landowners.\textsuperscript{315} Artificial watercourses could be blocked or diverted at will, subject to any contrary rights acquired by grant or prescription.\textsuperscript{316} The common law also afforded landowners the exclusive property right to fish in waters on their land.\textsuperscript{317}

(b) Surface water

Riparian rights recognized usufructuary rights in the owner of banks adjoining surface water in natural watercourses\textsuperscript{318} and lakes, provided that the watercourse had a defined

\textsuperscript{309} See \textit{Kennedy v Minister for Works} [1970] WAR 102, 105 (Hale J) making reference to the plaintiff’s contention that there was no statutory interference with riparian rights in 1879. That contention was not opposed in the judgement. Note, however, statutory provision for the resumption of water rights provided for by the \textit{Railways Act} discussed later in this chapter.

\textsuperscript{310} See S Hepburn, ‘Statutory verification of water rights: The ‘insuperable’ difficulties of propertising water entitlements’ (2010) 19 \textit{Aust Property Law Journal} 1, 10, citing Dunn \textit{v} Collins (1867) 1 SALR 126, especially at 135 (Wearing J).

\textsuperscript{311} \textit{Gartner v Kidman} (1962) 108 CLR 12, 23 (Windeyer J).

\textsuperscript{312} \textit{Acton v Blundell} (1823) 12 M & W 324, 354 (Tindal CJ). However, it has been suggested that the better view is that it is the \textit{use} of the groundwater rather than property in the groundwater which belongs to the landowner; see Bradbrook, above n 235, 469–470, citing \textit{Chasemore v Richards} (1959) 7 HL Cas 349, 385, and \textit{Ballard v Tomlinson} (1995) 29 Ch D 115 (CA). Note, however, R Bartlett, ‘The Development of Water Law in Western Australia’ in RH Bartlett, A Gardner and B Humphries (eds), \textit{Water Resources Law and Management in Western Australia} (The Centre for Commercial and Resources Law, University of Western Australia, Perth, 1996), 45. Bartlett regards the House of Lords in \textit{Chasemore v Richards} as an affirmation of \textit{Acton v Blundell}. On ground water generally, see S Clark, \textit{Groundwater Law and Administration in Australia} (Australian Government Publishing Service for the Dept. of National Development on behalf of the Australian Water Resources Council, 1979).

\textsuperscript{313} See \textit{Ballard v Tomlinson} (1885) 29 Ch D 115, 126 (Lindley LJ). This right was most dramatically illustrated in the case of Bradford \textit{v} Pickles [1895] AC 587.

\textsuperscript{314} See e.g. AJ Barker and M Laurie, \textit{Excellent Connections Bunbury, A History of Bunbury, Western Australia, 1836–1900} (City of Bunbury, 1992) 134.

\textsuperscript{315} See Bartlett, ‘The Development of Water Law in Western Australia’, above n 312, 42–43.

\textsuperscript{316} \textit{Gartner v Kidman} (1962) 108 CLR 12, 24 (Windeyer J).

\textsuperscript{317} W Gullett, \textit{Fisheries Law in Australia} (Lexisnexis, Chatswood, 2008) [3.14], citing \textit{Cooper v Phibbs} (1867) LR 2 HL 149, 165 (Lord Cranworth). A landowner could also grant a profit a prendre to fish based as part of the landowner’s bundle of rights.

\textsuperscript{318} See \textit{Marshall v Cullen} [No 2] (1914) WAR 92, 94 (Rooth J), that for a natural watercourse, the water must usually flow in a certain direction and by a regular channel with banks or sides.
bed, exhibited ‘features of continuity, permanence and unity’, and the land had not become a servient tenement by a prescriptive right. This doctrine applied in WA as part of the received common law.

Riparian rights included the right to make ordinary use of water connected with that tenement, such as for domestic purposes or for supplying drinking water to cattle, without regard to any effects upon other lower stream riparian proprietors. Extraordinary water use was permitted for irrigation, provided this did not interfere with the rights of other riparian proprietors. The riparian owner could take water for the riparian land provided that the taking did not ‘sensibly diminish’ the flow, thereby making lawful irrigation in dry areas problematic.

### 4.6.2 Land regulations and the restriction of water rights

Riparian rights arose naturally and passed upon a grant of land without express provision. This was reflected in land regulations. Although the reception of riparian rights was secured, the Crown could declare reserves for public purposes, including for water. Land regulations limited riparian rights in three ways. Firstly, land regulations progressively reduced the extent to which a land boundary could include a watercourse from one quarter to one eighth. Secondly, crown reservation of banks sometimes limited grantees of crown land from acquiring title to river banks and,

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319 Knezovic v Shire of Swan-Guildford (1968) 118 CLR 468, 475 (Barwick CJ).
320 H Jones and Company Pty Ltd v Wardens, Councillors and Electors of the Municipality of Kingbrough (1950) 82 CLR 282, 298 (Latham CJ); see also Dunn v Collins (1867) 1 SASR 126.
323 See Bartlett, ‘The Development of Water Law in Western Australia’, abov n 312, [2.2.2], citing s 137 Land Regulations 1866 (reservoirs, aqueducts or watercourses), and the broad powers of reservation contained in s 2 Water Supply Act 1893. This Act also permitted the Minister to limit the quantity of water to be taken from reserved lands (s 3). Note the supply of water presented a great challenge to the development of Western Australia particularly during the 1890s, for which the Government came under much blame: Battye, *Western Australia: A History from its Discovery to the Inauguration of the Commonwealth*, above n 6, 421–422.
324 See Bartlett, ‘The Development of Water Law in Western Australia’, above n 312, [2.2.2], citing Instructions to Captain Stirling 1828, 1829 Notice to settlers re grants of land, Land Regulations 1860, Ch V s 9; s 47 Land Regulations 1887. Bartlett also notes the Land Regulations 1851 and Land Regulations 1860, Chap V s 9 preventing both banks of a watercourse being granted to the same person.
therefore, riparian rights. Banks were generally reserved to the Crown. It was only later that close attention was given to the relationship between water resources and land usage. From 1886, government surveyors were required to provide for a setback from watercourses, which by 1897 was prescribed as a fifty-link setback. Thirdly, the Crown sanctioned the resumption of water rights. Initially, the Crown resumed springs and other watering places. Later statutory land resumption powers and the taking of water rights were part of public water works projects. Provision was made for compensation, and the supply of water for public purposes did not prevent the lawful exercise of remaining riparian rights.

4.7 Key Area 5- Planning laws

At no time did the Imperial or local legislature enact legislation expressly dealing with the planned use of land from a public interest perspective, although public interest planning objectives are arguably evident in matters such as the State agricultural land purchases considered below. This is in contrast to limited provisions concerning the subdivision of land in some of the other colonies. Therefore, land planning must be largely considered within a pre-legislative planning context. This requires a consideration of the role of government in land-use control, the regulation of urban and rural settlements, and the operation of the private sector within the common law. Through an examination of key approaches to planning below, a private interest perspective of property rights is evident.

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330 See Bartlett, ibid, [2.2.2], citing s 19 Land Regulations 1843. However, Bartlett notes that such provisions were deleted from the Land Regulations 1851. Note that Captain Stirling’s Instructions included a caution ‘not to grant more than a due proportion of sea or river frontage to any settler.’: see Russell, above n 1, 332, Appendix II, Instructions to Captain Stirling from Sir George Murray, Secretary of State for the Colonies, 30 December 1828.

331 Bartlett, ibid, [2.2.2] noting, however, the exception of riparian lands granted in the Swan/Avon and along minor water courses in the South West.


333 Kimberley, above n 113, 112. Note objections were made to the practice on the basis that it was contrary to Imperial regulations, but with no change by Governor Hutt: see Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 150.

334 See Bartlett, ‘The Development of Water Law in Western Australia’, above n 312, [4.2]–[4.3], noting s 7 Railways Act; ss 4, 5 Coolgardie Goldfields Water Supply Construction Act 1898.

335 Bartlett, ibid, [4.2]–[4.3]; see s 6 Waterworks Act 1889 (WA); ss 2–5 Coolgardie Goldfields Water Supply Construction Act 1898 (WA).

336 Bartlett, ibid, [4.2]–[4.3]; s 8 Government Railways Act 1904 (WA); s 8 Coolgardie Goldfields Water Supply Construction Act 1898 (WA).

337 Bartlett, ibid, [4.2]. Bartlett notes that the Waterworks Act 1889 (WA) did not prevent the exercise of riparian rights.


339 Ibid, 14, citing Undue Subdivision of Land Prevention Act 1885 (Qld); 11, regarding subdivision restrictions in New South Wales.

4.7.1 A ‘regular plan’ for the Swan River Colony

Stirling’s earliest duties included a determination of the most convenient location for government, guarding against the ‘improvident disposal of land surrounding the settlement’, and reserving crown lands in the immediate vicinity of the settlement for further extension which were only to be alienated by leasehold. Stirling was also instructed to reserve for public purposes land which by its features would likely be essential to the settlement’s future, as well as reserve lands for the Crown. As to the foundations of settlements, Stirling’s instructions stressed the importance of proceeding ‘upon a regular plan.

4.7.2 Crown grant reservations

Planning considerations were reliant on conditions attaching to crown land grants and limitations on land grants, rather than on legislation which might be enacted only after land had been alienated. Examples include the setback from watercourse requirements. The reservation of crown lands for public purposes was the subject of further instructions to Stirling, and subsequently formed a part of land regulation to the end of this period. This approach sits better with a private interest perspective of property rights, since the bundle of rights is qualified before the rights are acquired by the landowner.

(a) The shift from free selection to survey

A policy of ‘free and unfettered selection by purchase’ commonly underpinned crown grants. Selection of land before survey afforded great opportunities to landholders, particularly leasehold pastoralists, to secure the best lands. Free selection was ultimately condemned by John Forrest who, through regulations from 1887, promoted selection within surveyed areas and residence and improvement as a condition of crown grants. By the time of responsible government, the free selection of land

342 See Russell, above n 1, 331, Appendix II, Instructions to Captain Stirling from Sir George Murray, Secretary of State for the Colonies, 30 December 1828.
343 Ibid, 332. Land was also to be reserved for the maintenance of clergy and the education of youth.
344 Ibid.
345 Ibid, 348, Appendix IV, Instructions to the Office of Governor, 5 March 1831, 25th instruction.
346 See s 39 Land Act 1898.
347 Roberts, above n12, 281–282, 327; see also Bignell, above n 87, 114.
348 Roberts, ibid.
349 See Government Gazette 2/3/1887.
350 See FK Crowley, above n 132, 170–171. Note under s 148 of the Land Act 1898, land held under a pastoral lease was vulnerable to selection, although the lessee was entitled to the fair value of lawful improvements by arbitration. Through the 1887 Regulations, land alienation was confined to the South West: Jarvis, above n 89, 57.
was confined to small holdings.\textsuperscript{351} A departure from free selection is evident in the \textit{Land Act 1898}.\textsuperscript{352}

Planning is further evident in the dividing of the colony into six divisions,\textsuperscript{353} and the attaching of prescribed conditions to land available for selection depending on the classification of that land.\textsuperscript{354} Conditions attaching to land had the effect of preventing widespread land speculation in relation to town land or land amalgamation during much of this period.\textsuperscript{355}

\section*{4.7.3 ‘Planning’ by statutory provision}

The consideration of more specific planning considerations is evident only in narrowly framed statutes, such as the adjustment of divisional boundaries of allotments\textsuperscript{356} and prescribed standards for the erection of buildings.\textsuperscript{357} Title and control of roads and other communications was initially vested in local landowners collectively, subject to later reversion to the Crown.\textsuperscript{358} A later General Road Trust could lay out roads over alienated land,\textsuperscript{359} but compensation was afforded to owners or occupiers only for property damage and not for the loss of any land.\textsuperscript{360} While its successor, the Central Board of Works, was barred from building roads on improved land, the loss of land to road works was not compensable.\textsuperscript{361}

From 1896, the Crown commenced the extensive purchase of private lands which were suitable for closer settlement.\textsuperscript{362} This may erroneously have been described as a process of land resumption,\textsuperscript{363} but it appears that the process relied at least initially entirely upon voluntary offers by vendors.\textsuperscript{364} Western Australia stood alone from the other States in having a voluntary system for land resumption.\textsuperscript{365} The absence of any compulsory

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\textsuperscript{351} This was in contrast to the free selection of vast tracts of land available in New South Wales: Roberts, above n 12, 300.

\textsuperscript{352} See \textit{Land Act 1898} (WA), s 48 (Town and suburban lots); ss 53 and 59 (agricultural lands); s 68 (grazing lands); s 71 (poison lands); s 73 (free homestead farms); s 87 (working men’s blocks). The Crown could at any time withdraw lands from being open for selection.

\textsuperscript{353} S 38 \textit{Land Act 1898}.

\textsuperscript{354} See generally the \textit{Land Act 1898}; see also the \textit{Homestead Act 1893}.

\textsuperscript{355} Pitt Morison and White, above n 29, 516.

\textsuperscript{356} 6th Vic No 9, 1844. Note provisions on the compensation by an encroaching owner to a landowner adversely affected by the adjustment of land boundaries.

\textsuperscript{357} 14th and 16th Vic No 26, 1851.

\textsuperscript{358} ss II, VI, Anno Primo Vic Reg No 2, 1838.

\textsuperscript{359} 4 & 5 Vic No 17, 1841.

\textsuperscript{360} 4 & 5 Vic No 17, 1841, s IV.

\textsuperscript{361} 10th Vic No 19, 1847, s VII.

\textsuperscript{362} See the \textit{Agricultural Lands Purchase Act} 1896.

\textsuperscript{363} See Battye (ed), \textit{The Cyclopedia of Western Australia}, above n 19, 130.

\textsuperscript{364} See s 5 \textit{Agricultural Lands Act 1898} (WA).

\textsuperscript{365} Roberts, above n 12, 362.
repurchase of land for closer settlement is indicative of the State’s high regard for property rights. Agricultural land purchase assisted large landowners keen to subdivide their estates, while also satisfying public demand for agricultural lands.

4.7.4 The general law and private land use planning

The general law might indirectly achieve planning outcomes. Restrictive freehold covenants operated as instruments of private land use planning under general law, while planning control was also indirectly regulated by the tort of nuisance.

4.8 Key Area 6 - Environmental laws

Environmental qualifications to a landowner’s rights of enjoyment existed both at common law and by statute.

4.8.1 Common law

The common law has never treated environmental harm as actionable per se. Direct intentional interference with land was actionable in trespass. Material damage to land or the unreasonable interference with enjoyment was actionable in nuisance. However, where an occupier’s enjoyment of land was interfered with by the State, the occupier was always vulnerable to the defence of statutory authorization.

4.8.2 Statutory provisions

There were few statutory provisions regulating private land for environmental harm. This may be explained by not only the reliance on crown grant reservations to deal with matters of public interest but also the lack of scientific knowledge concerning the potential impact of the enjoyment of property, coupled with the express policy of promoting the cultivation and improvement of alienated land. The imperial

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366 Ibid. Note, however, the power of resumption in s 6 of Agricultural Lands Purchase Amendment Act, 1898 (WA). Roberts respectfully appears to overlook the existence of this power of resumption.


368 See G McLeod, Planning Law in Australia (LBC, 1997) [1.4010].

369 G Bates, Environmental Law in Australia, (LexisNexis, 8th ed, 2013) [3.18].

370 Ibid, [3.20].

371 On the tort of nuisance, see Walter v Selfe (1851) 4 De G & Sm 315, 322. For a discussion of the tort of nuisance and property rights, see Bates, above n 369, [3.10]-[3.12].

372 See eg Hammersmith and City Railway Co v Brand (1869) LR 4 HL 171, 215 (Lord Cairns). On the defence of statutory authorisation, see chapter 3, paragraph 3.4.4(b), and chapter 7 of this thesis.

373 Christensen et al, above n 11, 44–45.

classification of unimproved lands as ‘waste lands’ sums up well contemporary attitudes to the environment.

Environmental laws addressed environmental issues in piecemeal fashion. Examples include the grazing of cattle in town sites, which was regulated by licence.\footnote{Cattle and Stock kept in Towns, 14 Vict No 8, 1850.} From 1876, legislative enactment controlled effluent and sewage.\footnote{Bartlett, above n 270, [4.1], citing ss 61-81 Municipal Institutions Act 1876.}  Penalties were prescribed for water pollution,\footnote{Ibid, 61, citing Public Health Act 1886; see also ss 43–46 Waterworks Act 1889.} landowners could be prohibited from using water,\footnote{Ibid, citing s 45 Waterworks Act 1889.} and control over land use within water catchment areas became subject to regulation.\footnote{Ibid, citing Municipal Water Supply Preservation Act 1892.} A landowner might be required to raise the height of land.\footnote{See s 164 Health Act 1898, (WA) and considered in Collie Local Board of Health v Bradbury (1907) 9 WAR 227.} Provision was also made for land quarantine\footnote{Land Quarantine Act 1878; Land Quarantine Act 1884, 48 Vict No 3.} and the containment of disease.\footnote{42 Vict No 5 Infectious or Contagious Diseases 1878.} While lawful entry upon land might be carried out to inspect for disease,\footnote{S 2, Land Quarantine Act 1884; see also Scab Act 1885; Scab Act 1891, 54 Vict No 16.} this was not extended for the abatement of wild stock.\footnote{See s 3 Wild Horses and Cattle 1871, 34 Vict No 24.} Provision was made for the preservation of fauna, with provision for the establishment of declared reserves.\footnote{See s 4 (b) Game Act 1892. Note that the predecessor to the Act, the Game Act 1874, did not apply to owners of game or native game (s 8).}

### 4.9 Conclusion: the private interest and public interest balanced

This chapter establishes this period as one of a generally high State regard for property rights. The foundation of land tenure on Imperial common law doctrines of tenure established the Crown as the absolute owner of all land in the colony,\footnote{But noting that the history of the colony was later found not to have extinguished native title: Western Australia v Commonwealth (1995) 183 CLR 373,421–434 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ); Western Australia v Ward (2002) 213 CLR 1, 117 (Gleeson CJ, Gaudron, Gummow, Hayne JJ).} and the subsequent \textit{Colonial Laws Validity Act} secured the State’s dominion over property rights against possible common law entrenched rights to compensation upon resumption. However, rarely did this result in State disregard for landholders.

History recorded settler dissatisfaction with colonial land policy as a hallmark of this period, although this appears to have eventually abated. In the early days of the colony, settlers were more a victim of their own appetite for the high promises of speculators, their ignorance of and unpreparedness for the challenges presented by local conditions, and the willingness of the Imperial government to grant priority to speculators and officials, rather than any significant disregard by the State for settlers’ property...
rights. Free selection of land before survey afforded opportunities for settlers to select better land, although this probably favoured pastoralists over freehold farmers. The shift from the free grant of crown land to sale established a value for land. Wakefield theorists threatened private property rights, and the State did pursue a policy through to the 1840s of actively taking back land held by colonists under conditional grant. However, as with most State interference with property rights during this period, this represented an exercise of contractual rights, rather than a State resumption. Moreover, a spirit of compromise not required of the authorities often prevailed where colonists desired tenure, but had not fulfilled those conditions and were willing to come to arrangements with the State.

By the time of the first comprehensive Land Act, generous terms were established for encouraging land ownership by conditional purchase and deferred payment, although just how generous the conditions were depended on the classification assigned to the land grant. It is perhaps no wonder that on the State’s centenary, the colony’s first land regulations on land settlement were recorded as being ‘generous’, while some historians have regarded the colony’s first consolidated Land Act in 1898 as ‘most liberal’ for its age. Despite this generally positive assessment, it is significant that the legal interpretation to be given to matters such as undertakings made by the Crown in relation to the grant of fee simple estates was yet to be tested by the courts, as was the effect of the vesting of management and control of waste lands in the State. This is considered in chapter 5.

Land was forfeited for the non-performance of conditions precedent to the granting of the freehold estate. The terms of crown grants also later reserved to the Crown the right to resume land, without compensation. Resumption, however, must be considered within its context. The power of resumption likely existed at the time of land grants as a contractual term of the land grant made at a time of unique historical circumstance. The land might have been granted without any payment, thereby making otherwise popular notions of fair compensation questionable. As regards resumption by statutory provision, this may suggest an increasing public interest perspective of property rights. However, land benefited by expenditure or improvements was compensated, therefore taking some of the sting out of this treatment of property rights. The provision of

387 See Battye, Western Australia: A History from its Discovery to the Inauguration of the Commonwealth, above n 6, 150; see Holland et al, above n 26, 227.
388 Colebatch (ed), above n 82, 272. The first regulations enabled settlers to acquire vast tracts of land without any payment to the State: see Battye (ed), The Cyclopedia of Western Australia above n 19, 118.
389 See Roberts, above n 12, 331; the Land Act 1898 (WA).
compensation might be considered even more significant given the argument of increased freedom afforded to the legislature by the Colonial Laws Validity Act. Only with respect to the uncompensated resumption of land for internal communications such as roads can the resumption process be properly characterized on the basis of a disregard for property rights. However, this treatment hardly characterizes the treatment of property rights as a whole during this period.

A consideration of mineral rights reveals a shift in favour of the public interest with the assertion of crown ownership, but only towards the end of this period. A qualified regard for property rights even in this new framework of State mineral ownership is evident in the crown reservations which operated prospectively, rather than retrospectively.

Legislation sanctioned a new system of exploitation of minerals over the quiet enjoyment of private land. However, the restriction of mining to certain private land and the provision for compensation to an affected landowner brought some balance to the regard for property rights. Again, the late introduction of this policy prevents it being a significant feature of this period.

As regards water rights, while land regulations progressively reduced the availability of riparian rights, where riparian rights had accrued to a landowner, these were largely left intact, and there was no assertion of State ownership of water rights.

Planning and environmental laws, identified within some literature as a key indicator of a State’s disregard for property rights, are only present in a very limited form. The free selection of land characterized much of this period, and when reckoning finally came, the Government sought to achieve closer settlement not by resumption but by voluntary purchase.
Chapter 5: Real Property Rights in Western Australia:
The State’s regard and disregard 1900–1977

5.1 Introduction

Chapter 5 considers the second period identified for the study of the State’s regard for private property rights. This period is defined by Western Australia’s entry into the Commonwealth of Australia in 1900 through to 1977, when significant changes to state mining laws were introduced. This study continues the focus on the six identified key areas for consideration. As noted earlier, these areas are not always discrete. For example, injurious affection is considered as regards both resumption and planning laws.

5.1.1 Key themes

The chapter begins with a brief examination of the minimal impact of federation upon property rights. The six key areas of focus are then examined, beginning with land tenure, with particular attention to the extent that treatment of landholders varied from previous provisions. Attention is also given to land policy in relation to closer settlements, group settlements and soldier settlements. The fragility of property rights is presented through the Government’s early attempt to restructure land tenure from freehold to leasehold. Judicial interpretations of the previous vesting of the management and control of waste lands in the State are considered, and the vulnerability of crown grants to retrospective expropriation and alteration highlighted.

Statutory powers of resumption are examined through crown grant reservations and the Public Works Act. Compensation is considered regarding resumption by crown grant reservation, and the ingredients of compensation under the Public Works Act. The success of arbitration in resolving compensation claims is noted but not accepted as evidence of the State’s regard for property rights.

Mineral rights under the Mining Act 1904 and petroleum rights under the Petroleum Acts of 1936 and 1967 are considered. Expanded crown grant reservations are noted and a landowner’s exposure to mining on private land is considered, with particular attention to the farmer’s veto regarding land under cultivation. Different perspectives on the retrospective confiscation of petroleum rights are presented. The potential impact of State Agreements on property rights is noted.
Water rights are examined through the Rights in Water and Irrigation Act 1914. Attention is given to the displacement of riparian rights in particular through the vesting of all natural waters and the beds of watercourses in the Crown, and statutory licensing provisions. The benefits of the statutory redefining of riparian rights are considered. Finally, the consequences of State control over water, with particular attention to interference from public works, are considered.

Planning laws are examined with attention to the impact of planning schemes, policies and general uniform by-laws upon a landowner’s property rights. Appeals and compensation for injurious affection are considered, together with liability for betterment. Finally, environmental laws are examined, with particular attention to the impact of laws regarding soil and wildlife conservation, environmental protection and heritage laws.

The six areas of focus will reveal a shift from a frequently dominant private interest perspective of property rights to a more varied State perspective. Property rights are expropriated or controlled with or without compensation depending upon the relevant public interest and property rights.

Of indirect relevance may be the removal of property qualifications for voting for the Legislative Council in 1964, and the lowering of the voting age to 18 in 1970. It is speculated that the removal of property qualifications may have contributed in part to the ascendency of public interest perspectives shaping the State’s regard for property rights, and that younger voters, being less likely to be landowners themselves, may have been more persuaded by public interest perspectives. However, a study of electoral voting habits is beyond the scope of this thesis.

(b) Property rights remain a State matter despite federation

A Bill and a referendum in 1900 secured Western Australia’s entry into the Commonwealth of Australia, but constitutional conventions had rejected the possibility

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1 See HCJ Phillips, Electoral Law in the State of Western Australia: An Overview (WA Electoral Commission, 2nd ed, 2008) 89.
2 Certainly, the removal of property qualifications for voting was long regarded by Labor as essential to achieving a majority in the Legislative Council: ibid, 18.
3 For a consideration of the movement towards federation, see E Russell, A History of the Law of Western Australia and its Development from 1829 to 1979 (University of Western Australia Press, 1980) ch 21. The unwillingness of the Collier State Labor Government to pursue the later strong public support for WA’s secession ensured that WA remained part of the Commonwealth.
of vesting the making of property laws in the Commonwealth.\(^4\) Federation did not limit WA’s constitutional power to create new laws for land resumption,\(^5\) nor did it affect its ability to provide compensation for land resumed, upon any terms, whether just or otherwise.\(^6\) Only in rare circumstances where WA was a party to an agreement with the Commonwealth did federal constitutional provision\(^7\) affect the State’s treatment of property rights.\(^8\) Federation did not transfer State legislative power with respect to minerals to the Commonwealth, so there were no Commonwealth onshore mining laws applicable to the States.\(^9\) Nor did Federation divest power from the States regarding water because the States were keen to control irrigation.\(^10\) The Commonwealth had no control over State planning laws.\(^11\) State regard for property rights might be indirectly affected, such as in the case of environmental matters, through Commonwealth funding for State land acquisitions for ‘programs connected with nature conservation.’\(^{12}\) Federation also raised the possibility that the State’s treatment of property rights might be affected by international instruments ratified by the Commonwealth,\(^{13}\) but no

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\(^5\) *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 414 (McTiernan J).

\(^6\) *Pye v Renshaw* (1951) 84 CLR 58, 78–81, 83 (Dixon, Williams, Webb, Fullagar and Kitto JJ); *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 424 (Williams J).

\(^7\) S 51(xxxi) Constitution

\(^8\) The failure of the Commonwealth–State agreement with respect to war service land settlements in New South Wales to provide for just terms with respect to the acquisition of property and its consequent invalidity necessitated new legislation in WA; see *War Service Land Settlement Agreement Act 1945* (Ch): *War Service Land Settlement Agreement Act 1945* (WA); and the later *War Service Land Settlement Agreement Act 1951* (WA). For a discussion of the circumstances surrounding this legislation see *Gilbert v Western Australia* (1962) 107 CLR 494, 506–507 (Dixon CJ, Kitto and Windeyer JJ). Note also key changes made by this legislation, such as the conversion of settlers’ leasehold title to freehold title.

\(^9\) M Hunt, ‘Government Policy and Legislation Regarding Minerals and Petroleum Resources’ (1988) 62 ALJ 841. However, aspects of mining and petroleum operations within the State might fall within Commonwealth legislative powers, thereby affording the Commonwealth power indirectly over exploration and production within a State: see AG Lang and M Crommelin, *Australian Mining and Petroleum Laws: An Introduction* (Butterworths, 1979) [304]–[310], discussing ss 51(i), 51(vi), 51(xx), 51(xxi), 51(xxiv), 51(1xxi), 51(1xxix) Constitution (Ch). In relation to offshore minerals and petroleum, Commonwealth legislation ensured that state sovereignty extended only to the low-water mark: *Seas and Submerged Lands Act 1973* (Ch), discussed in Lang and Crommelin [316]; M Hunt, above, [1.3]. The 1973 Act was upheld by the High Court in *New South Wales v Commonwealth* (1975) 135 CLR 337. An examination of Commonwealth legislative powers is beyond the scope of this thesis, save in relation to a consideration of s 51(xxxi) in chapter 7.


\(^12\) See s 4 *State Grants (Nature Conservation) Act 1974* (Ch); note s 4 *Environment (Financial Assistance) Act 1977* (Ch), both considered in G Bates, *Environmental Law in Australia* (Butterworths, 1983) 51. . On the intrusion of certain federal laws with respect to property during the Second World War, see J Baalman, ‘Conflict of Federal and State Property Laws’(1942) 15 ALJ 345.

\(^13\) See e.g. Art 12 and 17 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess,183\(^{rd}\) plen mtg, UN Doc A/810, (10 December 1948). The Declaration was adopted by the United Nations General Assembly on 19 December 1948. Australia voted in favour of the Declaration; see also
evidence of this was found. Commonwealth law provided for racial equality before the law, but the significance of such provision for those asserting native title was not established. In summary, tenure and property rights remained a State matter and, subject to the Constitution and imperial limitation, Western Australia remained a sovereign state. The State’s plenary power was limited only by the requirement that State laws not conflict with limitations imposed by the Commonwealth Constitution or by applicable Imperial Acts.

5.2 Key Area 1 - Land tenure

Crown land grants and land tenure were governed initially by the Land Act 1898. The replacement Land Act 1933 (“LA”) remained operative in amended form. Much of the debate surrounding the passage of the 1933 Bill concerned ensuring that the terms of land tenure would sustain successful land development. The Minister for Lands stressed that the State’s land laws were ‘exceptionally liberal, our land conditions are easy and our values are low.’ Parliament stressed that the introduction of the LA would not affect existing land rights, title, interest or liability. Special provision for the grant or lease of crown land to Aboriginal peoples continued under the LA, but no legislative provision was made for Aboriginal land rights.

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14 s 10 Racial Discrimination Act 1975 (Cth); see also chapter 6, and RH Bartlett, Native Title in Australia (LexisNexis, 2nd ed, 2004) [18.1].

15 Communal native title had been found never to have been part of Australia’s laws: Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141, 244–245 (Blackburn J). See Bartlett, above n 14, [1.29] on problems with respect to this decision.

16 R v McDonald (1906) 8 WAR 149, 150–151 (MccMillan J).

17 Nicholas & Ors v WA & Ors [1972] WAR 168, 173 (Jackson CJ), citing ss 2 and 3 Colonial Laws Validity Act 1865, with whom Virtue SPJ agreed. On the possibility that Magna Carta may have not been received, see (Vincent v Ah Yeng (1906) 8 WALR 145, 146 (Parker CJ) and footnote 174 of chapter 2 of this thesis.

18 Act No 37 of 1933, assented to on 4 January 1934.

19 The Land Act 1933 (WA) as amended was repealed by the Land Administration Act 1997 (WA) on 30 March 1998.

20 Western Australia, Parliamentary Debates, Legislative Assembly, 17 August 1933, 425–431 (Minister for Lands, MF Troy). For example, the Minister for Lands favoured small land allotments over large allotments. Conditional purchase leases were of particular attention.

21 Ibid, 431.

22 Ibid, 424; see also s 4(1) Land Act 1933 (WA).

23 s 9 Land Act 1933 (WA). Grants and leases were limited to 200 acres.

24 Bartlett, above n 14, [1.33].
The LA largely represented a consolidation of existing arrangements, rather than new arrangements.\(^{25}\) The practice of reservations in crown grants continued.\(^{26}\) Different conditions attached to land, depending on whether it was town and suburban land,\(^{27}\) agricultural and grazing land,\(^{28}\) a pastoral lease,\(^{29}\) or agricultural lands purchase.\(^{30}\) The system of conditional purchases continued for agricultural and grazing land as a means to the acquisition of a fee simple estate upon the discharge of prescribed conditions.\(^{31}\) Free homestead farms and working men’s blocks continued, although improvements were still required before a crown grant issued.\(^{32}\) Land remained vulnerable to forfeiture where conditions were not performed.\(^{33}\)

Key themes from each of these Acts relevant to the State’s treatment of property rights are considered below, although measures relating to resumption and compensation are considered at paragraph 5.3. Although both improved and more onerous provisions as to land tenure are identified, the former outweigh the latter.

### 5.2.1 Improved provisions for land tenure and agriculture

Both Land Acts introduced new conditions as to land tenure. Firstly, provisions were focussed on better promoting the take-up of private land, although the opportunity to acquire land by free selection was reduced early by the principle of survey before selection.\(^{34}\) Initially, improvements to various modes of acquiring interests in land were made,\(^{35}\) including, curiously, the taking up of land tenure by minors.\(^{36}\) Lessees of town or suburban land might acquire a fee simple estate.\(^{37}\) Later, conditions regarding the sale

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\(^{25}\) The stated aim of the new Act was to ‘consolidate and amend Enactments relating to Crown Lands’: See Land Act 1933.

\(^{26}\) S 15 Land Act 1933 (WA). The practice of crown grant reservations was later considered unusual in relation to the grant of a fee simple estate, but upheld by the Supreme Court: Bamess v State of Western Australia and Conservator of Forests [1968] WAR 75, 79 (Negus J). Note the later cessation of marketable timber reservations to the Crown: S 3 Land Act Amendment Act 1971 (WA).

\(^{27}\) Part IV, Land Act 1933 (WA).

\(^{28}\) Ibid, part V.

\(^{29}\) Ibid, part VI.

\(^{30}\) Ibid, part VIII.

\(^{31}\) Ibid, s 47.

\(^{32}\) Ibid, part V, division (2 ), especially ss 69 and 72 (Free Homestead Farms); see also part V, division (3), especially s 81(7)(Working Men’s Blocks).

\(^{33}\) Ibid, s 23(1). Note that forfeiture might be waived: s 2(2) of the Act, and later, the return of moneys was provided for in cases where land was forfeited due to difficult circumstances: s 4 Land Act Amendment Act (No 2) 1969 (WA).

\(^{34}\) NT Jarvis, Western Australia: An Atlas of Human Endeavour (Government Printer, 1979) 57.

\(^{35}\) See e.g. s 67 Land Act Amendment Act 1906 (WA) regarding the conversion of a residential lease into a working man’s block and s 72 in relation to land within a special settlement area.

\(^{36}\) See s 27 Land Act Amendment Act 1917 (WA), which provided that minors may hold and deal with land.

\(^{37}\) Ibid, s 5, assented to on 28 March 1917.
of certain crown land by public auction were dispensed with,\(^{38}\) modified terms for disadvantaged Aborigines selecting land were introduced,\(^{39}\) generous provisions were added regarding homestead farms\(^{40}\) and agricultural and grazing land,\(^{41}\) and provision was made for the alienation of closed roads and other lands.\(^{42}\) Special leasehold tenure was introduced.\(^{43}\)

Much attention was given to improving the payment conditions attached to land tenure. Generous terms were initially added to reduce the price of conditional purchase land,\(^{44}\) cap the annual rent payable under a conditional purchase lease,\(^{45}\) and postpone the payment of rent during the first five years.\(^{46}\) A landholder might even be exempted from rent.\(^{47}\) Under the LA, provision to reduce excessive rent was added, as was provision for the extension of time to pay rent,\(^{48}\) relief from payment of rent,\(^{49}\) and review of rent\(^{50}\) notice provisions in the case of land withdrawn from a pastoral lease.\(^{51}\)

The history of farming districts reveals a State generally keen to assist farmers to increased landholdings, and support their struggles.\(^{52}\) For most rural landholders, the physical challenges of farming, often in remote locations, captured the attention of writers, rather than the State’s treatment of property rights in response to those challenges.

\(^{38}\) S 3 Land Act Amendment Act 1946 (WA); see also s 12 Land Act Amendment Act 1950 (WA) regarding land unsold at a public auction; see also s 5 Land Act Amendment Act (No 2) 1969 (WA).  
\(^{39}\) S 3 Land Act Amendment Act 1948 (WA).  
\(^{40}\) S 20 Land Act Amendment Act 1950 (WA).  
\(^{41}\) S 4 Land Act Amendment Act (No 2) 1969 (WA).  
\(^{42}\) S 5 Land Act Amendment Act 1962 (WA).  
\(^{43}\) Part VII, Land Act 1933 (WA).  
\(^{44}\) S 2 Lands Act Amendment Act 1915 (WA), assented to on 8 December 1915; see also s 21 Land Act Amendment Act 1917 (WA), and s 2 Land Act Amendment Act 1919 (WA). On the reduction of rent for pastoral leases, see s 2 Land Act Amendment Act 1926, assented to on 23 December 1926; s 2 Land Act Amendment Act 1931 (WA), assented to on 9 December 1931; and the restrictions under s 2 Land Act Amendment Act 1932 (WA). Note the rent increases on renewal of pastoral leases under s 2 Land Act Amendment Act 1928, assented to on 28 December 1928.  
\(^{45}\) S 3 Land Act Amendment Act 1915 (WA).  
\(^{46}\) S 25 Land Act Amendment Act 1917 (WA).  
\(^{47}\) S 4 Lands Act Amendment Act 1915 (WA).  
\(^{48}\) s7, 8 Land Act Amendment Act 1934 (WA); see also s 19 Land Act Amendment Act 1939 (WA).  
\(^{49}\) S 2 Land Act Amendment Act 1936 (WA). The relief might be given in the case of drought; see also s 3 Land Act Amendment Act 1938 (WA); s 12 Land Act Amendment Act 1939 (WA); s 6 Land Act Amendment Act 1946 (WA); s 6 Land Act Amendment Act 1971 (WA).  
\(^{50}\) S 7 Land Act Amendment Act 1963 (WA).  
\(^{51}\) S 15 Land Act Amendment Act 1939 (WA).  
\(^{52}\) See e.g. D Murray ‘Land Settlement and Farming Systems’ in L Hunt (ed), Yilgarn: Good Country for Hardy People. The Landscape and People of the Yilgarn Shire, Western Australia (Yilgarn Shire, Southern Cross, 1988) 299–316.
Land was progressively released by the Crown, normally with conditions regarding residence, improvement and payment over a 25-year period.\(^{53}\) The aim was to establish land tenure according to a region’s farming possibilities, but State revenue was the underlying aim.\(^{54}\) Settlers were supported by a generous Agricultural Bank, which also assisted in reconstruction schemes in times of hardship.\(^{55}\) LA amendments are recorded as generous.\(^{56}\) Land resumption from pastoral leases for agricultural settlements was added.\(^{57}\) The previous struggle between pastoralism and agriculture was resolved in favour of the farmer.

Of note was the ‘curious personal relationship’ between the State and settlers.\(^{58}\) The State’s prescription of land size, land use and terms of payment led to an assumption that state land settlement policy was a guarantee of a landholder’s future success, such that a landholder’s failure must be the State’s fault.\(^{59}\) This argument carries some weight concerning the slow release of land around Perth, where towards the end of this period the most significant factor impacting on landowners or prospective landowners was a shortage of available freehold land and the related matter of high land prices.\(^{60}\) There was much conversion of special leases to conditional purchase tenure between the 1940s–1960s, motivated by landholders keen to secure the improvements that a change in tenure afforded when using the land as security for borrowings.\(^{61}\) However, the Mines Department opposed any large-scale tenure conversion of land with mineral potential.\(^{62}\)

\(^{53}\) Ibid, 275.  
^{54}\) Ibid, 274.  
^{55}\) Ibid, 279, 293–301.  
^{56}\) Ibid, 295.  
^{57}\) S 4 Land Act Amendment Act 1906 (WA), assented to on 14 December, 1906.  
^{58}\) WK Hancock, Australia (The Jacaranda Press, 1930)  
^{59}\) Ibid, 115. While Hancock’s focus is on Victoria, the similarity of the schemes between the states suggests his comments are relevant to Western Australia. Hancock’s discussion is within the context of what Hancock regarded as state socialism.  
^{61}\) Murray, above n 52, 329.  
^{62}\) Ibid. This was in contrast to the Departments of Public Works and Forests.
5.2.2 Restrictions upon land tenure and less favourable terms

Statutory amendment did not always favour the landholder. Restrictions as to land area for cultivable and grazing land were made, although areas for other holdings might be increased. The time for the commencement of improvements for conditional purchase agricultural and grazing lands was shortened. Stocking conditions became more onerous and penalties for non-stocking changed from increased rent to forfeiture. The exclusion of resumed land from crown grants and power to cancel abandoned applications for homestead farms were provided for. Legislative change also protected the Crown from possessory title claims.

As regards the LA, attention was focussed upon the public interest. Rights concerning reserved land were limited. The conditions attaching to suburban lands and pastoral leases were increased. Eventually, it was provided that ‘applicable restrictions’ be observed before a crown grant could be issued.

5.2.3 Land tenure fragility

Of more significance to a landowner’s security of tenure than the amendments to the Land Acts considered above was the vulnerability of property rights to three potential threats: firstly, government proposals to cease granting freehold title; secondly, the exercise of State powers undiscoverable at the time of grant; and, thirdly, the retrospective expropriation and alteration of crown grant terms. The State’s previously generally high regard for a landholder’s tenure revealed in chapter 4 was found to be on occasions illusory during this period by the legal interpretation applied to land

63 S 23 Land Act Amendment Act 1906 (WA); see also s 5 of the Land Act Amendment Act 1920 (WA) regarding area restrictions for pastoral leases.
64 See e.g. s 8 Land Act Amendment Act 1917 (WA). Note, however, that Hansard records that the Minister exercised his power to grant a smaller maximum of 1,000 acres of cultivable land: see Western Australia, Parliamentary Debates, Legislative Assembly, 17 August 1933, 425, (Minister for Lands, MR Troy).
65 S 2 Land Act Amendment Act 1923 (WA), assented to on 22 December 1923.
66 S 14 Land Act Amendment Act 1917 (WA).
67 S 7 Land Act Amendment Act 1902 (WA), assented to on 19 February 1902.
68 S 12 Land Act Amendment Act 1905 (WA), assented to on 23 December 1905.
69 Russell, above n 3, citing s 36 Limitation Act 1935 (WA).
70 S 5 Land Act Amendment Act 1948 (WA).
71 S 13 Land Act Amendment Act 1950 (WA).
72 S 15 Land Act Amendment Act 1963 (WA); see also s 8 of Act No 113 of 1965, and s 5 Land Act Amendment Act 1971 (WA).
73 S 10 Land Act Amendment Act 1977 (WA), S 41 of the principal Act had originally merely provided for payment of moneys and that fencing or prescribed improvements be performed; see also the additional provision regarding the supply of water in s 7 Land Act Amendment Act (No 2) 1969 (WA); for a consideration of restrictions upon land tenure under the LA relating to planning considerations, see [5.6(c)].
regulations and the saving provisions of the State’s Constitution. Three cases revealed
the vulnerability of property rights to the State, because of the absence in the State’s
land regulations of any promise by the Crown never by subsequent legislation to
derogue from rights possessed at the time of a crown grant by grantees. These three
threats are considered below.

(a) Proposed new land tenure: freehold to leasehold

In 1912, the State Labor Government attempted to shift land tenure from freehold to
perpetual leasehold.\(^74\) The leasehold versus freehold debate again occurred in the
1940s.\(^75\) Freehold versus leasehold title was also the subject of a federal inquiry in the
1970s.\(^76\) While freehold title consistently remained the foundation of land tenure,
Attempts to shift from freehold to leasehold tenure reveal the vulnerability of property
rights.

The object of the 1912 proposal was to prevent the aggregation of land amongst a few
holders.\(^77\) A shift to leasehold, it was argued, would promote the availability of land to
incoming settlers,\(^78\) bring about closer land settlement and maximize agricultural
productivity.\(^79\) The restructure of land tenure from freehold to leasehold has been
considered to be of little practical significance, because of an acceptance already of
freehold title limited by conditions.\(^80\) A State’s \textit{regard} for property rights might even be
asserted by this restructure, since all existing tenure was assured, and there was no
power provided to resume conditional purchase land or freehold.\(^81\) However, this view
is unsound. By its own admission, the Government intended to secure the benefit of
unearned increments attaching to the land.\(^82\) The Bill was defeated by a majority in the
Legislative Council, who were not persuaded that leasehold would improve

\(^{74}\) Land Act Amendment Bill 1912 (WA); see also Western Australia, \textit{Government Gazette}, No 58, 20
October 1911.

\(^{75}\) The debate of whether perpetual leasehold or freehold was appropriate for outer farming areas
continued into the 1940s; see e.g. Murray, above n 52, 301.

\(^{76}\) See Commission of Inquiry into Land Tenures, \textit{First Report} (Australian Government Publishing
Service, Canberra, November 1973; \textit{Final Report} (Australian Government Publishing Service, Canberra,
February 1976), considered in chapter 3 of this thesis.

\(^{77}\) Western Australia, \textit{Parliamentary Debates}, Legislative Council, Thursday, 5 December 1912, 4217
(Colonial Secretary Hon JM Drew); according to SH Roberts, \textit{History of Australian Land Settlement
(Frank Cass & Co Ltd, 1969) 417, fn 44, at that time, 299 people held one-third of all freehold land.

\(^{78}\) \textit{Parliamentary Debates, ibid,} 4220.

\(^{79}\) \textit{Ibid,} 4223.

\(^{80}\) Roberts, above n 77, 409. The relevant conditions here were conditions as to improvement.

\(^{81}\) See clause 2, Land Act Amendment Bill 1912; Western Australia, \textit{Parliamentary Debates}, Legislative
Council, 5 December 1912, 4222–4224 (Colonial Secretary Hon JM Drew).

\(^{82}\) \textit{Parliamentary Debates, ibid,} 4222.
agriculture. It was feared there might be less incentive for the improvement of leasehold tenure over freehold, and there were concerns over the assessment periods.

The Bill’s passage through the Assembly revealed the vulnerability of property rights to the Government of the day, while the Bill’s defeat before the Council reveals how the defence of property rights in this instance rested entirely on the politics of that house. However, it would be misleading to conclude that the Government was always keen to dilute a landholder’s security of tenure. Particularly where the issue related not to the relationship between the State and the landholder but rather to the property rights between landowners, legislative amendment might be more favourable. For example, provision was made for the lodgement of a caveat by persons claiming an estate or interest in land, which was continued under the LA. Concerns over share or company titles which did not define a proprietor’s interest to a specific part of the land also resulted in the enactment of the Strata Titles Act 1966 to ‘facilitate the subdivision of land in strata and the disposition of titles thereto.’

(b) Undiscoverable State power may displace property rights

The vesting of the management and control of waste lands in the State revealed that property rights could be displaced by the Crown’s subsequent exercise of powers undiscoverable at the time of grant. Steere concerned the power of the Government to issue a grazing lease pursuant to s68 of the Land Act 1898 over land already the subject of a pastoral lease under the Land Regulations 1887 (WA). At issue was whether s 4 of the Western Australian Constitution Act (Imp) preserved pastoral leasehold interests, or whether the Crown had reserved powers to alienate the land by later statutory provision. The Land Regulations reserved to the Crown the power of sale. The Supreme Court held that the Constitution preserved the earlier vested pastoral lease from what would be

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83 Ibid, 4224–4229 (Hon JD Connolly).
84 Roberts, above n 77, 408–409; see also Western Australia, Parliamentary Debates, Legislative Council, 5 December 1912, 4238; for a reporting of parliamentary debate, see also The West Australian, 14 November 1912, 7; 15 November 1912, 9.
85 S 75 (1) Land Act Amendment Act 1906 (WA).
86 S 152 Land Act 1933 (WA).
87 Landgate, Strata Titles Practice Manual for Western Australia (Government of Western Australia, edition 8.0, June 2013) [2.1].
88 See long title, Strata Titles Act 1966. The Act came into operation on 1 November 1967. Although the creation of strata lots represented a new and novel title for landowners, major problems soon emerged, such as the allocation of unit entitlements without necessary reference to relative lot value, and the statutory provision for lot boundaries: see Landgate, above, [2.1]; see also Law Reform Commission of Western Australia, The Strata Titles Act 1966-1978, Project 56, (1982), ch 12.
89 Steere v Minister for Lands (1904) 6 WAL R 178.
90 See Land Regulations 1887, Sch 9.
a breach of contract by the Crown later granting a grazing lease, but the Court did not consider the Crown answerable for the dispossession by those claiming under the grazing lease. The High Court disagreed, finding the grazing leases were lawfully granted. The crown reservation of the power of sale included the sale of the land the subject of the pastoral lease under any conditions prescribed by future regulations, of which the Crown was entitled to take advantage. The grant of a grazing lease properly constructed was a sale under the crown reservation and the regulations. Although the High Court declined to deal with the question of the legislature’s competency to impair property rights granted before responsible government, thereby leaving open the possibility that s 4 of the WA Constitution (Imp) imposed a legislative restriction on State legislative power, the outcome was that by statutory construction and interpretation, property rights could be displaced by the Crown’s subsequent exercise of powers undiscoverable at the time of grant.

(c) Crown grant terms vulnerable to retrospective expropriation and alteration

Crown undertakings to grant a fee simple estate did not mean that the legislature was not free to later alter the terms of that crown grant. In Midland Railway, the State secured railway construction by the Crown’s agreement to land grants made pursuant to imperial legislation which did not reserve oil. Prior to any crown grants being made, the disposal of minerals was vested from the imperial legislature to the State legislature which then reserved oil from future crown land grants. However, previously accrued rights were expressly saved, until the State later retrospectively resumed petroleum. The Supreme Court found that although the agreement to issue

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91 Steere v Minister for Lands (1904) 6 WALR 178, 183–184 (Parker J, McMillan and Burnside JJ concurring, 184).
92 See Moore and Scroope v Western Australia (1907) 5 CLR 326, 327.
93 Ibid, 337 (Griffith CJ); 345 (Isaac J).
94 Ibid, 340 (Griffith CJ); 348 (Isaac J); (Barton J concurred, 341).
95 Ibid, 341 (Griffith CJ); 343 (Isaac J). Note, however, that Isaac J did not consider that a statute affording specific authority to perform an act in circumstances contemplated by Parliament would be unlawful, even if it constituted a breach of contract: 342.
96 See Kennedy v Minister for Works [1970] WAR 102, 104–105 (Hale J), citing Steere v Minister for Lands (1904) 6 WALR 178.
97 See the earlier comments of Parker J that the pastoral lessee could ever have imagined even with the ‘most anxious enquiries’, that the Crown would later intend to grant a grazing lease as had occurred here: Steere v Minister for Lands (1904) 6 WALR 178, 183.
98 Midland Railway Co of WA Ltd v State of WA and West Australian Petroleum Pty Limited [1954] 57 WALR 1, 8 (Dwyer CJ).
99 See Australian Waste Lands Act 1855 (Imp).
100 S 3 Western Australia Constitution Act 1890 (Imp).
101 See s 15, Land Act 1898 (WA); see also s 10 Petroleum Act 1936 (WA).
102 S 4 Western Australia Constitution Act 1890 (Imp); s 2 Land Act 1898 (WA).
103 See s 9 Petroleum Act 1936 (WA) and paragraph 5.4(a)(i) of this chapter.
land grants without reservation as to oil was binding, the terms of the agreement and consequently the saving provisions of the Constitution did not prevent the State later exercising its power to expropriate rights previously granted, and without compensation.\textsuperscript{104} The decision was upheld on appeal, despite the Privy Council admitting that the saving provisions of the Constitution could be read so as to restrict the legislature.\textsuperscript{105}

The common place grant of a leasehold estate, which entitled the lessee to a freehold estate upon the satisfaction of crown grant terms, placed the lessee at risk of the freehold estate being granted on less favourable terms than might have been granted earlier, following changes to the \textit{Land Regulations}. In \textit{Worsley Timber},\textsuperscript{106} a poison lease was granted pursuant to the \textit{Land Regulations 1882}, together with the contingent right of the grantee to obtain the future issue of a crown grant of the land upon the performance of prescribed conditions. The regulations provided only for the reservation of precious metals in a subsequent crown land grant. Although the regulations remained in force after the grant of responsible government,\textsuperscript{107} they were repealed by the \textit{Land Act 1898}.\textsuperscript{108} The Supreme Court held that the later crown land grant in 1907 upon the narrower reservations prescribed by the regulations did not secure all other minerals in favour of the grantee, despite the apparent reservation in the grantee’s favour. The future crown grant was to be made subject to the limitations and reservations prescribed at the time the crown grant occurred.\textsuperscript{109} The regulations contemplated that the terms of the crown grant would be in the form prescribed at the time of the grant.\textsuperscript{110} Any grant conferring greater rights than those legally permitted at the time of the grant was inoperative.\textsuperscript{111}

\section*{5.3 Key Area 2- Land resumption and compensation}

The State’s regard for a landholder’s property rights requires a consideration of the provisions for crown grant reservations, and a determination of the extent to which a

\textsuperscript{104} \textit{Midland Railway Co of WA Ltd v State of WA and West Australian Petroleum Pty Limited} (1954) 57 WALR 1, 8–9 (Dwyer CJ).
\textsuperscript{105} \textit{Midland Railway Co of WA Ltd v State of WA [1957] 1 WALR 1; State of WA v Midland Railway Co of WA Ltd [1956] 3 ALL ER 272, 279 (Lord Cohen); see also Kennedy v Minister for Works [1970] WAR 102, 104 (Hale J).
\textsuperscript{106} \textit{Worsley Timber Pty Ltd v Western Australia} [1974] WAR 115.
\textsuperscript{107} See s 4(1) \textit{Western Australia Constitution Act 1890} (Imp).
\textsuperscript{108} S 2 \textit{Land Act 1898} (WA).
\textsuperscript{109} \textit{Worsley Timber Pty Ltd v Western Australia} [1974] WAR 115, 118–119 (Jackson CJ).
\textsuperscript{110} \textit{Ibid}, 123 (Virtue SPJ); Note also that the poison lease did not afford the grantee any right to minerals anyway: 122, 124 (Virtue SPJ).
\textsuperscript{111} \textit{Ibid}, 119 (Jackson CJ); 124 (Virtue SPJ).
landholder’s property rights previously identified were affected by new legislation, chiefly the Public Works Act 1902 (‘PWA’).112

The limited contemporary academic literature suggests that the rights of property owners were ‘safeguarded to a reasonable extent’ with ‘judicial interpretation…achieving a balance between the need for the government to acquire land and the protection of the rights of the individual.’113 The literature indicates the absence of any widespread public disquiet over the State’s land resumptions, concern being generally limited to particular projects,114 although such observations suggested reforms to address perceived statutory defects.115

The private interest and public interest equilibrium asserted by the literature is evaluated below through an examination of State resumption and compensation provisions and practices. Improved compensation provisions, as evidenced by the system of voluntary payments, and a five-year limitation on the exercise of reserved powers of resumption without compensation, indicate the State’s regard for property rights, even where not legally required. However, the improved position concerning crown grant reservations may be overshadowed by the expanded powers of resumption under the PWA, and the difficulties of challenging a land resumption. Relevant statutory provisions and case law, including compensation provisions, are considered below.

5.3.1 Resumption by crown grant reservations

(a) Voluntary payments

All crown grants issued already had to reserve to the Crown the power to resume the land for various public purposes without compensation except for lands benefited by

112 Assented to and commenced on 20 December 1902.
113 D Brown, Land Acquisition: An examination of the principles of law governing the compulsory acquisition or resumption of land in Australia and New Zealand (Butterworths, 1972), 308.
114 Brown, above. The same can also be said for the resumption of land in WA by the Commonwealth. For example, for the period 1971 to 1979 Western Australia had the smallest number of compensation claims for compulsory acquisition against the Commonwealth compared to other states and territories: see RJ Ellicott QC, Terms of Reference, 7 July 1977, reproduced in Australian Law Reform Commission, above n 11, 13, Table B. WA had 22 compensation claims settled with no court writ, while the highest, NSW, had 1,520 claims. There was only one appeal to the High Court throughout this period concerning the Commonwealth’s resumption of private land in WA: see Spencer v Commonwealth (1907) 5 CLR 418, which concerned the resumption of land for the fortification of Fremantle harbour.
115 Brown, Land Acquisition: An examination, above n 113, ch 66. Brown later suggests (308–309) that the three critical areas of reform required to better protect landowners are (1) a statutory requirement of an inquiry wherever the resumption of more than 100 acres of land is mooted, (2) a statutory right of objection to a resumption, and (3) the adoption of reinstatement, rather than sale value, to determine awards of compensation. For a consideration of reform, see chapter 8 of this thesis.
expenditure or improvements. The Supreme Court upheld the State’s power to resume land in accordance with crown grant terms, so it is difficult to accept any unqualified assertion that it was judicial interpretation that balanced public and private interests. Instead, it was the Government’s own willingness to make voluntary payments to affected landowners that indicates a regard for property rights, although such payments might not fully compensate the affected party. The Crown’s ability to resume land without compensation was more problematic now than before, in particular because the original grant may have been made many decades before the resumption over land, and which land had since been exchanged by successive proprietors for valuable consideration. Provisions were initially added to afford ministerial discretion where the Act would result in inadequate compensation to a lessee affected by resumption. Power was also expressly afforded to the minister to waive forfeiture and reinstate a lessee for noncompliance with conditions of tenure. By the end of this period voluntary payments to affected landowners appear to have become the norm. Provision was also made to ensure that compensation for improvements on forfeited land be paid to the lessee who had actually carried out the works, despite such

116 See s 15 Land Act 1898 (WA), Second Schedule (Town and Suburban Lands) and Third Schedule (Rural Lands), but note the limitation regarding resumption to 1/20th of rural lands.

117 Strickland v Minister for Works (1915) 15 WALR 115, 116 (McMillan ACJ); Worsley Timber Co Ltd v Minister for Works (1936) 36 WALR 52, 63 (Draper J).

118 See e.g. Strickland v Minister for Works (1915) 15 WALR 115; Worsley Timber Company Limited v Minister for Works (1936) 36 WALR 52.

119 For example, the resumption of land pursuant to the terms of a crown grant did not entitle the landowner to claim loss of profits that might be subsequently suffered by reason of the impeding of the exercise of a profit a prendre: see Worsley Timber Company Limited v Minister for Works (1936) 36 WALR 52, 64 (Dwyer J).

120 See Brown, Land Acquisition: An examination, above n 113, 33.

121 See s 9 Land Act 1898 (WA); s 2 Land Act Amendment Act 1917 (WA). Note the added requirement in s 9 that particulars of the resumption and pecuniary compensation be tabled before Parliament. Compensation would, however, ordinarily be dealt with in accordance with the provisions of the Public Works Act 1902 (WA); see s 3 Land Act Amendment Act 1920 (WA), assented to on 31 December 1920, and the discussion of the Public Works Act later in this chapter. Note, however, that s 4 of the Amendment Act confirmed that compensation for improvements was to be dealt with under s 145 of the principal Act.

122 S 20 Land Act Amendment Act 1906 (WA).

123 Standing Committee on Public Administration and Finance, Report of the Standing Committee on Public Administration and Finance in Relation to the Impact of State Government Actions and Processes on the use and Enjoyment of Freehold and Leasehold Land in Western Australia, Report No 7 (Parliament of Western Australia, 2004) [3.113], citing a letter from the Department of Land Administration. Note a voluntary payment for land resumed pursuant to the terms of a crown grant did not then entitle the Crown to resume land in excess of that permitted by the terms of the crown grant. Any further resumption had to be in accordance with the exercise of relevant statutory powers: Strickland v Minister for Works (1913) 15 WALR 115, 116 (McMillan ACJ).
improvements reverting to the Crown. The return of moneys was also provided for where land was forfeited due to difficult circumstances.

(b) New 5-year limitation on uncompensated resumption

The possibility of uncompensated resumption continued with the introduction of the LA, which highlighted the contractual relationship between the Crown and the grantee of crown land. The Act initially continued the limitations on the power of resumption that it be exercised within 21 years of the grant in the case of town or suburban lands, and to an area not greater than 1/20th of any rural lands. However, after much debate, it was resolved that the power of resumption was not exercisable without compensation to the grantee after five years from the date of the grant, but that such compensation be set off against the value of the land resumed or any increase in the value of other land of the grantee due to or arising out of that resumption. The limitation on the power of resumption is significant when compared to the Crown’s powers of resumption under the Land Act 1898, which did not require compensation. It is also significant in the recognition of the betterment principle.

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124 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 August 1933, 429 (Minister for Lands, MF Troy).
125 S 4 Land Act Amendment Act (No 2) 1969 (WA).
126 Act No 37 of 1933. The Act was assented to on 4 January 1934. The Land Act 1898 (WA) as amended, and the Agricultural Lands Purchase Act 1909 (WA) as amended were repealed: s 4(1) Land Act 1933(WA). The power to resume private land remained free of any requirement to compensate the affected landowner, except where the land to be resumed was already benefited by expenditure or improvements: Second Schedule, Land Act 1933 (WA) (Town or Suburban Land) and Third Schedule (Rural Land). In the case of rural lands, the exclusion from resumption again specified ‘lands upon which any buildings may have been erected or which may be in use as gardens, or otherwise…’
128 S 15(1) and Second Schedule, Land Act 1933 (WA).
129 S 15(1) and Third Schedule, Land Act 1933 (WA). Note the prescribed purposes for which the power of resumption might be exercised were also unchanged: compare the Second Schedule and Third Schedule Land Act 1933 (WA) with the Second Schedule and Third Schedule Land Act 1898 (WA). The prescribed purposes were not to be construed ejusdem generis, but in accordance with their common meaning: see *Worsley Timber Co Ltd v Minister for Works* (1933) 36 WALR 53, 58 (Northmore CJ); 59–60 (Draper J); 64 (Dwyer J); cf contra where the ejusdem rule was applied to s 63 (aa) and (b) Public Works Act 1902 (WA) in *Konowalow and Felber v Minister for Works* [1961] WAR 40, 42–43 (Virtue J) discussed at paragraph 5.3(c)(i), footnote 204, of this chapter.
130 See Western Australia, *Parliamentary Debates*, Legislative Council, 15 November 1933, 1899–1902. A key feature of the debate was whether the principle of betterment should be applied.
131 S 141(1) Land Act 1933 (WA), Second Schedule (Town or Suburban Land) and Third Schedule (Rural Land). Brown *Land Acquisition: An examination*, above n 113, 33 suggests that this provision would overrule ss 35(2) and 113(2) of the Public Works Act 1902 (WA).
132 In that regard, see Western Australia, *Parliamentary Debates*, Legislative Council, 15 November 1933, 1900. For a discussion of this principle, see chapter 3 of this thesis.
limitation also suggests the declining importance of reservation clauses for the resumption of land.\textsuperscript{133}

5.3.2 Resumption by statutory provision: The PWA

Although there were minor changes to statutory powers of resumption prior to 1902,\textsuperscript{134} major changes only occurred with the enactment of the PWA.\textsuperscript{135} This was the first Act to deal comprehensively with the carrying out of public works in Western Australia,\textsuperscript{136} and has been described as ‘containing some of the more liberal measures in respect of land acquisition.’\textsuperscript{137} Relevant provisions of the Act are considered below, with particular attention to the extent of the power of resumption and the four ingredients of compensation. A study of these provisions is critical because the right of an affected person to claim compensation and the heads under which it could be claimed upon the resumption of land depended ‘exclusively upon the terms of the relevant statutory provisions.’\textsuperscript{138}

(a) Resumption powers expanded

The PWA saw the Government set out to ‘substantially expand the range of entities having the power to take land compulsorily.’\textsuperscript{139} Land could be taken for public works by agreement or resumption.\textsuperscript{140} The taking power extended to not only the Crown but also ‘any local authority’ regarding ‘any public work’.\textsuperscript{141} Both terms were broadly

\textsuperscript{133} See Brown, \textit{Land Acquisition: An examination}, above n 113, 33.

\textsuperscript{134} See e.g. the power to resume land for drainage works, \textit{Lands Resumption Act 1896}; amendment 1900, assented to on 5 December 1900.

\textsuperscript{135} 2 Edwardi VII, No 47, assented to on 20 December 1902. Note the retrospective operation of the Act per s 3(2). The Act replaced the \textit{Lands Resumption Act 1896} (WA).

\textsuperscript{136} See Western Australia, \textit{Parliamentary Debates}, Legislative Council, 30 September 1902, 1300 (Public Works Bill, Second Reading) (Hon ML Moss, Minister).

\textsuperscript{137} Brown, \textit{Land Acquisition: An examination}, above n 113, 15. Provisions dealing with land resumption were taken from the Commonwealth and New South Wales provisions, which were considered the most up to date of the time: Western Australia, \textit{Parliamentary Debates}, Legislative Council, 30 September 1902, 1801, (Public Works Bill, Second Reading) (Hon ML Moss, Minister), citing the \textit{Property for Public Purposes Acquisition Act} (Cth), and \textit{Public Works Act1900} (NSW); see also Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 19 August 1902, 623 (Public Works Bill, Second Reading) (Minister for Works, Hon CH Rason). However, the Act has also been described as containing ‘obfuscate provisions’ and being ‘verbose, clumsy and confused’: see D Brown, \textit{Land Acquisition} (Butterworths, 2\textsuperscript{nd} ed, 1983) [1.04]. Brown further notes that ‘poor quality’ legislation does not improve the position of a dispossessed landowner.

\textsuperscript{138} \textit{Konowalow and Felber v Minister for Works} [1961] WAR 40, 41 (Virtue J).

\textsuperscript{139} \textit{Re Hon Alannah MacTiernan MLA, Minister for Planning & Infrastructure; Ex parte McKay} [2007] WASCA 35, [66] (Martin CJ).

\textsuperscript{140} S 26(1) \textit{Public Works Act 1902} (WA). A landowner might also require that a small parcel of remaining land be taken: s 25(1).

\textsuperscript{141} \textit{Ibid}, s 10; cf \textit{contra} for example s 2 \textit{Land Act 1894} (WA), which power of resumption applied to the Governor in Council; see also Western Australia, \textit{Parliamentary Debates}, Legislative Council, 30 September 1902, 1801, (Public Works Bill, Second Reading) (Hon ML Moss, Minister).
defined. Where land was resumed but not required for the public work for which it was resumed, the land could be used for other public work or sold. Only later did the affected landowner become entitled to seek an option to purchase the unwanted land, but this could be refused where the minister had good cause or could be issued on terms as determined reasonable by the minister. An affected landowner could also apply to the minister to ascertain whether resumed land was required for public work as a means of seeking an option to purchase unwanted land, but this right was quickly limited by restricting the right to where the resumed land was not required for any public work, as opposed to merely the public work for which the land was resumed.

Land liable to resumption was broadened to include sub-surface land required for the construction of underground work. Mines and minerals would no longer be excluded from land taken, and the minister’s powers were extended to acquire land for electricity purposes. Common law principles might be varied by the legislature where deemed necessary. Additional provision was made for the resumption of private land where a railway was to be constructed, which was not uncommon. There were wide powers of entry for prescribed purposes.

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142 S 2 Public Works Act 1902 (WA); for a discussion of these terms, see GL Fricke QC, (ed), Compulsory Acquisition of Land in Australia (Law Book Company Ltd, 2nd ed, 1982) 234. The definition of ‘Public Work’ was further broadened by s 2 Public Works Act Amendment Act 1945 (WA) to include the procuring of materials such as timber and gravel. On the wide interpretation given to ‘public’, so that works initially benefiting only a small section of people still constituted a public work, see Worsley Timber Company Limited v Minister for Works (1936) 36 WALR 52, 57 (Northmore CJ); 60 (Draper J); 64–65 (Dwyer J).

143 S 29 Public Works Act 1902(WA). The Governor’s consent was required for a sale.

144 S 5 Public Works Act Amendment Act 1955 (WA), assented to on 13 December 1955, re-enacted a new s 29 into the principal Act. Public Works Act Amendment Act 1955 (WA), s 29(3)(b) of the principal Act. The Minister’s decision was final.

145 Public Works Act Amendment Act 1955 (WA), s 29(3)(d) of the principal Act. The Minister’s decision was final: s 29(3)(ii), but note s 29B(3) regarding the purchase price for land unwanted after 10 years, introduced by s 4 Public Works Act Amendment Act 1965 (WA), where the former owner could seek to have the price determined by the Supreme Court or the Local Court.

146 Public Works Act Amendment Act 1955 (WA), s 29A(1) of the principal Act.

147 Public Works Act Amendment Act 1955 (WA), s 29A(4) of the principal Act.


149 S 2(1) Public Works Amendment Act 1906 (WA). Note the limitations on compensation to be awarded: s 2 (2).

150 See s 4 Public Works Act Amendment Act 1953 (WA), assented to on 29 December 1953.


152 For example, the State’s powers were retrospectively amended to permit the creation of an easement in favour of the Crown without satisfying the common law requirement of a dominant tenement: see s 7 Public Works Act Amendment Act 1950 (WA), assented to on 5 December 1950, which inserted a new s 33A into the principal Act.

153 S 97(b) Public Works Act 1902 (WA). Where this power was exercised, s 97(c) permitted the State to avoid mesne encumbrances, but it did not prevent the continuance of an action in trespass against the State that already existed: see Commissioner of Railways v Davis (No 2) (1915) 18 WAR 51, 54
(b) **Resumption by acquiring authorities**

The resumption process of the PWA was expressly incorporated into many statutes governing specific acquiring authorities.\(^{157}\) The procedure for resumption and compensation entitlements was often replicated by reference back to the PWA.\(^{158}\) However, important variations sometimes occurred. For example, the publication of a notice of intention to acquire might not be required.\(^{159}\) An authority’s right to acquire land might be limited by requiring the authority to firstly seek agreement with the landowner, and by limiting the land subject to resumption.\(^{160}\) The powers of an acquiring authority might be widened over time.\(^{161}\) The *Land Act* made limited reference to the PWA but contained a separate procedure for resumption of certain land in the public interest.\(^{162}\)

(c) **Resumption procedure and the difficulty of challenging a resumption**

A gazetted notice declaring land resumption for a public purpose was now sufficient to vest the land in the State.\(^{163}\) The entering into of most transactions affecting the land

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(McMillan CJ); Rooth J in agreement, 54; Northmore J dissenting, 54–55. Special leave to appeal to the High Court was refused: see *Commissioner of Railways v Davis Brothers* (1916) 21 CLR 142, 144. Note the writer respectfully disagrees with the account of this case by Brown, *Land Acquisition: An examination*, above n 113, 89.

155 See Western Australia, *Parliamentary Debates*, Legislative Council, 15 November 1933, 1899.

156 See e.g. s 82 *Public Works Act* 1902 (WA) regarding surveys.

157 See e.g. s 20 *Country Areas Water Supply Act* 1947 (WA) as amended; ss 16, 17 *Country Towns Sewerage Act* 1948 (WA) as amended; *Forests Act* 1918 (WA) as amended; s 97(b) *Government Railways Act* 1904 (WA) as amended; *Industrial Lands Development Authority Act* 1966 (WA); s 282 *Local Government Act* 1960 (WA); s 37A *Metropolitan Region Town Planning Scheme Act* 1959 (WA) as amended; ss 24 and 25 *Metropolitan Water Supply Sewerage and Drainage Act* 1909 (WA); *State Housing Act* 1946 (WA) as amended; ss 12, 17(1) *Town Planning and Development Act*, 1928 (WA) as amended; s 46 *Water Boards Act* 1904 (WA) as amended. For a detailed discussion of the acquisition powers and compensation provisions in each of these Acts, see Fricke (ed), *Compulsory Acquisition of Land in Australia*, above n 142, 222–234. Land held by an acquiring authority was not strictly speaking crown land: see *City of Perth v Metropolitan Region Planning Authority* [1969] WAR 136, 141 (D’Arcy J). An acquiring authority might be established as a body corporate: see e.g. s 8(2) *State Housing Act* 1946 (WA) as amended. However, for the purposes of considering the State’s regard of property rights, the powers of acquiring authorities are included within this thesis.

158 See e.g. s 20 *Country Areas Water Supply Act* 1947 (WA) as amended; s 17 *Country Towns Sewerage Act* 1948 (WA) as amended; s 282 *Local Government Act* 1960 as amended; s 46 *Water Boards Act* 1904 (WA) as amended, discussed by Fricke (ed), *Compulsory Acquisition of Land in Australia*, above n 142.

159 See s 97(b) *Government Railways Act* 1904 (WA); but c.f. s 97(e); see also s 13(2) *Town Planning and Development Act* 1928 (WA) as amended, discussed by Fricke (ed), *Compulsory Acquisition of Land in Australia*, above n 142.

160 See e.g. s 37A *Metropolitan Region Town Planning Scheme Act* 1959 (WA) as amended.

161 See, for example, the wider power of municipal authorities to resume land under the *Municipality of Fremantle Act* 1925 (WA) than previously under the *Municipal Corporations Act* 1906 (WA), discussed in *CC Auto Port Pty Ltd v Minister for Works and City of Fremantle* [1965] WAR 148, 155 (Jackson J).

162 See Fricke (ed), *Compulsory Acquisition of Land in Australia*, above n 142, 225.

163 S 17 *Public Works Act* 1902 (WA); see also Western Australia, *Parliamentary Debates*, Legislative Council, 30 September 1902, 1801 (Public Works Bill, Second Reading) (Hon ML Moss, Minister).
was then prohibited without ministerial consent.\textsuperscript{164} Any estate and interest in the resumed land was converted into a compensation claim.\textsuperscript{165} Although the owner was notified of the resumption,\textsuperscript{166} this might leave a landowner unable to challenge the validity of the notice.\textsuperscript{167} A permissive power to resume land had to be exercised in strict conformity with private rights, but these could be displaced by clear language to that effect.\textsuperscript{168} There were also limitations to the doctrine of ultra vires,\textsuperscript{169} and bad faith might be difficult to establish.\textsuperscript{170} Only later was provision afforded to a landholder to make written objections to the minister within 30 days of the gazetted notice of the resumption (but not the compensation payable for that land),\textsuperscript{171} which notice of intention to resume the minister then could cancel or amend.\textsuperscript{172}

Where land was resumed, the affected landowner might have broader rights of appeal against one authority,\textsuperscript{173} while having no rights of objection against another authority.\textsuperscript{174} Where an acquiring authority had a qualified power to resume land for specified purposes which it exercised honestly, no objection could be made to the authority’s bona fides merely because the resumption might have been more appropriately effected under other statutory power.\textsuperscript{175}

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\textsuperscript{164} S 17(3) (a) \textit{Public Works Act 1902} (WA) as amended; for permitted transactions, see s 17(4).

\textsuperscript{165} \textit{Ibid}, s 18; Western Australia, \textit{Parliamentary Debates}, Legislative Council, 30 September 1902, 1800 (Public Works Bill, Second Reading) (Hon ML Moss, Minister).

\textsuperscript{166} \textit{Ibid}, s 19. This is described by Fricke (ed), \textit{Compulsory Acquisition of Land in Australia}, above n 142, 241 as the vesting of ‘an estate in fee simple in possession in the Crown’ or the acquiring authority.

\textsuperscript{167} See \textit{Walden v Minister for Works} (1915) 18 WALR 16, 19–20 (Burnside J); 23 (Rooth J); 24 (Northmore J). The point was decided by majority. Note, however, the \textit{Parliamentary Commissioner Act 1971} (WA), which might afford grounds for the review of the merits of notice to resume land, but note the limitations of s 14(3): see Brown, \textit{Land Acquisition: An examination}, above n 113, 97.

\textsuperscript{168} \textit{Jones v Shire of Perth} [1971] WAR 56, 59 (Jackson CJ).

\textsuperscript{169} The doctrine of \textit{ultra vires} did not apply so as to prevent the State from resuming more land than it required for immediate purposes so as to forestall expected increases in land values: \textit{Estates Development Company Pty Ltd v State of Western Australia} (1952) 87 CLR 126, 139–140 (Dixon CJ, Webb and Kitto JJ).

\textsuperscript{170} Even the resumption of land for multiple purposes, including a development project, might not satisfy a Court that the resumption was exercised in bad faith: see \textit{CC Auto Port Pty Limited v Minister for Works and City of Fremantle} [1965] WAR 148, 151–152, 154–155 (Jackson J); affirmed on appeal, see (1965) 113 CLR 365.


\textsuperscript{172} \textit{Ibid}, adding a new subsection 17(2)(d)(iii) into the principal Act; see also s 21 (1) of the Principal Act.

\textsuperscript{173} See s 21(2)(a) \textit{State Housing Act 1946} (WA) as amended, and discussed by Fricke (ed), \textit{Compulsory Acquisition of Land in Australia}, above n 142. For a case illustrating the interaction between the \textit{State Housing Act 1946–1948} (WA) and the \textit{Public Works Act 1902–1945} (WA) upon the resumption of land, see \textit{Estates Development Company Proprietary Limited v State of Western Australia} (1952) 87 CLR 126.

\textsuperscript{174} See s 13(2) \textit{Town Planning and Development Act 1928} (WA) as amended, discussed by Fricke (ed), \textit{Compulsory Acquisition of Land in Australia}, above n 142, 232–233. Note, however, ss 37(a)(i) and 38 of the Act. See also \textit{Town Planning and Development Act (Appeal) Regulations 1971} (WA).

\textsuperscript{175} \textit{CC Auto Port Pty Ltd v Minister for Works and Another} (1965) 113 CLR 365, 375 (Kitto, Taylor and Menzies JJ). This case concerned the resumption of land pursuant to ss 2, 3 \textit{Municipality of Fremantle Act 1925}, (WA). Note that the provisions for compensation to an affected landowner under the \textit{Public Works
5.3.3 PWA Compensation

The starting point of the PWA was:

EVERY person having any estate or interest in any land which is taken under this Act for any public work...shall, subject to this Act, be entitled to compensation…

However, no compensation was payable to the extent that the terms of the crown grant or an enabling Act otherwise provided, and no relief was afforded to a landowner affected by injurious affection but suffering no resumption of land. The Act prescribed the process for compensation, and required the plaintiff to state each matter for which compensation was claimed. An offer of compensation was to be made. Where rejected, the amount of compensation was to be determined by the Compensation Court. The Act extended the time from 12 months to two years from the date of publication of the notice of resumption for the claiming of compensation.
The PWA was not intended to substantially depart from the previous rules governing compensation,184 and followed the Land Resumption Act 1894 by setting out exhaustively the matters for determining the quantum of compensation. However, the PWA no longer restricted compensation by regard to probable and reasonable price and damages for severance or injurious affection,185 nor treated those considerations identically. Instead, the PWA limited compensation to ‘four ingredients’.186 The Court could also attach such conditions regarding the terms of payment as it considered equitable.187

(a) Value of the land

The first ingredient was the ‘probable and reasonable price’ of the land at the date of resumption.188 This was soon replaced by ‘value’.189 Both matters were expressed to exclude any increased value from the proposed public work,190 a customary statutory direction.191 Actions by a resuming authority which depressed the value of the land were also to be excluded.192

Case law on ‘value’ of land developed from the High Court’s review of the Commonwealth’s exercise of statutory powers of resumption.193 The test for value was difficult to answer and involved conjecture.194 This was not unsurprising given the sometimes wide discrepancy in valuations presented to a court.195 Various formulations

184 Parliamentary Debates, ibid. 1801. For an overview of the general principles governing compensation upon compulsory acquisition during this period, see AA Hyam, The Law Affecting the Valuation of Land in Australia (Law Book Co Ltd, 1983) ch 8.
185 See s 10 Lands Resumption Act 1894 (WA); chapter 4 of this thesis, paragraph 4.4(b).
186 Worsley Timber Company Ltd v Minister for Works (1933) 36 WALR 52, 65 (Dwyer J), referring to s 63 of the Public Works Act 1902 (WA).
187 S 66 Public Works Act 1902 (WA).
188 Ibid, s 63(a). It was held that compensation could be extended to loss of local goodwill attaching to the land, but not to loss of personal goodwill: Hayes v Minister for Works (1913) 15 WAR 106, 109–110 (McMillan A-CJ); 111 (Burnside J).
189 S 63(a) was amended by s 2 Public Works Act Amendment Act 1926 (WA) which replaced the ingredient of ‘probable and reasonable price’ of the land with the ‘value of such land’ as at the date of the notice of the taking. This was to prevent speculation in circumstances where a resumption was expected: Brown, Land Acquisition: An examination, above n 113, 15.
190 S 63(a) Public Works Act 1902 (WA); c.f. contra s 10(a) Lands Resumption Act 1894 (WA). For an example of where compensation would not include the benefit of an improvement plan issued days before the resumption of land, see Allen v Minister for Planning SCWA 2/11/77 No 11557/76 (Brinsden J).
191 GL Fricke, Compulsory Acquisition of land in Australia and particularly Victoria (Law Book Company Ltd, 1975) 103.
192 Wake v Minister for Works SCWA 18/4/78 No 10910/76 (Smith J), noted in Fricke, Compulsory Acquisition of Land in Australia, above n 142, 221.
193 Note rarely did this involve land in Western Australia. See, however, Spencer v Commonwealth (1907) 5 CLR 418.
194 Ibid, 432 (Griffith CJ).
195 See for example Commonwealth v Milledge (1953) 90 CLR 157, 160 (Dixon CJ and Kitto J).
were provided by the High Court before the value to the dispossessed owner was settled on. Land would be valued for its highest and best use. The method of valuation to be applied remained contentious.

The principle of betterment was initially included in the Public Works Bill, it being argued that it was scandalous that an owner be able to claim compensation for land resumed without deduction for improvements by the public works to land retained by the owner. However, it was also said that the betterment principle was unfair in its application to a landowner affected by resumption when adjoining owners, who also benefited from the public works, contributed nothing. The principle was accordingly abandoned.

More generous provisions were later added as a new and separate category of damage for the recovery of costs for buildings or improvements and other associated loss and damage where the resumption necessitated work by the owner arising out of consequent interference, or resulted in money being thrown away. However, rules of construction

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196 See Spencer v Commonwealth (1907) 5 CLR 418. In this case, Griffith CJ held (432) that the value would be determined by inquiring ‘what would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it at a fair price but not desirous to sell?’ However, Isaacs J expressed the test somewhat differently (441), while Barton J (435) advanced a test of ‘value to the owner’ which might not be mere saleable value; see also Commonwealth v Arklay (1952) 87 CLR 159, 170 (Dixon CJ, Williams and Kitto JJ); Commonwealth v Milledge (1953) 90 CLR 157, 163 (Dixon CJ and Kitto J); for a discussion generally see Fricke, Compulsory Acquisition of Land in Australia, above n 142, 15–16, and Hyam, above n 184, ch 2.

197 See e.g. Moreton Club v Commonwealth (1948) 77 CLR 253, 257–258 (Dixon J); see also Grace Brothers Pty Ltd v Commonwealth (1946) 72 CLR 269, 292–293 (Dixon J). The determination of value may also include an allowance for business disturbance: see Commonwealth v Milledge (1953) 90 CLR 157, 164 (Dixon CJ and Kitto J).

198 Turner v Minister for Public Instruction (1956) 95 CLR 245, 274, 284 (Williams J); see generally Fricke, Compulsory Acquisition of Land in Australia, above n 142, 324; Brown, Land Acquisition, above n 137, chapter 4.

199 See, for example, the adoption of the comparable value method of valuation over the productive capacity method in River Bank Pty Ltd v Commonwealth (1974) 48 ALJR 484, 485(Stephen J), noted in Brown, Land Acquisition, above n 137, [4.01]–[4.02]; see also the rejection of the discounted cash flow method in the case of Albany v Commonwealth (1976) 60 LGRA 287, 297, 304 (Jacobs J); Fricke, Compulsory Acquisition of Land in Australia, above n 142, 351–352.

200 See Western Australia, Parliamentary Debates, Legislative Assembly, 19 August 1902, 624 (Public Works Bill, Second Reading) (Minister for Works, Hon CH Rason).

201 Western Australia, Parliamentary Debates, Legislative Council, 30 September 1902, 1302 (Public Works Bill, Second Reading) (Hon ML Moss).

202 For an extract of relevant parts of the parliamentary debate, see also Standing Committee on Public Administration and Finance, above n 123, [3.82]. Note, however, that betterment was successfully applied to fund railways through the State Government receiving the increased value of property due to the establishment of railways; see Roberts, above n 77, 403.

203 S 15 Public Works Act Amendment Act 1955 (WA), assented to on 13 December 1955, and considered in Konowalow and Felber v Minister for Works [1961] WAR 40, 43 (Virtue J). For a further discussion of the betterment principle to the principal Act, see Fricke (ed), Compulsory Acquisition of Land in Australia, above n 142, 219–222. Note, however, the later limitation regarding improvements made after the gazetting of the notice but before the resumption to actual cost: see s 9 Public Works Act Amendment Act 1966 (WA).
prevented the recovery of all loss or damage. Compensation was also expressly denied for certain damage.

(b) Damage sustained by severance or other injurious affection

The second ingredient provided for damages for severance or other injurious affection. This initially remained the same as previously provided for. A landowner could receive compensation for damage sustained by reason of the severance of land from adjoining retained land, which severance affected the retained land. However, by later amendment, any enhancement of other land held by the claimant by public works or proposed public works was to be set off against this compensation. Compensation for injurious affection did not extend to injury arising from the execution of public works on other land where none of the claimant’s land had been resumed.

(c) Compulsory percentage

The third ingredient was a discretionary percentage award of up to 10% for resumption, where a claimant would have been better holding and developing the land than receiving compensation. Market value plus an allowance of up to 10% was the ‘norm’ and ‘basic yardstick’ for the determination of compensation. However, provision was added for the Court to determine adequate compensation where the

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204 See for example Konowalow and Felber v Minister for Works [1961] WAR 40, 42–43 (Virtue J). In this case, the ejusdem generis rule was applied to s 63 (aa)(v) so as to exclude a claim of injurious affection, in this case from recovery of loss or damage resulting from the depreciation in value of the remaining land held by the plaintiff, due to the use of the resumed land for public works. However, damage resulting from the cessation of building activities on the retained land due to the proposed use to which the resumed land would be put was held to be within s 63(aa)(v) of the Act.

205 See e.g. s 101 Public Works Act 1902 (WA) on any inconvenience or damage to land fronting a road or railway.

206 Compare s 63(b) Public Works Act 1902 (WA) with s 10(b) Lands Resumption Act 1894 (WA).

207 See s 63(b) of the Act and House v Minister for Works (1914) 17 WAR 31, 32–33 (McMillan CJ); see also Konowalow and Felber v Minister for Works [1961] WAR 40, 43–44 (Virtue J); but c.f. Worsley Timber Company Limited v Minister for Works (1933) 36 WALR 52, 61–62 (Draper J), considered in Fricke, Compulsory Acquisition of Land in Australia, above n 142, 221.

208 S 9 Public Works Act Amendment Act 1966 (WA), assented to on 4 November 1966.

209 To that extent, the WA provisions were more restrictive than the position as existed in England: Folkestone v Metropolitan Region Planning Authority [1968] WAR 164, 167 (Virtue J).

210 See Wake v Minister for Works SCWA 18/4/78 No 10910/76 (Smith J); Dale v Town of Cockburn WASC 7/3/1978 BC 780019, 24 (Smith J) also noted in Brown, Land Acquisition, above n 137, [3.35]; Fricke (ed), Compulsory Acquisition of Land in Australia, above n 142, 221, citing Lucas and Prindiville v Minister for Works (unreported decision, Jackson J) and Wake and Wende v Minister for Works (unreported decision, 1976, Smith J). The allowance could also be made where a resumption compelled a change in investment, and the inconvenience and expenses associated with that change: see D’Amico v Shire of Swan-Guildford [1969] WAR 183, 186 (Mr Comm Wilson).

provisions of the Act were inadequate to meet the ‘special circumstances of the case’. This afforded wide judicial discretion to consider the resumption from the plaintiff’s perspective, but it did not extend to the inclusion of circumstances ‘too remote’, nor did it mean that compensation was assessed on the basis of reinstatement cost.

(d) Mesne profits or interest

The fourth ingredient was mesne profits between the date of the resumption and the date of the award, or interest at 6% for the same period. More generous provisions as to interest were later provided for. Costs were a discretionary award. However, provided substantially more compensation was awarded than offered by the State, all costs would be awarded, even if the compensation awarded was a little less than the compensation claimed.

5.3.4 Compensation by other statutory provision

Where land was resumed, the compensation provisions of the PWA might be varied or not apply at all. Compensation for injurious affection might be curtailed, or a different method for its calculation might be prescribed. There might be a shorter limitation period for claiming compensation against an acquiring authority. A particularly vexed issue related to compensation following resumption for street

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213 S 9 Public Works Act Amendment Act 1966 (WA), assented to on 4 November 1966; see Western Australia, Parliamentary Debates, Legislative Assembly, 6 September 1966, 694 (Mr Ross Hutchinson, Minister) (second reading speech); s 63(c)(ii) of the Public Works Act 1902 (WA).
214 D’Amico v Shire of Swan-Guildford [1969] WAR 183, 185–186 (Mr Comm Wilson). Here, this included the alleged intention of overseas family members emigrating to Australia in the future and living on the resumed land.
215 Ibid, 185–186; see also the discussion of this case in Brown, Land Acquisition: An examination, above n 113, 256. Brown later argues (307, 309) that ‘the adoption of the principle of reinstatement is the biggest single reform needed in the rules governing the award of compensation to dispossessed owners’. Note that statutory provision for reinstatement as a basis for compensation was recognized only in s 25(i) Lands Acquisition Act 1969 (SA). On the possibility of applying reinstatement principles such as the West Midland Baptist principle into s 63 of the Public Works Act 1902 (WA), see Brown, Land Acquisition, above n 137, [3.30].
216 S 63 (d) Public Works Act 1902 (WA); see also Worsley Timber Company Limited v Minister for Works (1933) 36 WALR 52, 65 (Dwyer J). Note that s 8 of the Lands Resumption Act 1896 (WA) previously provided for compensation to be paid with 6% interest from the day of the taking.
218 S 47D(6)(b) Public Works Act 1902 (WA) as amended.
220 See s 12(2a)–(d) Town Planning and Development Act 1928 (WA) as amended, which limited the application of the Pointe Gourde principle, discussed by Fricke (ed), Compulsory Acquisition of Land in Australia, above n 142, 232.
221 See e.g. s 5(4) Municipality of Fremantle Act 1925 (WA) as amended, which prescribed that compensation ‘shall be limited to a sum representing the depreciation in value (if any) of the remaining land...’; see Lesmurdie Heights Pty Ltd v City of Fremantle [1965] WAR 132, 136–137 (Wolff CJ).
222 See s 24(2) Metropolitan Water Supply Sewerage and Drainage Act 1909 (WA).
widening.223 This was the subject of litigation224 and a law reform report.225 In relation to damages in the case of injury to land by the exercise of statutory powers, the Courts might not permit the cost of restoring the land to its former condition, where that cost would be disproportionate to the injury to the land.226

On resumption pursuant to the LA, the compensation provisions of the PWA applied only to the extent that the land was used for town or suburban allotments, which was rarely the case.227 Compensation was generally to be in the form of equivalent land or a refund of moneys paid for the resumed land plus interest.228 Land might also be resumed or selected from a pastoral lease under the LA for prescribed purposes, whereupon compensation would be determined by reference to the fair value of all lawful improvements.229 Land might be resumed for the purpose of a road without payment of compensation, although provision was later made to compensate the owner where equivalent land might be vested to the affected owner.230

5.3.5 Arbitration

Notwithstanding the establishment of the Compensation Court under the PWA, in practice over 99% of claims for compensation were settled by arbitration.231 Settlement by arbitration was offered to affected landowners on attractive terms as to costs by the Public Works Department.232 Arbitration was also a prescribed procedure for the

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223 Downing, above n 178, 362.
224 See e.g. Lesmurdie Heights Pty Ltd v City of Fremantle [1965] WAR 132.
227 S 11 Land Act 1933 (WA); Fricke (ed), Compulsory Acquisition of Land in Australia, above n 142, 225. Note also that compensation would be assessed under the Public Works Act 1902 (WA) with respect to land resumed from a conditional purchase lease or homestead farm.
228 S 11 Land Act 1933 (WA); Fricke (ed), Compulsory Acquisition of Land in Australia, above n 142, 225. Note also the ministerial discretion with respect to payment.
230 s 5 Land Act Amendment Act 1962 (WA).
231 Fricke (ed), Compulsory Acquisition of Land in Australia, above n 142, 219; but compare Downing, who described settlement only being reached ‘after a period of horse trading and hard bargaining’: above n 178, 354. Commonwealth provision also adopted arbitration for the determination of compensation claims: see s 18 Property for Public Purposes Acquisition Act 1901 (Cth); see also ss 26–27 Lands Acquisition Act 1955 (Cth); S 38(1)(b) of the Lands Resumption Act, 1906 (Cth). Where the Commonwealth did acquire private land in Western Australia, it appears this was often by negotiation, to the widespread satisfaction of landowners. See, for example, the Perth airport experience between 1970–1979, discussed in Australian Law Reform Commission, above n 11, [155].
232 Fricke (ed), Compulsory Acquisition of Land in Australia, above n 142, 219. Fricke also observes that this has resulted in there being little development of compensation principles by WA courts. See also the Arbitration Act 1895 (WA); s 49A Public Works Act 1902 (WA).
determination of compensation for land resumed from crown tenants,\textsuperscript{233} and where compensation was not agreed for land acquired for closer settlement.\textsuperscript{234} Arbitration is not necessarily conclusive evidence of the State’s regard for property rights concerning resumption. Alternative dispute resolution was attractive to the State for pecuniary reasons in the 1970s, and may emphasise settlement at the expense of the claimant’s empowerment.\textsuperscript{235} In addition, the arbitration process might restrict a party’s ability to have errors of law addressed by a court.\textsuperscript{236}

5.4 Key Area 3 - Mineral and petroleum rights

The State’s regard for a landholder’s mineral and petroleum rights requires a determination of the extent to which a landholder’s property rights as previously identified were affected by new legislation; chiefly, the Mining Act 1904\textsuperscript{237} (‘MA’) and the Petroleum Act of 1936 and 1967.\textsuperscript{238} An examination of key provisions suggests an increasing public interest perspective of property rights with respect to minerals. This included the expansion of crown grant reservations, the retrospective confiscation of petroleum rights, the extension of mining on private land, the widespread pegging of agricultural land, and the operation of State Agreements. However, provision for royalties in respect of base metals, compensation provisions in favour of the landowner with respect to mining, and most importantly the farmer’s veto concerning land under cultivation reveal a State cautious to disturb property rights. The uncompensated retrospective confiscation of petroleum rights is difficult to reconcile with a State regard for property rights, but as suggested below,\textsuperscript{239} this may not be so significant.

5.4.1 Crown reservation of minerals and ownership

New grants of freehold title were already required to reserve all minerals to the Crown.\textsuperscript{240} The definition of ‘minerals’\textsuperscript{241} left the ownership of particular substances to

\begin{footnotesize}
\begin{enumerate}
\item See s 111 \textit{Land Act 1933 (WA)} as amended, discussed in Fricke (ed), \textit{Compulsory Acquisition of Land in Australia}, above n 142, 225.
\item S 7(3) \textit{Closer Settlement Act 1927 (WA)}.
\item See \textit{Leighton Contractors Ltd v Western Australian Government Railways Commission} (1966) 115 CLR 575, 578 (Barwick CJ, McTiernan and Owen JJ).
\item Assented to on 16 January 1904 and commenced on 1 March 1904 (see s 2 of that Act).
\item The \textit{Petroleum Act 1936 (WA)} was assented to on 11 December 1936. The \textit{Petroleum Act 1967 (WA)} was assented to on 11 December 1967.
\item See para 5.4(c)(iii) of chapter 5 of this thesis.
\item S 15 \textit{Land Act 1898 (WA)}.
\end{enumerate}
\end{footnotesize}
be resolved by the application of common law principles.\textsuperscript{242} Depth limits to crown grants were substantially reduced for all lands not within the Goldfields or Mining Districts from 1907,\textsuperscript{243} and as Mining Districts expanded, so the number of crown grants with depth limits of only 40 feet increased.\textsuperscript{244} Crown reservations were expanded to include ‘all phosphatic substances’\textsuperscript{245} and in 1920 to include all mineral oil,\textsuperscript{246} but in other respects, the reservations in crown grants between 1898 and 1977 largely remained the same,\textsuperscript{247} save in relation to petroleum. The MA confirmed the crown ownership of gold, silver and other precious metals whether alienated from the Crown or not, and that all other minerals not alienated in fee simple before 1 January 1898 were crown property.\textsuperscript{248}

(a) Petroleum-Crown reservation and retrospective confiscation

In 1936, the reservation of ‘all petroleum on or below the surface’ occurred.\textsuperscript{249} The State also retrospectively confiscated petroleum,\textsuperscript{250} which extended to land grants made without any reservation of petroleum at the time of the grant.\textsuperscript{251} A statutory regime for the exploitation of petroleum was also established to the possible detriment of

\textsuperscript{241} S 3 \textit{Mining Act 1904} (WA) defines minerals as ‘all minerals other than gold, and all precious stones’. However, note the prescribed definition of ‘minerals’ in s 115 of the Act concerning mining on private land.
\textsuperscript{242} Lang and Crommelin, above n 9, [212].
\textsuperscript{243} The depth limit for all lands other than within the Goldfields and Mining Districts was reduced from 2,000 feet to 200 feet, while for lands within the Goldfields and Mining Districts, the depth remained at 40 feet: see Western Australia, \textit{Government Gazette}, 9 March 1906, 816 (operative from 1 January 1907), cited in Department of Lands, Western Australia, \textit{Crown Land Administration and Registration Practice Manual} (July, 2013) [2.3.6.1]. Depth limits remained unchanged under the \textit{Land Act 1933}, Regulation 15, Western Australia, \textit{Government Gazette}, (No 12), 2 March 1934, 293; Western Australia, \textit{Government Gazette}, 1 August 1968.
\textsuperscript{244} Department of Lands, \textit{ibid}, [2.3.6.1].
\textsuperscript{245} S 2 \textit{Land Act Amendment Act 1909} (WA), assented to on 21 December 1909.
\textsuperscript{246} S 3 \textit{Mining Act Amendment Act 1920} (WA), assented to on 31 December 1920. The Minister for Mines admitted that such a provision was frequently looked upon by the legal fraternity ‘as an act of repudiation or confiscation…without compensation to the owner.’ However, the provision was justified on the basis of being consistent with the already existing policy of mining crown minerals on private property, and difficulties experienced by the Empire during the Great War: see Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 23 October 1920, 1307–1308 (Mining Act Amendment Bill, Second Reading) (Minister for Mines, Hon J Scaddan).
\textsuperscript{247} Compare s 15 \textit{Land Act 1898} (WA) and s 15(1) \textit{Land Act 1933} (WA); see, however, minor amendments, such as s 2 \textit{Mining Act Amendment Act (No 2) 1932} (WA) assented to on 30 December 1932, which deemed tailings and other mining material to be the absolute property of the Crown.
\textsuperscript{248} S 117(1) and (2) \textit{Mining Act 1904} (WA).
\textsuperscript{249} S 10 \textit{Petroleum Act 1936} (WA). Note similar provisions were made in other states; but c.f. \textit{contra} the position in the Australian Capital Territory: see Lang and Crommelin, above n 9, [220]. This provision was replicated in 1967: s 10 \textit{Petroleum Act 1967} (WA).
\textsuperscript{250} S 9 \textit{Petroleum Act 1936} (WA); see also \textit{Midland Railway Company of Western Australia Ltd v State of Western Australia and West Australian Petroleum Pty Ltd} (1954) 57 WALR 1, 8 (Dwyer CJ). This provision was replicated in 1967: s 9 \textit{Petroleum Act 1967} (WA).
\textsuperscript{251} See \textit{Midland Railway Co of Western Australia Ltd v State of Western Australia. State of Western Australia v Midland Railway Co of Western Australia Ltd} [1956] 3 ALL ER 272, 278–279 (Lord Cohen (PC)).
landowners. The State might enter land to search for and obtain petroleum. The State might also issue prospecting licences and exploration permits for petroleum, except upon land that was or near cultivated land, or near a township. Petroleum leases could be issued over private land declared to be an oilfield. The minister might grant a licence for the construction of a petroleum pipeline upon land, which pipeline remained the property of the licence holder. The Crown claimed property in helium discovered in land the subject of a petroleum lease. The State might also resume land, and had pre-emption rights over all petroleum upon the proclamation of a national or state emergency.

5.4.2 Mining on private land

Fundamental to the principles of State mining laws was an early acceptance that minerals belonged to the community and that the Crown could authorize mining on any land. The MA aimed to extend the right to mine on private land so as to include base metals on private land alienated prior to the Land Act 1898, where the Crown had not reserved base metals. Mining, including on private land, was encouraged by miners’ subsidies. State geologists might enter private land for geological investigations.

252 S 11(1) Petroleum Act 1936 (WA); see also s 11(1)(b) Petroleum Act 1967(WA).
253 See s 42(1) Petroleum Act 1936 (WA); see also s 20(1) regarding general powers of entry by a licensee; see also s 14(1) Petroleum Act 1967 (WA).
254 See s 32(1) Petroleum Act 1936 (WA); see Part II Div II on exploration permits under the Petroleum Act 1967(WA).
255 See s 28 Petroleum Act 1936 (WA); note this limitation was later changed to ‘private land not exceeding one half acre in extent’: see s 16(1)(a) Petroleum Act 1967 (WA).
256 Ss 15(a) and 55(1) Petroleum Act 1936 (WA); regarding the 1967 Act, see Part II, Div III on production licences for petroleum.
258 S 14 Petroleum Act 1936 (WA). In the 1967 Act, s 5(1) included helium within the definition of petroleum.
259 Ibid, s 12(1). Note that in this event, the landowner would be entitled to compensation in the manner prescribed by the Public Works Act 1902 (WA); see s 12(2) Petroleum Act 1936 (WA); see also s 12(1) and (3) Petroleum Act 1967(WA).
260 S 13(1) Petroleum Act 1936 (WA); see also s 13(1) Petroleum Act 1967 (WA).
261 JS Battye, (ed), The Cyclopedia of Western Australia (Illustrated) in Two Volumes (Hussey & Gillingham Ltd, Vol. II, 1913) 294; see also chapter 4, paragraph 4.5(c) of this thesis regarding the Mining on Private Property Act 1897 (WA) and the Mining on Private Property Act 1898 (WA).
262 Western Australia, Parliamentary Debates, Legislative Assembly, 26 August 1903, 676, 693 (Mining Bill, Second Reading Speech) (Minister for Mines, Hon H Gregory). Under the Mining on Private Property Act 1898 (WA), ss 56-62 only continued to operate in relation to the Hampton Lands and Railway Syndicate; see s 4 Mining Act 1904 (WA). In relation to the common law ownership of minerals and the early shift to public interest perspectives affecting mineral rights, see chapter 4 of this thesis at paragraph 4.5.
263 Mining Development Act 1902 (WA), assented to on 11 December 1902. S 3 of the Act defined ‘mine’ to include land held under the Mining on Private Property Act 1898 (WA). The Act remained in force throughout this period.
264 S 2, Mining Act Amendment Act 1937 (WA), assented to on 18 January 1938.
WA’s mining laws were soon regarded as the most liberal when compared with other States.²⁶⁵

(a) **Private land and the limited statutory mining tenure with respect to privately owned minerals**

The mining of crown minerals on ‘private land’ was governed chiefly by Part VI of the MA.²⁶⁶ ‘Private land’ was broadly defined,²⁶⁷ but excluded mining for minerals other than gold, silver and precious metals where the land was alienated prior to 1 January 1899, unless the land was brought under the Act by the minister with approval by the Governor where there was a reasonable probability that the land contained minerals in payable quantities.²⁶⁸ If a notice was issued that the land would become subject to Part VI of the MA, the landowner could register an exclusive right to mine for specified minerals,²⁶⁹ thereby affording the landowner preferential rights.²⁷⁰ The land was then to be worked by the landowner but without liability for rent or royalties.²⁷¹ Landowners could also claim a mining lease over their own land.²⁷² The opening of private land to the mining of privately owned minerals represented a ‘radical interference…with the

²⁶⁵ Battye, (ed), above n 261, 301.
²⁶⁶ By later amendment, the relevant provisions of the *Mining Act 1904* (WA) regarding mining on private land were ss 136-185 of Part VII.
²⁶⁷ ‘Private land’ was broadly defined to include any estate of freehold or which was ‘the subject of any conditional purchase agreement’, or of any lease ‘with or without the right of acquiring the fee simple’, excluding a lease for pastoral or timber purposes: see s 115 *Mining Act 1904* (WA). This was consistent with the definition of ‘private land’ in s 3 *Mining on Private Property Act 1898* (WA).
²⁶⁸ See ss 115, and especially ss154, 156 *Mining Act 1904* (WA) regarding the bringing of exempted land under the operations of the Act. That process might be initiated by a petition from any person to bring the land under the operation of the Act. Where land alienated prior to 1 January 1889 was not brought under the Act, only ss 175–185 of the *Mining Act 1904* (WA) as amended applied to such land, while sections 136–174 applied to alienated land where the minerals were reserved to the Crown: see Western Australia, Committee of Inquiry, *Report of the Committee of Inquiry: Appointed to inquire into, and report on, the operation of the Mining Act of the State and to report on whether any and what amendments should be made to the Mining Act 1904* (1971) 67.
²⁷⁰ Note Lang and Crommelin, above n 9, [107]. The authors regard the discretion afforded to the Minister in deciding whether to respond to the petition, and the landowner’s consequent preferential mining rights, as a ‘problem’ on the basis that it operated as a disincentive to mining. Such views, however, fail to explain why the petitioning miner who had no property rights in the private land should in any way outweigh the respect to be afforded to the mineral rights of the landowner.
²⁷¹ See s 159 *Mining Act 1904* (WA), later s 180 *Mining Act 1904* as amended. Failure to work the land as required by the Act could result in the landowner’s exclusive right to mine being cancelled: see ss 163-164 *Mining Act 1904* and later ss182-184 *Mining Act 1904* as amended.
²⁷² *Ibid*, s 137.
common law rights of a landowner…Even when he owns the minerals in his land he must suffer them to be mined unless he be active in mining them himself’.

(b) Miners’ rights, mining leases and mining tenements

The MA provided for the issue of a miner’s right, which was a statutory licence granting certain privileges but did not constitute an interest in land. The holder of a miner’s right could seek a permit to enter private land. Public interest considerations were irrelevant to a consideration of a mining application. A prospecting area might be registered over private land for up to 6 months, during which period the miner could seek a mining lease. Private land might be occupied as a mining tenement, conferring a right to mine upon the miner. A mining lease conferred exclusive rights of occupancy for up to 21 years. A landowner could inspect ground workings, but otherwise had limited rights of re-entry.

Interference with vested interests was justified on grounds that it was not in the national interest that a mineral belt not be worked, and the claimed fairness of the compensation afforded to landowners. Recognition was afforded to landowners holding land alienated prior to 1899 where the owners owned all minerals other than gold, silver and precious metals, such owners receiving royalties from that mining.

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274 S 16 Mining Act 1904 (WA).
275 See Re Blencoe (1900) 2 WALR 83, 87 (Stone J) on a miner’s right under the Goldfields Act 1895 (WA); see also Adamson v Hayes (1973) 130 CLR 276, 288 (Barwick CJ).
276 On the privileges granted by a miner’s right over crown land, see s 26 Mining Act 1904 (WA). In relation to private land, see the more limited rights to mine per s 134.
277 Ibid, s 130; Bowen v Stratigraphic Explorations P/L & Kay [1971] WAR 119, 124 (Wickham J).
278 Ibid, s 124, which became s 146 of the amended Act.
280 See Mining Regulation 134 discussed in Lang and Crommelin, above n 9, [809.2]. The warden had discretion whether to register a prospecting area: see Reg 5, [811].
281 See Reg 135, discussed in ibid.
282 S 132 Mining Act 1904 (WA).
283 Ibid, s 134.
285 S 139 Mining Act 1904 (WA).
286 Ibid, s 153.
287 Western Australia, Parliamentary Debates, Legislative Assembly, 26 August 1903, 693 (Mining Bill, Second Reading Speech) (Minister for Mines). However, s 147 Mining Act 1904 (WA) provided that in assessing compensation, no allowance was to be made for gold or minerals.
288 See ss 175–185 Mining Act 1904 (WA) as amended, discussed in Report of the Committee of Inquiry, above n 268, 67. The Report states that these provisions should be regarded as ‘obsolete’.
(c) The farmer’s veto

A qualified exemption from mining tenements was afforded to prescribed land. However, by 1970, Parliament, aware of ‘farms and private properties being over-run by peggers’, introduced a new qualified exemption from mining for certain private lands, including ‘land under cultivation’, but which was now expansively defined. This controversial provision was openly acknowledged to give ‘wider protection’ to private property owners. A subsequent Committee of Inquiry reported that it was said that as a result of this amendment, ‘there is practically no private land available for mining unless the private owner consents.’

In 1971, it was recommended that ss 139–185 of the MA be replaced with a ban on prospecting or mining on private land without the written consent of the owner and occupier. The Committee saw no justification for affording precedence to the statutory rights of miners over a landowner’s common law rights. Public interest in mining would be secured by the Crown’s power of resumption of private land for mining, with compensation to the affected landowner for any privately owned minerals. This recommendation did not become law.

5.4.3 Compensation

The compensation afforded to landholders affected by mining depended upon whether the mining was of privately owned minerals, crown minerals or petroleum.

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289 S 119 Mining Act 1904 (WA) on land used as or near a yard, garden, orchard or cultivated field, or near any municipality, township or reservoir. Note this provision potentially afforded a landowner greater protection than the earlier provisions of s 6 Mining on Private Property Act 1898 (WA), since it extended the exclusion of mining to within a prescribed distance from certain private land uses. Land might also be exempted by the Governor.

290 Western Australia, Parliamentary Debates, Legislative Assembly, 21 April 1970, 3341 (Mining Act Amendment Bill, Second Reading) (Mr Bovell). Mr Bovell also referred to the expense landowners were put to in objecting to the grant of mining tenements over their lands; see also Western Australia, Parliamentary Debates, Legislative Assembly, 23 April 1970, 3412 (Mining Act Amendment Bill, Second Reading) (Mr Moir).

291 S 3 Mining Act Amendment Act 1970 (WA), assented to on 27 May 1970, which re-enacted with amendments a new s 140 of the Mining Act 1904 (WA). Note, however, the introduction of the requirement of ‘bona fide and regular use’ regarding the exempted land in s 140(1)(a) Mining Act 1904 (WA) as amended.

292 Western Australia, Parliamentary Debates, Legislative Assembly, 23 April 1970, 3412, (Mining Act Amendment Bill, Second Reading,) (Mr Moir). Mr Moir acknowledged ‘Some of the provisions relating to private land may be a little too farfetched.’ The Opposition failed in their efforts to have the Amendment Bill referred to a Select Committee.

293 Report of the Committee of Inquiry, above n 268, 68. This possibility had been acknowledged earlier by Mr Moir: see Western Australia, Parliamentary Debates, Legislative Assembly, 23 April 1970, 3412, (Mining Act Amendment Bill, Second Reading,) (Mr Moir).


295 Ibid, 72.

296 Ibid, Recommendation 15, 73.
(a) **Private land affected by mining of private minerals**

Regarding privately owned minerals affected by the grant of a statutory mining tenure as a result of land alienated prior to 1 January 1899 having been brought under the operation of the Act, 90% of all rent and royalty received by the Crown was paid to the landowner. Compensation was afforded for resumed land and privately owned minerals.

(b) **Private land affected by mining of crown minerals**

Compensation was required to be paid to the owner and occupier of private land to which the MA applied and which was affected by the mining of crown minerals. However, compensation was limited to the deprivation of and damage to the surface and improvements, severance, rights of way and consequential damages. No allowance was made for any gold or minerals. Without agreement as to compensation, the matter was to be determined by the Warden’s Court. The owner and occupier of nearby land were also entitled to compensation for any loss or damage suffered. Private land might be resumed for mining, with compensation afforded under the PWA, but a Committee of Inquiry was unaware of any exercise of this power.

Eventually, the MA was considered to favour landowners over miners. The exclusion of land under cultivation from mining, without the landholder’s consent, and the requirement to pay compensation to the landowner or have written agreement as to payment, prior to mining, enabled landholders to negotiate substantial compensation.

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297 See s 179 Mining Act 1904 (WA) as amended; Lang and Crommelin, above n 9, 1057]; see also ss 175–185 Mining Act 1904 (WA) as amended, discussed in Report of the Committee of Inquiry, above n 268, 67. The Report stated that these provisions should be regarded as ‘obsolete’.

298 S 142 Mining Act 1904 (WA) and Reg 128, discussed in Lang and Crommelin, above n 9, 1011.

299 S 168 of the Mining Act 1904 (WA) as amended; Report of the Committee of Inquiry, above n 268, 68; see also the original ss 147 and 151 Mining Act 1904 (WA) regarding compensation for further damage.

300 Ibid, s 147; s 168 Act as amended.

301 Ibid, s 148.

302 Ibid, s 150.

303 See ss 142, 143 Mining Act 1904 (WA) as amended. The original resumption provisions were contained in ss 121–123 Mining Act 1904 (WA).

304 Report of the Committee of Inquiry, above n 268, 69. The Committee further considered that the power would not be exercised lightly in any event.


306 See s 140 of the Mining Act 1904–1978 (WA).

307 See s 157 Mining Act 1904 (WA) as amended, discussed in Report of the Committee of Inquiry, above n 268,68; see also the original s 136 Mining Act 1904 (WA).
payments as a condition to their consent to mining, thereby effectively compensating the landowner for the Crown’s minerals.\textsuperscript{308}

(c) Private land affected by petroleum activities

Upon entry by the State, a landowner was afforded compensation only for ‘deprivation of the possession of the surface’.\textsuperscript{309} A licensee was liable to compensate the owner and occupier of private land for the right to occupy that land, which compensation could be determined conclusively by a warden.\textsuperscript{310} No allowance was to be made to the landowner or occupier for any gold, minerals or mineral oil known or supposed to be in the land.\textsuperscript{311} Compensation was required to be agreed or paid, before a licence was issued.\textsuperscript{312} A neighbouring landowner in the vicinity of a petroleum lease or licence was also entitled to compensation.\textsuperscript{313} Further damage to the land surface or improvements during the petroleum lease or licence term was also compensable.\textsuperscript{314}

The uncompensated expropriation of petroleum rights might demonstrate a State disregard for property rights, particularly if this is compared with the prospective approach adopted by the State regarding metallic minerals, where already acquired rights were not affected.\textsuperscript{315} Concerns included that the resumption of petroleum should be treated in the same way as a compensated resumption of land, and that grants once made should not be withdrawn.\textsuperscript{316} However, while others accepted that it was ‘in principle… a breach of contract to take away [petroleum rights],’\textsuperscript{317} petroleum was treated as a special case. Its discovery required significant financial expenditure, the engagement of experts and efficient organization,\textsuperscript{318} the determination of what particular land oil had been extracted from was problematic, and the resumption

\textsuperscript{308} Hunt, ‘The Mining Act of 1978’, above n 305, 324. Compensation was to comprise loss of possession of the surface, damage to the surface and any improvements, severance of the land to be mined from other land, for rights of way and consequential damage: see Lang and Crommelin, above n 9, [1041] noting ss 168 and 172 Mining Act 1904 (WA); see also Report of the Committee of Inquiry, above n 268, 68. The owner and occupier of adjoining land were also entitled to compensation for loss or damage: see s 171 Mining Act 1904 (WA) as amended.

\textsuperscript{309} S 11(1)(b) Petroleum Act 1936 (WA). Note, however, the limited provision for compensation under the Public Works Act 1902; see s 11(2) and (3) Petroleum Act 1936 (WA).

\textsuperscript{310} See ss 21–24 Petroleum Act 1936 (WA); note under the 1967 Act, the amount of compensation was to be determined by the nearest Local Court; see s 17(4) Petroleum Act 1967 (WA).

\textsuperscript{311} S 22 Petroleum Act 1936 (WA); see also s 24(2) Petroleum Act 1967 (WA).

\textsuperscript{312} Ibid, s 27; see also s 20(1) of the 1967 Act (WA).

\textsuperscript{313} Ibid, s 25; see also s 18 of the 1967 Act (WA).

\textsuperscript{314} Ibid, s 26; see also s 19 of the 1967 Act (WA).

\textsuperscript{315} Lang and Crommelin, above n 9, [220].

\textsuperscript{316} Western Australia, Parliamentary Debates, Legislative Council, 28 October 1936, 1419 (Hon J Nicholson).

\textsuperscript{317} Ibid, 1420 (Hon HSW Parker).

\textsuperscript{318} Ibid 1420, (Chief Secretary).
involved the taking away of a substance likely unknown to the landowner. These arguments prevailed, and compensation for the disturbance of surface rights became the focus of Parliament.

While this thesis maintains that the availability and adequacy of just compensation is essential to the State’s regard for property rights, additional arguments might be advanced against compensating a landowner whose petroleum rights were resumed. A narrow argument is that any landowner was always exposed to the risk that freehold interests in land might be adversely affected by subsequent legislative provision, by the very terms of their agreement with the State. However, that argument might also be expressed in rather different terms—of property rights being displaced by the State’s subsequent exercise of powers undiscoverable at the time of agreement with the State. A better argument is simply that the uncompensated resumption of petroleum can be explained on the basis of national defence considerations, which was consistent with the foundations of the Crown’s prerogative over royal metals on defence and circumstances of ‘prolonged national emergency’. Accordingly, the uncompensated resumption of petroleum rights is less significant, at least when compared with the State resumption of other property, such as surface rights.

### 5.4.4 State Agreements

Particularly during the 1960s and 1970s, the State entered into written agreements with miners to exploit certain minerals, which agreements Parliament then ratified.

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319 *Ibid*, 1420 (Hon HSW Parker). Having regard to the rights associated at common law with the possession of land, this might be considered to be a weak argument, since an occupier can possess items under land, without knowledge of the existence of those items: see e.g. *South Staffordshire Water Co v Sharman* [1896] 2 QB 44. However, the rights of an occupier over items beneath the land surface has more to do with the consequences of the occupier’s manifest control of that land, while issues with respect to petroleum rights arise from the common law ownership of subsoil which tends to diminish this otherwise significant point.

320 Western Australia, *Parliamentary Debates*, Legislative Council, 10 November 1936, 1660 (Hon HSW Parker).


322 See chapter 3 of this thesis, in particular *Steere v Minister for Lands* (1904) 6 WAL R 178, 183 (Parker J).

323 See Western Australia, *Parliamentary Debates*, Legislative Council, 21 October 1936, 1259 (Chief Secretary). Hon WH Kitson thought it ‘expedient that the State should have this power to safeguard its own interests in times of war.’


326 A review of the state agreements for this period reveals that iron ore was the subject of 18 state agreements, nickel was the subject of 3 state agreements, alumina was the subject of 6 state agreements, salt was the subject of 5 state agreements, mineral sands was the subject of 2 state agreements, and uranium one state agreement. Two state agreements in relation to coal were just outside of this period (1979): see Reed, above n 284, Appendix A, 153–154.
There was a lack of consistency in approach to State Agreements.\textsuperscript{328} Some agreements were given the force of law as if enacted in the ratifying act, while others were simply endorsed by a bare statutory approval.\textsuperscript{329} It was usual for a State Agreement to modify or override the MA to facilitate aspects of the agreement.\textsuperscript{330} Special provision was also made for the disposal of crown land for agricultural purposes.\textsuperscript{331}

Although there was debate on the effect of State Agreements,\textsuperscript{332} they could render a landowner or occupier vulnerable to the overriding laws.\textsuperscript{333} For example, a refinery to produce alumina at or near Worsley was established by State Agreement under the \textit{Alumina Refinery (Worsley) Agreement Act 1973}.\textsuperscript{334} The agreement included reference to the grant of a mineral lease over privately held land in respect of which mineral rights were reserved to the Crown.\textsuperscript{335} By amending Act,\textsuperscript{336} authority was granted for the joint venturer to apply to dispense with the obtaining of a landowner’s and occupier’s consent to mining on privately owned land, where that consent had been unreasonably withheld or refused.\textsuperscript{337} Other examples might include a modification of resumption procedures.\textsuperscript{338}

\textbf{5.5 Key Area 4 - Water Rights}

The State’s regard for a landholder’s water rights requires a consideration of the extent to which a landholder’s water rights considered in chapter 4 were affected by new legislation, chiefly the \textit{Rights in Water and Irrigation Act 1914} (‘RWIA’).\textsuperscript{339} This chapter focuses on the earlier part of this period, since the latter is not marked by any

\textsuperscript{327} \textit{Ibid}, Appendix A, 153–154 lists all state agreements; see also M Hunt, \textit{Mining Law in Western Australia} (Federation Press, 4\textsuperscript{th} ed, 2009) [1.5.2]; see also LA Warnick, ‘State Agreements–The Legal Effect of Statutory Endorsement’ (1982) 4 \textit{AMPLJ} 1.
\textsuperscript{329} \textit{Ibid}, 883, 886; for an example of an agreement endorsed by bare statutory approval, see \textit{Iron Ore (Wittenoom) Agreement Act 1972} (WA); for a list of state agreements by bare statutory approval, see Warnick, 886, fn 26; for a discussion of the distinction between a statutory provison which gives validity to a contract and a statutory provison which imposes a statutory obligation upon the contracting parties, see \textit{Sankey v Whittam} (1978) 21 \textit{ALR} 505, 566 (Mason J).
\textsuperscript{330} Reed, above n 284, [5.17]; see e.g. ss4, \textit{5 Iron Ore (Wittenoom) Agreement Act 1972} (WA).
\textsuperscript{331} \textit{S 2 Land Act Amendment Act (No 3) 1956}.
\textsuperscript{332} See e.g. KD MacDonald, ‘The Negotiation of State Agreements with State Governments relating to the Development of Mineral Ventures’ (1977) 1 \textit{AMPLJ} 29, cited in Hunt, \textit{Mining Law in Western Australia}, above n 327, [1.5.2].
\textsuperscript{334} Act No 67 of 1973, assented to on 28 November 1973.
\textsuperscript{335} \textit{Alumina Refinery (Worsley) Agreement Act 1973}, s 7.
\textsuperscript{336} \textit{Alumina Refinery (Worsley) Agreement Act Amendment Act 1978} (WA), assented to 15 May 1978.
\textsuperscript{337} See s 9(a) of the \textit{Alumina Refinery (Worsley) Agreement Act Amendment Act 1978} (WA); Hillman, above n 333, 297, fn 44.
\textsuperscript{338} Hunt, \textit{Mining Law in Western Australia}, above n 327, [1.5.6.8].
\textsuperscript{339} Act No 19 of 1914, assented to on 22 September 1914.
significant reform. There are conflicting assessments of this period. The period may be characterized as one in which a transition occurred from a system of water resources management based on common law rights to one based on the Crown ownership of water resources. On the other hand, WA did not engage in a nationalization of water use rights to the extent undertaken in Victoria. It might be said that when faced with a common law system ill-suited to the conditions of Western Australia, the State did not follow the direction of the Imperial legislature in seeking to overturn riparian rights, instead permitting common law rights to co-exist, albeit in a limited and fragile form. These conflicting perspectives are considered alongside State assertions of control over water, in particular natural waters and watercourse beds, and control by statutory licences, alongside the benefits brought to landowners by a statutory redefining of riparian rights, revealing the State to show a frequent disregard for established water rights, but a willingness at the same time to afford new statutory rights to landowners.

5.5.1 State assertions of control over water

This early period is characterized by the State’s various attempts to assert control over water, although consumptive demands shaped water legislation across Australia throughout this period. There was a resultant preoccupation with irrigation, water extraction and how to deal with the competing interests of consumers, rather than environmental considerations. Key measures to control water and the water rights of landholders are outlined below.

(a) State control of natural waters

In 1912, the State Labor Government, keen to promote irrigation, attempted to extinguish riparian rights. Even the Opposition conceded that ‘private ownership

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344 P Tan, ‘Legal Issues Relating to Water Use’ in C Mobbs and K Moore, Property: Rights and Responsibilities–Current Australian Thinking (Land & Water Australia, 2002) 13, 19. In the case of the Rights in Water and Irrigation Act 1914, it was the need to provide water relief to Harvey without fear of injunction for which the enactment of the Act was deemed essential: see Western Australia, Parliamentary Debates, Legislative Assembly, 3 September 1914, (1053) (Minister for Works).
345 See cl 5 Rights in Water and Irrigation Bill 1912 (WA) discussed by Bartlett, ‘The Development of Water Law in Western Australia’, above n 343, 52–54.; see also A Gardner, R Bartlett and J Gray, Water Resources Law (LexisNexis, 2009) [9.7].
must stand on one side’ when the interests of the State otherwise required. However, private perspectives of property rights, in particular concerning the uncompensated extinguishment of riparian rights, led to the Bill lapsing. The extinguishment of water rights purchased by landholders without compensation remained a feature of parliamentary debate when an amended Bill was re-tabled in 1914. This Bill was passed, incidentally in the same year that the reception of riparian rights into the laws of Western Australia was confirmed. The express purpose of the RWIA concerned rights in natural waters, the making of provision for the conservation and utilisation of water for industrial irrigation, and the management of irrigation works. All natural waters were vested in the Crown. Initially, the vesting was limited to irrigation districts and certain spring waters, but this later extended to surface water in any proclaimed areas.

There is speculation as to whether the vesting of natural waters amounts to absolute crown ownership and, consequently, the extinguishment of riparian rights in natural waters, or whether it is merely to be equated with a declaration of State sovereignty to control. Early NSW authority suggests the extinguishment of riparian rights. It has also been suggested that in 1914, it would have been reasonable to conclude as such.

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346 See Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 September 1912, 1924 (Mr George). Mr George, however, thought that the provision of compensation to affected owners was essential.
348 See Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 September 1912, 1924, 1926 (Mr George).
350 *Rights in Water and Irrigation Act 1914* (WA).
351 Ibid, s 4(1). Note the vesting of natural waters extended to ‘subterranean source of supply’: s 4.
352 Ibid, s 27: *Rights in Water and Irrigation Act Amendment Act 1939*; see also s 28(1) of the Act on the power of the Minister to constitute any defined part of the State an Irrigation District; s 29 of the Act on the power of the Minister to alter boundaries of Irrigation Districts; see also *Rights in Water and Irrigation Act Amendment Act 1949* (WA).
355 See Bartlett et al, *Water Law in Western Australia*, above n 354, [3.5], [4.5.1]–[4.5.2].
356 See *Hanson v Grassy Gully Gold Mining Co* (1900) 17 WN (NSW) 187, 187–188 (Stephen J), 199 (Cohen J), and discussed by Bartlett, ‘The Development of Water Law in Western Australia’, above n 343, [3.1.1]; but cf contra the opinions of some members of the Parliament of New South Wales, noted in A Gardner et al, *Water Resources Law*, above n 345, [9.5].
357 See Bartlett, ‘The Development of Water Law in Western Australia’, above n 343, [3.1.1].
However, control rather than ownership was eventually held to be the position in WA, although this position has been criticised.

The Crown’s right to the use and control of water in any watercourse, therefore, did not extinguish the common law rights of riparian owners. Common law rights continued to co-exist with the rights of the Crown. For example, the vesting of natural waters to the Crown did not prevent an owner or occupier from draining land or making any dam or tank, provided that the flow was not sensibly diminished. However, the Crown’s superior rights could be exercised in derogation of common law rights, revealing the ultimate prevailing of public interest perspectives. Where the Crown exercised control, injunctive relief was refused.

(b) Watercourse beds deemed crown property

From 1914, the beds of watercourses were deemed always to have been crown property, despite any contrary prior alienation, as part of the Crown’s scheme to control surface water. This did not prevent a landowner or occupier from access, a remedy in trespass, or seeking to protect his land from damage by erosion or flooding. Private

358 Rapoff v Velios [1975] WAR 27, 31 (Virtue SPJ) applying Thorpe’s Ltd v Grant Pastoral Co Pty Ltd (1955) 92 CLR 317, 330 (Fullager J). This line of reasoning is also supported by SD Clark and IA Renard, ‘The Riparian Doctrine and Australian Legislation’ (1969–1970) 7 Melb U L Rev 475, 505. Note that the conflicting case law on the effect of state declarations of rights to water referred to by Gardner et al, Water Resources Law, above n 345, [9.27] are persuasive only in Western Australia, and are decided post-1977 in any event.

359 The decision attracted criticism on the basis of being ‘unsound and inappropriate’: see PN Davis, ‘Nationalization of Water Use Rights by the Australian States’ (1975–1976) 9 U Qld LJ 1, 20; see also RB Bartlett, ‘The Development of Water Law in Western Australia’, above n 343, [9] on the failure of the State to provide a water management regime in the public interest.

360 Rapoff v Velios [1975] WAR 27, 31 (Virtue SPJ) applying Thorpe’s Ltd v Grant Pastoral Co Pty Ltd (1955) 92 CLR 317, 330 (Fullager J). This line of reasoning is supported by Clark and Renard, above n 358, 505.

361 S 8(2) Rights in Water and Irrigation Act 1914 (WA); note it is unclear whether the right to drain or build a tank or dam is dependent upon this right having already existed at common law: see Bartlett, ‘A Comparative Examination of Crown Rights and Private Rights to Water in Western Australia’, above n 354, [4.5.2.6.2A].

362 Thorpe’s Ltd v Grant Pastoral Co Pty Ltd (1955) 92 CLR 317, 330 (Fullager J), cited with approval in Rapoff v Velios [1975] WAR 27, 31 (Virtue SPJ).

363 Rapoff v Velios [1975] WAR 27, 32 (Virtue SPJ).

364 S 5 Rights in Water and Irrigation Act 1914 (WA); see also s 26. Note that this did not at the time include river banks: see Bartlett, ‘A Comparative Examination of Crown Rights and Private Rights to Water in Western Australia’, above n 354, [4.1.3], noting that WA ‘reserved the banks of boundary water courses from subsequent alienation.’

365 See Bartlett, ‘A Comparative Examination of Crown Rights and Private Rights to Water in Western Australia’, above n 354, [4.1.3].

366 S 7(a) Rights in Water and Irrigation Act 1914 (WA).

367 Ibid, s 7(b).

368 Ibid, s 12.
interest perspectives included that the resumption of rivers and lakes should be treated in the same way as a resumption for public works.\(^\text{369}\)

(c) **Control by statutory license**

The displacing of common law rights was further secured by a prohibition on the unlicensed operation of an artesian well\(^\text{370}\) and the prohibition on the obstruction of a watercourse on alienated land.\(^\text{371}\) Water rights enjoyed prior to the RWIA might be accommodated by the grant of a special licence to divert and use water for a term of 10 years.\(^\text{372}\) Otherwise, provision was made for the grant of ordinary licenses to any owner or occupier of land for water use.\(^\text{373}\) Where crown grants purported to afford water rights to a grantee in conflict with the provisions of the RWIA, the provisions of the RWIA prevailed.\(^\text{374}\) The vulnerability of property rights to legislation is, therefore, most evident, and it is no surprise that the control of the private use of water through licenses was regarded as ‘extremely controversial’ in 1914.\(^\text{375}\)

No action existed against the State for any infringement of a right to the flow of water or of flooding.\(^\text{376}\) Limited compensation provisions might be available if claimed within 12 months of the injury,\(^\text{377}\) unless the water supply was not previously enjoyed or was temporary,\(^\text{378}\) or where the taking of water was in exercise of a minister’s powers.\(^\text{379}\) On any of these measures, the State’s treatment of water rights was, therefore, one of significant disregard. In the case of a conflict between upstream and downstream landholders, the State generally left the matter to be resolved by private civil, if the upstream landholder could not be persuaded despite the declaration, licensing

\(^{369}\) See Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 September 1912, 1924,1926 (Mr George).

\(^{370}\) SS 18–22 *Rights in Water and Irrigation Act 1914* (WA); on non-artesian wells, see the controls imposed under the *Rights in Water and Irrigation Act Amendment Act 1962* (WA) and widened under the *Rights in Water and Irrigation Act Amendment Act 1971* (WA); see also the licensing requirements under s 57EA–G *Metropolitan Water Supply, Sewage, and Drainage Act Amendment Act 1972* (WA).

\(^{371}\) S 9(1) *Rights in Water and Irrigation Act 1914* (WA).

\(^{372}\) Ibid, s 15(1) *Rights in Water and Irrigation Act 1914* (WA); see also the *Rights in Water and Irrigation Act Amendment Act 1945* (WA).

\(^{373}\) S 16 *Rights in Water and Irrigation Act 1914* (WA); on licenses and s 16, see also *Rights in Water and Irrigation Act Amendment Act 1978* (WA).

\(^{374}\) For example, the right of a landowner to draw water from wells within a proclaimed area would be subject to the conditions attaching to a statutory licence for that purpose; see *Garbin v Wild* [1965] WAR 72, 75 (Wolff CJ and Jackson J). In this case, s 15(2) *Land Act 1933–1963* was held to be subject to s 18 of the *Rights in Water and Irrigation Act 1914–1945*.

\(^{375}\) See the later comments of Mr Tonkin, Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 October 1984, 2067.

\(^{376}\) S 35 *Rights in Water and Irrigation Act 1914* (WA).

\(^{377}\) Ibid, s 36.

\(^{378}\) Ibid, s 38(b).

\(^{379}\) Ibid, s 38(c).
provisions\textsuperscript{380} and right of entry of the Crown to prevent interference with a watercourse.\textsuperscript{381}

(d) Other measures to limit riparian rights

The presumption of the grant of water rights by length of use was annulled.\textsuperscript{382} The setback requirements considered in the preceding chapter were doubled in 1961 to a 100-link setback,\textsuperscript{383} and then changed to a 20-metre setback,\textsuperscript{384} thereby further limiting riparian rights.

5.5.2 The benefit of statutory riparian rights

Although State measures to control water frequently evidenced a disregard for property rights, the displacement of riparian rights was not without new advantages being afforded to landowners. Aside from the obvious point that many landowners benefited from the supply of public water, the redefining of ordinary riparian rights by way of a statutory right for domestic, ordinary use and irrigation\textsuperscript{385} brought new benefits. The transition to a right enjoyed by statutory provision represented a significant shift from the common law in favour of the landowner or occupier in the case of irrigation,\textsuperscript{386} and afforded priority of riparian rights over the State’s appropriation of water for irrigation.\textsuperscript{387} Limited rights of diversion from watercourses vested in the Crown were also permitted for domestic, ordinary use, and for the watering of stock where there was public access.\textsuperscript{388}

5.5.3 Rates, public works, and the importance of statutory construction

State water controls also had adverse consequences for landowners. Firstly, it came at a financial cost. Rates were levied against the landowner, normally based on land value

\textsuperscript{380} See Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 9 October 1984, 2068. This position was regarded as unsatisfactory and resulted in amendments to the Act in 1984, which are considered in chapter 6 of this thesis.

\textsuperscript{381} S 11(1) \textit{Rights in Water and Irrigation Act 1914} (WA).

\textsuperscript{382} \textit{Ibid}, s 8.

\textsuperscript{383} Bartlett, ‘The Development of Water Law in Western Australia’, above n 343, [2.2.2], citing WA Government Gazette, 4/8/65. 4.97095959596 links equals 1 metre. 100 links equals 20.1168402337 metres: see http://www.convertunits.com/from/links/to/metre.

\textsuperscript{384} \textit{Ibid}, citing the 1965 Regulations.

\textsuperscript{385} Ss 14, 17 \textit{Rights in Water and Irrigation Act 1914} (WA).

\textsuperscript{386} Bartlett, ‘A Comparative Examination of Crown Water Rights and Private Rights to Water in Western Australia’, above n 354, [4.5.2.4].

\textsuperscript{387} S 39 \textit{Rights in Water and Irrigation Act 1914} (WA).

\textsuperscript{388} \textit{Ibid}, s 6.
rather than the quantity of water supplied.\(^{389}\) Towards the end of this period, the supply of water also impacted on the costs associated with the subdivision of land.\(^{390}\) Secondly, State controls also equated to an increase in public works. From 1909, various boards were established for the control of water supply.\(^{391}\) Further legislation was enacted as consumptive demands increased.\(^{392}\) Landowners were faced with the exercise of statutory powers of entry to land and the right to take land\(^{393}\) and divert water.\(^{394}\)

Case law reveals the importance of statutory construction in determining the extent to which a landowner might be afforded relief when disturbed by public works. Public works might cause disturbance to a landowner, but without any liability in nuisance or provision for compensation to the affected landowner\(^{395}\) where permitted by statute, but not where the invasion of common law rights was not sanctioned by statute.\(^{396}\) A landowner might be awarded damages for the unlawful entry upon land for the construction of a drain outside of a board’s powers,\(^{397}\) but would not be afforded compensation where the loss suffered was outside of the relevant provisions for compensation.\(^{398}\) Establishing a cause of action against the State\(^{399}\) in nuisance\(^{400}\) or for

\(^{389}\) Part VI, Water Boards Act 1904 (WA); Part VIII, Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA); Parts VI and VII, Country Towns Sewerage Act 1948 (WA); see also s 22 Land Drainage Act 1900 (WA); but c.f. contra Goldfields Water Supply Act 1902 (WA); Country Areas Water Supply Act 1947 (WA). For a discussion of charging for water during this period, see Bartlett, ‘The Development of Water Law in Western Australia’, above n 343, [4.5]. A landowner might incur liability for rates despite the water supplied not being fit for domestic use. Minister of Water Supply, Sewage and Drainage v Stone, Minister of Water Supply, Sewage and Drainage v Green (1915) 17 WAR 117, 121 (McMillan CJ).

\(^{390}\) See Act No 183 (1976) and Act No 109 (1979), discussed in Bartlett, ‘The Development of Water Law in Western Australia’, above n 343, [4.5].

\(^{391}\) See Water Boards Act 1904 (WA); Metropolitan Water Supply, Sewage, and Drainage Act 1909 (WA); see also the Land Drainage Act 1900 (WA); Goldfields Water Supply Act 1902 (WA); for a discussion of key features of this legislation, see Bartlett, ‘The Development of Water Law in Western Australia’, above n 343, [4.4]. On the attempt by a road board not appointed for the supply of water to recover charges for the supply of water by implied contract, see Wiluna Road Board v Jackson (1932) 34 WALR 130.

\(^{392}\) See e.g. Country Areas Water Supply Act 1947 (WA).

\(^{393}\) See e.g. s 46(1) and (2) Water Boards Act 1904 (WA); see also ss 24 and 25 Metropolitan Water Supply, Sewage and Drainage Act 1909 (WA); see also ss 19 and 20, Country Areas Water Supply Act 1947 (WA); see also ss 16 and 17, Country Towns Sewerage Act 1948 (WA). The taking of land under all of these Acts was subject to the provisions of the Public Works Act 1902 (WA). In relation to s 18(2) of the Land Drainage Act 1900, land could be resumed for drainage works without compensation, but not exceeding the extent permitted by the proviso reserving to the Crown the right to resume land for certain public purposes.

\(^{394}\) S 46(5) Water Boards Act 1904 (WA).

\(^{395}\) Crown v White (1910) 12 WAR 31, 38–39 (McMillan ACJ); 40–41 (Burnside J).

\(^{396}\) Gaunt v West Guildford Road Board (1921) 23 WAR 36, 37–38 (McMillan CJ); 39–40 (Northmore J, Bursnide J in agreement).

\(^{397}\) Ash v Harvey Drainage Board (1911) 13 WAR 133, 138 (McMillan J); 140 (Rooth J).

\(^{398}\) See Dermer v Minister for Water Supply, Sewerage & Drainage (1941) 43 WALR 85, 89 (Dwyer J) regarding loss of subsoil moisture following works pursuant to the Land Drainage Act 1925 (WA).

\(^{399}\) Kennedy v Minister for Works [1970] WAR 102.

\(^{400}\) See e.g. Greenwood v Minister for Water Supply, Sewerage and Drainage (1922) 24 WAR 99.
interference with riparian rights might also fail as a result of evidentiary problems. Landowners might also face interference from the exercise of similar statutory powers relating to water and public health$^{401}$ or local government$^{402}$.

5.6 Key Area 5 - Planning laws

At the beginning of this period, a landowner might subdivide land simply by registration of a surveyor’s plan.$^{403}$ There was no code with respect to town planning.$^{404}$ A statutory planning code restricting subdivision rights was enacted in 1928.$^{405}$ Restrictions on tenure under the LA also became a planning instrument. The State continued its policy of encouraging closer settlements, but now also made extensive provisions for group and soldier settlements. By 1970, conflicting planning laws and property rights was the subject of comment by the legal profession.$^{406}$ These developments are considered below, revealing a State prepared to discriminate positively in favour of certain interest groups to the possible detriment of others. Furthermore, while the enactment of a planning code is revealed not to be without some regard for property rights, particularly as regards compensation provisions for injurious affection, the weight of new statutory provisions adversely affecting property rights reveals the State’s new willingness to substantially limit property.

5.6.1 Restrictions on land tenure

Planning through crown grant reservations was considered in the preceding chapter. Land tenure continued to be shaped by planning considerations. Restrictions were imposed on the transfer or subletting of leases$^{407}$ and the transfer of pastoral leases$^{408}$.

$^{401}$ See e.g. Geneff v Shire of Perth [1967] WAR 124 regarding s 62(g) Health Act 1911 (WA) and the discharge of storm water; G Stephenson and JA Hepburn, ‘Plan for the Metropolitan Region Perth and Fremantle Western Australia: a report prepared for the Government of Western Australia’ (Government Printing Office, 1955) 247, described public health restrictions in WA as being ‘quite numerous’ and that ‘it is an accepted fact that these restrictions are necessary in a civilised community and the making of them does not attract compensation.’

$^{402}$ See e.g. Knezovic v Shire of Swan–Guildford [1967] WAR 129 regarding ss 300 and 301(a) Local Government Act 1960 (WA) and the entry upon and discharge of water on private land.

$^{403}$ S Willey, ‘Western Australia’ in G McLeod, Planning Law in Australia (Law Book Co, 1997) [1.4010]. Note, however, that the writer disagrees with assertions that there was no formal planning control at this time.

$^{404}$ Lesmurdie Heights Pty Ltd v City of Fremantle [1965] WAR 132, 133 (Wolff CJ).

$^{405}$ Town Planning and Development Act, 1928 (WA).

$^{406}$ See e.g. TR Morling, ‘Conflict of Planning Legislation with Private Interests: Litigation Likely To Arise From The Implementation Of A Planning Scheme’ (1969–1970) 9 UWA L Rev 303. Morling focuses on land use control in terms of the continuance of existing uses and the enlargement and extension of existing buildings, claims for injurious affection, and the imposition of conditions on development consents.

$^{407}$ S 4 Land Act Amendment Act 1956 (WA); s 3 Land Act Amendment Act 1960 (WA).
Area limitations with respect to agricultural and grazing land were also provided for. However, reservations and restrictions in crown grants did not remain a key feature of planning laws. Instead, new planning laws require consideration.

5.6.2 Closer land and group settlements, and soldier settlements

A continuing feature of planning policy was provision for closer settlement. In 1909, a new Act enacted for ‘better provision for the purchase of lands suitable for immediate settlement’ included provision for the surrender of private land at a price fixed by the Land Purchase Board as the fair value, or any lesser price, and also for land resumption. Statutory provision was also made for crown land to be issued to a statutory board or approved group settlement without any prior offering to the public. Grant of fee simple holdings to group settlers could be made with provision for the payment of expenditure on land holdings and support to the settlers through advances to support the establishment of productive land. The Closer Settlement Act 1927 also provided that land deemed to be unutilized for upwards of two years could be taken, thereby converting the owner’s estate to a claim for compensation. However, land would not be taken where the owner made substantial progress in putting the land to the required reasonable use within one year of receipt of the prescribed

408 See s 4 Land Act Amendment Act 1969 (WA); Executors of the Will of Frances The Dowager Lady Vestey (Deceased) and Ors v Minister for Lands [1972] WAR 98. In this case, the refusal of a Minister to consent to the transfer of shares in a company holding a pastoral lease was held to be a valid exercise of ministerial discretion.
409 S 3 Land Act Amendment Act 1962 (WA); see also s 4 Land Act Amendment Act 1963 (WA).
410 Originally, this was carried out pursuant to the Agricultural Lands Purchase Act 1896 (WA); see further paragraph 4.7(c) of chapter 4 of this thesis.
411 Agricultural Lands Purchase Act 1909 (WA), assented to on 21 December 1909. Note this Act was itself later replaced by the Land Act 1933: see s 4(1) and First Schedule.
412 S 8 Agricultural Lands Purchase Act 1909 (WA). The Act also determined the conditions upon which land would be sold: s 12; see also s 2(1) Agricultural Lands Purchase Act Amendment Act 1917 (WA) on the power to reduce the selling price.
413 S 17 Agricultural Lands Purchase Act 1909 (WA).
414 See s 3 Land Act Amendment Act 1922 (WA) regarding town and suburban land under the Workers’ Home Act 1911, and s 7 regarding disposal to a group settlement; see also s 3 Land Act Amendment Act 1930 (WA), assented to on 22 December 1930 regarding the disposal of land to the Housing Trust.
415 See s 2(1) Group Settlement Act 1925 (WA), assented to on 31 December 1925. For an examination of group settlement life in Western Australia, see JP Gabbedy, Group Settlement Part 2—Its people, Their Life and Times—An Inside View (University of Western Australia Press, 1988).
416 S 3(1) Group Settlement Act 1925 (WA); see also s 2 Group Settlement Act Amendment Act 1925.
417 See Group Settlers Advances Act 1925 (WA), assented to on 12 September 1925.
418 Act No 21 of 1927, assented to on 22 December 1927. This Act remained operative with amendments, until its repeal by Act No 57 of 1985.
419 S 3(3) of the Act provided for land to be deemed unutilized ‘if the land, having regard to its economic value, is not put to reasonable use and its retention by the owner is a hindrance to closer settlement and cannot be justified.’
420 S 7 Closer Settlement Act 1927 (WA).
421 Ibid, s 7(2)(b). On the procedure for compensation, see s 7(3) and Part III, Public Works Act 1902 (WA).
notice, and thereafter continued to do so, or the owner agreed to subdivide the land and offered the approved subdivision for sale, in accordance with approved terms. A portion of land to be taken might also be retained for the subsistence of the owner and his family. 

An additional feature of planning policy was provision for the settlement of discharged soldiers from the Great War, despite the rehabilitation of soldiers now being a Commonwealth responsibility. A discharged soldier was afforded favourable terms, including generous terms of purchase and assistance. Their settlement might extend not only over crown land, but also over resumed pastoral leases, or private land purchased by the minister for that purpose. The soldier settlement schemes included provision for the resumption of land, although it appears that no private land was resumed for these soldier settlements. Repurchased estates were to be acquired by the Lands Department. Provision was afforded for compensation.

A war service land settlement scheme complementary to Commonwealth legislation operated following World War II. This scheme included provision for settlement by

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422 Ss 6(1), 6(3)(a), 7(1) and 8(a) Closer Settlement Act 1927 (WA).
423 Ibid, ss 6 (1), 6(3)(b), 6(4), 7(1) and 8(b).
424 Ibid, s 11.
425 See Discharged Soldiers Settlement Act 1918 (WA) assented to on 3 January, 1919; Agricultural Lands Purchase Act Amendment Act 1918 (WA). Note also the earlier regulations approved under s 28 Land Act Amendment Act 1917 (WA). The declaration of the policy is set out in The West Australian, 27 March 1917, 2. Similar schemes were effected across the States: for a review of each state scheme, see Year Book Australia, 1925 [1301.0]. Although Australia’s treatment of discharged soldiers was described as the ‘most liberal in the world’ (see M Barnard, A History of Australia (Angus & Robertson Publishers, Reprint, 1976) 522), Western Australia’s initial policy of giving land and money without restriction was regarded by South Australia as ‘suicidal’: see Roberts, above n 77, 410.
426 Barnard, above n 425, 298. Note that the Commonwealth contributed financially to the state soldier settlement schemes.
427 See s 9 Land Act Amendment Act 1946 (WA).
428 See e.g. s 11(1) Discharged Soldiers Settlement Act 1919 (WA) regarding reduced price, and s 14 regarding other assistance; see also s 9 Land Act Amendment Act 1946 (WA); see also the Agricultural Lands Purchase Act Amendment Act 1918 (WA). Note, however, that the property rights of discharged soldiers were restricted: see S 25(1) Discharged Soldiers Settlement Act 1919 (WA).
429 Ss 8, 18(1), 19(1) Discharged Soldiers Settlement Act 1919 (WA).
430 Ibid, s 10(4).
431 Ibid, s 22.
432 See Western Australia, Parliamentary Debates, Legislative Assembly, 17 August 1933, 431 (Minister for Lands, MF Troy).
433 See Agricultural Lands Purchase Act. By s 12(1) of the Agricultural Lands Purchase Act Amendment Act 1918 (WA), the Governor might compulsorily acquire land held in fee simple for the purpose of settling discharged soldiers. For a discussion of the scheme in Western Australia and extracts from relevant statutory provisions, see JP Gabbedy, Group Settlement. Part 1: Its Origins, Politics and Administration (University of Western Australia Press, 1988) 33. On the matter of resumption and repayment, see Roberts, above n 77, 410–411, who notes Queensland being the most liberal.
434 See s 19 Agricultural Lands Purchase Act Amendment Act 1918 (WA).
435 See War Service Land Settlement Agreement Act 1945 (WA), assented to on 15 January 1946. Again, the Commonwealth contributed financially to this scheme: see s 4(4). The Commonwealth had considered
the compulsory acquisition or purchase of private land,\textsuperscript{436} despite parliamentary opposition to the resumption of large areas of productive private land.\textsuperscript{437} Settlers were afforded the opportunity to acquire the fee simple of land, following occupation pursuant to a perpetual lease.\textsuperscript{438} The terms of land grants were similar to the terms upon which crown grants of land were made.\textsuperscript{439} However, positive discrimination was extended in favour of servicemen by the imposition of restrictions upon the alienation of crown land to other persons.\textsuperscript{440}

Legislative provision aimed at achieving closer settlements was not new, nor was the settlement of soldiers.\textsuperscript{441} The general failure of the group settlements\textsuperscript{442} has parallels with the failings of early colonial land settlement policy. However, these policies reveal a distinct shift in the approach of the State towards property rights, particularly during the first half of this period. As regards closer settlement, the State had previously relied upon the voluntary surrender and purchase of land,\textsuperscript{443} but now powers of resumption were contemplated by the legislature as a means to implement planning policy. The soldier settlements also revealed a new willingness of the State to discriminate positively in favour of vesting property rights in a particular interest group.

\textsuperscript{436} See 'Urges WA Land for Soldier Settlement Plan' \textit{The Canberra Times}, 1 September 1945.

\textsuperscript{437} See s 6(2) \textit{War Service Land Settlement Agreement Act 1951} (WA), assented to on 2 January 1952; s 7 \textit{War Service Land Settlement Scheme Act 1954} (WA), assented to on 5 November 1954. For a detailed review of the history of this scheme, see Gilbert v State of Western Australia (1961) 107 CLR 494.

\textsuperscript{438} Barnard, above n 425, 299.

\textsuperscript{439} See e.g. the early nineteenth century practice of land grants to the military for services to the Crown, in Roberts, above n 77, 409–410; see also chapter 4 of this thesis, paragraph 4.3 (b).


\textsuperscript{441} See \textit{Agricultural Lands Purchase Act 1896}; see chapter 4 of this thesis, paragraph 4.7 (c).
5.6.3 Town planning schemes, policies, uniform general by-laws, rights of appeal, compensation and betterment

In 1927, the Metropolitan Town Planning Commission was established to inquire into matters of town planning. 444 A small professional association of town planners supported the enactment of a statutory planning code, 445 and the following year, the Town Planning and Development Act 1928 (WA) (‘TPDA’) was enacted. 446 Other significant developments included provision in 1959 for the establishment of the Metropolitan Region Planning Authority 447 for the formulation and implementation of the Metropolitan Region Scheme. 448 The Authority zealously pursued a public interest perspective of planning, called for a ‘quiet revolution’, and condemned cultural attitudes it perceived to threaten its public interest agenda. 449 Perth was soon regarded as ‘a living laboratory of experiment …in planning techniques and in administrative organization…’. 450 The Supreme Court recognized that with certain planning laws, the legislature ‘contemplated a scope of activity involving interference with proprietary rights…some interference…[was] to be borne without compensation.’ 451 However, it may be misleading to simply see these developments in planning as the State’s regard for the public interest over private property rights. The ownership of a plot of land was still considered a ‘fundamental right of all Western Australians,’ 452 and it was largely to the credit of the Authority that progress was made in resolving problems such as the lack of supply of private land in the 1960s. 453 Ultimately, the State’s regard or disregard

444 Ss 4, 10 Metropolitan Town Planning Commission Act 1927 (WA). For a summary of the history of planning in the metropolitan region of Perth, see White et al, above n 60, ch 1.

445 The Town Planning and Development Bill was the result of the efforts of a small movement, the Town Planning Association of WA, established on 31 March 1916. For a discussion of the Town Planning and Development Bill, Second Reading, see Western Australia, Parliamentary Debates, Legislative Council, 11 December 1929, 2309–2313 (Chief Secretary, JM Drew).

446 Act No 39 of 1928, assented to on 28 December 1928. The notes in the margin to the Act reveal that the Act was shaped by Act No 52 of 1926 of New Zealand.

447 S 7(1) Metropolitan Region Town Planning Scheme Act 1959 (WA). For a background to the establishment of the Metropolitan Region Planning Authority and Region Scheme, see A Fogg, ‘Significant Aspects of Land Use Planning Law and Organisation in Western Australia’ (1972) 10(4) UWA Law Rev 309, 310–313; see the recommendations of Stephenson and Hepburn, above n 401, 248–251.

448 S 25 Metropolitan Region Town Planning Scheme Act 1959 (WA). Note s 6 defined Metropolitan Region Scheme as a ‘town planning scheme for the metropolitan region…’


450 Ibid.

451 Pearse v City of South Perth [1968] WAR 130, 133–134 (D’Arcy J), referring to ss 11 and 12, Town Planning and Development Act 1928 (WA).

452 White et al, above n 60, 63.

453 White et al, above n 60, 63. The authors note the implementation of the recommendations of the McCarrey Committee helped stabilize land prices.
for private property rights is best considered through a closer examination of relevant statutory planning laws.

(a) Town planning schemes

The TPDA provided for the making of town planning schemes by a local authority\(^{454}\) with respect to any land, to improve and develop land ‘to the best possible advantage.’\(^{455}\) A town planning scheme was ‘…a program of action with respect to any land…which has the general object of improving and developing such land…to the best possible advantage.’\(^{456}\) A scheme might be proposed by any landowner for adoption by the local authority,\(^{457}\) or the landowner might request a variation to an existing scheme.\(^{458}\) However, all schemes required ministerial approval\(^{459}\) before having force and effect.\(^{460}\) A local authority could recommend the review of a town planning scheme, which might result in the making of a new town planning scheme.\(^{461}\) Pending the approval of a proposed town planning scheme, an interim development order\(^{462}\) could be made by the minister regulating, restricting or prohibiting any land development within the metropolitan region\(^{463}\) or outside that region.\(^{464}\) Limited regard for a landowner is evident in the inability of a scheme to prevent the continuance of a lawful

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\(^{454}\) S 7(1) Town Planning and Development Act 1928 (WA). The development and subdivision of land was controlled by local authorities, the Town Planning Board and the Minister between 1928 and 1956: see White et al, above n 60, 63.

\(^{455}\) Ibid, s 6(1). Note the wide power conferred by s 6 was not limited by the content of the First Schedule: see Pearse v City of South Perth [1968] WAR 130, 134–135 (D’Arcy J). For a definition of a town planning scheme, see Costa v Shire of Swan (1983) WAR 22, 24 (Olney J), cited in McLeod, above n 403.


\(^{457}\) Note s 2 Town Planning and Development Amendment Act 1975 (WA).

\(^{458}\) S 7(2) Town Planning and Development Act 1928 (WA).

\(^{459}\) Ibid, s 7(3). On the meaning ‘as if enacted by this Act’ in s 7(3), see obiter comments in Pearse v City of South Perth [1968] WAR 130, 136 (D’Arcy J).

\(^{460}\) S 2 Town Planning and Development Act Amendment Act 1972 (WA).

\(^{461}\) Interim development orders were used to prevent undesirable developments within the metropolitan region: see White, et al, above n 60, 63.

\(^{462}\) The Perth Metropolitan Region was defined by a new Third Schedule to the Act, added by s 5 Town Planning and Development Act Amendment Act 1955 (WA); see also s 10 Town Planning and Development Act Amendment Act 1961 (WA).

\(^{463}\) s 3 Town Planning and Development Act Amendment Act 1962 (WA).
land use. Nor could a local authority refuse an application based on matters extraneous to its duty.

Although the wide use of planning schemes was frustrated for many years, the significant potential impact of a town planning scheme upon a landowner’s bundle of rights is evident in the general objects of town planning schemes for which regulations might be made. While underutilized, planning schemes tended to be negative rather than positive. Local authorities had a discretionary power in relation to proposed buildings. Other significant matters included subdivision controls without compensation, the extinction or variation of easements or restrictive covenants, the acquiring of land, and the demolition of buildings. It was also contemplated that the replanning and reconstruction of a scheme area might require the pooling and then redivision of lands of several owners between such owners, the adjustment of boundaries, the exchange of land or cancellation of existing subdivisions, the adjustment of rights between landowners, and the vesting of lands. A responsible authority might either purchase or take land for the purpose of a town planning scheme, whereupon the Authority would have all the powers of an owner in respect of such land.

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465 S 3 Town Planning and Development Act Amendment Act 1955 (WA); see also s 3 Town Planning and Development Act Amendment Act 1962 (WA). Note that allowance for a continuing non-conforming use was limited to that actual use and did not extend to other uses within the general class of uses to which the non-conforming use belonged: see Shire of Perth v O’Keefe (1964) 110 CLR 529, 536 (Kitto J); 537 (Kitto J, Owen J agreeing). The decision in O’Keefe v Shire of Perth [1964] WAR 89 was reversed; see also Williams v Town of Claremont (1976) WAR 125, 128 (Wickham J).

466 R v Shire of Perth; Ex Dewar & Burridge [1968] WAR 149, 152 (Wollf CJ); 155, 156 (per Jackson J).

467 Stephenson and Hepburn, above n 401, 244. The stated reasons for this were uncertainty surrounding legal requirements with respect to compensation, and the lack of an overall regional scheme.


469 Stephenson and Hepburn, above n 401, 244. However, the authors suggest that planning schemes were not as widely used as might have been expected because of the absence of an overall region scheme and uncertainty surrounding the compensation provisions of the Act. In NSW, the planning schemes were recognized as making ‘considerable inroads into the rights of property owners to deal with their properties as they see fit…’: North Sydney MC v Allen Commercial Constructions Pty Ltd (1969) 71 SR (NSW) 1, 6, cited in DJ & KH Gifford, Town Planning Law and Practice (LBC, 1987) [2-1]. J Baalman ‘The Estate in Fee Simple’ (1960) 34 ALJ 3, 6 regarded planning schemes as prescribing ‘a form of use inconsistent with private ownership’.

470 See Town Planning and Development Act 1928 (WA), First Schedule, para 7; Pearse v City of South Perth [1968] WAR 130.

471 See Stephenson and Hepburn, above n 401, 247. The authors note that ‘control of subdivision of land has been exercised for many years now without any compensation being payable in respect of refusal or permission, or imposition of conditions upon approval.’

472 Town Planning and Development Act 1928 (WA), First Schedule, matters 5, 15, 18 and 20.


474 Ibid, s 13. The taking of land was subject to the Public Works Act 1902 (WA), but note the later exclusion of s 17(2) to (7) and s 17A of that Act: see s 3 Town Planning and Development Act Amendment Act 1957 (WA).

475 S 14 Town Planning and Development Act 1928 (WA).
landowner might be granted an easement over land taken or acquired, the easement could later be revoked without compensation.\textsuperscript{476} Notwithstanding these negative observations, it may also be that planning laws assisted both authorities and private property developers in achieving a better return from their investment by centralizing statutory approvals and coordinating the subdivision process.\textsuperscript{477}

The \textit{Metropolitan Region Town Planning Scheme} operated from 1963 and provided the basis for planning, development and subdivision within the metropolitan region.\textsuperscript{478} The planning of the metropolitan region was formulated upon a study which had suggested that new legislation be adopted for the Metropolitan Region, based on the \textit{Town Planning and Development Act}.\textsuperscript{479} The study revealed a strong public interest perspective with respect to land use.\textsuperscript{480} Under the new resulting Act, powers were afforded to the Authority for the purchase of land,\textsuperscript{481} the determination of value,\textsuperscript{482} and the payment of compensation.\textsuperscript{483} The Authority also formulated influential policy.\textsuperscript{484} Land might be resumed despite not being required for the stated public work where otherwise required or likely required for the Scheme.\textsuperscript{485} A local authority within the metropolitan region might lawfully take into account nonconformity with a proposed town planning scheme as a basis for the refusal of a development application.\textsuperscript{486}

\textbf{(b) Planning by-laws}

Planning by-laws might be made by a local authority.\textsuperscript{487} By-laws might affect landowners, such as through the purchasing or reserving of land for prescribed purposes, provision for the restriction of land according to classification or zoning, and

\begin{itemize}
\item \textsuperscript{476} \textit{Ibid}, s 15.
\item \textsuperscript{477} See Stephenson and Hepburn, above n 401, 252.
\item \textsuperscript{478} See http://www.planning.wa.gov.au/1222.asp.
\item \textsuperscript{479} See Stephenson and Hepburn, above n 401, 248.
\item \textsuperscript{480} See Stephenson and Hepburn, above n 401, ch 11. See for example, the comment that ‘the potential payment of compensation has been one of the major obstacles to constructive planning’: 245.
\item \textsuperscript{481} S 37(3) \textit{Metropolitan Region Town Planning Scheme Act} 1959 (WA); see also s 37A inserted by s 3 \textit{Metropolitan Region Town Planning Scheme Amendment Act} (No 2) 1965 (WA).
\item \textsuperscript{482} See s 3 \textit{Metropolitan Region Town Planning Scheme Amendment Act} 1968 (WA).
\item \textsuperscript{483} S 37(4) \textit{Metropolitan Region Town Planning Scheme Act} 1959 (WA). Payment of compensation or the cost of purchasing land was to be done in accordance with s 7A(12)(b) of the \textit{Town Planning and Development Act} 1928 (WA) as amended.
\item \textsuperscript{484} See e.g. Metropolitan Region Planning Authority, \textit{Corridor Plan for Perth} (February 1971).
\item \textsuperscript{485} S 37(7)(a) \textit{Metropolitan Region Town Planning Scheme Act} 1959 (WA).
\item \textsuperscript{486} \textit{Begley and Begley and Begley Investments Pty Ltd v Shire of Wanneroo} [1970] WAR 91, 95 (Virtue, SPJ).
\item \textsuperscript{487} S 30(1) \textit{Town Planning and Development Act} 1928 (WA). Note that s 30 provided for these by-laws to be made by the Governor. Note the later requirement that a local authority town planning scheme be consistent with the Metropolitan Region Scheme: see s 34 \textit{Metropolitan Region Town Planning Scheme Act} 1959 (WA).
\end{itemize}
prescribing requirements for subdivisions.\textsuperscript{488} By-laws affecting land use were also made under a range of other statutes.\textsuperscript{489} A landowner might be faced with a refusal in relation to a particular development based upon a by-law wrongfully applied by a local authority.\textsuperscript{490} Prosecution might be brought for the contravention of a zoning by-law, although an injunction could be refused.\textsuperscript{491}

An approved plan of subdivision was now required for the subdivision or sale of land as lots.\textsuperscript{492} Two approvals were required; an approval to subdivide and an approval of the plan of subdivision.\textsuperscript{493} Approval was later added for any long lease.\textsuperscript{494} The transfer or mortgage of land of less than half an acre and not comprising the whole of one or more lots required the approval of the board before it could be registered.\textsuperscript{495} Soon, no land could be sold except as a lot or lots.\textsuperscript{496} The consequences of statutory non-compliance might be illegality.\textsuperscript{497} Conditions might be imposed on a plan of subdivision,\textsuperscript{498} which might include the vesting of some land in the Crown, without compensation.\textsuperscript{499} The involuntary and uncompensated transfer of land as a condition of that approval was initially held to be \textit{ultra vires} due to an absence of express legislative intent.\textsuperscript{500}

However, the High Court recognized that the TPDA had expropriated without compensation the proprietary right to subdivide without statutory approval, such that the

\textsuperscript{488} *Town Planning and Development Act* 1928 (WA), Second Schedule; see also s 3 *Town Planning and Development Act Amendment Act* 1944 (WA); s 10 *Town Planning and Development Act Amendment Act* 1953 (WA).

\textsuperscript{489} See e.g. powers contained under s 180 *Municipal Corporations Act* 1906 (WA) as amended; s 250 *Local Government Act* 1960 (WA). Note by-laws made under the *Local Government Act* could not be inconsistent with or repugnant with that Act or other laws: see s 190(7)(e) of that Act; *Hotel Esplanade Pty Ltd and Plowman v City of Perth* [1964] WAR 51, 54 (Hale J).

\textsuperscript{490} See *Wanneroo Shire Council v BP Australia Limited* [1965] WAR 179, 185 (Hale J).

\textsuperscript{491} See *Attorney-General v Barrington* [1963] WAR 78. For a discussion of this case, see AS Fogg, \textit{Australian Town Planning Law Uniformity and Change} (University of Queensland Press, 1974) 282–284.

\textsuperscript{492} s 20(1) *Town Planning and Development Act* 1928 (WA); but note the saving provisions later introduced by s 3 *Town Planning and Development Act Amendment Act* 1976 (WA).

\textsuperscript{493} See s 20(1)(a) and (2) *Town Planning and Development Act* 1928 (WA); *Lombardo v Development Underwriting (WA) Pty Ltd* [1971] WAR 188, 198 (Wickham J).

\textsuperscript{494} S 2 *Town Planning and Development Amendment Act* 1943 (WA) limited the provision to any lease exceeding 21 years, but this was later amended to 10 years; see s 5 *Town Planning and Development Act Amendment Act* 1956 (WA), and included any option term: s 2 *Town Planning and Development Act Amendment Act* 1969 (WA). See also *NLS Pty Ltd v Hughes* (1966) 120 CLR 583.

\textsuperscript{495} S 21(1) *Town Planning and Development Act* 1928 (WA).

\textsuperscript{496} s 5 *Town Planning and Development Act Amendment Act* 1956 (WA).

\textsuperscript{497} See e.g. *Glass v Ralph* [1966] WAR 91; *Reid Murray Developments (WA) Pty Ltd v Hall* [1967] WAR 3, 7–8 (Virtue J); but cf *contra McKenna v Perecich* [1973] WAR 57.

\textsuperscript{498} S 23(3) *Town Planning and Development Act* 1928 (WA).

\textsuperscript{499} See e.g. s 20A inserted by s 4 *Town Planning and Development Act Amendment Act* 1962 (WA); see also s 4 *Town Planning and Development Act Amendment Act* 1965 (WA). It was common practice from 1955 for the Planning Commission to require that land equal to 10% of the gross subdivisonal area in a residential subdivision vest in the Crown free of cost: The Government of Western Australia, Department of Planning, \textit{Planning makes it happen: phase two–Review of the Planning and Development Act 2005} (September 2013) [4], citing the Stephenson Hepburn Report, 1955.

\textsuperscript{500} *Robinson v Lloyd* [1962] WAR 168, 174 (Virtue J).
board could invoke such a condition. A subdivider of land also became liable to pay a proportion of the cost of any road which the subdivided land fronted. Litigation from the implementation of planning schemes was not uncommon, especially where there was a change of land use, developers wished to carry out building works, conditions were imposed on development consents, or a landowner was injuriously affected by a scheme.

From 1976, the board could prepare a statement of planning policy which could make provision for any matter the subject of a town planning scheme. Relevant considerations in the preparation of this statement included social and economic factors, conservation, characteristics of land, and characteristics and disposition of land use, the environment, and the development requirements of public authorities.

(c) Appeal

The extent to which planning laws affected a landowner might depend upon the availability of rights of appeal. A local authority could appeal to the Supreme Court against a minister’s decision to enforce a town planning scheme upon an authority. However, a landowner could only appeal to the minister regarding a board decision. An appeal to the minister enabled a reconsideration of a local authority’s decision, but it was not for the determination of questions of law and the minister’s decision was final. A right of appeal to the Court of Petty Sessions existed in relation to by-laws. Scheme provisions proved to be difficult for a landowner to challenge. Only

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502 See s 28A inserted by s 6 Town Planning and Development Act Amendment Act 1961 (WA).
503 See e.g. Shire of Perth v O’Keefe (1964) 110 CLR 529.
504 See e.g. Morling, above n 406.
505 S 3 Town Planning and Development Act Amendment Act 1976 (WA).
506 Ibid, s 3. Once approved, local authorities were required to have due regard to the statement in preparing or amending a town planning scheme: s 4.
507 S 4 Town Planning and Development Act Amendment Act 1947 (WA).
509 Note, however, that a Minister had no dispensing power regarding by-laws: see R v Smith and Harley; Ex parte Crugnale [1970] WAR 43, 45 (Wollf CJ); 52 (Negus J).
511 S 25(1) Town Planning and Development Act 1928 (WA). The decision of the Minister was also final in relation to an appeal concerning an interim development order: see s 3 Town Planning and Development Act Amendment Act 1955 (WA).
512 See s 222(3)(d) Local Government Act 1960 (WA). See also s 243 Local Government Act 1960; R v Smith and Harley; Ex parte Crugnale [1970] WAR 43. Note also the power of a referee. A referee had the power to override a local authority: see e.g. s 411(3) of the Local Government Act 1960; Crugnale v Town of Albany [1970] WAR 54, 59 (Neville J).
in 1970 were limited rights of alternative appeal made to a Town Planning Court in specified cases\textsuperscript{514} for a final decision.\textsuperscript{515} However, the Governor could, on application by the minister, stop an appeal to a court by declaring that the appeal would be contrary to town planning principles and would tend to prejudice the public interest.\textsuperscript{516} Such limitations were removed upon the establishment of the Town Planning Appeal Tribunal.\textsuperscript{517} The Tribunal was required to ‘act according to equity and good conscience…without regard to technicalities or legal forms.’\textsuperscript{518} The Tribunal could invite the minister to provide a submission where an appeal might have a substantial effect on the future planning of the relevant area.\textsuperscript{519} It appears most decisions regarding private rights were decided by the minister.\textsuperscript{520} The minister may have tended to favour private interests over the public.\textsuperscript{521}

(d) Compensation for injurious affection

The State’s regard of property rights in planning laws also requires a consideration of compensation for injurious affection. In their influential report, Stephenson and Hepburn noted that they had not been able to trace any cases of compensation having been claimed or paid for injurious affection,\textsuperscript{522} so comment is focused upon statutory provisions. Any person whose land was injuriously affected by the making of a town planning scheme prior to the date of approval of a scheme was entitled to compensation,\textsuperscript{523} unless the relevant scheme provisions were already law or would have been enforceable without compensation, had they been contained in a local authority’s by-laws.\textsuperscript{524} Similar provisions applied regarding injurious affection from uniform

\textsuperscript{513} See e.g. \textit{Pearse v City of South Perth} [1968] WAR 130, 135 (D’Arcy J); commentary on this case in Fogg, \textit{Australian Town Planning Law Uniformity and Change}, above n 491, 642.
\textsuperscript{514} S 3 \textit{Town Planning and Development Act Amendment Act 1970} (WA). See s 37(a) inserted into the principal Act regarding the permitted grounds of appeal, such as the exercise of a discretionary power by a responsible authority under a town planning scheme.
\textsuperscript{515} \textit{Ibid.} See s 52 inserted into the principal Act.
\textsuperscript{516} \textit{Ibid.} See s 42(4) inserted into the principal Act. The writer could find only one instance of this occurrence. The matter related to building a road on Garden Island: see Hiller above n 468, 151.
\textsuperscript{517} See ss 7, 9, 10, \textit{Town Planning and Development Amendment Act 1976} (WA).
\textsuperscript{518} \textit{Ibid.} s 17.
\textsuperscript{519} \textit{Ibid.} s 1.
\textsuperscript{520} Fogg, ‘Significant Aspects of Land Use Planning Law and Organisation in Western Australia’, above n 448, 324. Fogg notes (328) that in 1972, nearly 400 appeals had gone to the Minister while only one had gone to the Town Planning Court.
\textsuperscript{521} Hiller, above n 468, 151–152.
\textsuperscript{522} Stephenson and Hepburn, above n 401, 247.
\textsuperscript{523} S 11(1) \textit{Town Planning and Development Act 1928} (WA).
\textsuperscript{524} S 12(1) \textit{Town Planning and Development Act 1928} (WA). For an illustration of the operation of s 12(1) to deny compensation to a landowner whose land was injuriously affected by a town planning scheme, see \textit{Hunt v Swan Road Board} (1937) 40 WALR 107, 111–112 (Dwyer J).
general by-laws. Limited provision for compensation for injurious affection from the operation of an interim development order existed, which included Crown power to purchase the affected land in lieu of compensation. A scheme might afford the State an option to acquire affected land where compensation for injurious affection was claimed. That acquisition was to be by agreed price, or by land value determined by arbitration, agreement, or the Supreme Court.

Restrictions applied to the grounds of injurious affection. Certain provisions prescribed for buildings or takings of land for parks or open spaces could not be a basis for claiming injurious affection. Further restrictions were later added, which prevented any claim arising for injurious affection regarding the classification or zoning of land, except where the scheme restricted land development to a public purpose or prohibited the continuation of a non-conforming use. Provision was later made to limit the compensation payable for injurious affection where no land had been acquired or purchased, and for deductions. Where a scheme reserved land for a public purpose, no compensation for injurious affection was payable until the land was later sold or a development application was refused or conditionally approved upon conditions unacceptable to the owner. Where a landowner sold land, the sale must have been at a lesser sale price than the landowner might reasonably have anticipated receiving had there been no reservation under the planning scheme of the land, the owner prior to selling the land must have provided written notice to the responsible authority of the landowner’s intention to sell the land, and the landowner in good faith must have sold

525 Ibid, s 30(3).
526 See s 7A(12)(a) and (b), inserted by s 3 Town Planning and Development Act Amendment Act 1955 (WA); see also s 7B(12) inserted by s 3 Town Planning and Development Act Amendment Act 1962 (WA). Note the purchase price for the land was not to include any value arising from betterment.
527 S 36(2)(a) Metropolitan Region Town Planning Scheme Act 1959 (WA).
528 Ibid, ss 36(2a) and (2b). For a history of this provision, see Mount Lawley Pty Ltd v Western Australian Planning Commission (2004) 29 WAR 273, 321–326. The significance of the election to acquire process over compulsory acquisition for the affected landowner is considered in chapter 6, paragraph 6 (d)(iii).
529 S 12(2) Town Planning and Development Act 1928 (WA). For an illustration of the operation of s 12(2) denying a claim for injurious affection, see Williams v Town of Claremont [1976] WAR 125, 127–128 (Wickham J).
530 S 4 Town Planning and Development Act Amendment Act 1956 (WA), which inserted a new s 12(2a). Note also the further restrictions on compensation imposed by s 12(2a)(d) regarding e.g. the requirement that the non-conforming use be carried on a lot or lots.
531 See 36(6)(a) inserted into the Metropolitan Region Town Planning Scheme Act by s 2 Metropolitan Region Town Planning Scheme Act Amendment Act 1963 (WA). The compensation was not to exceed the difference between the value of the land affected by the scheme and the value of the land not so affected.
532 S 6 Metropolitan Region Town Planning Scheme Act Amendment Act 1966 (WA).
533 See s 5 Metropolitan Region Town Planning Scheme Act Amendment Act 1962 (WA). For the making of a claim for injurious affection by an owner intending to sell, see s 5 Metropolitan Region Town Planning Scheme Act Amendment Act 1966 (WA); Reg 3, Metropolitan Region (Valuation Board) Regulations 1967 (WA).
the land and taken reasonable steps to obtain a fair and reasonable price.\textsuperscript{534} Compensation for injurious affection was only payable once in relation to a reservation on land,\textsuperscript{535} and limits applied to the quantum payable compensation.\textsuperscript{536} Arbitration was prescribed for the determination of injurious affection and the compensation payable.\textsuperscript{537}

(e) Betterment

Where land increased in value as a result of a responsible authority spending money in the making and carrying out of a town planning scheme, a landowner was liable to pay to the responsible authority half of that increase, where claimed by the responsible authority within the prescribed period.\textsuperscript{538} Similar provisions applied regarding betterment arising from uniform general by-laws.\textsuperscript{539} As regards a claim for compensation arising under the Metropolitan Region Scheme, any betterment was to be disregarded.\textsuperscript{540} Arbitration was again prescribed for the determination of the entitlement of a responsible authority to recover betterment.\textsuperscript{541} The collection of a betterment charge to cover the costs of development or servicing by local authorities was supported by a royal commission, which also noted how ineffective in practice the betterment provisions were when it came to assessment and collection.\textsuperscript{542} Stephenson and Hepburn recommended a land tax in lieu of betterment.\textsuperscript{543}

5.7 Key Area 6 - Environmental laws

The State’s regard for property rights requires a consideration of the extent to which environmental laws affected a landowner’s property rights. A distinct difference in focus has been suggested between environmental laws enacted prior to and post the

\textsuperscript{534} s 36(4) Metropolitan Region Town Planning Scheme Act 1959 (WA) as amended.  
\textsuperscript{535} See s 3 Metropolitan Region Town Planning Scheme Act Amendment Act 1968 (WA). Nb a further claim could be made in the case of alteration of an existing reservation or the imposition of a further reservation.  
\textsuperscript{536} See s 36 (6)(a) Metropolitan Region Town Planning Scheme Act 1959 (WA) as amended.  
\textsuperscript{537} S 11(4) Town Planning and Development Act 1928 (WA).  
\textsuperscript{538} Ibid, s 11(2).  
\textsuperscript{539} Ibid, s 30(3).  
\textsuperscript{541} S 11(2) Town Planning and Development Act 1928 (WA).  
\textsuperscript{543} Stephenson and Hepburn, above n 401, 247.
mid-1960s.\textsuperscript{544} Prior to the mid-1960s, most environmental laws were for resource allocation and development.\textsuperscript{545} These laws may be characterized as ‘micro-environmental’,\textsuperscript{546} were often revised provisions from the first period,\textsuperscript{547} and typically dealt with local issues of health, public welfare and pollution.\textsuperscript{548} Even after the 1960s, environmental laws continued to reflect the agricultural foundations of the State’s economy.\textsuperscript{549} In contrast, from the 1970s, most new environmental laws were enacted for conservation, environmental protection and planning, and may be characterized as ‘macro-economic’\textsuperscript{550} and conservation and sustainable-development orientated,\textsuperscript{551} although legislation may exhibit the characteristics of both categories.\textsuperscript{552}

It might be thought that the micro/macro classification of environmental laws is suggestive of a shift in the State’s regard for property rights from the mid-1960s. This would accord with some of the literature reviewed in chapter 3 concerned with the impact of environmental planning laws upon private property rights.\textsuperscript{553} That there are few reported state cases on environmental law in its modern sense during this period\textsuperscript{554} makes this position difficult to assess. An examination of environmental laws indicates that categorization according to a micro focus pre mid-1960s and a macro focus post-1960s is difficult to maintain, at least when applied to a consideration of the impact of environmental laws upon property rights. Micro-environmental laws might impact negatively upon property rights. For example, powers under the \textit{Local Government Act}\textsuperscript{544}

\textsuperscript{544} D Grinlinton, ‘The ‘Environmental Era’ and the Emergence of ‘Environmental Law in Australia–A Survey of Environmental Legislation and Litigation 1967-1987’ (1990) 7 \textit{EPLJ} 74, 79 and Figure 3.
\textsuperscript{545} \textit{Ibid}, 79 and figure 3.
\textsuperscript{546} This classification is developed by J Cole, ‘Environmental law and Politics’ (1981) 4 \textit{UNSWLJ} 55, 65, and applied by Grinlinton, above n 544. Although Cole applies early New South Wales legislation, this classification would equally apply to early legislation in Western Australia as related to mining and water, and soil, including the \textit{Soil Conservation Act 1945} (WA) considered herein.
\textsuperscript{547} Grinlinton, above n 544, 79. Although Grinlinton provides the \textit{Mining Act 1978} (WA) by way of example, the same can be said for the \textit{Mining Act 1904} (WA) when compared with its predecessor, the \textit{Mining on Private Property Act 1898} (WA).
\textsuperscript{548} This point is made by Grinlinton, above n 544, 77; see also Bartlett, ‘The Development of Water Law in Western Australia’ above n 344, [4.4], [6] noting the \textit{Metropolitan Water Supply Sewerage and Drainage Act 1909} (WA).
\textsuperscript{549} Grinlinton, above n 544, 94, fn 48. See e.g. ss 48–50 \textit{Agriculture and Related Resources Protection Act 1976}, No 42 of 1976 and assented to on 9 June 1976, which required an occupier to declare and control certain plants and animals.
\textsuperscript{550} Cole, above n 546, 65. Cole again applies New South Wales legislation to this classification. The extensive provisions of the \textit{Environmental Protection Act 1971} (WA) considered at paragraph 5.7.3 indicate that this Act was ‘macro-economic’.
\textsuperscript{551} Grinlinton, above n 544, 79.
\textsuperscript{552} \textit{Ibid}, 77, 79. For a useful table of the legislative history of Australian environmental, planning and management laws during this period, see P Ryan, \textit{Urban Development Law and Policy} (The Law Book Co Ltd, 1987) 32–53.
\textsuperscript{553} See chapter 3 of this thesis, paragraphs 3.2, 3.4.5.
\textsuperscript{554} See Grinlinton, above n 544, Appendix A.
enabled the public interest to be considered regarding buildings.\textsuperscript{555} Compensation was sometimes provided for,\textsuperscript{556} but agreement on compensation was not a precondition to the exercise of statutory power.\textsuperscript{557} An affected landowner might sometimes succeed in setting aside an order,\textsuperscript{558} but not always.\textsuperscript{559} The \textit{Health Act 1911}\textsuperscript{560} could result in the carrying out of works on private land by a local authority,\textsuperscript{561} or an order that works be carried out.\textsuperscript{562} Soil conservation and wildlife protection legislation enacted pre-1960 also reveals macro environmental concerns, with a significant disregard for property rights in the case of the vesting of native flora and fauna to the Crown, while the provisions of the \textit{Environmental Protection Act 1971} (‘EPA’) were applied in consultation with affected landowners. It is probably more correct to regard environmental laws across this period evidencing an increasing desire by the State to regulate property rights in the public interest, but with the voluntary cooperation of landowners wherever possible.

The State’s regard for property rights is considered more closely below with respect to soil and wildlife conservation, and environmental and heritage protection. Although this discussion is focussed on the State’s regard for property rights, landowners might also themselves face threats to their property rights from environmental degradation. No Australian jurisdiction made any provision for the bringing of class actions which might assist landowners in joining together in the protection of their property rights from environmental degradation.\textsuperscript{563}

5.7.1 Soil conservation

Concern over land degradation from the 1930s led to the establishment of the Soil Conservation Service, which under ministerial direction administered a new statutory

\textsuperscript{555} See, for example, s 401(1) \textit{Local Government Act 1960-1976} (WA).
\textsuperscript{556} See ss 63, 108(2) and 212 \textit{Health Act 1911} (WA); see also Div 19, \textit{Local Government Act 1960–1976} (WA).
\textsuperscript{558} For an example of an order under the \textit{Health Act 1911} (WA) and found to be ultra vires, see \textit{Haddy v Howard} (1920) 22 WALR 48; see also \textit{Fermanis Investments Pty Ltd v City of Perth} [1978] WAR 32 on the setting aside of a notice under the \textit{Local Government Act 1960–1976} (WA).
\textsuperscript{559} \textit{McKenzie v Higgs} (1918) 21 WAR 10.
\textsuperscript{560} Act No 34 of 1911 assented to on 16 February 1911.
\textsuperscript{561} See ss 53 (sewers), 62 (drains and sewers), 108 (right of way) \textit{Health Act 1911} (WA). Note the provision for compensation to an effected owner in ss 63 and 108(2).
\textsuperscript{562} See e.g. s 106 (paving of private streets) \textit{Health Act 1911} (WA); \textit{McKenzie v Higgs} (1918) 21 WAR 10.
\textsuperscript{563} See Bates, above n 12, 205–206.
regime for soil conservation.\textsuperscript{564} The Act contemplated State assistance to landholders whose land suffered erosion.\textsuperscript{565} While Parliament was keen to secure public confidence that the legislation did not ‘harass or insist unnecessarily’, the Government made it clear that if soil erosion became a menace, public interests must prevail over individual interests.\textsuperscript{566} Agreements might be entered into with landholders to effect soil conservation or erosion mitigation works,\textsuperscript{567} whether or not their lands had been notified as an area of erosion hazard.\textsuperscript{568} However, landholders might also face the regulation of their lands by proclamation as part of a soil conservation district,\textsuperscript{569} or by issue of a soil conservation order restricting land usage.\textsuperscript{570} Rights of appeal were provided.\textsuperscript{571} Land might be taken for the purposes of a soil conservation reserve.\textsuperscript{572} Land within a soil conservation reserve was then under the minister’s control and management.\textsuperscript{573}

5.7.2 Wildlife conservation

The preservation of fauna was not a new phenomenon.\textsuperscript{574} Provisions for the conservation and protection of native flora were made as early as 1912\textsuperscript{575} but their scope did not initially extend to private land,\textsuperscript{576} and were later only extended to apply to a person upon private land who destroyed any native plant, where that person was not the owner of the private land and had no lawful authority to be on that land.\textsuperscript{577} The State retained the power to declare any locality a reserve for native game.\textsuperscript{578} Private land could only be declared to be a protected area under the control of the Acclimatisation Committee with the owner’s consent.\textsuperscript{579} Agreement with landowners for the use of land

\textsuperscript{564} S 6 Soil Conservation Act 1945 (WA), assented to on 9 January 1946. On the objects of the Soil Conservation Service, see s 13 of the Act. Other States also had similar provision, and reference is made to such legislation in the margin of the Act; on Commonwealth funding of soil conservation projects, see State Grants (Soil Conservation) Act 1974 (Cth).
\textsuperscript{565} See s 14(g) Soil Conservation Act 1945 (WA); see also s 35(1).
\textsuperscript{566} Western Australia, Parliamentary Debates, Legislative Assembly, 6 September 1945, 555, 561 (Soil Conservation Bill, Second Reading) (Premier, FJS Wise).
\textsuperscript{567} S 33(1) Soil Conservation Act 1945 (WA). Financial assistance might be provided to landholders: see s 6 Soil Conservation Act Amendment Act 1955 (WA).
\textsuperscript{568} S 35(1) Soil Conservation Act 1945 (WA); see also s 31(1).
\textsuperscript{569} Ibid, s 22.
\textsuperscript{570} S 8 Soil Conservation Act Amendment Act 1955 (WA), assented to on 24 November 1955.
\textsuperscript{571} See S 31(6) S 31(1) Soil Conservation Act 1945 (WA); see also s 8 Soil Conservation Act Amendment Act 1955 (WA).
\textsuperscript{572} S 26(3) of the Soil Conservation Act 1945 (WA), provided for a taking in accordance with the Public Works Act 1902 (WA) as amended.
\textsuperscript{573} S 27 Soil Conservation Act 1945 (WA).
\textsuperscript{574} See chapter 4 of this thesis; Game Act 1874; Game Act 1892.
\textsuperscript{575} Native Flora Protection Act 1912 (WA), assented to on 24 December 1912.
\textsuperscript{576} Ibid, s 3; see also s 6 Native Flora Protection Act 1935 (WA), assented to on 7 January 1936.
\textsuperscript{577} S 4 Native Flora Protection Act 1938 (WA), assented to on 31 January 1939.
\textsuperscript{578} S 6(b) Game Act 1912 (WA), assented to on 24 December 1912.
\textsuperscript{579} Ibid, s 8.
as a sanctuary for the conservation and protection of fauna continued with a new Act in 1950.\textsuperscript{580} However, several significant changes now occurred. Firstly, the new Act marked a policy shift from the protection of fauna for later hunting, to preservation.\textsuperscript{581} Secondly, property in all fauna,\textsuperscript{582} and later all flora,\textsuperscript{583} until lawfully taken or otherwise declared, was vested in the Crown and without compensation.\textsuperscript{584} Certain dealings in fauna required a licence.\textsuperscript{585} Flora on private land might be taken by the owner or occupier, or a person taking with their consent,\textsuperscript{586} but no flora could be sold without a licence.\textsuperscript{587} A landowner could not take rare flora without ministerial consent, although compensation was to be afforded where consent was refused and the landholder would suffer loss of use or enjoyment of the land as a result of that refusal.\textsuperscript{588} Overall, the new regime represented an uncompensated derogation from a landowner’s bundle of rights,\textsuperscript{589} particularly given that the Crown might also profit.\textsuperscript{590} Interestingly, when native vegetation controls were introduced in 1976,\textsuperscript{591} the Premier’s declaration that compensation provision would not expose the State ‘to any unmanageable compensation risks’ was proven correct, despite the concerns of Treasury.\textsuperscript{592}

Commonwealth-funded programs for the State acquisition of lands for nature conservation were established.\textsuperscript{593} Private land might be vested for national parks,\textsuperscript{594} but

\begin{footnotesize}
\textsuperscript{581} See Western Australia, Parliamentary Debates, Legislative Assembly, 19 September 1950, 796 (Fauna Protection Bill, Second Reading)
\textsuperscript{582} S 22 Fauna Protection Act 1950 (WA), assented to on 5 January 1951. Curiously, no mention of this is made in the Second Reading of the Bill by the Assembly, on 19 September 1950.
\textsuperscript{583} S 12 Wildlife Conservation Act Amendment Act 1976 (WA).
\textsuperscript{584} Note such a vesting would constitute a declaration of sovereignty, however, and not a declaration of full beneficial or absolute ownership: see \textit{Yanner v Eaton} (1999) 201 CLR 351, 369–370 (Gleeson CJ, Gaudron, Kirby and Hayne JJ) on s 7(1) Fauna Conservation Act 1974 (Qld).
\textsuperscript{585} S 17(2) Fauna Protection Act 1950 (WA).
\textsuperscript{586} s 15 Wildlife Conservation Act Amendment Act 1976 (WA).
\textsuperscript{587} \textit{Ibid}, s 15.
\textsuperscript{588} \textit{Ibid}, s 17.
\textsuperscript{589} At common law, a landowner had a qualified right of property in wild animals while on that owner’s land, which became absolute if the fauna was killed; see T Bonyhady (ed), \textit{Environmental Protection and Legal Change} (Federation Press, 1992) 61, citing \textit{Walden v Hensler} (1987) 163 CLR 561, 565–566 (Brennan J); see also \textit{Yanner v Eaton} (1999) 201 CLR 351, 368 (Gleeson CJ, Gaudron, Kirby & Hanyne JJ).
\textsuperscript{590} s18 Fauna Protection Act 1950 (WA) afforded the Crown royalties in relation to skins.
\textsuperscript{592} Bonyhady, above n 589, ch 3, 67, citing WAPD, Vol 213, 1976, 2875.
\textsuperscript{593} S 4 (1)(a) State Grants (Nature Conservation) Act 1974 (Cth); see also Environment (Financial Assistance) Act 1977 (Cth).
\textsuperscript{594} S 18(1) National Parks Authority Act 1976 (WA).
\end{footnotesize}
agreements for the control or management of such land required owner and occupier consents.595

5.7.3 Environmental protection

The EPA596 was the most significant environmental law affecting property rights, although other acts also might affect property rights.597 The Government wished to protect the environment, while maintaining ‘a proper balance between industry and the requirements of the people.’598 The EPA established the Environmental Protection Authority,599 of which the most important function was the formulation of environmental protection policies,600 which once approved by the Governor carried the force of law.601 The EPA provided for limited602 rights of appeal to aggrieved persons.603 However, the Authority’s powers to make proposals on State policy regarding environmental matters604 did not result in any EPA environmental protection policies.605 No provision for environmental impact assessment was provided for, with the Authority applying procedural arrangements on an ad hoc basis regarding individual projects.606

595 Ibid, s 21(2).
597 See e.g. the Clean Air Act 1964 (WA). Note the Commonwealth legislature was also active towards the end of this period in the enactment of Commonwealth environmental laws. However, the direct impact of Commonwealth laws upon a landowner’s property rights in Western Australia is considered minimal when compared with the range of state laws considered herein.
598 Western Australia, Parliamentary Debates, Legislative Council, 17 November 1971, (Environmental Protection Bill, Second Reading) (JT Tonkin, Premier).
599 S 9(1) Environmental Protection Act 1971 (WA). On the duty, functions, and powers of the Authority, see ss 28–30 of the Act.
600 Western Australia, Parliamentary Debates, Legislative Assembly, 23 September 1971, 1738 (Environmental Protection Bill, Second Reading).
601 S 39(3) Environmental Protection Act 1971 (WA).
602 See e.g. s 43(1) of the Act which prohibited a right of appeal against a proposal submitted to the Governor.
603 S 43(3) Environmental Protection Act 1971 (WA) was prescriptive in that regard.
604 Ibid, s 30(4)(g).
Landowners’ property rights might be directly affected by the Authority’s recommendations on applications for the subdivision, amalgamation or development to a town planning authority. Similar provision was also made for the grant of any interest in land for mining. Any person might refer to the Authority any matter which gave rise to a possible cause of pollution, for which the Authority might then make recommendations to the minister. However, the Authority pursued a policy of collaboration rather than regulation regarding environmental issues. That approach is perhaps explained by the lack of any regulatory power, and that landowners even in the early 1970s were generally ignorant concerning many environmental issues. Agreement with private landowners was also a theme of other enactments.

While Parliament was anxious that the EPA not impact adversely on existing contractual arrangements where State Agreements existed, the question of compensation to landowners negatively affected by the EPA appears not to have been considered. Property rights received closer attention under other legislation. For example, a landowner might be required to obtain a licence to clear land in catchment areas under the Country Areas Water Supply Act 1947 (WA), but compensation was payable if a licence was refused.

5.7.4 Heritage laws

Comprehensive State and Commonwealth heritage laws were enacted for the first time. In 1964, the National Trust of Australia (WA) was established, which could

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607 S 56(1)(e) Environmental Protection Act 1971 (WA); see also the similar provisions under s 36(1)(f) of the Waterways Conservation Act 1976 (WA). Note s 56(5) of the Environmental Protection Act which prevented a town planning authority from granting approval to a subdivision, amalgamation or development until the Authority’s recommendations had been considered.

608 S 55 Environmental Protection Act 1971 (WA).

609 Ibid, s 57 (2). Note the broad definition of ‘pollution’ in s 4(1) of ‘any direct or indirect alteration of the environment to its detriment or degradation,’ but the failure of the Act to define any offence in relation to pollution: see M Hollick, ‘The Role of Statute Law in Environmental Management: A Case Study of Western Australia’ (1984) EPLJ 116, 117.

610 S 57(3) Environmental Protection Act 1971 (WA).

611 Environmental Protection Authority, Annual Report (1973) 33, cited in Hollick, above n 609, 119.

612 Bates, above n 12, 25


614 See e.g. s 31(1) Waterways Conservation Act 1976 (WA).

615 See Western Australia, Parliamentary Debates, Legislative Assembly, 17 November 1971, 84 (Mssrs Court and Tonkin) (Environmental Protection Bill, Second Reading).


617 Ibid, s 12E.

618 National Trust of Australia (WA) Act 1964 (WA).

619 Australian Heritage Commission Act 1975 (Cth).
acquire land by purchase and control that land through by-laws. Unlike later Commonwealth law, land use and development might be restricted by covenants voluntarily entered into pursuant to State heritage legislation. The covenant could bind the registered proprietor’s successors in title. The Act has been considered attractive to private property owners since it allowed ownership to be retained, a commitment to the public interest to be secured and possible tax advantages to the proprietor.

5.8 Conclusion

This chapter revealed a mixed and shifting State regard towards property rights from a private interest perspective to a more mixed private interest/public interest perspective. Particularly where a strong public interest was perceived, the State did not hesitate to expropriate property rights without compensation, such as with petroleum rights, property in the beds of watercourses, and a landholder’s right to subdivide land. The State might also seek to control property rights through statutory controls, as in the case of water rights and land use. In other areas, the State displayed regard for property rights alongside the pursuit of the public interest, either in the case of statutory rights, as for example in the case of the farmer’s veto with respect to land under cultivation, or in the collaborative approach taken with respect to addressing the public interest, as in the case of environmental laws.

State disregard for a landowner’s security of tenure is most evident in the willingness of the State to displace property rights by the exercise of powers undiscoverable at the time of the Crown grant. Crown grant terms might also be retrospectively expropriated and altered to the detriment of a landowner’s property rights. Although a proposed restructure of land tenure from freehold to leasehold failed, the vulnerability of property rights becomes self-evident. As with many areas of focus, however, there is no one picture of complete disregard for property rights. The Land Acts generally improved provisions for the securing of land tenure and the promotion of agriculture. Payment conditions attaching to a landholder’s title were also improved, although the time for performance of other conditions such as improvement might be shortened. The change

620 s5 and 26(1)(a) and (b) National Trust of Australia (WA) Act 1964 (WA).
621 The Australian Heritage Commission Act 1975 (Cth) did not affect property rights per se. Entry of a place on the Register of the National Estate merely required the relevant Minister not to take action adversely affecting such a place: s 30.
622 S 21A National Trust of Australia (WA) Act 1964 (WA).
623 Ibid, s 21A(4).
624 Bates, above n 12, 85.
from a 21-year limitation to a five-year limitation on the exercise of reserved powers of resumption might suggest an increasing regard for property rights, and the State’s willingness to make voluntary payments to an affected landowner certainly does. However, the five-year limitation is probably better explained by the declining reliance of the State on reservation clauses for the resumption of land in favour of the PWA.

Expanded State powers of resumption under the PWA and the expansively defined purpose of public works is a further important feature. The four ingredients of compensation underlying the PWA reveal an improved regard for the property rights of landowners affected by a PWA resumption. Many of the prescribed ingredients were amended over time in favour of affected landowners. The wide discretion afforded to the Supreme Court through a discretionary percentage is of particular significance in providing additional means to address the circumstances of a particular case. However, difficulties faced by a landowner in challenging a resumption until 1955, together with the compensation provisions of the PWA failing to secure reinstatement costs for an affected landowner, reveal the State’s regard for property rights to be qualified, and brings into question assertions of an equilibrium between the State’s regard for the public and private interest. The widespread settlement of compensation claims, often upon generous terms, by arbitration may have been of great comfort to many landowners, but may have been motivated by reasons other than the State’s regard for property rights.

The shift to a public interest perspective of property rights becomes more evident in the State’s treatment of mineral rights. Although this shift had already occurred with the crown reservation of all minerals, the shift was continued with the crown reservation, and retrospective and uncompensated confiscation, of petroleum. Increasing public interest perspectives are also evident in the opening up of private land to mining. However, the preferential right to mine afforded to the landowner the provision for the payment of royalties for minerals privately owned, and the later protection of the broadly defined ‘land under cultivation,’ greatly diluted the disregard that mining on privately owned land would have otherwise represented. Compensation provisions were also favourable to a landowner affected by mining, although many property owners were adversely affected by mining. A landowner’s position was less favourable as regards compensation for petroleum activities, although there may be sound policy reasons for this distinction. The presence of State Agreements served as a further reminder that the statutory rights of a landowner were vulnerable to being overridden.
An early shift to a public interest perspective of property rights is also evident with respect to water rights, in particular through the State’s assertion of control over natural waters, the deeming of watercourse beds to have always been the property of the Crown and without compensation, the various controls exercised by the requirements of statutory licences with only limited compensation provisions, and the later increased setback requirements. Furthermore, riparian rights only co-existed with the rights of the Crown because of the judicial interpretation applied to the RWIA. The public interest perspective also brought with it rates and the increasing risk that a landowner’s quiet enjoyment might be disturbed by public works. However, the statutory redefining of riparian rights was not without significant benefit to landowners, thereby diluting much of the disregard towards property rights otherwise represented by the State’s treatment of water rights. For some landowners, no doubt the benefits of statutory riparian rights might even be considered de-facto compensation for the disregard the State had demonstrated towards their property rights. Whatever view is ultimately taken as regards the State’s treatment of water rights, what is most significant is the early recognition by the legislature that ‘private ownership must stand on one side’ when the interests of the State otherwise required.625

Planning policy, particularly with respect to the soldier settlements, reveal the State’s willingness to distribute property rights as an instrument of social policy and to discriminate positively in favour of some people at the expense of others. However, it is only when the pre-1928 position of landowners with respect to the exercise of property rights is compared with the position post enactment of the TPDA that a new disregard by the State towards property rights is revealed. Primacy was afforded by the legislature to town planning principles over property rights, which was reflected in town planning schemes, interim development orders, by-laws and, later, planning policy. Certain dealings in land were restricted without prior statutory approval, such as the uncompensated expropriation of the right to subdivide land. Questions of land use were often at the discretion of local authorities. The scope and influence of planning over land use is illustrated by matters such as the Corridor Plan for Perth. Only limited recognition was given to the notion of compensating a landowner affected by the operation of town planning principles, as is evident in the compensatory provisions for injurious affection. Avenues for appeal by affected landowners were also limited, and

625 See Western Australia, Parliamentary Debates, Legislative Assembly, 24 September 1912, 1924 (Mr George).
landowners may have depended upon the possibility of receiving favourable treatment by the minister.

Conservation and environmental protection also provided a new platform for the regulation of property rights, particularly as regards land development and native fauna and flora, in favour of the State. This disregard of property rights through environmental laws occurred earlier than may be commonly thought. However, environmental laws often contemplated voluntary participation by landowners. The establishment of the Environmental Projection Authority, which could make laws and exert influence over matters such as town planning, also created a new layer of State scrutiny over property rights, although the significance of such developments were limited by the lack of any environmental protection policies or environmental impact assessment, and the collaborative practices of the Authority.
6.1 Introduction

Chapter 6 considers the State’s regard for private property rights during the third identified period. As with previous periods, State regard for property rights is defined by new legislation affecting landowners. This study remains focussed on the six identified key areas. A seventh key area, criminal property confiscation, is added. Although these areas are not discrete, their study reveals this period to be one of increasing State disregard for property rights, with a public interest perspective of property rights becoming frequently dominant in shaping the treatment of real property rights.

6.1.1 Key themes

The chapter begins with a brief discussion of property rights remaining the preserve of the States, despite the occasional influence of Commonwealth laws and international covenants. The first key area, land tenure, is considered with particular attention to the security of land tenure and property rights under new crown land tenure legislation, and the increasing statutory exceptions to a landowner’s indefeasibility of title. Proposed reform regarding pastoral and rangelands leases is also noted.

Land acquisition, resumption and compensation are examined through the changes introduced by the Land Administration Act 1997 (‘LAA’). The repeal of resumption by crown grant reservation without compensation is noted. Attention is given to how a landowner may be adversely affected by the acquisition of land by State Agreement, and the challenges presented to a landowner objecting to a taking or seeking compensation. Potential compensation problems are explored. The vagaries of the determination of value, limitations with respect to loss or damage, and absence of discretion to consider special circumstances are discussed alongside the more favourable treatment of injurious affection, severance and solatium.

Mineral, petroleum and geothermal energy rights are examined, beginning with the extension of crown reservations and retrospective State confiscations. Attempts to amend the continuing farmers’ veto are discussed together with the more limited veto
with respect to petroleum and geothermal energy exploration. New compensation provisions for mining of privately owned and crown minerals are reviewed.

Water rights are examined within the context of water resource planning and the shift to a national water policy. The licencing implications of widened crown vesting declarations for existing water rights are considered. The new quasi property regime for water licences is noted. The treatment of statutory riparian rights is also reviewed, together with improved compensation provisions and appeal rights.

Planning and environmental laws are examined within the new context of sustainability and the increasing dominance of public interest considerations. The increasing scope and significance of planning schemes and policy, changes with respect to compensation, subdivision and development controls, and rights of appeal are studied. The generally negative impact of new environmental impact assessment requirements upon a landowner is discussed, together with the shift from land clearing by notification to clearing by permit, pollution and contamination controls, and new heritage laws. The State’s regard for property rights in addressing the public interest is considered through the new statutory regime for carbon rights.

A new State disregard for property rights is identified in the retrospective shift from a conviction-based system of criminal property confiscation to a non-conviction-based regime. Attention is given to the impact of non-conviction-based forfeiture upon innocent property owners. The inclusion of criminal law is also significant; an assessment of the State’s regard for property rights for this period now extends beyond the six key areas identified in chapter 3.

(a) Property rights remain a State matter

Property rights remained almost exclusively a State matter. The State legislature continued to enjoy the power to deprive an owner of property rights without any constitutional requirement affording just terms.\(^1\) Commonwealth legislation might operate to override a registered interest holder’s indefeasible title to land,\(^2\) or restrict the

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\(^1\) *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; *Silbert v DPP (WA)* (2004) 217 CLR 81, 194 (Kirby J); *Western Australian Planning Commission v Farjaro* (2007) 49 SR (WA) 165, 169. However, WA is subject to compensation obligations imposed by the *Native Title Act 1993* (Cth).

exercise of property rights in a particular way. However, the Commonwealth Parliament remained without general legislative power regarding land. Only with the recognition of common law native title in 1992 alongside existing Commonwealth statutory provision for racial equality before the law and the subsequent enactment of the *Native Title Act 1993* (Cth) was the State’s power to affect native title controlled. State legislation affecting native title, for example, might be declared incompatible, and compensation with respect to native title extinguishment was now prescribed. Significantly, WA was able to validate past acts, and crown grants of freehold title generally extinguished native title because of the lack of use limitations in most crown grants. Pending and future claims under the *Native Title Act* have, however, resulted in recent State Agreements with respect to compensation and the allocation of freehold, leasehold and reserved land to be held on trust for the benefit of the Noongar people. New external influences on the State’s regard for property rights also occasionally emerged through Australia’s entry into international covenants, as in the case of State criminal property confiscation laws.

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3 See e.g. s 46 of the *Competition and Consumer Act 2010* (Cth) where a property owner with substantial market power may be required to allow a competitor to use private property rights in the public interest; see S Corones ‘Competition law and market regulation: When should private property rights give way to the public interest?’ (2014) 42 ABLR 124; see also BHP Billiton Iron Ore Pty Ltd v National Competition Council (2008) 236 CLR 145, 155, 157 (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

4 See *Mabo v Queensland* (No 2) (1992) 175 CLR 1. Note, however, the power of States to extinguish native title without compensation: 201–202 (Wilson J); see also RH Bartlett *Native Title in Australia* (LexisNexis, 2nd ed, 2004) [2.10].


6 See ss 48–51 *Native Title Act 1993* (Cth).

7 *Titles Validation Act 1995* (WA); see also *Titles Validation Amendment Act 1999*(WA) regarding intermediate period acts.

8 See Bartlett, above n 4, [16.108], citing *Mabo v Queensland* (No 2) (1992) 175 CLR 1, *Wik Peoples v Queensland* (1996) 187 CLR 1, and *Fejo v Northern Territory* (1998) 195 CLR 96. In Western Australia, see eg *Ward on behalf of the Miriuwung and Gajerrong People v Western Australia* (1998) 159 ALR 483, 568 (Lee J). Pre-1994, crown grants of freehold title are also deemed to have permanently extinguished native title; see Bartlett, ibid, [5.9]; on the test for extinguishment of native title by inconsistency at the time of grant, see also *State of Western Australia v Brown* (2014) 253 CLR 507, [37] (French CJ, Hayne, Kiefel, Gageler and Keane JJ). On the security of pastoral lessee, see *Wik Peoples v Queensland* (1996) 187 CLR 1, 132–133 (Toohey J); 250 (Kirby J).


10 See *Crimes (Confiscation of Profits) Act 1988*; *Permanent Trustee Co Ltd v WA* (2002) 26 WAR 1, 5 (McKechnie J), discussed further at paragraph 6.10(a) of chapter 6 of this thesis.
6.2 Key Area 1 - Land tenure and the LAA

Crown land grants and land tenure were governed principally by the Land Act 1933 in amended form until replaced by the LAA.\textsuperscript{12} The LAA was enacted to consolidate and reform the law regarding crown land and the compulsory acquisition of land.\textsuperscript{13} Although the Government maintained that most of the provisions of the earlier Land Act 1933 were transferred to the new Act,\textsuperscript{14} the LAA also brought changes to land tenure.\textsuperscript{15} The creation and registration of crown grants was discontinued.\textsuperscript{16} Provision for the release of land in various tenures continued.\textsuperscript{17}

Some changes to land tenure reveal increased regard for property rights as regards dealings in crown land, and the nature of strata titles. The acquisition of private land received new support by financial grants to first home buyers.\textsuperscript{18} However, new potential threats to old strata schemes, some transitional provisions of the LAA, particularly in relation to forfeiture, and increasing statutory exceptions to a landholder’s title, reveal an increased disregard for property rights. Given that regard to the security of lesser interests in crown land and improvements to strata titles is relatively narrow in scope when compared with the reach of qualifications to every landowner’s indefeasibility of title, the State’s disregard for property rights arguably becomes a more dominant theme. Key features of the LAA and new developments are considered below.

6.2.1 Improved certainty and security for dealings in crown interests

In the 1980s and 1990s, significant sales of crown or reserved land had exposed deficiencies where the land was leased.\textsuperscript{19} Although problems with continuing leasehold interests were addressed in 1992,\textsuperscript{20} the LAA now provided greater certainty and security

\textsuperscript{12} Assented to on 3 October 1997, and commenced on 30 March 1998. For a general review of the LAA and tenure changes introduced by the LAA, see Government of Western Australia, Department of Lands, Crown Land Administration and Registration Practice Manual (July 2013) ch 2. On the repeal of the Land Act 1933, see s 281 LAA.

\textsuperscript{13} See the long title to the LAA.

\textsuperscript{14} See eg Western Australia, Parliamentary Debates, Legislative Assembly, 27 June 1996, 3468, (Mr Kierath).

\textsuperscript{15} A general change was the shift from the vesting of administrative functions from the Governor in Executive Council to the Minister for Lands; see Crown Land Administration and Registration Practice Manual, above n 12, [2.3].

\textsuperscript{16} Ibid, [2.3.6.3].

\textsuperscript{17} See Western Australia, Parliamentary Debates, Legislative Assembly, 28 October 1997, 5658 (Mr Board, Minister for Works); Parts 6, 7 LAA.

\textsuperscript{18} First Home Owner Grant Act 2000 (WA).

\textsuperscript{19} Crown Land Administration and Registration Practice Manual, above n 12, [2.5.1]. The Land Act 1933 did not include similar provisions to ss 75-78 of the Property Law Act 1969 (WA).

\textsuperscript{20} Ibid, citing Land Amendment (Transmission of Interests) Act 1992 (WA). The LAA also made specific provision for continuing interests in crown land: see ibid, [2.5.2], citing ss 10, 22, 23, 27, 35, 46, 50, 57.
for those dealing in crown interests. Most importantly, the LAA brought crown interests under the Torrens system. Crown land was now recordable on a land title,\(^{21}\) bringing the advantages of the Torrens system to those dealing with crown interests.\(^{22}\) The increasing number of private leases and mortgages associated with commercial ventures on reserved crown land were now more secure.\(^{23}\)

### 6.2.2 Improved strata title, but with later threats to old strata schemes

The State has been inconsistent in its regard for property rights with respect to strata titles. The *Strata Titles Act 1985* effected a number of key improvements to strata titles,\(^{24}\) including the consolidation or re-subdivision of lots, provision for the allocation of unit entitlement for a lot based on lot values, and the variation of lot boundaries.\(^{25}\) Survey strata plans were also introduced.\(^{26}\) Disregard for landowners is evident in the treatment of unregistered strata plans under the *Strata Titles Act 1966* as cancelled strata plans.\(^{27}\) The Government’s 2015 reform agenda regarding community titles and leasehold strata titles is positive.\(^{28}\) However, the proposed termination of older strata schemes by only a majority of owners makes older strata lots potential redevelopment targets\(^{29}\) and is a dangerous step towards ‘private to private’ eminent domain.\(^{30}\)

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\(^{21}\) Section 29(5) LAA.

\(^{22}\) *Crown Land Administration and Registration Practice Manual*, above n 12, [2.3.2]. Note, however, that dealings regarding crown land under the LAA were not effective until registered under the Torrens system: s 19 LAA.

\(^{23}\) *Western Australia, Parliamentary Debates*, Legislative Assembly, 28 October 1997, 5658 (Mr Board, Minister for Works); Parts 6, 7 LAA; Part IIB *Transfer of Land Act 1893* (WA) as amended.

\(^{24}\) For a summary of the main changes introduced by the *Strata Titles Act 1985* and the *Strata Titles Amendment Act 1995*, see Western Australian Land Information Authority, *Strata Titles Practice Manual for Western Australia* (June 2013, edition 8.0) [2.1], [3.6] and [13.4].

\(^{25}\) *Ibid*, [2.1]; see e.g. ss 9, 14, *Strata Titles Act 1985*. Note also s 29 of the Act on the variation of a strata scheme upon resumption. The Act was assented to on 6 May, 1985.

\(^{26}\) *Strata Titles Amendment Act 1995* (WA). The Act was assented to on 20 December 1995.

\(^{27}\) *Strata Titles Practice Manual for Western Australia*, above n 24, [2.1]. Note, however, the two-year period afforded to affected owners to register their strata plans.

\(^{28}\) See Landgate, *Strata Titles Act Reform Consultation Summary* (Government of Western Australia, 2015), 3. Landgate (10) states its aim is for the Minister of Lands to introduce draft legislation to Parliament in June 2016.

\(^{29}\) See P McGirath, ‘Apartment owners could be forced to sell properties under proposed strata law shakeup’ *ABC News*, 12 September 2015.

\(^{30}\) Note, however, the reference to ‘ensuring protections are in place for objecting owners’: *Ibid*. On the risks presented by ‘private to private’ acquisitions, see *Griffiths v Minister for Lands, Planning and the Environment* (2008) 235 CLR 232 at [7.3.4] of this thesis.
6.2.3 Conditional purchase interests - no waiver of forfeiture

The conditions of sale of crown land were subject to such conditions concerning use as the minister determined.\(^{31}\) Breach of the conditions made the conditional tenure land liable to forfeiture.\(^{32}\) Regarding existing licences or leases previously granted for the conditional purchase of town and suburban lots,\(^{33}\) forfeiture for non-compliance with any conditions was prescribed.\(^{34}\) Unlike previous forfeiture provisions,\(^{35}\) no provision existed for the waiving of forfeiture and reinstatement, once the minister determined to cause forfeiture,\(^{36}\) although compensation for improvements upon forfeiture was available.\(^{37}\)

6.2.4 Pastoral and rangeland leases

The Government proposes to introduce into Parliament a bill concerning pastoral reform and rangelands lease tenure.\(^{38}\) Although the Government claims the intended reforms will bring ‘more secure tenure’\(^{39}\) questions to the Minister for Lands reveal that no compensation will be afforded to existing landowners negatively impacted by the introduction of rangeland leases.\(^{40}\)

6.2.5 Increasing challenges to indefeasibility of title

The qualified nature of a fee simple title holder’s indefeasibility of title is not unique, since indefeasibility of title has always been qualified.\(^{41}\) However, the increasing statutory exceptions to a landholder’s title are notable. In 1982, statutory exceptions to a

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\(^{31}\) Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 October 1997, 5658 (Mr Board, Minister for Works); s 75(1) LAA. This was not a new development, however; see e.g. s 20 *Land Act 1933*. In relation to the conditions attaching to conditional purchase leases, pastoral leases, and the wide scope afforded to the Minister, see ss 80(3)(a) and 103 LAA.

\(^{32}\) S 75(4)(a) LAA as amended.

\(^{33}\) See *Land Act 1933*.

\(^{34}\) See ss 35 LAA and *Crown Land Administration and Registration Practice Manual*, above n 12, [2.11.3].

\(^{35}\) S 23 *Land Act 1933*.

\(^{36}\) See S 35 LAA; *Crown Land Administration and Registration Practice Manual*, above n 12, [2.11.3]. Note, however, the statement that ‘forfeiture should only be initiated as a last recourse.’ Note also the rights of appeal afforded to the interest holder: s 35(2) and Part 3, LAA. On the effect of forfeiture, see s 35(4) LAA. Subleases and caveats were exempted from the forfeiture provisions: s 35(5)(a)(i) LAA.

\(^{37}\) S 35(5)(a)(ii) LAA. Note, however, that such circumstances are described by the Government as ‘special cases’; see *Crown Land Administration and Registration Practice Manual*, above n 12, [2.11.5].

\(^{38}\) Land Administration Amendment Bill 2016 (WA).

\(^{39}\) Government of Western Australia, Land Administration Amendment Bill 2016: General information.

\(^{40}\) Western Australia, *Parliamentary Debates*, Legislative Council, Wednesday, 24 February 2016, p716c-717a. Hon Col Holt representing the Minister for Lands indicated that no compensation to affected landowners would be considered ‘as the rent is based on market conditions’.

\(^{41}\) See chapter 2 of this thesis, [2.1.2(a)(i)]; note under s 3(1) of the *Transfer of Land Act 1893* (WA), laws inconsistent with that Act shall not apply to land under the Torrens system. However, the scope of this exclusionary provision appears uncertain: *Olympic Holdings Pty Ltd v Windslow Corporation Pty Ltd (In liq)* (2008) 36 WAR 342 [130] (Heenan AJA).
landowner’s indefeasibility of title reached ‘epidemic proportions’.42 In a 1992 study, 17 State Acts43 were identified containing provisions affecting freehold title without notification on the Torrens Register, and 12 State Acts44 contained provisions affecting freehold title upon registration or lodgement of a notice or memorial. By 2004, the Government admitted that there were ‘100 or so exceptions to indefeasibility contained in our land laws.’45 Public interests in matters such as the recovery of State debts may explain this phenomenon, with exceptions commonly securing state interests over a landowner’s title.46 Priority between private interests might also be affected.47 Indefeasibility of title might also operate against a landholder by vesting title in the transferee, following resumption, despite the resumption itself being void.48 Although the High Court was unwilling to displace registered interests without a clear legislative

43 Key, above n 2, 4–8 citing ss 25, 27 Aboriginal Affairs Planning Authority Act 1972 (WA); s 8 Administration Act 1903 (WA); s 5 City of Perth Act 1925 (WA); Escheat Procedures Act 1940 (WA); ss 30, 33 Family Court Act 1975 (WA) (repealed but now see s 126 Family Court Act 1997 (WA)); s 53 Health Act 1911 (WA); ss 7B, 7C Industrial Lands Developments Authority Act 1966 (WA); ss 269, 368, 440A, 515(1), 515(9), 516A, 560, 577, 581 Local Government Act 1960 (WA) (see now ss 6.43, 6.68, 6.71, 6.74, 6.75 Local Government Act 1995 (WA)); Part 6 Mental Health Act 1962 (WA) (also noting ss 69, 77 Guardianship and Administration Act 1990 (WA) not yet then proclaimed); ss 109, 124A (now repealed) Metropolitan Water, Sewage and Drainage Act 1909 (WA); ss 9, 27 Mining Act 1978 (WA); Misuse of Drugs Act 1981 (WA); s 4(4) Municipality of Fremantle Act 1925 (WA); s 25B Soil and Land Conservation Act 1945 (WA); Strata Titles Act 1985 (WA); s 10 Trustees Act 1962 (WA).
46 Key, above n 2, 4.
47 See eg s 20 Retirement Villages Act 1992 (WA) (charge to secure repayment of a premium); s 13(10) Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA). Note, however, that under s 20(6)(a) the charge under the Retirement Villages Act is subject to the interests in the proviso in s 68 of the Transfer of Land Act 1893 (WA), while under s 13(1), the statutory option under the Commercial Tenancy (Retail Shops) Agreements Act is a complete exception to s 68. Affording priority to one individual over another has led some to question how such a provision accords with legislation ‘avowedly motivated by public interest and protection’: Key, above n 2, 15, referring to the then Retirement Villages Bill (WA).
intention, the Court’s lack of clarity as to when a statute displaced a registered proprietor’s indefeasibility of title contributed to the uncertainty surrounding the security of property rights.

6.3 Key Area 2 - Land acquisition, resumption and compensation

A consideration of State regard for a landholder’s property rights requires a consideration of new legislation providing for private land acquisition and resumption. Although less significant, provisions for crown grant reservations must also be considered.

Many Acts provided for compensation to the affected party from the compulsory State acquisition of land. In 2004, in addition to local government and redevelopment authorities, 10 government agencies and bodies could resume private land, mostly under Part 9 of the LAA, although where the Planning and Development Act 2005 (WA) (‘PDA’) applied, this was in a modified form. Compensation remained a

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51 Note the acquisition of land injuriously affected as a result of the reservation of the land for a public purpose, where compensation for that injurious affection is claimed, is considered separately, since an election to acquire involves no compulsory acquisition: see s 187 Planning and Development Act 2005 (WA) and Mount Lawley v Western Australian Planning Commission [2004] 29 WAR 273, 326–327 citing Hill v Western Australian Planning Commission (2000) 107 LGERA 229, [21] – [22]; MacDougall v Western Australian Planning Commission (2003) 129 LGERA 243.


53 See eg s 15(1) Conservation and Land Management Act 1984 (WA); s 12E Country Areas Water Supply Act 1947 (WA); s 28(3)(e) Energy Operators (Powers) Act 1979 (WA); s 73(1) Heritage of Western Australia Act 1990; s 29(1) Main Roads Act 1930; s 19(1) Petroleum Pipelines Act 1969 (WA); s 191 and 192 Planning and Development Act 2005 (WA); s 75(1), 81(8) Water Agencies (Powers) Act 1984 (WA); s 21 East Perth Redevelopment Act 1991 (WA); s 23 Midland Redevelopment Act 1999 (WA); s 24 Subiaco Redevelopment Act 1994 (WA); s 20 Armadale Redevelopment Act 2001 (WA); s 6 Hope Valley-Wattewup Redevelopment Act 2000 (WA). However, note exceptions such as the Rail Freight System Act 2000 (WA), and the Dampier to Bunbury Pipeline Act 1997 (WA). Land within the DBNGP corridor cannot be taken under the LAA unless all DBNGP rights and interests are maintained. See Crown Land Administration and Registration Practice Manual, above n 12, [9.1.5.6]; see generally KP Pettitt SC, ‘Land acquisition and compensation for injurious affection: issues for property lawyers’ in Issues for Property Lawyers (Law Society of WA, 27 November 2008) 4.


55 See s 191(3) PDA. The land is taken compulsorily under and subject to the provisions of Part 9 of the LAA, but note s 191(3) PDA. Note also the election to acquire process under s 187 PDA does not apply to the LAA. For a discussion of the election to acquire process, see chapter 6 of this thesis, [6(d)(iii)].
creature of statute. The provisions of the LAA concerning compensation for a landowner affected by resumption are exhaustively prescriptive. Occasionally, compensation is determined outside the LAA, as in the case of a PDA taking of land.

Unlike the former *Public Works Act*, which made fundamental changes to the State’s powers of resumption, members from both Houses accepted that the LAA merely consolidated and carried across the compulsory acquisition provisions of the former Act. However, the stated purpose of the LAA included ‘reform of laws for the compulsory acquisition of land...’ While the LAA was considered to reflect the traditional model of land acquisition and compensation, a review of the LAA reveals new regard and disregard by the State for property rights.

### 6.3.1 Resumption by crown reservation without payment extinguished

The decline of resumption by crown grant reservation noted in chapter 5 was completed by extinguishment of any right to resume land by crown reservation without payment of compensation. If the practice of land resumption by crown reservation without compensation had been abandoned for decades by 2004, this concession by the State

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56 See chapter 2 of this thesis; *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2010) 240 CLR 409, 420–421 (French CJ, Gummow, Crennan and Bell JJ); see also *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 269–270; *R & R Fazzolari Pty Ltd v Parramatta City Council* (009) 237 CLR 603, 619. However, c.f. contra *Battista Della Vedova v State Planning Commission* SCWACC 2 of 1986, BC8800828, 16, citing *Ag v De Keyser’s Royal Hotel* [1920] AC 508. It has been suggested that the common law includes a right similar to the Fifth Amendment to claim compensation for taking: *G McLeod, ‘The Commonwealth Tobacco Packaging Law, Property Rights and the Environment’* (April 2013) *Brief*, 36, citing *R v Compensation Court* (1990) 2 WAR 243, 253 (Wallace J). The writer doubts this argument in chapter 2 [2.2.1(d)].

57 S 241 LAA provides that ‘regard is to be had solely to the matters referred to in this section’; see also *McKay v Commissioner of Main Roads (No 7)* [2011] WASC 223, [139]–[141] (Edelman J).

58 Where a responsible authority takes land comprised in a scheme under s 191 PDA, valuation of the land is to be done in accordance with s 192 PDA.

59 See chapter 5, [5.2(b)(i)] of this thesis.

60 *Western Australia, Parliamentary Debates, Legislative Assembly*, 27 June 1996, 3468/1 (G Kierath) (Land Administration Bill, second reading); *Western Australia, Parliamentary Debates, Legislative Council*, 26 March 1997, 913–914 (M Evans). See also *Western Australia, Parliamentary Debates, Legislative Assembly*, 27 June 1996, 3468 (Mr Kierath). This was despite a parliamentary standing committee having earlier recommended that a new Act be based upon the former provisions of the *Public Works Act 1902* on compulsory acquisition and compensation incorporate various amendments to the resumption and compensation process: see Standing Committee on Government Agencies, *Resumption of Land by Government Agencies: Final Report* (Parliament of WA, June 1987), summary of recommendations, vi–xii.


63 Schedule 2, clause 7(2) LAA. However, conditional tenure land (formerly Crown grants in trust) may be resumed without any entitlement to compensation where the land was granted for nil or nominal consideration. In that case, compensation is restricted to lawful improvements: see s 202(3) LAA; *Crown Land Administration and Registration Practice Manual*, above n 12, [10.2.1.6].

64 Standing Committee on Public Administration and Finance, above n 52, [3.113].
is diminished. It does, however, acknowledge State recognition that land resumption without compensation was unacceptable, particularly where the terms upon which the crown reservations had been made occurred many generations prior to the current proprietor.

6.3.2 Acquisition for public works by agreement may disadvantage affected landowners

The preferred method of State land acquisition remained by agreement. The State continued to be able to make agreement to purchase land required for a public work, or to acquire land by written consent and compensation. Acquisition by agreement under the LAA ‘excited little controversy’.

While acquisition by agreement may appear more respectful of property rights as opposed to resumption, it could take time, and may have been intended to encourage amicable compulsory acquisitions rather than consensual transfers. The outcome for a landowner might prove less satisfactory than a taking. The purchase money might reflect a market value depressed by the intended public works and may not include matters for which compensation would have been awarded had the land been resumed, such as injurious affection. Without agreement on the sale terms, a landowner could then face a regional reservation over the land by amendment to the Metropolitan Region Scheme. The purchase prices paid for the

65 Ibid, [5.10]. Indeed, it would appear that at least one government agency only ever sought to acquire private land by negotiation, this being the former Water and Rivers Commission: [4.187]

66 S 168(1) LAA; see also the former s 26(1) Public Works Act 1902 (WA). Acquisition by agreement might also be made pursuant to the PDA: s 190 PDA; for a discussion of the PDA provision, see Law Reform Commission of Western Australia, Compensation for Injurious Affection Final Report (Project No 98, 2008) 59. The Commission suggests that if the owner cannot reach agreement as to price, a compulsory acquisition could be ‘engineered’ by the landowner so that the compensation provisions would apply.


68 The approximate average timeframe for a negotiated purchase is 18 months; Department of Regional Development and Lands, Land Acquisition (State Land Services) 4.

69 Law Reform Commission of Western Australia, ‘Compensation for Injurious Affection’ (Project No 98, Discussion Paper, October 2007) 27.

70 Standing Committee on Public Administration and Finance, above n 52, [5.13]–[5.19].

71 Ibid, [5.17], citing D McLeod, ‘Compensation Issues–Snatch and Grab-Land Acquisition and Compensation’ (Law Society of Western Australia Seminar, 27 November 2002) [2.2].

72 See E Samec and E Andre, ‘Planning and Development Law in Western Australia’ (Lecture Materials, Edith Cowan University, 2009) 179. The writer acknowledges the work of Samec and Andre, which provided the writer with an excellent overview of the State’s new planning and environmental framework. Where referred to, acknowledgement is made via footnotes. The authors also suggest that the landowner may be disadvantaged by an information notice under s 168(2) LAA not informing the landowner of the procedure for compensation for land taken. On the acquisition process generally, see ibid, 177-190.

73 D McLeod, ‘Compensation Issues–Snatch and Grab-Land Acquisition and Compensation’ (Law Society of Western Australia Seminar, 27 November 2002) [2.3]–[2.5]; see also the effects of the Hope Valley-Wattelup Redevelopment Act 2000 (WA) considered in Standing Committee on Public Administration and Finance, above n 52, [4.247]–[4.263].
purchase of other land at a depressed value might then be relied upon by the agency in the landowner’s efforts to resolve any compensation dispute.\textsuperscript{74}

A former landowner who seeks to repurchase unused land taken by the State might be required to pay the current value of that land, instead of the compensation value of that land plus 10\% per annum, as was previously the case.\textsuperscript{75}

\textbf{6.3.3 Takings for public works}

The State may take interests in land for ‘public works’,\textsuperscript{76} but the State takes land compulsorily as a last resort.\textsuperscript{77} Generally, land is taken for impending works.\textsuperscript{78} Land required to confer interests may also be affected as if for a public work.\textsuperscript{79} The power of resumption was extended to ‘any State instrumentality’.\textsuperscript{80} The taking process is almost identical to the former procedures.\textsuperscript{81} Again, a landowner might require that where resumption left unimproved land of less than 1,000 square metres, the resuming authority was also to take that land.\textsuperscript{82} A taking order, once registered,\textsuperscript{83} extinguishes registered and unregistered interests in land, unless otherwise provided.\textsuperscript{84} No provision existed for a reading down of a taking order,\textsuperscript{85} but limited protection was again afforded against the taking of certain improved land.\textsuperscript{86}

\textsuperscript{74} McLeod, \textit{ibid}, [2.3]–[2.5].
\textsuperscript{75} \textit{Ibid}, 14, citing the former ss 29, 29A and 29B \textit{Public Works Act 1902 (WA)}.
\textsuperscript{76} S 161(1) \textit{Land Administration Act 1997 (WA)}. For a discussion of s 161 LAA see \textit{Mandurah Enterprises Pty Ltd v WA Planning Commission} (2010) 240 CLR 409, 422 (French CJ, Gummow, Crennan and Bell JJ). This term has the same meaning as under the former Act: see s 151(1) LAA. Note that a taking may also now be deemed to be for a public work: see e.g. s20 \textit{Western Australian Land Authority Act 1992 (WA)}. Note also the power of the State to lease land designated for a public work but not yet presently required: s 192 LAA considered in J Bell, \textit{Climate Change & Coastal Development Law in Australia} (The Federation Press, 2014) [4.2.4].
\textsuperscript{77} \textit{Crown Land Administration and Registration Practice Manual}, above n 12, [9.4.2].
\textsuperscript{78} Department of Planning, \textit{Planning makes it happen: phase two-Review of the Planning and Development Act 2005} (Government of Western Australia, September 2013) 3. A ‘taking’ of an interest in land refers to the extinguishment of that interest: s 151 (2)(a) LAA.
\textsuperscript{79} S 166 LAA.
\textsuperscript{80} S 161(1) LAA. See s 3(1) LAA on the definition of ‘State instrumentality’.
\textsuperscript{81} A taking of land is carried out by a notice of intention to resume land: s 170 LAA; see also s 17 \textit{Public Works Act 1902 (WA)} as amended; chapter 5, [5.2(b)(i)] of this thesis. On the requirements of this notice and for a discussion of the compulsory acquisition under the LAA generally, see McKenzie v Minister for Lands (2011) 45 WAR 1, 11–12 (Martin CJ). Upon issue, transactions which can be entered into over the affected land are limited: s 172 LAA. A similar limitation was imposed by s 17(3) of the \textit{Public Works Act 1902} as amended.
\textsuperscript{82} S 176 LAA; see also the former s 25 \textit{Public Works Act 1902 (WA)} as amended.
\textsuperscript{83} See s 177(1) LAA on the making of a taking order and s 178 LAA on the content of a taking order; see also \textit{Crown Land Administration and Registration Practice Manual}, above n 12, [9.8].
\textsuperscript{84} S 179(b) LAA. Note that a taking order may be annulled or amended under s 180(1) LAA.
\textsuperscript{85} \textit{Mandurah Enterprises Pty Ltd v WA Planning Commission} (2010) 240 CLR 409, 429 (Hayne J).
\textsuperscript{86} S 163(b) LAA requires the Minister’s written consent for the taking of an interest in land occupied by any building, yard, garden, orchard or vineyard or in genuine use as a recreation park; see also the former s 14 \textit{Public Works Act 1902 (WA)} as amended.
(a) **Objections to takings**

The LAA improved disclosure obligations upon the registration of a notice of intention to take, regarding payment of purchase price, compensation and rights of appeal.\(^87\) An affected owner wishing to resist the taking continued to be entitled to object to the notice by ministerial appeal.\(^88\) The objection could not relate to compensation.\(^89\) The minister could uphold, cancel or amend the notice of intention.\(^90\)

A landowner might, by originating summons, question a taking’s lawfulness.\(^91\) However, the validity of a statutory power of resumption or the determination of compensation could only be considered by a superior court,\(^92\) potentially increasing the time and cost of seeking relief. Challenging a taking would likely raise questions of statutory interpretation.\(^93\) Regarding a LAA taking, the public work was required to be within the scope of the power conferred by s 161 of the LAA; the taking of private land by an acquiring authority to avoid other statutory obligations is invalid.\(^94\) However, there need not exist ‘an immediate unconditional and enforceable right to undertake the relevant public work’\(^95\) by the acquiring authority.

A challenge to the legality of a resumption\(^96\) may in rare instances result in sui generis legislation, as in the case of the *Yallingup Foreshore Land Act 2006*. This Act sought to

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\(^87\) S 170(5)(d). This was a greater level of disclosure than required under the *Public Works Act*. See Western Australia, *Parliamentary Debates*, Legislative Council, 26 March 1997, 913–914 (M Evans). Standing Committee on Government Agencies, above n 60, recommendation 7(f), [3.40] stated that a notice of intention to resume include a full statement of the rights of landowners.

\(^88\) S 175 LAA; note that 60 days rather than 30 days were now afforded to the affected party in which to object; compare s 175(2) LAA with s 17(2)(d)(i) of the *Public Works Act 1902* (WA) as amended. The approximate average time for the consideration of objections is 2 to 3 months: Department of Regional Development and Lands, above n 68, 4.

\(^89\) S 175(1) LAA.

\(^90\) S 175(5) LAA; see also the former s 17(2)(d)(iii) of the *Public Works Act 1902* (WA) as amended.

\(^91\) See eg *Mandurah Enterprises Pty Ltd v WA Planning Commission* (2010) 240 CLR 409 where the Supreme Court of WA (Court of Appeal) decision (2008) 38 WAR 276 was varied.

\(^92\) *WA Planning Commission v Furfaro* (2007) 49 SR (WA) 165, 169. The State Administrative Tribunal is unable to review the validity of any legislation conferring jurisdiction upon it to determine matters of compensation.

\(^93\) See e.g. *Mandurah Enterprises Pty Ltd v WA Planning Commission* (2010) 240 CLR 409, 421 (French CJ, Gummow, Crennan and Bell JJ) that legislation would be ‘assessed by reference to the statutory presumption against an intention to interfere with vested property rights.’ For a further discussion of the principles of statutory interpretation, see chapter 7, [7.3.2].


\(^95\) *Re the Hon Alannah MacTiernan MLA, Minister for Planning and Infrastructure; Ex parte McKay* [2007] WASCA 35, [78] (Martin CJ).

\(^96\) See *Hammond (as Executor of the Estate of Hammond) v Minister for Works* [2001] WASC 284; *Hammond (as Executor of the Estate of Hammond (Dec’d)) v Minister for Works* BC9203205; *William Garth Hammond as Executor of the Estate of Thomas Garfield Hammond (deceased) v Minister for Works and Ors* BC9101107.
ensure that to the extent that a resumption of land in 1938 was invalid or ineffective under the former Public Works Act, the rights (both retrospectively and prospectively) of all persons were deemed to be the same as if the 1938 resumption of the land had always been ‘valid and effective’. Despite Opposition protests, the Act did not compensate the loss of property rights claimed by the former owner’s representative.

The Government asserted public interest considerations and relied on Parliament’s power to enact a special law relating to land being unaffected by the pendency of legal proceedings under another law.

6.3.4 State agreements

Under State Agreements, landowners may be affected by modified law, where the State becomes contractually bound to resume land on behalf of private parties, typically for major resource development projects. New legislation affirmed retrospectively legislative authority for all acts done pursuant to any State Agreement. The price a landowner received for land the subject of a forced sale might be adversely affected.

State Agreements on mining are considered at paragraph 6.4(g).

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97 The land had been resumed in 1938 for a public recreation ground, but much remained undeveloped. In 1955, ss 29 and 29A of the Public Works Act 1902 (WA) as amended afforded the previous owner a right to re-purchase the resumed land. Although ss 29 and 29A of the Act were repealed in 1997, the effect of these provisions was continued by transitional provisions in section 200 of the Land Administration Act 1997 (WA). For a detailed statement of the legislative background to the land in question, see Western Australia, Parliamentary Debates, Legislative Assembly, 7 April 2005 (JA McGinty, Attorney General); Yallingup Foreshore Bill 2005 (WA), Explanatory Memorandum. Note s 90 LAA which affords the former owner of land taken for public works an option to purchase the fee simple, where the land was resumed not less than 10 years previously or the land has not been used for any public works.


99 The expropriation of private property rights without compensation was deplored by some members of the State Liberal Party, who unsuccessfully attempted to block the passage of the Yallingup Foreshore Land Bill 2005 (WA); see Western Australia, Parliamentary Debates, Legislative Assembly, 24 May 2005, (DF Barron-Sullivan) (second reading debate, Yallingup Foreshore Land Bill 2005). There was also a purported waiver of the relevant limitation period by the previous Liberal Minister.

100 Note, however, provision for the discretionary payment of legal costs: s 7(1) Yallingup Foreshore Land Act 2006.

101 Western Australia, Parliamentary Debates, Legislative Assembly, 7 April 2005, 571 (JA McGinty, Attorney General). For example, there was a desire to ensure that the people of Western Australia retained approximately 13.5 hectares of valuable beachfront land, much of which remained in its natural state.


103 See in particular s 3 of the Act, considered in L Warnick, ‘State Agreements’ (1998) 32 ALJ 878, 899. Note, however, state agreements now operated merely as a contract between the parties: see M Hunt, Mining Law in Western Australia (The Federation Press, 4th ed, 2009) [1.5.2] citing RE Michael; ex p WMC Resources Ltd(2003) 27 WAR 574. The use of state agreements under the ‘as if enacted model’ such that it has the force of law to bind third parties is no longer used in WA; see R Hillman, ‘The Future Role for State Agreements in Western Australia’ (2006) 35 ARELJ 293, 325.

104 See Government Agreements Act 1979 (WA); see in particular s 3 of the Act, considered in L Warnick, ‘State Agreements’ (1998) 32 ALJ 878, 899. Note, however, state agreements now operated merely as a contract between the parties: see M Hunt, Mining Law in Western Australia (The Federation Press, 4th ed, 2009) [1.5.2] citing RE Michael; ex p WMC Resources Ltd(2003) 27 WAR 574. The use of state agreements under the ‘as if enacted model’ such that it has the force of law to bind third parties is no longer used in WA; see R Hillman, ‘The Future Role for State Agreements in Western Australia’ (2006) 35 ARELJ 293, 325.

105 Standing Committee on Public Administration and Finance, above n 52, [4.273]–[4.276].
6.3.5 Compensation by statutory provision: the LAA

Fewer resumption disputes were taken to court in WA than in other States, and most compensation claims were settled by agreement. This might also be interpreted as evidence of the State’s generally high regard for property rights in WA. A review of compensation afforded for the taking of land, however, suggests that this conclusion is problematic at best. The relatively low number of compensation disputes is not necessarily indicative of State regard for a landholder’s property rights. A review of the procedure for compensation and the compensation ingredients below also reveals further concerns.

(a) Qualified entitlement to compensation only

Part 10 procedures for claiming compensation generally reflects the processes under the previous Public Works Act 1902 (WA). The Government intended to bring across the previous compensation provisions with ‘minimal changes’. Compensation proceedings generally arise because the landowner has rejected an offer of compensation. Every person who has any interest in land taken under Part 9 of the LAA is entitled to compensation for that interest. However, this entitlement is qualified. It does not apply to any taking that could have occurred under another law that did not require compensation to be made. Compensation may also be expressly

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106 D Brown, Land Acquisition (Lexisnexis, 6th ed, 2009) [3.33]. Brown suggest this may be because of the more generous allowance of an additional 10% above value for solatium under s 241(9) LAA than in other States.

107 Crown Land Administration and Registration Practice Manual, above n 12, [10.5.2].

108 See, for example, Standing Committee on Public Administration and Finance, above n 52, ii, which noted the many complaints received by the Committee related to the adequacy of compensation for resumed land, or for the loss of the landholder’s economic viability. In addition, many affected landowners stated that they accepted a negotiated settlement rather than brought compensation proceedings, because of factors such as personal stress: see ibid, [5.3], [5.13].

109 B McMurdo, above n 62, 2. Note also the interrelationship between the compensation provisions of the LAA and earlier provisions for compensation, such as under the Metropolitan Region Town Planning Scheme Act 1959 (WA), has caused some uncertainty for the Supreme Court, with speculation that although probably unintended by the legislature, a claimant could possibly receive double compensation: see Cerini v Minister for Transport (2001) WASC 309, [199] (Parker J).

110 Western Australia, Parliamentary Debates, Legislative Assembly, 27 June 1996, 3473/1 (G Kierath). Note that a resumption under the former Public Works Act 1902 will continue to be governed by that Act, but the procedure to be followed will be determined by the LAA: see WA Planning Commission v Furfaro (2007) 49 SR (WA) 165, 170 (Chaney J).

111 Clifford v Shire of Busselton (2007) 52 SR (WA) 58, 64 (ML Barker J).

112 S 202(1) Land Administration Act 1997 (WA); see also the former s 34(1) Public Works Act 1902 (WA) as amended. However, a strata company may have no estate or interest in the land taken: see Owners of Habitat 74 Strata Plan 222 v WA Planning Commission (2004) 137 LGERA 7.

113 Ss 206(1) and (3), Land Administration Act 1997 (WA); see also the former s 35(1) Public Works Act 1902 (WA) as amended. Note that “taking” of an interest in land refers to the extinguishment of that interest: s 151(2)(a) LAA.
denied, for example, where private land is dedicated for a public road.\textsuperscript{114} Unregistered interest holders are vulnerable to compensation entitlements being defeated by another party obtaining compensation.\textsuperscript{115} Compensation for conditional tenure land is limited to improvements.\textsuperscript{116}

(b) Procedural obstacles and pitfalls

The claimant may bring an action for compensation against the acquiring authority, or have the claim referred to the State Administrative Tribunal.\textsuperscript{117} In addition to litigation risks,\textsuperscript{118} a compensation claim presents various procedural obstacles and pitfalls. The claimant remains barred from commencing compensation proceedings where no compensation offer has been made for 120 days from service of the claim.\textsuperscript{119} Although the claimant is still not required to state the compensation sought,\textsuperscript{120} the onus remains upon the claimant to initiate a compensation claim, which normally carries a six-month limitation period.\textsuperscript{121} Failure to reject an offer within 60 days is deemed acceptance of the offer.\textsuperscript{122} An improvement is that the claimant may require 90\% of the offer to be paid pending settlement.\textsuperscript{123} Compensation claims continued to be assessed at the

\textsuperscript{114} Ss 55(4) and 56(6) Land Administration Act 1997 (WA).
\textsuperscript{115} Ibid, s 202(2).
\textsuperscript{116} Ibid, s 202(3).
\textsuperscript{117} Ibid, s 220; see also McKay v Commissioner of Main Roads [No 7] [2011] WASC 223, [137] (Beech J).
\textsuperscript{118} For example, the claimant may be faced with a costs order much greater than the compensation awarded: see eg Clifford v Shire of Busselton (2007) 52 SR (WA) 58, 69 where the applicant was ordered to pay the Shire’s costs fixed at $99,899.13. The value of land taken was assessed at $3,250.00 plus solatium at 10\%; see Clifford v Shire of Busselton (2007) 52 SR (WA) 58, [84] (ML Barker J). It may take years to finalise a compensation claim: Standing Committee on Public Administration and Finance, above n 52, [5.22], citing evidence from the Urban Development Institute of Australia (Western Australian Division Incorporated).
\textsuperscript{119} S 221(1) LAA; see also the former s 47B Public Works Act 1902 (WA) as amended. Within 90 days of service of a claim, the acquiring authority must have a report made on the value of the interest to be acquired: s 217(1) LAA; see also the former s 46(1) Public Works Act 1902 (WA) as amended.
\textsuperscript{120} S 211 LAA; see also the former s 41(1) Public Works Act 1902 (WA) as amended; c.f. contra s 67(1) Lands Acquisition Act 1989 (Cth).
\textsuperscript{121} S 207(1) LAA; see also the former s 36(1) Public Works Act 1902 (WA) as amended. Note that the period to claim compensation following the annulment or amendment of a taking order was doubled from 30 days to 60 days under the LAA: see Department of Land Information, Overview of the Land Administration Bill 1997 and the Acts Amendment (Land Administration) Bill 1997 (July 1997) 19. If proceedings are not initiated within the limitation period, no action will lie for compensation against the acquiring authority: S 207(3) LAA; see also the former s 36(2)(b) Public Works Act 1902 (WA). The limitation period may be extended by the Minister: s 207(2) LAA; see also the former s 36(2)(a) Public Works Act 1902 (WA) as amended.
\textsuperscript{122} S 219(1) and (2) LAA; see also the former s 47(2) Public Works Act 1902 (WA). In the writer’s opinion, it would be preferable that the reverse occur, since there may be legitimate reasons why the claimant has not responded to the offer.
\textsuperscript{123} S 248(2) LAA. The government has maintained that its general practice is to make an offer of advance payment of 100\% of the offer of compensation: see Government of Western Australia, Response Of The Western Australian Government to The Western Australian Legislative Council Standing Committee on Public Administration and Finance in Relation to the Impact of State Government Actions and Processes
resumption date. The compensation awarded may fail to account for land value increases after the taking, a critical point given the sometimes bullish WA property market during the last decade. A landowner may be unable to establish that a taking has occurred, as for example, by the minister’s acquisition of State corridor rights, the sale of rights to a private operator, and the imposition of statutory restrictions. While State corridor rights are acquired under Part 9 of the LAA, the content of those rights is unclear. A taking order for the acquisition of State corridor rights may leave a landowner unable to establish that any compensable land acquisition under s 241 occurred. State corridor rights may cause landowners financial hardship, and serve no purpose other than to disallow a landholder compensation.

(c) Compensation ingredient 1: Value

The LAA shares many similarities with the former Public Works Act 1902 regarding the four ingredients of compensation. ‘Value’ remained the principal component of the

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124 See Jacobs, above n 48, [18.60], citing Turner v Minister for Public Instruction (1956) 95 CLR 245, 268–269 (Dixon CJ); but note s 178(1) Planning and Development Act 2005 (WA); note also that compensation may not be assessed at the date of the acquisition where the taking is authorised ‘by a special Act’: see s 241(2)(a) LAA considered in Bell, above n 76, [4.1.4].
125 Note, however, the payment of interest (s 241(10)–(13) LAA) and advance payments of compensation that may be offered pending settlement (s 248(1)(a) LAA) may offset some of the inability of the landowner to participate in the benefit of subsequently rising land prices. It is acknowledged, however, that an affected landowner may also benefit where land values fall after the taking.
126 S 29 Dampier to Bunbury Pipeline Act 1997 (WA).
127 Ibid, s 34.
128 Ibid, s 41. For a case which provides an example of the operation of the DBPA and state corridor rights, see Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue (2011) 43 WAR 186, 191–194 (McLure P).
129 S 29(2) Dampier to Bunbury Pipeline Act 1997 (WA).
130 Ibid, s 28(1) merely provides that state corridor rights ‘... are an interest in land ...’; see J Tarrant, ‘The Dampier to Bunbury Gas Pipeline: The Case of Unidentified Property Rights—Case Note’ (2006) 12 APLJ 262, 264.
131 Auld v Dampier to Bunbury Natural Gas Pipeline Access Minister (2005) 139 LGERA 52, [32] (Pullin J); see also Brown, Land Acquisition, above n 106, [1.21]. Note compensation for injurious affection is provided under the Act: see s 42(1) Dampier to Bunbury Pipeline Act 1997 (WA). Taking orders are made under s 177 LAA.
132 There is concern from affected landowners regarding loss of income: see Western Australia, Parliamentary Debates, Legislative Council, 26 September 2007, 5733b (Hon M Criddle and Hon L Ravlich). See also grievances that landowners are required to remove infrastructure on affected land at their own expense, Western Australia, Parliamentary Debates, Legislative Assembly, 2 April 2009, 2597b–2599a (Mr BJ Grylls).
133 Tarrant, above n 130, 265. But c.f. contra Law Reform Commission of Western Australia, Report, above n 66, 67, that state corridor rights are for the purpose of triggering and settling compensation to affected landholders.
134 See chapter 5, [5.2(b(ii)]; s 63 Public Works Act 1902 (WA); Worsley Timber Co Ltd v Minister for Works (1933) 36 WALR 52, 65 (Dwyer J). On valuing compensation generally, see E Samec and E Andre, above n 72, 191-205.
compensation to be assessed in favour of an affected landowner.\(^{135}\) The Supreme Court\(^{136}\) and industry\(^{137}\) have applied the Spencer principle of market value.\(^{138}\) ‘Value’ has also continued to reflect ‘the highest and best use to which the land could be put.’\(^{139}\) As under previous legislation,\(^{140}\) the value test is applied despite its omission from the LAA,\(^{141}\) and despite the Spencer principle being difficult to apply.\(^{142}\)

Various methods for the determination of value continue to be applied,\(^{143}\) but are subjective, involve conjecture and are ‘sometimes bordering on guesswork.’\(^{144}\) It is not an assessment of damages.\(^{145}\) A landowner’s compensation is determined by the application of ‘an art not a science’.\(^{146}\) The Court may end up rejecting the reasoning of all valuers in determining questions of value,\(^{147}\) although doubts continue to be resolved.

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\(^{135}\) See Brown, *Land Acquisition*, above n 106, [3.14]. Section 241(2) LAA provides ‘regard … be had to the value of the land with any improvements, or the interest of the claimant in the land …’ This reflects the former s 63(a) *Public Works Act 1902* (WA) as amended.

\(^{136}\) See eg *McKay v Commissioner of Main Roads [No 7]* [2011] WASCA 223, [145] (Beech J) that value is determined ‘by identifying the price of a notional bargain between hypothetical vendor and purchaser who are prudent, well informed and willing, but not anxious, to compete the exchange’. Beech J relied upon *Spencer v Commonwealth* (1907) 5 CLR 418, 432 (Griffith CJ); 441 (Isaacs J) on the basis that ‘these statements have been consistently applied in cases since then’. [148].

\(^{137}\) The *Spencer* principle is now reflected in the Australian Property Institute (Inc), *Code of Professional Practice: see Clifford v Shire of Busselton* (2007) 51 SR (WA) 62, 65 (ML Barker J).

\(^{138}\) Value is determined ‘by identifying the price of a notional bargain between hypothetical vendor and purchaser who are prudent, well informed and willing, but not anxious, to complete the exchange’: see *McKay v Commissioner of Main Roads [No 7]* [2011] WASCA 223, [145] (Beech J), who relies upon the test in *Spencer v Commonwealth* (1907) 5 CLR 418, 432 (Griffith CJ); 441 (Isaacs J) on the basis that ‘these statements have been consistently applied in cases since then’. [148]. The writer respectfully disagrees on this point, noting the authorities provided in ch 5, [5.1]. However, the *Spencer* decision ‘has stood the test of time’: Brown, *Land Acquisition*, above n 106, [3.14].

\(^{139}\) Various methods for the determination of value continue to be applied,\(^{140}\) but are subjective, involve conjecture and are ‘sometimes bordering on guesswork.’\(^{144}\) It is not an assessment of damages.\(^{145}\) A landowner’s compensation is determined by the application of ‘an art not a science’.\(^{146}\) The Court may end up rejecting the reasoning of all valuers in determining questions of value,\(^{147}\) although doubts continue to be resolved.

\(^{140}\) See eg *McKay v Commissioner of Main Roads [No 7]* [2011] WASCA 223, [155]–[157] (Beech J). The ‘highest and best uses’ test is also applied to considerations of injurious affection considered below, although the adjoining land will be valued in its affected state; see *Lenz Nominees Pty Ltd v Cmr of Main Roads* [2012] WASCA 6, [326] (Edelman J).


\(^{142}\) It has also been held that the *Spencer* principle does not form part of the common law: see Brown, *Land Acquisition*, above n 106, [3.14], citing *Melwood Units Pty Ltd v Commissioner of Main Roads (Qld)* 3 QLQR 209. This view was not supported on appeal to the Privy Council: see Brown citing *Melwood Units Pty Ltd v Commissioner of Main Roads* (1978) 19 ALR 453.


\(^{144}\) *McKay v Commissioner of Main Roads [No 7]* [2011] WASCA 223, [152], [2213]–[2214] (Beech J), who then considers the comparable sales method and the hypothetical subdivision analysis method. Note also the before and after method of valuation, particularly in respect of small areas of resumed land that may be difficult to sell: see *Cerini v Minister for Transport* [2001] WASC 309.

\(^{145}\) *McKay v Commissioner of Main Roads [No 7]* [2011] WASCA 223, [2214] (Beech J); see also [165].


in the disposed owner’s favour.\textsuperscript{148} The best evidence of market value of resumed land will generally be comparable sales of similar land.\textsuperscript{149} However, this can prove time consuming, costly and difficult to establish, especially where the sales are not comparable, and given that valuers are under no obligation to identify key comparable sales.\textsuperscript{150} Increasingly complex planning, zoning and environmental restrictions may also frustrate a claimant seeking to demonstrate highest and best land use over and above the current use value.\textsuperscript{151}

A discounting of ‘any increase or decrease in value attributable to the proposed public work’ remains.\textsuperscript{152} This reflects the continued application of the pointe gourde principle.\textsuperscript{153} Alterations in value attributable to a proposal for a public work may be disregarded.\textsuperscript{154}

\textbf{(d) Compensation ingredient 2: Limited loss or damage}

Regard is had to various heads of prescribed pecuniary loss or damage arising from interference with the plaintiff’s land activities.\textsuperscript{155} This includes regard to other facts considered ‘just to take into account’.\textsuperscript{156} Unfortunately, this provision ‘is of limited utility in ensuring that courts and authorities interpret 241 with an eye to just compensation.’\textsuperscript{157} Like its predecessor,\textsuperscript{158} the provision is confined to its context,\textsuperscript{159}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{148} Ibid, [175]-[178] (Beech J).
\item \textsuperscript{149} Ibid, [4.11]; see also Duffy v Minister for Planning [2003] WASCA 294, [24].
\item \textsuperscript{150} See eg Western Australian Planning Commission v Arcus Shopfitters Ltd [2003] WASCA 295 discussed in JJ Hockley and RTM Whipple, ‘Valuation Evidence: The Comparable Sales Approach when Sales are not Comparable’ (2005) 11 APLJ 90.
\item \textsuperscript{151} Brown, \textit{Land Acquisition}, above n 106, [3.17].
\item \textsuperscript{152} S 241(2) LAA; see also s 188(1)(b) Planning and Development Act 2004 (WA); see also the former s 36(2b) Metropolitan Region Town Planning Scheme Act 1959 (WA). On the interpretation of the word ‘attributable’, see McKay v Commissioner of Main Roads [No 7] [2011] WASC 223, [194]–[198] (Beech J).
\item \textsuperscript{153} Cerini v Minister for Transport [2001] WASC 309, [196] (Parker J). This principle ensures that ‘an acquiring authority cannot by a proposed public work, cause planning restrictions to destroy development potential of land and then assess compensation for its taking on the basis that the destroyed potential had never existed’; see McKay v Commissioner of Main Roads [No 7] [2011] WASC 223, 291] (Beech J).
\item \textsuperscript{154} See s 241(2) LAA; Law Reform Commission of Western Australia, \textit{Final Report}, above n 66, 25. Note, however, s 241(2) LAA has been interpreted in accordance with previous statutory provision: McKay v Commissioner of Main Roads [No 7] [2011] WASC 223, [198], [241]–[292] (Beech J), applying the decision in Mount Lawley Pty Ltd v WA Planning Commission [2007] 34 WAR 499 regarding s 36(2b) Metropolitan Region Town Planning Scheme Act 1959 (WA). In McKay, attention was given to the hypothetical zoning of the land, absent the proposed public work: see [204] (Beech J).
\item \textsuperscript{155} S 241(6)(a)-(e) LAA and s 63(aa)(i)-(v) Public Works Act 1902 (WA) as amended.
\item \textsuperscript{156} S 241(6)(e) LAA; see Lenz Nominees Pty Ltd v Cmr of Main Roads [2012] WASC 6, [420]–[425] (Edelman J) that s 241(6)(e) does not cover non-pecuniary loss or loss not actually suffered.
\item \textsuperscript{157} Law Reform Commission of Western Australia, \textit{Final Report}, above n 66, 16.
\item \textsuperscript{158} See s 63(aa)(v) Public Works Act 1902 (WA) as amended; Konowalow & Felber v Minister for Works [1961] WAR 40, 42 (Virtue J) considered in chapter 5, [5.3(c)(i)].
\end{enumerate}
\end{footnotesize}
thereby applying only to compensation for removal expenses and disruption and reinstatement of a business. \(^{160}\) Accordingly, the recovery of costs which otherwise would have been awarded may be denied. \(^{161}\) The reference to ‘just’ bars acquisition costs of a replacement property where the plaintiff did not purchase or have an intention of purchasing a replacement property at the date of the taking. \(^{162}\) Other references to ‘just’ relate only to very limited circumstances. \(^{163}\)

A range of other damage for which compensation may be awarded is recognized. Compensation is awarded for damage from entry onto land \(^{164}\) or the removal of materials from the land. \(^{165}\) However, reference to ‘damage’ requires that damage actually be suffered and there must be a causal link between the acquiring authority’s entry, occupation or taking of material and the damage. \(^{166}\) As a result, a landowner will not, for example, be awarded compensation for the removal of gravel from land which did not constitute a loss. \(^{167}\)

(e) Compensation ingredient 3: injurious affection and severance more favourably treated

Disputes commonly involve imprecise matters such as severance and injurious affection, rather than value. \(^{168}\) The practice of both legislature and the common law regarding compensation for expropriation was to ‘allow many people no compensation

\(^{159}\) Caltex Petroleum Pty Ltd v Commissioner of Main Roads [2004] WASC 239, [27]–[30] (McKechnie J); Cerini v Minister for Transport [2001] WASC 309, [282] (Parker J). This interpretation of s 241(6)(e) LAA relies upon an application of the ejusdem generis rule.


\(^{161}\) Cerini v Minister for Transport [2001] WASC 309, [283] (Parker J) on disallowing the reasonable costs of expert advice which his Honour would have otherwise awarded; see also Caltex Petroleum Pty Ltd v Commissioner for Main Roads [2004] WASC 239, [34] (McKechnie J) on finding a manifest error in an Arbitrator’s award of compensation for goodwill due to the loss of leasehold tenure.


\(^{163}\) See ss 249(2) and (3) LAA on compensation where title is doubtful; s 156(2a) LAA regarding the taking of land in relation to native title; Bartlett, Native Title in Australia, above n 4, [23.33]–[23.35] describes s 241(6)(e) LAA as a ‘most exceptional provision’ which could accommodate intangible loss associated with the extinguishment of native title.

\(^{164}\) But see Clifford v Shire of Busselton (2007) 51 SR (WA) 62, 84 (ML Barker J) where trenching works did not constitute ‘entry’ for the purposes of s 241(11) LAA. Nor did Barker J consider the Shire works to amount to ‘an unambiguous act of eminent domain.’

\(^{165}\) See s 203(1) LAA. On the power of entry and removal of materials, see ss 182-186 LAA; see also the former Part II, Public Works Act 1902 (WA) as amended.

\(^{166}\) Kingstripe Pty Ltd v Commissioner of Main Roads [2010] 71 SR (WA) 289, 294 (J Pritchard DP).

\(^{167}\) Ibid, 289, 295 (J Pritchard DP).

\(^{168}\) Evidence to the Standing Committee on Public Administration and Finance, Perth, 10 November 2003, 13 (Mr Gary Fenner, Valuer General), cited in Samec and Andrew, above n 72, 193.
but a few people some\ufffd, based on the distinction between a taking and an affectation of property.\ufffd

The LAA makes no mention of injurious affection, instead providing for ‘damage…due to the reduction in value of…adjoining land.’\ufffd Both terms, however, are synonymous.\ufffd A landowner affected by severance or injurious affection is treated favourably,\ufffd as for example with a holder in fee simple of adjoining and injuriously affected land.\ufffd Accordingly, s 241(7)(b) has permitted compensation where retained adjoining land is reduced in value because of the public work for which the land was resumed,\ufffd and without limiting the public work to that carried out on the resumed land.\ufffd

However, as regards injurious affection, s 241(7) LAA applies only where there has been a taking of fee simple land from an owner who also retains adjoining land in fee simple following that resumption.\ufffd Claims for injurious affection may also be limited by other legislation. The taking of an easement over land by energy operators\ufffd and

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P Ryan, Urban Development Law and Policy (Law Book Co, 1987) [7.53].

Ibid.

S 241(7)(b) LAA; Lenz Nominees Pty Ltd v Commissioner of Main Roads [2012] WASC 6, [302] (Edelman J). Compare this with the former s 63(b) Public Works Act 1902 (WA) as amended, which provided for ‘injurious affection’.

Lenz Nominees Pty Ltd v Commissioner of Main Roads [2012] WASC 6, [302] (Edelman J) that injurious affection is a ‘shorthand description for the reference to ‘the reduction in value of that adjoining land’.’ S 241(7)(b) LAA is still commonly referred to as ‘the injurious affection provision’: Cerini v Minister for Transport [2001] WASC 309, [224] (Parker J).

Note, however, the LAA may still be quite narrow when compared with other States: compare eg s 201(1)(b) Acquisition of Land Act 1967 (Qld) considered in Cerini v Minister for Transport [2001] WASC 309, [227], [232]. Parker J refused to read into s 241(7) the width of operation intended by the Qld provision.

Cerini v Minister for Transport [2001] WASC 309, [228] (Parker J) that:

‘…when the LA Act was enacted in 1997 the legislature…dispensed with the notion of damage due to injurious affection by taking and replaced it with the novel concept of damage suffered ’(b) due to a reduction of value of that adjoining land’. In this form the words do not expressly relate to the reduction in value to the public work for which the resumption was affected, let alone specifying whether the public work is relevantly limited to that carried out on the resumed land of the claimant…or the public work at large.’


Ibid, [231] (Parker J).

Compare this with the position under the former s 63(b) Public Works Act 1902 (WA), as noted by McLeod, ‘Compensation Issues—Snatch and Grab—Land Acquisition and Compensation’, above n 73, 14, and by Samec and Andre, above n 72, 157-159. Accordingly, this may operate to the disadvantage of a party holding a lesser interest, such as a lessee: Law Reform Commission of Western Australia, above n 66, 15, 21. The Commission recommended that s 241(7) LAA be amended to provide an entitlement to compensation for any affected holder of any interest in adjoining land: Appendix 1, Recommendation 6, 80.

S 45 Energy Operators (Powers) Act 1979 (WA); c.f. contra the former s 31 State Electricity Commission Act 1945 (WA), where the taking of an easement would probably have afforded compensation for injurious affection: Law Reform Commission of Western Australia, above n 66, 73.
water agencies\textsuperscript{179} will not afford a claim for injurious affection. A similar position exists in relation to petroleum pipelines.\textsuperscript{180} While most easements for power infrastructure works are acquired by agreement with the landowner,\textsuperscript{181} grievances from affected landowners, who often receive little recompense when an easement is acquired over their land, suggest the unfair disturbance of property rights,\textsuperscript{182} despite contrary assertions.\textsuperscript{183} The State Government has refused to extend compensation for injurious affliction arising out of the acquisition of any interest in the landowner’s land,\textsuperscript{184} despite recommendation to that effect.\textsuperscript{185}

With severance,\textsuperscript{186} the recovery of subsequent losses consequential upon the taking is permitted.\textsuperscript{187}

\textbf{(f) Compensatory ingredient 4: Solatium}

Generous compensation awards continue for solatium,\textsuperscript{188} which may explain the fewer compensation disputes in WA compared with other States.\textsuperscript{189} However, this is confined

\textsuperscript{179} Water Agencies (Powers) Act 1984 (WA).
\textsuperscript{180} See s 19(1) Petroleum Pipelines Act 1969 (WA), discussed in Law Reform Commission of Western Australia, above n 66, 76, 77.
\textsuperscript{181} Law Reform Commission of Western Australia, above n 66, 72.
\textsuperscript{182} See eg Western Australia, Parliamentary Debates, Legislative Assembly, 27 September 2007, 5950b–5952a (Mr P Watson and Mr F Logan) on landowners; grievances concerning routes for powerlines for the Albany region. Note also the large losses of affected landowners noted by the Law Reform Commission of WA, above n 66, 73.
\textsuperscript{183} The State Government maintained that the current position balanced the public interest in improved electricity supply with the private interests of affected landowners: Government of Western Australia, Response, above n 123, 8.
\textsuperscript{184} Standing Committee on Public Administration and Finance, above n 48, [4.151].
\textsuperscript{185} Ibid [4.151]. This recommendation was rejected by the Government on concerns that it ‘could potentially have significant financial implications’: Government of Western Australia, Response, above n 123, 8.
\textsuperscript{186} S 241(7)(a) LAA. Compare this with the former s 63(b) Public Works Act 1902 (WA) as amended.
\textsuperscript{187} In Lenz Nominees Pty Ltd v Cmr of Main Roads [2012] WASC 6, [237]–[238], [280]. Edelman J held that the words ‘damage suffered…due to’ introduced issues of causation, thereby permitting the recovery of subsequent losses consequential upon the taking. The former s 63(b) Public Works Act 1902 (WA) provided for ‘damage…sustained…by reason of…’ His Honour also observed [235] that the severance provision s 241(7)(a) was a separate provision to the injurious affection provision of s 241(7)(b) LAA. This was not the case under the former s 63(b) Public Works Act 1902 (WA) as amended.
\textsuperscript{188} S 241(8) and (9) LAA. See also the former s 63(c) Public Works Act 1902 (WA). Although the award is discretionary, it is accepted practice that solatium is awarded: Cerini v Minister for Transport [2001] WASC 309, [298], [300] (Parker J). On why this is considered generous, see footnote 106.
\textsuperscript{189} The allowance of 10% above value has been regarded as the reason for fewer compensation disputes in Western Australia than in other states: Brown, Land Acquisition, above n 106.
to non-pecuniary loss from a taking without agreement. Interest continues to be available at six per cent.

(g) Removal of discretion for special circumstances

A significant reversal from previous compensation provisions is the absence of judicial discretion to depart from the prescribed heads of compensation in special circumstances where normal methods of assessment would lead to an inadequate result. This absence may detract from the doubtful common law right to compensation upon resumption. The present position restricts the operation of accepted compensation principles. For example, when land is taken, the affected owner is entitled to the greater of market value or value to the owner.

Where taken land had a protected non-conforming business use, compensation under the former statutory provisions was available on the basis of special value when use was not relocatable. While the circumstances when special value will arise are rare, the Court’s inability to consider special circumstances may mean severance must be relied upon for recovery.

190 Lenz Nominees Pty Ltd v Cmr of Main Roads [2012] WASC 6, [454] (Edelman J). Note also that s 241(9) LAA is not a power at large, but is a power confined to the solatium which may be awarded under s 241(8) LAA: Cerini v Minister for Transport [2001] WASC 309, [301] (Parker J).
191 S 241(11) LAA; see also the former s 63(d) Public Works Act 1902 (WA). Note, however, this is unlikely to extend to the costs of litigation: Cerini v Minister for Transport [2001] WASC 309, [303] (Parker J).
192 See s 63(c)(ii) Public Works Act 1902 (WA) as amended, and considered in chapter 5, [5.2(b)(ii)]; R v Compensation Court (WA); Ex parte State Planning Commission Re Della Vedova (1990) 2 WAR 242, 265–266 (Brinsden and Walsh JJ); St John Ambulance Assn of Western Australia Inc v East Perth Redevelopment Authority (2001) 114 LGERA 112, [82].
193 See Battista Della-Vedova v State Planning Commission, 2 of 1986 No 3 of 1986 BC8800828, 14 on the former s 63(3) Public Works Act 1902 (WA) as amended, and considered in McLeod, above n 52; see also chapter 2 of this thesis; Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority (2007) 233 CLR 259, 270 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
194 Arcus Shopfitters Pty Ltd v WA Planning Commission [2002] WASC 174, [70] (Pullin J). This involves a recognition of the Pastoral principle from Pastoral Finance Association Ltd v Minister [1914] AC 1083 regarding ‘special value’.
196 S 63(c)(ii) Public Works Act 1902 (WA) as amended.
197 For a discussion of ‘special value’ principles, see St John Ambulance Assn of Western Australia Inc v East Perth Redevelopment Authority (2001) 114 LGERA 112 [79]–[99] (Hasluck J, Mr Priest and Mr Gauntlett) Note, however, that Brown, Land Acquisition, above n 106, [3.15], sees this case as difficult to distinguish from a severance claim; Pettitt, SC, above n 53, 13, doubts this was a case of special value. For a case involving compensation for special value as regards a leasehold interest under s 241(2) LAA, see WA Planning Commission v Shim (2008) 58 SR (WA) 127, 136 (Judge J Chaney).
199 See St John Ambulance Assn of Western Australia Inc v East Perth Redevelopment Authority(2001) 114 LGERA 112, [182] (Hasluck J, Mr Priest and Mr Gauntlett). This would require the claimant to address the requirement of ‘causal connection between the consequential loss brought about by the
6.4 Key Area 3 - Mineral Rights

This period is characterized by continuing tension between farmers and miners. A parliamentary committee was unconvinced that there were ‘significant problems with conflict between mining companies and freehold landholders in the South West of the State’. Determination of the State’s regard for a landholder’s property rights requires a consideration of new crown grant reservations and confiscation provisions, and a determination of the extent to which a landholder’s property rights previously identified were affected by the Mining Act 1978 and the amended Petroleum Act 1967. Private property rights are revealed to be the subject of significant further reservation by crown grant and uncompensated retrospective confiscations. However, significant protection was also provided in the continuing farmer’s veto, royalty rights and compensation provisions, suggesting that ultimately a high regard would be shown by the State towards property rights where it was considered in the public interest to do so, or where a sectional interest group prevailed upon the Government.

6.4.1 Crown reservation and retrospective confiscations

The new Mining Act 1978 continued the Crown’s assertion of property over royal metals. A requirement that all grants of freehold title reserve all minerals to the

resumption’: [183]. The issue is also difficult to determine because the court may see no distinction between ‘special value’ and ‘value’ to the affected landowner; see Western Australian Planning Commission v Kelly [2007] WASCA 160, [26] per McLure JA. Note that to the extent that any special value includes injurious affection, this is dealt with separately under s 241(7) of the LAA considered above.


201 Standing Committee on Public Administration and Finance, above n 52, [6.46]. The Committee reported that such issues ‘appear to the Committee to stem primarily from changing expectations as to land use from parties locked into long term contractual arrangements.’ This conclusion is curious to the extent that access and compensation agreements between landholders and miners do not run with the land.

202 See s 24 LAA.

203 Act No 107 of 1978, assented to on 8 December 1978.

204 See s 9 Mining Act 1978 (WA) and the former s 138 Mining Act 1904 (WA) as amended. For a comparison of the new Act with the previous 1904 Act as amended, see M Hunt, ‘The Mining Act 1978 of Western Australia’ (1981) 55 ALJ 317; for comment on the 1978 Act, see also SJC Wise, ‘Comment on Western Australia Mining Act’ (1978) 1 AMPLJ 397; M Hunt, ‘Mining Act 1978 of Western Australia’ (1979) 2 AMPLJ 1. On the position in other states, see s 3(1) Crown Lands Act 1989 (NSW); s 9(1) Mines Resources (Sustainable Development) Act 1990 (Vic); s 16 Mining Act 1971 (SA) where minerals are reserved in favour of the Crown. The position under s 8(3) Mineral Resources Act 1989 (Qld) and s 6 Mineral Resources Development Act 1995 (Tas) is more similar to the position in Western Australia. It has been argued that the registration system under the Act gave greater state control over Crown resources; N Skead, ‘The Registration and Caveat Systems under the Mining Act 1978 (WA): A Torrens Clone?’ (2007) 26 ARELJ 185, 187, 197, 201.
Crown was continued by the LAA. Several important changes were also made. Earlier established depth limits to crown grants of only 40 feet for land within Mining Districts were increased as Mining Districts expanded to eventually cover the whole of the State. The Crown also arguably broadened its assertions of ownership by retrospective confiscations.

(a) Minerals

The new Mining Act broadly defined ‘minerals’ to include ‘all naturally occurring substances obtained or obtainable from any land by mining.’ Broadly defining ‘minerals’ may have retrospectively expropriated without compensation ‘naturally occurring substances’ from crown grants made to landowners prior to 1978, in favour of the Crown. This may have also included geothermal energy and resources, depending on how the hybrid qualities of geothermal resources are classified. Although the Crown’s property over minerals and the reservation of minerals in crown grants has been affirmed by Parliament when amendments to the Mining Act have been

205 See chapter 5, [5.4(a)] of this thesis; s 15 Land Act 1933 (WA).
206 See s 24 Land Administration Act 1997 and the definition of ‘minerals’ in s 3. Note that depth limits are no longer specified unless already in existence; see Crown Land Administration and Registration Practice Manual, above n 12, [2.3.6.3].
207 See chapter 5 of this thesis, [5.4(a)].
208 Crown Land Administration and Registration Practice Manual, above n 12, [2.3.6.1], noting that by 22 May 1981, all of WA was covered by Mining Districts.
209 See s 8(1) Mining Act 1978 (WA). ‘Minerals’ were previously defined as ‘all minerals other than gold and all precious stones’: s 3 Mining Act 1904 (WA) as amended. On ‘minerals’ generally, see C Willis, ‘What is a Mineral? Interpreting Mineral Technology’ (1997) 16 AMPLJ 69. Note some substances on private land were excluded: See s 8(1)(b) Mining Act 1978 (WA). See also Western Australia, Parliamentary Debates, Legislative Assembly, 24 August 1978, 2620 on the additional exclusion of shale, clay and limestone on private land; see also Hunt, Mining Law in Western Australia, above n 104, [1.8.2]. The substances excluded from the definition of ‘minerals’ where occurring on private land were also later expanded: see s 3 Mining Act 1978 (WA) as amended. The substances now excluded are limestone, rock, gravel, shale (excluding oil shale) and certain sand and clay. Oil shale was previously regulated by the Petroleum and Geothermal Energy Resources Act 1967. See Hunt, ibid, [1.82].
210 AJ Bradbrook, SV MacCallum and AP Moore, Australian Real Property (LBC, 4th ed, 2007) [16.115]; Hunt, Mining Law in Western Australia, above n 104, [1.8.2] citing M Crommelin, Annual Survey of Law (Law Book Co, 1978) 213. Hunt provides uranium as an example of a substance outside of the definition of ‘minerals’ under the Mining Act 1904 (WA) but within the definition of ‘minerals’ under the Mining Act 1978 (WA). Hunt also states that the change in definition brings oil shale occurring on private land within the definition of ‘minerals’.
211 See AJ Bradbrook, ‘The Ownership of Geothermal Resources’ 1987 AMPLA Yearbook, 352, 355. If geothermal resources constituted a mineral, the revised definition of minerals considered earlier under the Mining Act 1978 (WA) may have included a retrospective confiscation of geothermal energy when compared with the Mining Act 1904 (WA): see Bradbrook, ibid, 339. If geothermal resources constituted groundwater, then the Crown would have control but not ownership of the resource: 363. See also the writer’s consideration of groundwater at [6.7]. If the resource were a gas, then it would belong to the Crown. Bradbrook, ibid, 360, citing s 9 Petroleum Act 1967 (WA). If the resource was sui generis, ownership would effectively rest with the overlying private landowner: 364–376, applying either the cuius est solum ejus est usque ad coelom et ad inferos maxim or the res nullius principle.
considered, such propositions are uncertain because of the absence of explicit legislative intent.

(b) Extended crown reservations and confiscation: geothermal energy, greenhouse gas formations and injection sites

The legislature continued its established practice of retrospective confiscation regarding geothermal energy resources and geothermal energy; geothermal resources and energy were deemed always to have been crown property, despite previous alienation of the land in fee simple. This was reinforced by a retrospective crown reservation. As with mining, statutory provisions were made for land resumption by the Crown for the purposes of the Petroleum and Geothermal Energy Resources Act.

Currently, the Government seeks to secure potential greenhouse gas formations and injection sites. A motivation for the declaration of crown property is so that the State can allocate exploration rights. However, attempts to argue that the same considerations that justify crown ownership of greenhouse gases apparently also justify crown ownership of petroleum have been contentious. It has also been debated

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212 See e.g. Western Australia, Parliamentary Debates, Legislative Assembly, 13 March 1985, 889, (Mr Parker, Minister for Mines); Western Australia, Parliamentary Debates, Legislative Council, 17 April 1985, 2091 (IG Medcalf).
213 See Hunt, Mining Law in Western Australia, above n 104, citing Commonwealth v Hazeldell [1921] 2 AC 373. The common law will not find legislation to be retrospective, in the absence of clear legislative intention. See J Corkery and A Gerrard, ‘Editorial: Retrospectivity’ (2007) 17(1) Art 12, Revenue Law Journal 1, 2, citing Garder v Lucas (1878) 3 App Cas 582, 601 (Lord O’Hagan), and Maxwell v Murphy (1957) 96 CLR 261, 267 (Dixon CJ). However, Bradbrook et al, above n 206, argue that the change in definition of minerals does effect an expropriation, as a matter of statutory interpretation. The matter was not addressed in the second reading of the Mining Bill: see Western Australia, Parliamentary Debates, Legislative Assembly, 24 August 1978, 2619–2625.
214 With respect to petroleum, see eg s 9 Petroleum Act 1936 (WA); see also Midland Railway Company of Western Australia Ltd v State of Western Australia and Western Australian Petroleum Pty Limited [1954] WALR 1, 8 (Dwyer CJ); s 9 Petroleum Act 1967 (WA).
215 s 9 Petroleum Amendment Act 2007 (WA), assented to on 21 December 2007. Compensation is afforded to the landowner: see s 9(3). For a further consideration of geothermal ownership, see Bradbrook, ‘The Ownership of Geothermal Resources’ above n 211, 353–380.
216 S 10 Petroleum Amendment Act 2007 (WA).
217 S 12 Petroleum and Geothermal Energy Resources Act (WA).
218 Cls 9, 10 Petroleum and Geothermal Energy Legislation Amendment Bill 2013 (WA); see also Western Australia, Parliamentary Debates, Legislative Assembly, 12 June 2013, 1315c–1352a (WR Marmion, Minister for Mines and Petroleum); Western Australia, Parliamentary Debates, Legislative Council, 8 August 2013, 3040b–3041a (Hon Ken Baston). The Bill was discharged and referred to the Standing Committee on Legislation which tabled Report No 20 on 19 November 2013 (TP 969).
220 The explanation for the retrospective and uncompensated expropriation of petroleum appears to be that ‘it became increasingly desirable for both strategic and economic reasons that certain resources, or at least the means of their development, be under government control’: see D Grinlinton, ‘Property Rights and the Environment’ (1996) 4 APLJ 1, 5. Grinlinton sees the state expropriation of petroleum as indispensable for heavy industry, transport and military purposes, but no examination is undertaken of the ability of the
whether the Crown can claim property in something which is only a potential.\textsuperscript{222} Unlike with geothermal resources and energy, concern has also been expressed regarding the impact of geosequestration upon freehold rights, in particular rights of access\textsuperscript{223} and the unequal footing of landowners negotiating for compensation.\textsuperscript{224}

6.4.2 Private land, resumption, and the limited statutory mining tenure with respect to privately owned minerals

Most ‘private land’\textsuperscript{225} is available for mining under the \textit{Mining Act 1978}.\textsuperscript{226} The Crown’s appropriation of minerals and petroleum and the subjection of all minerals and petroleum to legislative disposition was confirmed by the High Court.\textsuperscript{227} Land alienated prior to 1 January 1899 remained vulnerable to mining for minerals other than gold, silver and precious metals by ministerial declaration.\textsuperscript{228} Private land might also be resumed.\textsuperscript{229} While the public ownership of minerals brought benefits to the State in royalties, it may also have caused conflict between the tenement holder and the private sector to meet the needs of these industries. Parliament appears to still apply similar arguments to Grinlinton in relation to petroleum: see \textit{ibid}.

\textsuperscript{221}Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 27 June 2013, 2404b–2419a, (MJ Cowper).
\textsuperscript{222}\textit{Ibid}, (DJ Kelly).
\textsuperscript{223}See proposed s11(2A) in clause 11, Petroleum and Geothermal Energy Legislation Amendment Bill 2013 (WA); see also Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 26 June 2013, 2176b–2190a (Mr MJ Cowper); Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 27 June 2013, 2450b–2466a (MJ Cowper); Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 8 August 2013, 3078c–3084a (MJ Cowper); Western Australia, \textit{Parliamentary Debates}, Legislative Council, 17 September 2013, 4112b–4120a (Hon C Holt).
\textsuperscript{224}Western Australia, \textit{Parliamentary Debates}, Legislative Council, 17 September 2013, 4112b–4120a (Hon C Holt). The Bill was referred to the Standing Committee on Legislation, which presented its report to Parliament on 19 November 2013.
\textsuperscript{225}See s 8(1) \textit{Mining Act 1978} (WA) on the definition of private land. Certain specified lands were expressly excluded: see s 27(2) \textit{Mining Act} and the Third Schedule. See also \textit{Margaret River Resources Pty Ltd v Calder} [2008] WASCA 238, [38] (McClure JA) where crown land the subject of a reserve was held not to constitute private land. However, Garden Island constitutes ‘private land’: \textit{Precious Metals Australia Limited v Cth}, Perth Warden’s Court, 18 June 1993, considered in \textit{AMPLA} (1993) Vol 12(3), Bulletin 15, 143–145. ‘Private land’ may also not have included freehold land alienated prior to 1 January 1899, and which did not comprise an estate in fee simple, such that the minerals contained therein are now crown property: see MA Lewis, ‘Exploration and Mining on Private Land: An Analysis of the Law of Western Australia’ [1981] 3 \textit{AMPLJ} 354, 355 citing s 9 \textit{Mining Act 1978} (WA).
\textsuperscript{226}S 27 \textit{Mining Act 1978} (WA), cited in Hunt, above n 104, [3.4.2]; see also s 37(1) and (3) of the Act on the power to bring private land within Div 3 of the \textit{Mining Act 1978} (WA); Hunt, \textit{ibid}, [3.4.10].
\textsuperscript{227}Western Australia v Ward [2002] 213 CLR 1, 184–186 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), referring to s 117 \textit{Mining Act 1904} (WA), s 9 \textit{Petroleum Act 1936} (WA) and s 3 \textit{Western Australian Constitution Act}; see also the Federal Court decisions of \textit{Daniel v Western Australia} [2003] FCA 666, [728] (Nicholson J); \textit{Neowarra v State of Western Australia} [2003] FCA 1402, [599] (Sundberg J), considered in \textit{Mining and Petroleum Legislation Service} (Lawbook Co, 2010) Vol 11, [620.9.10].
\textsuperscript{228}See s 37(1) and (3) of the Act on the power to bring private land within Div 3 of the \textit{Mining Act 1978} (WA); Hunt, \textit{Mining Law in Western Australia}, above n 104, [3.4.10].
\textsuperscript{229}S 21(1) \textit{Mining Act 1978} (WA). Upon a resumption, the land becomes crown land: s 22.
landowner. However, it appears ministerial declarations over private land were rare because of the farmers’ veto considered below. Where private land is brought under the Act, the landowner remains vested with a preferential right to mine by application for a mining tenement, without liability for rent or royalties. Only if the landowner does not apply for a mining tenement may a right to mine then be granted to others.

6.4.3 Prospecting licences, exploration licences and mining leases

The Act recognized various interests, including prospecting licences, exploration licences and mining leases. The grant of a mining tenement over private land entitles the holder to prospect, explore or carry out mining operations on the surface or to a depth not less than 30 metres from the land surface. The lessee has ownership of all minerals mined pursuant to the mining lease. Although a Warden’s permit is required to enter private land, neighbouring landowners’ property rights may also be disturbed by the right of a mining tenement holder to a right of way through private land to access a road. The practice of obtaining sub-surface rights for mining has increased in the south-west of the State.

Objections to the grant of a mining tenement may be made by any person. The owner and occupier of private land are entitled to be heard, but objections cannot be made

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231 Ibid., Mining Law in Western Australia, above n 104, [3.4.10].
233 Ibid., s 39. Note, however, that the landowner must comply with the terms and conditions of the mining tenement, including expenditure conditions.
234 Ibid., s 38. Note AG Lang and M Crommelin, Australian Mining and Petroleum Laws: An Introduction (Butterworths, 1979) [107]. The authors regard ministerial discretion in deciding whether to respond to the petition, and the landowner’s consequent preferential mining rights as a ‘problem’ on the basis that it operates as a disincentive to mining. Such views, however, fail to explain why the petitioning miner who had no property rights in the private land should in any way outweigh the respect to be afforded to the mineral rights of the landowner.
235 See ss 40-56 Mining Act 1978 (WA). Note that the new Act discontinued miners’ rights, but note the continuation by s 3(1) Mining Amendment Act 1981 (WA).
236 Ss 57-70 Mining Act 1978 (WA). This replaced the temporary reserve system.
237 Ibid., ss 71-85.
238 Ibid., s 29(2). Note the clarification in s 48 of the 1978 Mining Act of title to mineral claims by grant rather than registration, a point unclear under the Mining Act 1904: see Hunt, ‘The Mining Act 1978 of Western Australia’, above n 204, 323.
239 S 85(2) Mining Act 1978 (WA). However, uncertainty has existed as to the time at which the transfer of ownership occurs; see J Tarrant, ‘Ownership of Mining Product, Tailings and Minerals’ (2005) 24 ARELJ 321. Tarrant notes this can create uncertainty as to the ownership of mining product and tailings.
240 S 30 Mining Act 1978 (WA).
241 See ibid., s 29(7); Hunt, Mining Law in Western Australia, above n 104, [3.4.8].
242 Hunt, ibid., [3.4.7].
243 See ss 42(1), 59(1), 75(1), 90 and 92 Mining Act 1978 (WA) noted in Hunt, ibid., [11.7]; reg 67(2) Mining Regulations 1981 (WA). For a discussion of objections to applications for mining tenements, see
on matters which relate to government policy. Although the Act contains notice provisions, a landowner generally is not notified of sub-surface tenement applications, and probably cannot object to a mining tenement limited to sub-surface rights. Objections lodged by private landowners are uncommon. A mineral tenement over private land will normally be granted, subject to the 30-metre surface limit.

6.4.4 Land under cultivation: a landowner’s broad power of veto secured

The Crown’s right to dispose of minerals on private land has been a point of government debate. However, the conferral of ownership of minerals upon the private landholder as a means to resolving disputes over mining on agricultural land has been dismissed. Instead, qualified statutory protection from mining is provided for certain private land, including ‘land under cultivation’ and land on which there is erected a ‘substantial improvement’. The evolution of this protection reveals the tension between public and private interest perspectives on property rights with respect to mining and agriculture during this period; of the Mining Acts, it has been said that they...
are ‘social documents, because they illustrate the changing fortunes of different groups of citizens...over a long period.’ The veto could be defeated by resumption.

(a)  No ‘unreasonable refusal’ to mining defeated

Initially, mining operations could not be conducted upon protected private land without the prior written consent of the owner and occupier. Compensation was again required to be paid or agreed upon before the commencement of mining operations. However, a proven unreasonable refusal to permit mining operations could be overridden, thereby eroding the earlier discretionary veto of the owner and occupier to refuse mining. Although the minister considered the new Act to create ‘an equitable balance between mining and other legitimate land uses’, on the basis that mining did not override other land uses nor was it generally subservient to them, the lobbying of concerned farmers and prospectors delayed the Act coming into operation. The outcome of that lobbying was a return to the previous position regarding mining on private land, including land under cultivation, such that the prior

254 See Western Australia, Parliamentary Debates, Legislative Council, 17 April 1985, 2092.
255 It has been suggested that the power of resumption be exercised where the exercise of a landowner’s veto would prejudice the national or public interest: see Select Committee into the Mining Amendment Bill 1985, above n 247, 10–11. However, it appears that freehold farming land has never been resumed for mining: see ‘Miners should respect the rights of farmers-farmer’s veto-WA Premier’ The Australian, 15 August 2011.
256 S 34(1)(g) Mining Act 1978 (WA).
257 Ibid, s 35(1). See also the former s 157 Mining Act 1904 as amended.
258 S 34(1)(g) Mining Act 1978 (WA). Note also the other grounds upon which mining operations over such private land could be carried out without any requirement to obtain a landholder’s consent, in s 34(1)(h) and (i) of the Mining Act 1978 (WA). Lewis, above n 225, 357, considered that an application for a mining tenement under s 34 of the Mining Act 1978 (WA) could proceed, without an application being required to demonstrate that a consent under s 34 (where applicable) had been obtained from the owner and occupier.
259 See the former s 3 Mining Act Amendment Act 1970; s 140 Mining Act 1904-1978. For a further consideration of unreasonable refusal to mining on private land, see Committee of Inquiry into Aspects of the Mining Act 1978, above n 252, 93. The Committee of Inquiry did not accept this as a viable solution to resolving disputes as to entry for exploration and mining on agricultural land. Lewis, above n 225, 357, acknowledged this was a significant departure from the Mining Act 1904 and a major concern to farmers and owners of land likely to be affected by prospecting or mining operations.
260 Western Australia, Parliamentary Debates, Legislative Assembly, 24 August 1978, 2620 (Mr Mensaros, Minister for Mines). Note, however, the Minister’s assurances of no change to farmers’ rights was subsequently criticised by the Upper House: see Western Australia, Parliamentary Debates, Legislative Council, 17 April 1985, 2093 (M McAleer).
262 See ss 9 and 12 Acts Amendment (Mining) Act 1981 (WA). The Act was assented to on 30 October 1981. See also later comment in Western Australia, Parliamentary Debates, Legislative Council, 17 April 1985, 2091 (IG Medcalf); see also M Hunt, ‘Mining Act Amendments in Western Australia’ (1986) 5 AMPLA Bulletin 14. Note also s 27 of the 1981 Act, which amended compensation provisions for pastoralists.
written consent of the owner and occupier was required, unless the tenement was confined to more than 30 metres below the land surface.\textsuperscript{263}

(b) Attempts to remove farmer’s veto defeated

Conflicting perspectives from miners and farmers over the statutory veto on surface mining prevented a later Committee of Inquiry from reaching consensus on the mining of private land.\textsuperscript{264} The chairman considered that the landowner’s veto denied the Crown ownership of minerals,\textsuperscript{265} and should be postponed in favour of miners.\textsuperscript{266} Recommendations were made to facilitate exploration and mining on private land, particularly in the State’s south west. Legislative provisions were then introduced to remove much of the landholder’s veto over mining.\textsuperscript{267} Members noted that the protection afforded to cultivated land went back to 1904 but had been ‘greatly amplified’ since 1970.\textsuperscript{268} A Compensation Tribunal was proposed to advise on the terms of mining on private land, including matters of compensation.\textsuperscript{269} The landowner’s consent would not be required for the grant of mining tenements, including on cultivated land.\textsuperscript{270} However, the Bill was opposed by members of the Legislative Council. Although crown ownership of minerals was not contested, the Crown’s

\textsuperscript{263} Western Australia, Parliamentary Debates, Legislative Assembly, 22 September 1981, 3845 (Mr PV Jones, Minister for Mines); and s 29 introduced by s 9 Acts Amendment (Mining) Act 1981 (WA). Mr Jones confirmed that this was the then current position operating under the Mining Act 1904–1978. That position remains today: see s 29(2) Mining Act 1978 (WA) as amended. Note a requirement of good faith was added in relation to the granting of permits: s 30(3) inserted by s 10 Acts Amendment (Mining) Act 1981 (WA).

\textsuperscript{264} Committee of Inquiry into Aspects of the Mining Act 1978, above n 252, 97. The Committee’s terms of reference included a consideration of a landowner’s veto over surface mining: section 6, 88–112.

\textsuperscript{265} Ibid, recommendation 6.1(1), 98.

\textsuperscript{266} Ibid, recommendation 6.1(2), 98–99. The Chairman suggested that if these recommendations were not accepted, that mining exploration on private land be permitted where the Minister was satisfied that it was in the public interest: \textit{ibid}, recommendation 6.1(7), 103. On public interest, see J See, ‘Public interest and the Mining Act (WA)’ (2007) Murdoch University E Law Journal, Vol 14, No 2, 123, noting Re Warden Heaney (1994) 11 WAR 320 and Re Warden Calder (1998) 20 WAR 343. See also generally Western Australia, Parliamentary Debates, Legislative Assembly, 13 March 1985, 887 (Mr Parker, Minister for Mines).

\textsuperscript{267} Mining Amendment Bill 1985. The definition of ‘cultivated land’ was to be amended, despite the Committee of Inquiry chairman having recommended no change to the definition of ‘land under cultivation’: see Committee of Inquiry into Aspects of the Mining Act 1978, above n 252, recommendation 6.1(11), 105. However, it was intended that protection still be afforded to occupied land upon which a dwelling or other substantial building had been erected; see Western Australia, Parliamentary Debates, Legislative Assembly, 13 March 1985, 888–889 (Mr Parker, Minister for Mines). The Government tried to find common ground and a balance of competing interests between farmers and miners.

\textsuperscript{268} See Western Australia, Parliamentary Debates, Legislative Council, 17 April 1985, 2091 (IG Medcalf).

\textsuperscript{269} See \textit{ibid}. Note the findings of the Select Committee into the Mining Amendment Bill 1985, above n 247, 9, 15–16, that where compensation was not agreed, compensation should be determined by a qualified tribunal or court and not the Minister.

\textsuperscript{270} See Western Australia, Parliamentary Debates, Legislative Council, 17 April 1985, 2091 (IG Medcalf).
disposition of minerals was thought to be necessarily qualified by a weighing up of all interest groups.\footnote{Ibid, 2107 (GC MacKinnon).} Furthermore, it represented a ‘nationalisation of people’s property rights without the right of those people to be heard, and without providing proper compensation for those people.’\footnote{Select Committee into the Mining Amendment Bill 1985, above n 247, 3, 5.} A subsequent select committee, instead of supporting the Bill,\footnote{The Committee proposed that a landholder have an absolute veto regarding mining but not in relation to exploration. It was further recommended that the exercise of the veto should result in a moratorium preventing exploration or mining over the land for a period of years: ibid, 5, 9, tabled in the Legislative Council on 22 October 1985. See also Western Australia, Parliamentary Debates, Legislative Council, 13 November 1985, 4229 (IG Medcalf).} recommended a modified veto only.\footnote{Ibid, 2107 (GC MacKinnon).} In the end, the Government’s Bill failed, as did a later attempt to amend the veto.\footnote{Ibid, 5, 9, tabled in the Legislative Council on 22 October 1985. See also Western Australia, Parliamentary Debates, Legislative Council, 13 November 1985, 4229 (IG Medcalf).} Consequently, the favourable treatment of farmers\footnote{Hunt, Mining Law in Western Australia, above n 104, [3.4.6]. See Mining Amendment Bill 1993 and AMPLA Bulletin 12, September 1993, 140–143 on private landowners’ power of veto. For a further discussion on the power of veto, see L Ranford, W Carr, A Smurthwaite and M Freeman, ‘Resource Access in Western Australia’ in ABARE Outlook 1997–Minerals and Energy (ABARE, 1997) 56, 61.} largely continued.\footnote{The Select Committee found that the Mining Act was ‘more heavily weighted than the legislation of any other State in favour of farmers who have an absolute veto in this State in regard to ‘land under cultivation’”: Select Committee into the Mining Amendment Bill 1985, above n 247, 3. See also Hunt, ‘Government Policy and Legislation Regarding Mineral and Petroleum Resources’, above n 230, 848.} It is ironic that the Government later sought to mirror some of the protections afforded to private land for crown land.\footnote{See Western Australia, Parliamentary Debates, Legislative Assembly, 18 October 2001, 4566b.}

6.4.5 Petroleum and geothermal energy: a landowner’s more limited veto

Unlike the farmers’ veto, private landowners have been afforded only limited protection with respect to exploration. The consent of a landowner is required where the affected private land does not exceed 2000 square metres, or is less than 150 metres from a reservoir or substantial improvement.\footnote{See ss 16(1) and 16(1)(a) Petroleum and Geothermal Energy Resources Act 1967 (WA) as amended.} This secures only limited protection.\footnote{Mining and Petroleum Legislation Service, above n 227, Vol 11, [620.16.10]; see also, for example, the rights of entry in s 11(2A) proposed by clause 11 of the Petroleum and Geothermal Energy Legislation Amendment Bill 2013 (WA).} Landowners may have only limited rights to prevent fracking and to compensation for...
injury to their land, which is a concern for WA farmers, despite the introduction of disclosure requirements in 2012.281

6.4.6 Compensation

Compensation afforded to a landowner affected by mining again depended upon the property rights attaching to the relevant minerals.

(a) Private land affected by mining of private minerals

Regarding privately owned minerals, the landowner remained entitled to 90% of rent and royalties.282 Compensation was provided for resumed land, and the value of private minerals.283

(b) Private land affected by mining of crown minerals

The Act retained previous compensation provisions regarding loss or damage suffered from the grant of a mining tenement.284 Compensation was amended in 1981 to include an owner’s or occupier’s substantial loss of earnings.285 Wider compensation provisions were recommended which were not limited to direct damage,286 and which included compensation for damage on entry under a permit287 and full compensation for loss of land the subject of a mining lease (e.g. injurious affection and severance),288 but not for the mineral content of the land.289 In response, the Government proposed that a Compensation Tribunal determine compensation matters,290 but members of the

281 See K Diss, ‘Farmers call for right of veto on tracking’ ABC News, 27 May 2013, noting the concerns of the WA Farmers Federation. The Premier Colin Barnett appears to have considered that a farmer’s veto in relation to mining is sufficient to protect the interests of a farmer: see ‘Miners should respect the rights of farmers-farmers’ veto’<http://coalseamgasnews.org/qld/miners> (15 August 2011).
282 S 38(2)(a) Mining Act 1978 (WA); see also the former s 179 Mining Act 1904 as amended.
283 S 21(3) Mining Act 1978.
284 Ibid, s 123(1); see also s 123(2); Hunt, Mining Law in Western Australia, above n 104, [13.1.1]–[13.1.2]. Note the additional provision for the compensation of pastoralists suffering loss or damage from mining operations: see Western Australia, Parliamentary Debates, Legislative Assembly, 24 August 1978, 2625 (Mr Mensaros, Minister for Mines); s 123(7) Mining Act 1978 (WA), but note the limitations to compensation under s 125 of the Act. Compensation may also not be awarded to a pastoralist where damage has occurred but her tenement is not yet in existence: see s 123 Mining Act and Rita Brooks v John Cotter (1990) 9 AMPLA Bulletin 125, cited in Mining and Petroleum Legislation Service, above n 227, Vol 10, [570.123.10].
288 Ibid, recommendation 6.1(5), 102; for compensation to pastoral lessees, see recommendation 6.3(1), recommendation 6.3(3), recommendation 6.3(5) and recommendation 6.3(6), 110–112.
290 Western Australia, Parliamentary Debates, Legislative Council, 17 April 1985, 2091. Note the findings of the Select Committee into the Mining Amendment Bill 1985, above n 247, pp 9, 15-16 that where compensation was not agreed, compensation should be determined by a qualified tribunal or court and not the Minister.
Legislative Council would not support ‘reform without providing proper compensation.’

An additional continuing feature was the exclusion of the value of crown minerals from a mining or resumption compensation claim. In 1985, the exclusion provisions were further expanded. Despite these exclusions, a landowner might indirectly receive compensation for mineral values, particularly where the land was subject to the landowner’s veto. Before mining commences, compensation must be agreed, or determined by the Warden. However, compensation agreements do not bind successors in title, thereby creating the possibility of future uncertainty regarding access and compensation and re-negotiation between landowners and miners. Not surprisingly, compensation agreements have been described as a ‘black art’.

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291 See Western Australia, Parliamentary Debates, Legislative Council, 17 April 1985, 2107 (GC MacKinnon).
293 Ibid, s 21(3).
294 See ibid, s 123(1)(a)–(d) inserted by s 93 Mining Act Amendment Act 1985 (WA), and discussed in Hunt, ‘Mining Act Amendments in Western Australia’, above n 262, 17. The amendments provided that no compensation claim could be made for entry to land for mining purposes, for the value of any minerals, by reference to rent, royalty or other assessed amount in respect of the mining, or regarding any loss or damage for which compensation could not be assessed in accordance with common law principles in monetary terms.
295 Hunt, Mining Law in Western Australia, above n 104, [3.6.6]. R Crabb, ‘Compensation Agreements for Exploration and Mining on Private Land in Western Australia’ (AMPLA Annual State Conference (WA Branch), 1995), 199–200 refers to the very common and generous practice of a miner purchasing the freehold or leasehold to be mined at two or three times the market value, due to the risk of exercise of the veto and the desire to determine compensation quickly and amicably; see also Select Committee into the Mining Amendment Bill 1985, above n 247, 3, which noted ‘ransom’ requests of a number of landowners, and cases where landowners have been ‘trading in the Crown’s minerals’. The Committee did, however, also acknowledge the unreasonable activities of some miners.
296 S 35 Mining Act 1978 (WA); See also Crabb, ibid. However, a miner has been held not liable to negotiate compensation with or to pay compensation to a pastoralist: ss 23 and 20(5) Mining Act 1978; Shell Company of Australia Limited v Langtree and Money, Kalgoorlie Warden’s Court, 3 February 1989, in Hunt, Mining Law in Western Australia, above n 104, [14.1.4].
297 Where the parties cannot agree on compensation, the matter may be determined by the Warden: s 123(3) Mining Act 1978 (WA) as amended. A landowner may limit the jurisdiction of the Warden by the terms of the compensation agreement: Reynolds Australia Gold Operations Ltd v Benedetto Panizza (unreported Southern Cross Warden’s Court, 3 March 1995), considered in Vol 14(3) AMPLA Bulletin 180. The Warden’s determination cannot be appealed: see s 123(9) Mining Act 1978 (WA), but note the discussion of judicial review of a Warden’s decision in Hunt, Mining Law in Western Australia, above n 104, ch 14.
298 K Brennan, ‘Balancing Landowner Rights and Interests in Australian Mining: A Comparative Analysis’ AMPLA Yearbook 2009, 563, 488; note the original provisions of s 36 of the Mining Act 1978 (WA) regarding irrevocable consents, which was repealed by s 14 of Act 69 of 1981.
299 Watson, above n 200, 494.
Other problems for landowners include limited rights to the rehabilitation of land where rehabilitation is not part of the negotiated access agreement with the miner. This is because of the non-application of environmental protection provisions.\(^300\)

(c) **No compensation for geothermal resources and energy**

Geothermal resources and energy were confiscated by the State without regard for the loss of property rights\(^301\) or compensation.\(^302\) However, compensation for the occupation of private land and injury thereto\(^303\) and surrounding land\(^304\) continued to apply.\(^305\) Compensation was provided for resumed land.\(^306\)

6.4.7 **State Agreements**

New State Agreements were created during this period.\(^307\) The process of ratification of State Agreements by a ratifying Act\(^308\) means that the terms of the State Agreement are subject to parliamentary procedures, thereby securing the public interest in the terms of any acquisition. However, there has been a trend against their use,\(^309\) and most issues of tenure have related to the granting of crown leases,\(^310\) the compulsory acquisition of private property being relatively rare.\(^311\) In addition, a State Agreement may not create an interest in land without the landowner’s consent being given to mining operations (or the mining warden dispensing with the need for this consent),\(^312\) and the consent of the

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\(^{300}\) See Crabb, above n 295, 198–199. However, see now the *Mining Rehabilitation Fund Act 2012* (WA).

\(^{301}\) See Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 August 2007, 4215b–4219a (Mr Fran Logan).

\(^{302}\) See s 17(3) of the principal Act, as amended by s 15 *Petroleum Amendment Act 2007* (WA).

\(^{303}\) See ss 17(1) and (2) and 19, *Petroleum and Geothermal Resources Act 1967* (WA).

\(^{304}\) Ibid, s 18.

\(^{305}\) Note, however, the later restriction to limited circumstances with respect to lessees: *Mining and Petroleum Legislation Service*, above n 227, Vol 11, [620.17.10], citing s 24 *Petroleum and Geothermal Resources Act 1967* (WA) as amended.

\(^{306}\) S 12(2) *Petroleum and Geothermal Resources Act 1967* (WA) as amended.

\(^{307}\) For a list of most state agreements to 1982, see L Warnick, ‘State Agreements–The Legal Effect of Statutory Endorsement’ (1982) 4 *AMPLJ* 1. For a list of most state agreements from 1982–1988, see Warnick, ‘State Agreements’, above n 104, 882, fn 10; for details of the four state agreements 2002–2009, see Hunt, *Mining Law in Western Australia*, above n 104, [1.5.5]; for a list of current state agreements, see the Government of Western Australia, Department of State Development website. See s3 *Government Agreements Act 1979* (WA) on operation and effect of Government Agreements.

\(^{308}\) See e.g. s 4 *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA). However, note the inconsistent approach taken in Western Australia previously in relation to the form of ratification: see Warnick, above n 104, 883.

\(^{309}\) See Hunt, *Mining Law in Western Australia*, above n 104, [1.5.5].

\(^{310}\) Warnick, above n 104.

\(^{311}\) Standing Committee on Public Administration and Finance, above n 52, [4.268].

owner of private land may be more widely required than under the *Mining Act*.\(^{313}\)
Compensation to a landowner affected by mining would still be determined in accordance with the *Mining Act*.\(^{314}\) However, a State Agreement may defeat a landowner’s veto to mining\(^{315}\) and development,\(^{316}\) and disputes under a State Agreement may not be justiciable.\(^{317}\)

6.5 Key Area 4 - Water Rights

A consideration of water rights reveals significant statutory changes in 1978, 1984 and 2000. Attention is focussed upon the impact of new State vesting declarations, a new quasi property regime, new duties attaching to statutory riparian rights, and improved compensation provisions. Although a consideration of these developments indicates this period cannot be characterized as one of consistent regard or disregard for water rights, developments overall suggest a disregard for property rights, through increased licencing requirements and public interest considerations.

6.5.1 Fundamental changes: water resource planning and a national water policy

From the late 1970s, there was recognition of an over-allocation of water in Australia.\(^{318}\) Parliament expressed concern in relation to riparian rights and landholders. Previous control measures had been ‘irksome’ to some landowners and also unfair where the owner had statutory responsibility for an occupier’s failure to observe license conditions.\(^{319}\) Another concern was the number of disputes arising from upstream landholders exceeding their common law riparian rights and denying water to downstream landholders.\(^{320}\) Parliament sought to adjust a landowner’s liability for an occupier’s conduct.\(^{321}\) Parliament determined that a landholder’s rights to surface water should be defined by statutory provision, with prescribed penalties for

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\(^{313}\) See s 7(9) *Alumina Refinery ‘Worsley’ Act 1973–1978* (WA); *Worsley Alumina Pty Ltd v Shire of Williams* (1986) 64 LGRA 302, 305 (Rowland J).


\(^{315}\) See Hillman, above n 104, 297.

\(^{316}\) *Ibid*, citing *RGC Mineral Sands Ltd v Lewis* (unreported) Perth Warden’s Court, 16 December 1994, Plaintiff No 1H/945.

\(^{317}\) Warnick, above n 104, 902 citing the *Commonwealth Aluminium Corporation Limited v AG* [1976] QdR 231, 261 (Dunn J).


\(^{319}\) Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 August 1978, 2183–2184.

\(^{320}\) Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 October 1984, 2068.

noncompliance. However, concern over riparian rights conflicts between landholders remained.

From the early 1980s, a non-statutory system of water resource planning was adopted by the Water Authority and later the Water and Rivers Commission. The administrators of this system acknowledged the system had limited impact on other government agencies controlling land use. By the early 1990s, conflicting demands of water security and ecosystems were a government focus. The Government tried to abolish common law riparian rights outside of statutory provision and reduce existing statutory riparian rights. However, by 1999, the Government accepted that a balance between crown and private rights must be maintained. A statutory framework for water allocation management plans and by-laws was then established. By-laws might impact on the terms of water licences, while a statutory water management plan became a relevant consideration in the issue of a water licence. Institutional water resource management reform came into effect from 1996. A National Water Initiative was adopted by Western Australia in 2006. This is expected to bring further changes

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322 See s 11 inserted by s 3 of the Rights in Water and Irrigation Amendment Act 1984 (WA).
323 The 1978 and 1984 amendments to the Rights in Water and Irrigation Act 1914 (WA) did not quell this concern with the State again seeking to address these concerns through the 2000 amendments: see Western Australia, Parliamentary Debates, Legislative Assembly, 1 July 1999, 9937/1.
326 Tan, above, n 314, 22–24.
327 See cl 36 Water Bill 1990 (WA) discussed in R Bartlett, ‘The Development of Water Law in Western Australia’ in RH Bartlett, A Gardner and B Humphries (eds), Water Resources Law and Management in Western Australia (University of Western Australia, 1996) 73.
328 For example, the overriding principle of the 2000 amendments was to ‘preserve equity for users of the system’: Western Australia, Parliamentary Debates, Legislative Assembly, 1 July 1999, 9937/1.
330 See eg s 26L regarding local by-laws, inserted by s 46 Rights in Water and Irrigation Amendment Act 2000 (WA).
331 See ibid, Schedule 1, clause 7(2)(g); A Gardner, ‘Environmental Water Allocations in Australia’ (2006) 23 EPLJ 208, 225.
333 See Council of Australian Governments, Intergovernmental Agreement on a National Water Initiative (June 2004); K Stoeckel, R Webb, L Woodward and A Hankinson, Australian Water Law (LawBook Co, 2012) 11, 12, 50; see also Council of Australian Governments, National Action Plan for Salinity and
to water rights in Western Australia, and by the enactment of a new *Water Resources Management Act*.  

6.5.2 The 1984 and 2000 amendments

Statutory controls were already established as the foundation of water allocation, beyond domestic and limited agricultural usage. The State’s regard for water rights is revealed through the 1984 Amendments and the 2000 Amendments.  

(a) State declarations of vesting redrafted and extended beyond proclaimed management areas

The 1984 Amendments did not make substantive change to the previous State declarations in favour of the Crown. Unconfined surface waters remained unaffected by new vesting provisions. When the 1984 Amendments were proposed, parliamentary members assumed, probably erroneously, that the common law riparian right to take and divert water had been displaced. The 1984 and 2000 Amendments

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334 See generally Department of Water, ‘Looking after all our water needs’ (Proposed Water Resources Management Act background discussion paper, 2009). It is proposed that a landowner or occupier will continue to have basic water rights (see page 9 and information sheet 10), that the existing system of water licences will largely remain intact (p 10 and information sheet 10), and that the compensation provisions discussed herein will remain (see p 12 and information sheet 13). The Department of Water’s website confirms that “in February 2015, the State Government approved drafting of the *Water Resources Management Bill*. The drafting of the Bill has commenced with significant progress expected by mid to late 2017”: http://www.water.wa.gov.au/legislation/water/water-resource-management-legislation.


337 *Rights in Water and Irrigation Amendment Act 2000* (WA), assented to on 28 November 2000. However, note the *Rights in Water and Irrigation Amendment Act 1914* (WA) as amended now only contains minimal provision regarding measures to protect water quality (see e.g. ss 5E(1)(b) and 26O), but this is because of the enactment of the *Environmental Protection Act 1986* (WA); see Ryan and Others v Commissioner of Soil and Land Conservation (2006) 48 SR (WA) 166, 173 (WASAT). Accordingly, this chapter should be read as a whole when considering water rights.

338 Compare s 8(1) introduced by s 3 of the *Rights in Water and Irrigation Amendment Act 1984* (WA) with s 4(1) of the principal Act regarding the vesting of natural waters in the Crown; also compare s 26 inserted by s 3 of the amending Act with s 4 of the principal Act regarding the vesting of underground waters in the Crown; note the alveus of waters remained not alienated as per s 15(1) inserted by s 3 of the amending Act, which reflected s 5 of the principal Act. Note also s 26(a) of the principal Act. For a further discussion of crown rights in water resources, see A Gardner, ‘Water Resources Law Reform in Western Australia—Implementing the CoAG Water Reforms’ (2002) 19(1) *EPLJ* 6, 8–9.


did not change a landholder’s right to water in any lake, lagoon, swamp or marsh wholly within private land. The vesting provisions did not, subject to by-laws, prevent the draining of land or the making of a dam not on a watercourse or wetland where the flow of water in a watercourse or amount of water in a wetland was not diminished. Limitations were imposed, however, regarding water licences, as considered further at sub-paragraph 6.5.3 (c).

The 2000 Amendments were more radical. The vesting of surface waters in watercourses and wetlands was extended beyond proclaimed management areas to include all surface waters in all watercourses and wetlands. A qualification was also added that there was no significant adverse effect on water quality or any ecosystem. This imposed a new duty upon a landholder using water. This is considered at paragraph 6.5.4

remedies (see s 24 inserted by s 3 of the Rights in Water and Irrigation Amendment Act 1984 (WA)), and that the vesting provisions were substantially unchanged, it is thought that riparian rights survived, except where the Crown had exercised control (see Rapoff v Velios [197] WAR 27, 31, 33 (Virtue SPJ)). However, see the criticism of Rapoff v Velios being ‘unsound and inappropriate’: PN Davis, ‘Nationalization of Water Use Rights by the Australian States’ (1975-1976) 9 U Qld LJ 1, 20; note the High Court’s move away from the proposition that riparian rights survived the vesting provisions of the legislature, in ICM Agriculture v Commonwealth (2009) 240 CLR 140, 172–173 and 191–192.

See ss 6(1)(b) and 19(2)(b) inserted by s 3 of the Rights in Water and Irrigation Amendment Act 1984 (WA), and s 5(1)(b) inserted by s 7 of the 2000 Amendment Act. See also commentary in Bartlett, ‘The Development of Water Law in Western Australia’, above n 327, 57; A Gardner, ‘Water Resources Law Reform in Western Australia–Implementing the CoAG Water Reforms’, above n 338, 9. Note also the exemption in relation to spring water within the boundaries of private land was also unaffected, unless by-laws otherwise provided. On the exemption in relation to spring water until it passed beyond the land boundaries, compare ss 6(1)(a) and 19(2)(a) inserted by s 3 of the 1984 Amendment Act, and s 5(1)(a) inserted by s 7 of the 2000 Amendment Act, with s 4(3) of the principal Act.

See ss 6(1)(b) and 19(2)(b) inserted by s 3 of the Rights in Water and Irrigation Amendment Act 1984 (WA), and considered by Gardner, ‘Water Resources Law Reform’, above n 333, 382. The vesting of underground water in the Crown was also reconfirmed. Compare s 5A inserted by the 2000 Amendment Act with s 26 of the principal Act. For a useful comparison between the principal Act and the proposed reforms leading to the 2000 Amendments, see Water and Rivers Commission, Water Reform in Western Australia, Rights in Water and Irrigation Act 1914 incorporating proposed reforms (January 1999).

See s 5A inserted by s 18 Rights in Water and Irrigation Amendment Act 2000 (WA); compare this with s 8(2) inserted by the 1984 Amendment Act. Gardner, ‘Water Resources Law Reform in Western Australia–Implementing the CoAG Water Reforms’, above n 338, 13, notes that this amendment ‘will be a significant constraint on irrigation farm dams’ which assertion, if correct, would appear to be contrary to what was intended by Parliament: see Western Australia, Parliamentary Debates, Legislative Assembly, 1 July 1999, 9937/1. Gardner later acknowledges (14) that there is no sanction expressed for a breach of this requirement.

(b) The significance of the State vesting declarations

Crown authorisation was now required for many takings of water.\(^{346}\) Together with restrictions upon interference with a watercourse on private land in a proclaimed surface water management area,\(^{347}\) water use beyond personal and domestic use\(^{348}\) now required the grant of a statutory licence.\(^{349}\) The common law right to take underground water from a non-prescribed management area probably remained.\(^{350}\) Vesting provisions provided a basis for levying of fees and charges for access to water,\(^{351}\) but regulations for water licence fees were rejected by the Government.\(^{352}\)

6.5.3 Water Licences

The nature and content of licences are considered below, through the 1978, 1984 and 2000 Amendments.

(a) New quasi-property rights

Water licences were appurtenant to the land until the 2000 Amendments.\(^{353}\) Following a consultation process,\(^{354}\) water rights became statutory quasi property rights, being a tradeable asset in determined areas.\(^{355}\) The licence or water entitlement under the

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\(^{346}\) This applied to watercourses or wetlands within either proclaimed surface water management areas, or as newly prescribed by the Regulations, or from any artesian underground water or other underground water within a proclaimed underground water management area or prescribed underground water management area: *ibid.*, 10; s 5C(1) and (2) inserted by s 18 of the 2000 Amendment Act; see also ss 11, 26A and 26B inserted by s 3 of the 1984 Amendment Act.

\(^{347}\) See ss 17 inserted by s 3 of the 1984 Amendment Act.

\(^{348}\) See ss 9, 10 inserted by s 3 of the 1984 Amendment Act.


\(^{352}\) See Western Australia, *Parliamentary Debates*, Legislative Council, 22 November 2009, 7607b–7617a. The Government was unwilling to pass the cost of the public good of water management on to water licensees.


\(^{355}\) Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 July 1999, 9938/1.
licence was now transferable to an eligible person,\textsuperscript{356} subject to the Commission’s broad discretion\textsuperscript{357} to approve the transfer.\textsuperscript{358}

Licence grants remained discretionary,\textsuperscript{359} and access to land as a feature of licence eligibility remained.\textsuperscript{360} The Act contemplated a wider assessment of an applicant’s suitability\textsuperscript{361} and prescribed matters were considered in the granting of a licence.\textsuperscript{362} These factors included the public interest and sustainability,\textsuperscript{363} but the applicant’s needs were not mentioned, although the discretion might include this consideration.\textsuperscript{364}

(b) \textit{Duration and renewal}

The 2000 Amendment Act provided for the grant of a licence for a fixed or indefinite term,\textsuperscript{365} and recognized the previously common practice of granting the renewal of a licence\textsuperscript{366} by providing that a licence was to be renewed,\textsuperscript{367} but also providing grounds

\begin{thebibliography}{99}
\bibitem{356} S 52 \textit{Rights in Water and Irrigation Amendment Act 2000} (WA), and sch 1, cl 29(1). Note that the transfeere of a licence does not have to be the owner or occupier of the land: sch 1, cl 3; but note also cl 9 on persons not eligible, cl 13 on persons becoming ineligible; see also Gardner, ‘The Legal Basis for the Emerging Value of Water Licences–Property Rights or Tenuous Permissions’, above n 350, 8. Gardner notes that because the eligibility criteria area broader than previously provided, trade in water entitlements should be facilitated.
\bibitem{357} \textit{Rights in Water and Irrigation Amendment Act 2000} (WA), sch 1, cls 30(5) and 31(5).
\bibitem{358} \textit{Ibid}, sch 1, cls 30(3)(b), 30(4) and 31(1). Note a transfer was also subject to there being no prohibition under relevant local by-laws: sch 1, cl 29(2). Temporary rights may also be granted to a third party subject to similar requirements: sch 1, cl 30(1) and (2), and cl 36(d).
\bibitem{359} \textit{Ibid}, sch 1, cl 7; compare with s 13(1).
\bibitem{360} Note that water rights in Western Australia, however, are still regarded as ‘bundled’ to land and therefore inconsistent with the National Water Initiative: see K Stoeckel et al, above n 333, [4,700]; but c.f. contr\textit{a} Gardner, ‘The Legal Basis for the Emerging Value of Water Licences–Property Rights or Tenuous Permissions’, above n 350, 8.
\bibitem{361} \textit{Rights in Water and Irrigation Amendment Act 2000} (WA), sch 1, cl 7(4); compare with s 13(1).
\bibitem{362} \textit{Ibid}, sch 1, cl 7(2); compare the previous provisions of ss 13 and 26D inserted by s 3 of the \textit{Rights in Water and Irrigation Amendment Act 1984}; see also Kurz, above n 349, 52.
\bibitem{363} \textit{Rights in Water and Irrigation Amendment Act 1984}, sch 1, cl 7(2)(a) and (b). On the definition of ‘public interest’, see sch 1, cl 1.
\bibitem{364} See Gardner, ‘The Legal Basis for the Emerging Value of Water Licences–Property Rights or Tenuous Permissions’, above n 350, 9. Note also that there may be an implied duty under the Act that water be allocated on an equitable basis: see s 26GX(2)(b) and 26GY(2)(a) inserted by s 44 of the 200 Amendment Act; \textit{More v Water and Rivers Commission} [2006] WASAT 112, considered in V Chung, ‘Making Waves: An Overhaul of Western Australia’s Legislative Framework for the Allocation of Water’ (2007) 26 \textit{ARELJ} 161, 170.
\bibitem{365} \textit{Rights in Water and Irrigation Amendment Act 2000} (WA), sch 1, cl 12(1). The Act previously provided that a term of a licence was ‘to have effect for such period as may be specified therein.’; see s 13(2) of the principal Act. However, note s 12(8), which provides for a period of 10 years for a special licence. Both provisions were inserted by s 3 of the 1984 Amendment Act. It appears that the licences were normally granted for a fixed period of between 5 and 10 years: see Kurz, above n 349, 51, citing Water and Rivers Commission, \textit{Reform in Western Australia, Proposal for Discussion}, 11. Gardner, ‘The Legal Basis for the Emerging Value of Water Licences–Property Rights or Tenuous Permissions’, above n 350, 9–10, states that shorter periods were granted where the impact of a licence upon water resources was uncertain.
\bibitem{366} Kurz, above n 349, 51.
\bibitem{367} \textit{Rights in Water and Irrigation Amendment Act 2000} (WA), sch 1, cl 22(2).
\end{thebibliography}
for non-renewal. While these amendments might increase resource security, it exposed licensees to the risk of relevant local by-laws or plans preventing renewal through inconsistency.

(c) Terms, limitations, conditions and variations

The 1978 Amendments re-enacted amended provisions for ordinary licenses, which permitted the Minister to vary the terms, limitations or conditions attaching to an ordinary license. Licensing and control provisions were also added for referable dams. The minister could now vary the terms or conditions of a licence in the public interest, and cancel a licence for non-compliance with any term or condition. The grant of such licenses, therefore, might not afford a landowner security.

The terms, limitations and conditions that might attach to a licence were prescribed by the 2000 Amendments. Now, all licences were subject to certain conditions. At the Commission’s discretion, further conditions could apply. The Commission considered whether the proposed taking and use of water was in the public interest and sustainable.

368 Ibid, sch 1, cl 22(2)(a)–(e). Kurz, above n 345, 52. Gardner, ‘The Legal Basis for the Emerging Value of Water Licences–Property Rights or Tenuous Permissions’, above n 350, 10 states that the duration of a licence will now be a matter of ‘administrative practice’. The Act previously did not prescribe on what basis a renewal should be considered.

369 Kurz, above n 349, 52.

370 Rights in Water and Irrigation Amendment Act 2000 (WA), sch 1, cl 22(2)(a).

371 S 9 Rights in Water and Irrigation Amendment Act 1978 (WA), assented to on 17 November 1978. Note that in matters such as the issue of a licence, the Minister could only act on the advice of the Irrigation Commission. The re-enactment was motivated by advice that all existing licenses issued to divert surface water were invalid: Western Australia, Parliamentary Debates, Legislative Assembly, 10 August 1978, 2183. The problem arose from the use of the words ‘as may be prescribed’ in s 16 of the principal Act, which had never been complied with in relation to the terms and conditions attaching to a license. The 1978 Act nevertheless declared these existing licenses to be valid: see s 16(6) inserted by s 9 Rights in Water and Irrigation Amendment Act 1978 (WA).

372 See s 21 Rights in Water and Irrigation Amendment Act 1978 (WA). See in particular s 45F(2) inserted into the principal Act.

373 See ibid, s 24, in particular s 45J(8) inserted into the principal Act.

374 Ibid, s 45J(9)(a).

375 However, it appears the power to vary a licence was rarely exercised: see Gardner, ‘The Legal Basis for the Emerging Value of Water Licences–Property Rights or Tenuous Permissions’, above n 350, 4.

376 Ss 13, 26D inserted by s 3 Rights in Water and Irrigation Amendment Act 1984 (WA).


378 Rights in Water and Irrigation Amendment Act 2000 (WA), sch 1, cl 7(1). Conditions might relate to such matters as the taking, use, or disposal of water: ibid, sch 1, cl 7(5) and the appendix to the schedule.

379 Ibid, sch 1, cl 7(2)(a) and (b).
The 1984 Amendments permitted variation of duration, terms, limitations or conditions for surface water licences. The improper use of groundwater was subject to ministerial direction. The 2000 Amendments went further and prescribed two grounds upon which a licence could be varied; firstly, by regard to the licence terms, and secondly, by direction restricting the volume, draw rate or purpose for which water might be taken. A direction overrides water rights. The Commission may vary the duration or the terms, conditions or restrictions, or suspend or cancel a licence. However, these powers appear to be reactive rather than proactive, and the scrutiny of licence conditions appears to have been minimal.

The 2000 Amendments may give a landholder greater certainty regarding the basis of a licence being affected. However, the inclusion of grounds for amendment, suspension or cancellation such as the public interest, the protection of a water resource and serious inconsistency with plans or by-laws means a licence may be determined by external factors. It is also difficult not to construe these powers as a disregard of landholders when the suspension or cancellation of a licence does not affect the duties imposed by the licence. Considered as a whole, these amendments have further regulated the taking and use of water.

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380 See s 13(3)(a)–(c) inserted by s 3 Rights in Water and Irrigation Amendment Act 1984 (WA).
381 S 26G(1) and (2) inserted by s 3 Rights in Water and Irrigation Amendment Act 1984 (WA). Note also s 26G(4) on cancellation of a well licence.
382 S 29GC(1) and (2) inserted by s 40 Rights in Water and Irrigation Amendment Act 2000 (WA). Directions are made as a result of water resource considerations: See s 26GD(2) inserted by s 40 Rights in Water and Irrigation Amendment Act 2000 (WA).
384 Rights in Water and Irrigation Amendment Act 2000 (WA), sch 1, cl 24(1) and (2).
385 Ibid, sch 1, cl 25(1) and (2).
386 See Roberts and Gardner, above n 351, 42, 48.
387 Ibid, 42.
388 See e.g. Kurz, above n 349, 53.
389 Rights in Water and Irrigation Amendment Act 2000 (WA), sch 1, cl 24(2)(b), (e) and (f), and cl 25(2)(a), (b) and (c). For criticism of the ‘public interest’ ground, see Gardner, ‘The Legal Basis for the Emerging Value of Water Licences–Property Rights or Tenuous Permissions’, above n 350, 14.
390 Rights in Water and Irrigation Amendment Act 2000 (WA), sch 1, cl 25(3).
6.5.4 Statutory riparian rights

A landholder’s statutory riparian rights, other rights and exemptions were not affected by the 1984 Amendments, although groundwater was further regulated. Basic existing rights of private landholders were also unaffected by the 2000 Amendments, but new duties were imposed. A statutory duty to other water users was placed upon a person taking or using water by common law or statutory right to take ‘all reasonable steps to minimise the degradation of water resources.’ Permits were now required for the interference with a watercourse or wetland and the construction of works on private and public land in a surface water management area.

A works permit might be required for a watercourse outside a management area by local by-laws. Statutory riparian rights were also qualified by limitations where water was augmented. Directions might restrict the amount, draw rate or purpose for which water was taken and/or prohibit the taking of water by a person or the purpose for which

392 On the defining of riparian rights, compare ss 9(1) and 20(1) inserted by s 3 of the Rights in Water and Irrigation Amendment Act 1984 (WA) with s 14 of the principal Act.
393 In relation to other rights to surface water, compare ss 10(1), 16(1)(a) and s 21(1) inserted by s 3 of the amending Act with ss 6 and 7(a) of the principal Act.
394 On the draining of land or the making of a dam, compare s 8(2) introduced by s 3 of the Rights in Water and Irrigation Amendment Act 1984 (WA) with s 4(2) of the principal Act; on the exemption in relation to spring water until it passed beyond the land boundaries, compare ss 6(1)(a) and 19(2)(a) inserted by s 3 of the amending Act with s 4(3) of the principal Act.
395 In relation to groundwater, the 1984 Amendments subjected all wells to ministerial direction on the amount of water and rate of draw: S 26G(2) inserted by s 3 Rights in Water and Irrigation Amendment Act 1984 (WA). Note the daily penalties prescribed for non-compliance and the risk of cancellation of a licence: s 26(3) and (4) inserted by s 3 of the 1984 amending Act. However, non-artesian wells might be exempt from the licensing provisions of the Act: see s 26C introduced by s 3 of the Rights in Water and Irrigation Amendment Act 1984 (WA). Measures for pollution control under the Act were also increased for both surface and groundwater: See ss 4 and 5 of the Rights in Water and Irrigation Amendment Act 1984 (WA); Western Australia, Parliamentary Debates, Legislative Assembly, 9 October 1984, 2069. Note, however, that it was always contemplated that such provisions would be replaced by a comprehensive Environmental Protection Act, as indeed occurred in 1986.
397 Prior to the 2000 Amendments, there was no duty upon water users except in relation to a licensee’s obligation to maintain facilities in good order and repair: see Water and Rivers Commission, Water Law Reform Guide to Legislative Change (Water Reform Series, Report No WR9, August 1998) 21.
399 S 5E(1)(b) inserted by s 18 of the Rights in Water and Irrigation Amendment Act 2000 (WA). Note also the expansive definition of ‘water resources’ inserted in s 2 by s 5 of the 2000 Amendment Act. This duty was, however, less onerous than the duty proposed earlier by the Water and Rivers Commission, above n 397. For a consideration of that report, see A Gardner, ‘Water Resources Law Reform’, above n 333, 385–386. The unauthorized taking of water was reinforced by statutory offence provisions: see s 5C inserted by s 18 Rights in Water and Irrigation Amendment Act 2000 (WA).
401 See Gardner, ibid; s 17(4B) of the principal Act.
402 See s 26GA inserted by s 40 Rights in Water and Irrigation Amendment Act 2000 (WA).
water might be taken.\textsuperscript{403} A direction overrode statutory riparian rights or rights under a licence.\textsuperscript{404} By-laws could also make riparian rights to take water outside of surface water management areas inapplicable,\textsuperscript{405} as well as certain other rights.\textsuperscript{406} Given these duties and limitations, which did not apply to the Crown,\textsuperscript{407} the assertion by Parliament that ‘[t]he current balance of crown and private rights is maintained’\textsuperscript{408} is disputed.

6.5.5 Compensation

Significant improvements for compensating water rights were made. Existing compensation provisions\textsuperscript{409} were improved by the 1984 Amendments, which made the cancellation or change of a special licence in the public interest compensable.\textsuperscript{410} Compensation later became a recognized feature of the National Water Policy, although its significance may be questionable.\textsuperscript{411} The 2000 Amendments extended compensation to damage, including loss of profit suffered as a result of the permanent\textsuperscript{412} loss of reasonable use\textsuperscript{413} from a licence being amended, suspended or cancelled in the public interest, or as a result of certain other grounds,\textsuperscript{414} and the effect was unfair and unreasonable.\textsuperscript{415} Curiously, both public and private interest perspectives are critical of the improved compensation provisions. Public interest perspectives point to the variation of a defeasible statutory right not requiring compensation;\textsuperscript{416} arguably, no compensation

\textsuperscript{403} S 26GC(1) inserted by s 40 Rights in Water and Irrigation Amendment Act 2000 (WA); see also s 26GD on the circumstances when s 26GC applies.
\textsuperscript{404} S 26GF(1) inserted by s 40 Rights in Water and Irrigation Amendment Act 2000 (WA)
\textsuperscript{405} See s 20(1) amended by s 28 of the 2000 Amendment Act; s 21(2) amended by s 29 of the 2000 Amendment Act; see also Gardner, ‘Water Resources Law Reform in Western Australia–Implementing the CoAG Water Reforms’, above n 338, 12.
\textsuperscript{406} See eg s 21(2) amended by s 29 of the 2000 Amendment Act.
\textsuperscript{408} Western Australia, Parliamentary Debates, Legislative Assembly, 1 July 1999, 9937/1.
\textsuperscript{409} See e.g. ss 35–38 Rights in Water and Irrigation Act 1914 (WA) regarding damages for direct pecuniary injury arising from harm to riparian rights or flooding caused by public works.
\textsuperscript{410} S 12(12) inserted by s 3 Rights in Water and Irrigation Amendment Act 1984 (WA).
\textsuperscript{411} According to the Commission, compensation was rarely an issue because of the Commission’s efforts to protect riparian rights and water licences when carrying out public works: Water and Rivers Commission, above n 397, 16. The Commission recognized circumstances in which the award of compensation to an affected licensee was appropriate: 16
\textsuperscript{412} Rights in Water and Irrigation Amendment Act 2000 (WA), sch 1, cl 39(5)(a).
\textsuperscript{413} Ibid, sch 1, cl 39(2)(a)(i). Note also the additional requirements in cl 39(2)(a)(ii) and (iii).
\textsuperscript{414} Ibid, sch 1, cl 39(1), e.g. serious inconsistency with plans or by-laws.
\textsuperscript{415} Ibid, sch 1, cl 39(5)(b). This provision suggests that a reduction of entitlement which equally affected other licence holders in the surrounding area would not attract compensation.
should apply when allocations are reduced.\textsuperscript{417} Private interest perspectives see the compensation provisions as ‘illusory’, because the taking or use of water must be a reasonable use.\textsuperscript{418} The legal correctness of the public interest perspectives is conceded.\textsuperscript{419} However, such arguments ignore the uncompensated crown vesting provisions considered earlier. That the National Water Initiative will continue the compensation provisions adds legitimacy to private interest perspectives.\textsuperscript{420}

### 6.5.6 Appeals

Regard for water rights through appeal provisions is evident. Aggrieved persons initially could seek a ministerial review, and judicial review under the 1978 Amendments.\textsuperscript{421} Ministerial appeal rights existed in the 1984 Amendments.\textsuperscript{422} The 2000 Amendments afforded various appeal grounds for persons aggrieved by a Commission decision\textsuperscript{423} to appeal to a ministerial tribunal.\textsuperscript{424} Regarding decisions to refuse water licences on the basis of sustainable allocation limits, aggrieved persons have had considerable success on appeal.\textsuperscript{425}

Challenges for an aggrieved person existed. Third parties affected by Commission directions are not included.\textsuperscript{426} The inclusion of public interest factors to be considered for the granting of a water licence,\textsuperscript{427} without any reference to the needs of the applicant, within a broadly framed discretion may make a challenge to that discretion difficult.\textsuperscript{428}

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\textsuperscript{418} See M Gerus, ‘Transferable Water Entitlements in Western Australia: Water Markets and Property Rights for the Mining Industry’ 2001 AMPLA Yearbook, 474, 491.

\textsuperscript{419} See Gardner et al, above n 416, [22.2], [22.24]–[22.25] on unilateral state power to vary access to water. This accords with the High Court’s treatment of water as a natural resource that the State has power to limit: \textit{ICM Agriculture Pty Ltd v Commonwealth} (2009) 240 CLR 140, 172–173 (French CJ, Gummow and Crennan JJ); 1901–192 (Hayne, Kiefel and Bell JJ).

\textsuperscript{420} See Department of Water, above n 334, [4.10].

\textsuperscript{421} See s 45K inserted by s 25 \textit{Rights in Water and Irrigation Amendment Act 1978} (WA).

\textsuperscript{422} See ss 14(1) and 26D(4) inserted by s 3 of the \textit{Rights in Water and Irrigation Amendment Act 1984} (WA). Note also s 45K inserted by s 25 of the 1978 amending Act.

\textsuperscript{423} See s 26GG inserted by s 65 \textit{Rights in Water and Irrigation Amendment Act 2000} (WA). For a table setting out reviewable decisions under the Act, see Stoeckel et al, above n 333, [4.795]. Note also the appeal procedures introduced by s 70 \textit{Rights in Water and Irrigation Amendment Act 2000} (WA), sch 2.

\textsuperscript{424} S 70 \textit{Rights in Water and Irrigation Amendment Act 2000} (WA), sch 2, cl 5.

\textsuperscript{425} See the statistics noted in Roberts and Gardner, above n 351, 43.


\textsuperscript{427} \textit{Rights in Water and Irrigation Amendment Act 2000} (WA), sch 1, cl 7(2)(a) and (b). On the definition of ‘public interest’ see sch 1, cl 1.

6. Key Area 5 - Planning laws

New planning legislation, the Planning and Development Act 1995 (‘PDA’), was enacted, the purpose of which was ‘to provide for a system of land use planning and development.’ Key provisions of the PDA are the main focus of this section. Frequent comparison with the former Public Works Act 1906 is made to highlight the State’s generally increased disregard for property rights, primarily due to public interest considerations.

6.6.1 Sustainable use and development of land: meaning and significance

Unlike its predecessor, the PDA’s purpose included the promotion of ‘the sustainable use and development of land.’ To ensure flexibility, sustainability was not defined, but its meaning is informed by the ‘State Sustainability Strategy—a vision for quality of life in Western Australia’ (‘SSS’) and relevant state planning policies. Sustainability ‘is now a core element of orderly and proper planning.’ Implementation of sustainability is ‘through the preparation of regional and local strategic plans, statutory

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430 S 3(1)(c) PDA. ‘Use’ and ‘development’ require a purposive construction to promote the objectives of the PDA: see Randall and Town of Vincent [2005] WASAT 129, [93]; Dik Vernooij and Town of Kwinana [2009] WASAT 235, [15], considered in D McLeod (ed), Planning and Development WA (Presidional Legal Publication) [3.4.333]. On the meaning of ‘use’ and ‘development’ under the former Town Planning and Development Act 1928 (WA), see Danielle v Shire of Swan (1998) 20 WAR 164, 168–169 (Ipp J); 176 (Owen J) that the concept of development is not a passive use. For a discussion of the concept of ‘sustainability’ as applied by Parliament, see Western Australia, Parliamentary Debates, Legislative Assembly, 21 September 2004, 6180b. For a consideration of the development of sustainability assessment, see B Jenkins, D Annadale and A Morrison-Saunders, ‘The evolution of a sustainability assessment strategy for Western Australia’ (2003) 20 EPLJ 56; on sustainability generally, see also E Samec, and E Andre, above n 72, 13-23

431 Planning Bulletin No 76, above n 429, 2.

432 Moore River Company Pty Ltd and WA Planning Commission (2008) 57 SR (WA) 255 [85] (WASAT) and also considered in D Parry, ‘Coastal Law Ecologically Sustainable Development in WA Planning Cases’ 2009 NELA (WA) State Conference (State Administrative Tribunal, WA), The SSS defines sustainability as ‘meeting the needs of the current and future generations through integration of environmental protection, social advancement and economic prosperity’: see Moore River Company Pty Ltd and WA Planning Commission [86]; Department of Environment and Conservation, State Sustainability Strategy (2003) 12, considered in D Parry ‘Ecologically sustainable development in Western Australian planning cases’ (2009) 26 EPLJ 375. Sustainability is further defined in SPP 1 through key principles and is incorporated in DC1.2: see Mt Lawley Pty Ltd and WA Planning Commission [2007] WASAT 59, [48]. On six elements or principles of ecologically sustainable development, see Telstra Corporation Ltd v Hornsby Shire Council (2006) 146 LGERA 10 [108]-[120] (Preston CJ). This case has been cited with approval in WA Developments Pty Ltd and WA Planning Commission [2008] WASAT 260, [38].

planning schemes, conservation and management plans...day to day process of decision-making on zoning, subdivision, strata subdivision and development applications...’.

(a) Impact

The consideration of the environmental impact of land development was not new. However, the PDA’s sustainability principle had great significance. The introduction of ‘sustainability’ had a major effect on the control of land use. For example, it may shift the burden of proof to the land developer that a development does not offend the principles of sustainability. Overall, the SSS is described as having ‘changed the planning paradigm in the government significantly...’.

6.6.2 Planning Schemes: increased scope and significance

Planning schemes commonly contain provisions removing the common law right to develop land without statutory approval. By the late 1970s, planning schemes were accepted as ‘a feature of modern civilization that few, if any, people are unaffected by’. The former Town Planning and Development Act 1928 had afforded a wide and diverse scope for planning schemes, with no limitations on planning or development.

434 Moore River Company Pty Ltd and WA Planning Commission (2008) 57 SR (WA) 255, [90] (WASAT) quoting SPP2.6. For a discussion of other provisions of the PDA contributing to sustainability, see Planning Bulletin No 76, above n 429, 2; see also Samec and Andre, above n 72, 13-21.

435 Parry, ‘Ecologically sustainable development in Western Australian planning cases’, above n 432, 387.

436 It has been applied by the State Administrative Tribunal in upholding the WA Planning Commission’s recommendation against subdivision of land where a subdivision proposal did not adhere to sustainability in ‘material respects: Moore River Company Pty Ltd and WA Planning Commission (2008) 57 SR (WA) 255 [145], cited by Parry, ibid; see also M Yuen d C Poustie, ‘Moore protection: a 2007 good news story’ (December 2007) EDO News (Newsletter of the Environmental Defender’s Office WA (Inc)), 13(4) 2. It has also been applied to the upholding of the imposition of a condition which required the realigning of the proposed central boundary of a two-lot subdivision which traversed an area containing vulnerable native flora: WA Developments Pty Ltd and Western Australian Planning Commission [2008] WASAT 260, [45], cited by Parry, ibid. Conversely, the State Administrative Tribunal has approved the granting of a development approval where the proposed development involved ‘orderly and proper planning, and in particular, the sustainable use and development of land’: Mt Lawley Pty Ltd and Western Australian Planning Commission [2007] WASAT 59, [48].


439 G McLeod (ed), Planning Law in Australia (LBC, 1997) [1.4240].

440 Costa v Shire of Swan [1983] WAR 22, 23 (Olney J) cited in G McLeod, ibid, [1.4100]. The writer acknowledges Samec and Andre, above n 72, 45 for initially drawing this case to his attention.
provisions.\textsuperscript{441} Under the new PDA, the purposes for which a planning scheme could be made were further broadened,\textsuperscript{442} thereby widening the potential impact of a planning scheme. The natural environment was also a relevant planning consideration which might be dealt with in a planning scheme.\textsuperscript{443} The scope of planning control areas was also broadened.\textsuperscript{444} Any planning scheme operative under the former Act continued under the PDA.\textsuperscript{445}

Incorporated into a local planning scheme are the Residential Design Codes (‘RDC’).\textsuperscript{446} RDC ‘provide a comprehensive basis for the control, through local government of residential development throughout Western Australia.’\textsuperscript{447} The RDC can be relied upon by the WA Planning Commission ‘as the fundamental basis for establishing subdivision patterns in residential areas’,\textsuperscript{448} and will be accorded the highest weight by a court.\textsuperscript{449} However, compliance with RDC is no guarantee that an application for development will be approved.\textsuperscript{450}

Zoning schemes are now the most common form of state planning control.\textsuperscript{451} A draft scheme adopted by formal resolution of a local authority but yet to be considered by the Town Planning Board may also impact upon a landowner, since it may be regarded as ‘seriously entertained, and relevant for consideration.’\textsuperscript{452} Even where land is not caught by a local planning scheme or regional planning scheme, it may be the subject of an


\textsuperscript{442} The PDA provided that a local planning scheme may be made for or with respect to any land ‘with the general objects of making suitable provision for the improvement, development and use of land in the local planning scheme area’; see s 69(1)(a) PDA. Compare this with the former provision, which provided as the general object the development of land ‘to the best possible advantage’: s 6(1) Town Planning and Development Act 1928 (WA), First Schedule. On planning schemes generally, see E Samec and E Andre, above n 72, 45-80.

\textsuperscript{443} See PDA, sch 7, item 4(2).

\textsuperscript{444} See sch 6 PDA, and considered in Planning Bulletin No 76, above n 429.

\textsuperscript{445} S 33(1) (region planning schemes), and s 68(1) PDA (local planning schemes).

\textsuperscript{446} See Western Australian Planning Commission, State Planning Policy 3.1 –Residential Design Codes, (2008).

\textsuperscript{447} Clause 2, Residential Design Codes, cited by G McLeod (ed), above n 439, [1.4135].


\textsuperscript{449} See eg Milne v WA Planning Commission (2003) 33 SR (WA) 110, 111. In this case, departure from minimum lot size under the scheme was refused.

\textsuperscript{450} See Iemma v Town of Vincent (2009) 61 SR (WA) 95, [57].

\textsuperscript{451} G McLeod, (ed) above n 439, [1.4100].

interim development order controlling development. Significant financial penalties are prescribed for the contravention of a planning scheme. Landowners also face subsidiary legislation made by local governments affecting private land, sometimes beyond the local government’s power.

Planning schemes can affect property rights. A positive affect might be an increase in the value or development potential of land. Negative impacts might include a restraint upon alienation to the extent that they ‘prescribe a form of use inconsistent with private ownership.’ A scheme’s financial impact may be disproportionate to any benefit received, and the reasonableness of the impact is not justiciable. No duty is owed by a local government to a landholder whose commercial interests may suffer from a failure by the local government to make or amend a planning scheme or to comply with the Act’s requirements in the exercise of its quasi-legislative function.

In extreme instances, a scheme may result in the long-term sterilisation of land through development controls, or even the taking of land. The ultimate intent of a regional planning scheme may even be to secure public ownership of private land reserved for a public purpose. However, the Planning Commission maintains that it ‘rarely compulsorily takes land.’ ‘Resume and develop’ schemes, involving the exercise of compulsory powers of acquisition within the planning scheme, may be exercised over

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453 See Pt 6 Planning and Development Act 2005 (WA); G McLeod (ed), above n 439, [1.4085], [1.4100]. On WA interim development orders, planning control and improvement plans generally, see Samec and Andre, above n 72, 107-110.
454 Ss 218, 223 Planning and Development Act 2005 (WA). A local government may also have standing to seek an injunction: see s 9.28 Local Government Act 1995; G McLeod (ed), above n 439, [1.4264]. Note the increased penalties applied for offences under the PDA by the Heritage and Planning Legislation Amendment Act 2011, discussed in Planning makes it happen, above n 78, [8.1].
458 See eg Costa v Shire of Swan [1983] WAR 22, 33–34 (Olney J). Landowners within the scheme area were required to contribute to the costs of a scheme according to the ratio that each owner’s land bore to the total land within the scheme but without regard to the benefit to be derived from a scheme by a landowner. This was held to be a valid exercise of power, and the court would not consider the reasonableness of such provisions.
459 Stein, above n 452, 15, citing Murcia v City of Nedlands (1999) 22 WAR 1. See also s 5X Civil Liability Act 2002 (WA) as amended regarding the policy defence that may be available in a claim for damages caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function; see also s 5Y in relation to breach of statutory duty.
460 McMurdo, above n 62, 3.
461 See s 191 PDA.
463 Planning makes it happen, above n 78, 3.
large tracts of land, where, for example, the planning authority encounters difficulty in obtaining landowners’ consents to a development. Non-participating landowners are compensated, while participating owners share in profits.

### 6.6.3 Planning policy: increased influence

Planning policy continued to have a non-statutory status. Attempts to change this failed. This status may be significant, because policy is not subject to the same scrutiny as legislation, and may suffer from being made quickly. Despite this status, planning policy continued to be afforded regard by local governments in the preparation or amendment of a town planning scheme. Even draft policy might be considered if ‘seriously entertained’. The influence of planning policies (of which there are now many) also increased. The PDA extended the influence of state planning policies to a subdivision application, and might determine the outcome of a development application.

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464 G McLeod (ed), above n 439, [1.4100]. On WA state and local planning policy generally, see Samec and Andre, above n 72, 81–90.
465 Ibid.
466 On the non-statutory status of state planning policy, see also Permanent Trustees Australia Ltd v WA Planning Commission (1998) 20 SR (WA) 192, 206 on the adoption and use of non-statutory policies regarding the corridor plan for Perth; 213 on non-statutory status; see also Permanent Trustee Australia Ltd v City of Wanneroo (1994) 11 SR (WA) 1, 17. On the classification of state planning policies, see Western Australian Planning Commission, ‘New System for Classifying Western Australian Planning Commission Policies and Plans, Planning Bulletin No 60 (September 2003); for the state planning framework and hierarchy of the policies, see ‘State Planning Policy No 1: State Planning Framework’, Government Gazette (22 December 1998), considered in G McLeod, (ed), above n 435, [1.4120].
468 Stein, above n 452, 88. Note, however, s 26(1) PDA on the requirement of ministerial approval for the preparation of state planning policies.
469 S 77(1)(a) PDA; see also the former s 4 Town Planning and Development Act Amendment Act 1976 (WA). Any statement of planning policy in force immediately prior to the commencement of the PDA continued in force under the PDA: s 25 PDA.
471 The WA Planning Commission, for example, has published over 100 policies: see Stein, above n 452, 89.
472 G McLeod (ed), above n 439, [1.4130].
473 Ibid., citing s 138(2) PDA; compare s 20 Town Planning and Development Act 1928 (WA) as amended.
474 Stein, above n 452, 88. However, policy must not be slavishly applied: see Permanent Trustee Australia Ltd v City of Wanneroo (1994) 11 SR (WA) 1, 15; see also Falc Pty Ltd v State Planning Commission (1991) 5 WAR 522 where too much weight was given to a policy when considering a subdivision application.
increasingly relied upon in planning decisions. Policy was ‘one matter relevant to the exercise of planning discretion...ignoring it will be an error of law as a failure to take into account a relevant consideration."

(a) **Bush Forever**

The adverse effect of planning policy on property rights is illustrated by ‘Bush Forever’. Despite only a proposed amendment to the Metropolitan Region Scheme and a draft statement of planning policy, Bush Forever operated as an overlay to the applicable zoning and applied conservation and preservation restrictions, and was applied ‘almost as a de-facto law’.

Any development application was required to be provided to the local government, and also reviewed by the Department of Environment and Conservation, or otherwise referred to the WA Planning Commission. As a policy rather than an amendment to the Metropolitan Region Scheme, affected owners’ ability to seek compensation for injurious affection was denied. While some land was purchased, the State effectively applied a non-statutory policy while not compensating affected landowners. Concerns from affected landowners to a standing committee failed to change the draft policy. Eventually, on 22 June 2010 Metropolitan Region Scheme...
Amendment 1082/33 was tabled which could be of impact where future land use changes was intended.\footnote{Western Australia, Parliamentary Debates, Legislative Assembly, 22 June 2010, 4221d–4222a, (Metropolitan Regional Scheme Amendment 1082/33–Bush Forever Areas) (Mr JHD Day). On the original purpose and outcome of MRS Amendment 1082/33 - Bush Forever and Related Lands, see https://www.planning.wa.gov.au/publications/753.aspx, and noting MRS Amendment 1082/33 applied Bush Forever areas to the Metropolitan Region Scheme (MRS Maps) Two hundred and eighty seven Bush Forever sites are now provided for under the Metropolitan Region Scheme Amendment for Bush Forever and Related Lands (MRS 2083). See now Metropolitan Region Scheme Amendment 1236/57 (October 2012) on Bush Forever area definition.}

6.6.4 Injurious affection

Injurious affection typically arises in the case of private land reserved for public use.\footnote{Law Reform Commission of Western Australia, Final Report above n 66, 37–38.} There have been improvements with respect to provision for injurious affection. In 1981, compensation provisions were made for injurious affection from the declaration or amendment of a declaration of a planning control area.\footnote{See the former s 36A Metropolitan Region Town Planning Scheme Act 1959 (WA) as amended. This is now similarly provided for under s 186 PDA.} The PDA carried over limitations to the recognition of injurious affection in similar form to previous statutory provisions.\footnote{See e.g. s 173(2) PDA and the former s 11(1) Town Planning and Development Act 1928 (WA). Note, however, there appears to be no equivalent to the former s 12(2) of the 1928 Act. See also s 174(3) PDA and the former s 12(2a) of the 1928 Act.} The exhaustively prescribed circumstances in which injurious affection may arise by the making or amending of a town planning scheme\footnote{Land must be reserved land under a planning scheme for a public purpose, or development under the scheme must be limited to a public purpose, or the scheme must prohibit the continuation of a non-conforming use, or building restrictions apply in connection with that non-conforming use: s 174(1) Planning and Development Act 2005 (WA). Compare the former s (2a)(b) Town Planning and Development Act 1928 as amended, with s 174(1) PDA, considered in City of Canning v Avon Capital Estates (Australia) [2008] WASAT 46, [19]–[29] (Chaney J) and discussed in D McLeod (ed), above n 430. Note also s 11(4) of the former Town Planning and Development Act 1928 (WA), which provided that any question as to whether any land was injuriously affected was to be determined by arbitration, unless the parties otherwise agreed. This provision is now carried across to s 176 PDA.} may now extend to the mere reservation of land under the planning scheme for a public purpose.\footnote{See s 174(1)(a) PDA: City of Canning v Avon Capital Estates (Australia) [2008] WASAT 46, [19]–[29] (Chaney J). An award of compensation was not permitted in such circumstances under the former s 36(3) Metropolitan Region Town Planning Scheme Act 1959 (WA); see Bond Corporation Pty Ltd v WA Planning Commission [2000] WASCA 257, [34] (Ipp J).} In addition, the PDA also provides for compensation for injurious affection to land in relation to an interim development order.\footnote{S 185(1) PDA.}
(a) Compensation

Compensation for injurious affection may be claimed by any person whose land is injuriously affected by a planning scheme. A limited benefit introduced by the PDA was the removal of the six-month limitation period for the bringing of an injurious affection claim following notice of approval of a scheme. Payment provisions contained regulated compensation entitlements. Compensation is not payable until a prescribed event occurs, which events remain unchanged. Payment of compensation need not be made at the time of the taking. Compensation cannot exceed the difference between the value of the affected land and the value of the land as not so affected. However, this suggests that the compensation may be less than the difference.

Despite improvements to the treatment of injurious affection, land may be injuriously affected without any compensation following the Planning Commission’s power to impose development conditions. Other statutory provisions may operate negatively or positively.
positively regarding compensation.\textsuperscript{501} For example, no entitlement to compensation may arise for injuriously affected land within a management area which is not reserved, but is affected by development restrictions.\textsuperscript{502} If the owner wishes to sell, rather than develop the land, the landowner will be unfairly deprived of compensation in the event of a reduced sale price consequent upon the development restrictions.\textsuperscript{503}

(b) Betterment

Where land increases in value as a result of money spent by a responsible authority in the implementation of a planning scheme, the responsible authority continues to be entitled to recover from the landowner half the amount of that increase in value,\textsuperscript{504} where a claim is made within the required time period.\textsuperscript{505} Betterment may be considered at the time of assessing injurious affection.\textsuperscript{506} However, notwithstanding statutory provision, it appears that betterment is not in practice recovered.\textsuperscript{507}

(c) Election to acquire

A responsible authority can still acquire land injuriously affected\textsuperscript{508} as a result of the public purpose land reservation, where compensation for injurious affection is claimed by the affected owner.\textsuperscript{509} Although an election has been construed as compulsory acquisition,\textsuperscript{510} an election to acquire involves no compulsory acquisition.\textsuperscript{511}

\textsuperscript{501} See s 175 PDA.
\textsuperscript{502} See s 89(2) Swan and Canning Rivers Management Act 2006 (WA). Note if the land were reserved land, then the owner could seek compensation for injurious affection in accordance with s 177(1) PDA.
\textsuperscript{503} Law Reform Commission of WA, \textit{Final Report}, above n 62, 78. The Commission indicates in that case the purchaser of the land, who then had a development application refused, would be entitled to compensation. In contrast, injurious affection is more generously compensated under s 42(1) of the \textit{Dampier to Bunbury Pipeline Act 1997} (WA) to a landholder affected by the conferral or exercise of rights under that Act: see ss 34 and 41 \textit{Dampier to Bunbury Pipeline Act 1997} (WA) discussed in Law Reform Commission of Western Australia, \textit{Final Report}, above n 62, 68.
\textsuperscript{504} S 184(1) PDA.
\textsuperscript{505} S 184(2) PDA. The provision is consistent with the former statutory provision considered earlier: see s 11(2) \textit{Town Planning and Development Act 128} (WA); see also chapter 5, [5.7] of this thesis.
\textsuperscript{507} Stein, above n 452, 16. Note the practical difficulties of charging for betterment discussed by Stein (17).
\textsuperscript{508} See s 174 PDA on when land is injuriously affected.
\textsuperscript{509} S 187(1) PDA; \textit{Vincent Nominees Pty Ltd v Western Australian Planning Commission} [2012] WASC 28, [66] (Beech J); see also the former ss 36(2a) and (2b) of the \textit{Metropolitan Region Town Planning Scheme Act 1959} (WA) as amended.
\textsuperscript{510} Law Reform Commission of Western Australia, \textit{Final Report}, above n 62, 58.
\textsuperscript{511} \textit{Mount Lawley v Western Australian Planning Commission} (2004) 29 WAR 273, 326-327 (Steylter, Templeman and Simmonds JJ), citing \textit{Hill v Western Australian Planning Commission} (2000) 107 LGERA 229, [21]-[22]; \textit{MacDougall v Western Australian Planning Commission} (2003) 129 LGERA 243. Reasons as to why it is not compulsory acquisition include that the owner is free to withdraw a compensation claim in the event that the election is made by the responsible authority; \textit{Mt Lawley v WAPC}, 325. The significance of this distinction is that an owner is compensated for a compulsory
The Government regards the election to acquire process as a fair treatment of landowners, providing the landowner with a guaranteed state purchaser in the event the owner wishes to sell, and a vested right to compensation if the land is sold on the open market. However, the election to acquire process may cause unfair disadvantage to owners if exercised. This is of concern given that most land purchases by the Planning Commission are by election. Where a claim for injurious affection is made and the acquiring authority then makes an election to acquire the land, the landowner may be denied any compensation for the injurious affection of adjoining land, despite such a claim being compensable if there had been a formal taking of land. The value of the land will be that determined at the date of the election to acquire the land. Special value to the owner will not apply to the ‘election to acquire’ provisions, which apply the test of market value. There is no policy justification for not compensating the affected landowner on the basis of an acquisition.

### 6.6.5 Subdivision and development controls

The starting point for a consideration of any right to subdivide is the statutory limitation of subdivision. The State’s previous uncompensated expropriation of the proprietary right to subdivide land without statutory approval remained, with the PDA continuing many of the subdivision controls previously introduced. No right to subdivide land acquisition, while the owner receives the price or value of the land upon an election: 320, 328–331. A landowner can withdraw and then resubmit a claim for compensation, so as to amend the date of valuation or assessment to a time effectively of his choosing: see Nicoletti v Western Australian Planning Commission [2006] WASC 131, discussed in Law Reform Commission of WA, Discussion Paper, above n 65, 23. However, a landowner will be bound once a determination of the price has been made:

512 Planning makes it happen, above n 78, 3.
514 Planning makes it happen, above n 78, 3.
515 S 187 PDA
516 See the earlier s 36(2b) Metropolitan Region Town Planning Scheme Act 1959 (WA); Mount Lawley Pty Ltd v Western Australian Planning Commission (2004) 29 WAR 273. The Law Reform Commission states that it is unclear whether that interpretation will apply to s 188 PDA: Law Reform Commission of WA, Final Report, above n 62, 58.
518 S 188(1) PDA
519 See s 188 PDA; Pettitt SC, above n 49, 19.
520 Law Reform Commission of WA, Final Report, above n 62, 58. The Commission recommended that the process for acquisition following an election to acquire be amended: ibid, 62.
522 Lloyd v Robinson (1962) 107 CLR 142, 154; see also Western Australian Planning Commission v Temwood Holdings Pty Ltd (2004) 221 CLR 30.
523 Compare e.g. ss 135 and 136 PDA with the former s 20(1)(a) Town Planning and Development Act 1928 (WA) as amended.
was conferred, nor was the deprivation of this right thought to warrant compensation. The subdivision or amalgamation of a lot continued to be prohibited without the Commission’s approval, which approval might be denied. Any personal hardship to the applicant would seldom be decisive in the balancing of the public interest against the private interest of the developer. The Commission also retained a broad discretion for the imposing of conditional approvals. Development, which included ‘use’, was also prohibited without statutory approval, where required by a planning scheme or interim development order. While land could be freely developed where not regulated by a planning scheme or development order, most planning schemes deprived the owner of development rights without statutory approval. The subdivision or development of land might also be affected by other statutory provisions, such as environmental and heritage considerations.

The treatment of subdivision and development was not without some regard to a landowner’s property rights. For example, the future use of the land remains a relevant consideration to a subdivision or development application, but the consequences of the land division are more important. Although authorities should also endeavour to prevent the sterilising of land development, this does not mean a statutory discretion will be exercised in the land developer’s favour. A landholder’s ability to lease land

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Standing Committee on Public Administration and Finance, above n 48, [8.144].

S 135(1) PDA. Frequently, ambulatory conditions are imposed by the Commission which require performance to the satisfaction of third parties: see Department of Planning, Review of the Planning and Development Act 2005, (September 2013) [5.2].

S 143(1)(b) PDA.

G McLeod (ed), above n 439, [4.5372] citing Pavlovich v Town Planning Board (1985) 3 SR (WA) 181. However, there is now provision to take account of hardship provided that it does not ‘affect the application of sound planning principles’: s 241(3) PDA.

See s 143(1)(c) PDA and the former s 20(1c) Town Planning and Development Act 1928 (WA) as amended. For a summary of the planning considerations to be taken into account regarding a subdivision, see Falc Pty Ltd v State Planning Commission (1991) 5 WAR 522, 535 (Ipp J), cited in G McLeod (ed), above n 439, [1.4220].

See s 4(1) PDA and note the broad definition of ‘development’; see also s 162(1). Consequently, a change in land use may also require planning approval: see University of Western Australia v City of Subiaco (1980) 52 LGRA 360, 363, cited in G McLeod (ed), above n 439, [4.5012].

Ss 162-164 PDA.

G McLeod (ed), above n 439, [1.4240].


See Stein, above n 452, 81, citing Marford Nominees Pty Ltd v State Planning Commission WASC 1/12/96 BC 9600102.

Anglo Estates Pty Ltd v Shire of Beverley (1996) 17 SR (WA) 151, 163.
not dealt with as a lot was also improved.\textsuperscript{536} Notwithstanding this regard, however, public amenity weighed heavily against a land developer.\textsuperscript{537} Indeed, the vulnerability of property rights was heightened. A more limited discretion was afforded to the Commission to approve a subdivision where it conflicted with a local planning scheme.\textsuperscript{538} This effected ‘a significant change to planning law concerning subdivision.’\textsuperscript{539}

Planning conditions presented a significant threat to property rights. As part of the approval of a subdivision, planning conditions relating to use and development might be imposed.\textsuperscript{540} It appears that it became increasingly common for land-use restrictions and public-benefit requirements to be imposed as standard conditions in the approval of development applications.\textsuperscript{541} The scope of statutory conditions which might be imposed by the Commission was also broadened. The common law requirement that a condition be imposed for proper planning purposes and that the condition reasonably and fairly relate to the permitted development\textsuperscript{542} was interpreted not as an enquiry into planning law and theory,\textsuperscript{543} but merely a requirement that the condition be ‘... imposed in good faith and not with a view of achieving ends or objects extraneous to the purposes for which the discretion exists.’\textsuperscript{544} Liberal interpretations would also generally be preferred in the application of planning instruments.\textsuperscript{545}

Planning conditions could still require the complete surrender of property rights. For example, a proprietor seeking to subdivide land might be required to cede reserved land

\textsuperscript{536} Compare s 136 PDA with the former s 20(1) Town Planning and Development Act 1928 (WA) as amended. The former wider restrictions might render a lease invalid; see eg Wilson International Pty Ltd v International House Pty Ltd [1983] WAR 243; Stone James & Co v Investment Holdings Pty Ltd [1987] WAR 363; but note also Glenthom Pty Ltd v City of Perth [1986] WAR 205. \textsuperscript{537} Cornell v Town of East Fremantle (1995) 12 SR (WA) 339, 346 \textsuperscript{538} Compare s 138(3) PDA with the former s 20(5) Town Planning and Development Act 1928 (WA) as amended. \textsuperscript{539} Rocca v WA Planning Commission [2007] WASAT 110, [29], cited in G McLeod (ed), above n 439, [1.4220]. The Planning Commission notes this as a major change in Planning Bulletin No 76, above n 429, 4–5. \textsuperscript{540} See G McLeod (ed), above n 439, [1.4220]. The power to impose such conditions arises under s 148 PDA. The power was previously restricted to survey strata subdivision. \textsuperscript{541} See Standing Committee on Public Administration and Finance, above n 48, [8.129]. \textsuperscript{542} See Newbury District Council v Secretary of State for the Environment [1980] 1 ALL ER 731, considered in Stein, above n 452, 225–231. \textsuperscript{543} C.f. contra Temwood Holdings Pty Ltd v WA Planning Commission (2002) 25 WAR 484, [70] (Olsson AUJ), cited in Stein, above n 452, 229. \textsuperscript{544} Planning Commission (WA) v Temwood Holdings Pty Ltd (2004) 221 CLR 30, [60] (McHugh J); see also Stein, above n 452, 230. \textsuperscript{545} Georgiou Corporation Holdings Pty Ltd v City of Stirling (2009) 61 SR (WA) 314, [45].
to the Crown, and without any guarantee of compensation.\footnote{Planning Commission (WA) v Temwood Holdings Pty Ltd (2004) 221 CLR 30.} It continued to be a requirement that public open space be set aside as a condition of subdivision.\footnote{This emanates from the recommendations of the Plan for the Metropolitan Region, Perth and Fremantle: WA Planning Commission, ‘Development Control Policy 2.3 – Public Open Space in Residential Areas’. Developments with less than five lots may now attract a public open space requirement. The object of such conditions is driven by public interest considerations. See e.g. that of the City of Albany, ‘to ensure that sufficient public open space is provided for the enjoyment of local residents in areas of the City subject to infill subdivision’: ‘Public Open Space Contribution Policy, (3 to 5 lots)’ (City of Albany, 2008) 2. The Commission may now instead require a cash payment in lieu of the ceding of land: s 153 PDA. On the review of the discretion on cash in lieu payments, see Langer Nominees Pty Ltd & Anor v WA Planning Commission [2007] WASAT 137. The reason for this additional power was explained by the need to prevent the ceding of small parcels of land with no practical use: see Planning Bulletin No 76, above n 42, 5–6. For a consideration of the appropriateness of cash in lieu contributions, see D McLeod (ed), above n 430, [3.153.5]. The date for the determination of the amount cash in lieu is the date of the valuation of the land: s 153(3)(b)(i) PDA. Compare this with the former s 20C(3) Town Planning and Development Act 1928 (WA) which provided the relevant date was the date of the subdivision of the land.}

Disregard for property rights was suggested in ‘requiring regional open space to be ceded whether or not it exceeds the amount of open space required by a particular subdivision.’\footnote{Working Party on the Erosion of Property Rights, ‘Property Rights Under Attack in Western Australia–A Paper Addressing the Erosion of Property Rights in Western Australia’ (Discussion Paper, February 2004) 12; see also McMurdo, above n 62, 4–6.} However, conditions requiring the ceding of land were not regarded as confiscatory, since the surrender of the land was in consideration of the previously taken but now restored subdivision rights.\footnote{Lloyd v Robinson (1962) 107 CLR 142, 154 (Kitto, Menzies and Owen JJ). In this case, the approval of the Town Planning Board of Western Australia to a subdivision was made subject to the subdivider transferring other land not within the area for which approval was sought, and to the construction of a road. Both conditions were upheld by the High Court.} The principles of statutory interpretation did not assist a landowner.\footnote{Planning Commission (WA) v Temwood Holdings Pty Ltd (2004) 221 CLR 30, [31], [44] (McHugh J).} Accordingly, any compensation may need to be secured before a subdivision application, which may be difficult.\footnote{M Hardy, ‘Answers by a Higher Authority: a review of recent decisions of the High Court, Supreme Court and the SAT in the field of environmental planning law’ in Developments of Use in the Law of Land Use and Development (Law Society of WA, 6 September 2006) 8; see also s 177(3)(b) PDA.}

6.6.6 Planning appeals

The popular process of de novo hearing of appeals by the Minister for Planning (as opposed to hearings by the former Town Planning Appeal Tribunal) was criticised for being closed and secretive, unfair,\footnote{G McLeod (ed), above n 439, [2.3020].} denying procedural fairness,\footnote{Dilatte v MacTiernan [2002] WASCA, [69], [80], [83] (Malcolm CJ).} and contrary to the doctrine of separation of powers.\footnote{S Willey and V McMullen, ‘Planning Appeals in Western Australia: where to now?’ (2004) 21 EPLJ 124, 126.} From April 2003, all planning appeals were directed
to the then Town Planning Appeal Tribunal,\textsuperscript{555} which function is now performed by the State Administrative Tribunal (‘SAT’).\textsuperscript{556} An applicant may seek the review of an application for planning approval before the SAT in two ways; firstly, through the appeal provision contained in a LPS,\textsuperscript{557} and, secondly, through s 252 of the PDA.\textsuperscript{558} An applicant may also exercise a right of review arising from determinations made in relation to a subdivision,\textsuperscript{559} and use. Time limitations apply.\textsuperscript{560} A person having a sufficient interest in the matter may also make submissions to the Tribunal.\textsuperscript{561} A person aggrieved by ‘the failure of a local government to enforce or implement effectively the observance of a LPS’\textsuperscript{562} may make representations to the minister. A new right of review was also included regarding a local government’s decision as to use under a planning scheme.\textsuperscript{563}

A landowner’s new appeal rights brought advantages, such as where the Planning Commission had refused to endorse its consent on a diagram or plan of survey.\textsuperscript{564} However, significant challenges also exist. Limitations restricting the ability of the Tribunal to approve a subdivision which conflicts with a local planning scheme\textsuperscript{565} removed the former discretion to approve any subdivision.\textsuperscript{566} The SAT may also give leave for a third party to intervene.\textsuperscript{567} Private property rights may, therefore, again be

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555 & Planning Appeal Amendment Act 2002 (WA). Note that an appeal from the decision of the Town Planning Board might previously have been made to the Privy Council but the Privy Council might defer to the Board’s decision in the absence of any error of fact or law: Glentham Pty Ltd v City of Perth (1986) 65 ALR 449, 450 (Lord Bridge of Harwich). \textsuperscript{556} See State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004 (WA); D Parry, ‘Revolution in the West: The transformation of planning appeals in Western Australia’ (2008) 14 LGJL 119, 126. Note, however, that appeals to the Minister have not been entirely dispensed with. The Minister may still order a local government to prepare or adopt a LPS: S 7(1) PDA; see also Moore River Co Pty Ltd v Western Australian Planning Commission (2007) 57 SR (WA) 98. On SAT reviews and challenges generally, see E Samec and E Andre, above n 72, 217-246 \textsuperscript{557} See s 236 PDA; C Slarke, ‘Devil in the Detail: trips and traps when acting in a Planning Review Application in the SAT’, Developments of Use in the Law of Land Use and Development (The Law Society of WA, topic 2, 6 September 2006) 2. \textsuperscript{558} This involves the applicant seeking a review of an authority’s exercise of its discretion to refuse authorisation under a LPS or region planning scheme, or granted an application subject to conditions: Slarke, \textit{ibid}. \textsuperscript{559} \textit{Ibid}, citing ss 251 and 253 PDA. \textsuperscript{560} \textit{Ibid}, 4, noting rule 9, State Administrative Tribunal Rules 2004 (WA), but note also rule 10 on extension of time. \textsuperscript{561} \textit{Ibid}, 5, noting s 242 PDA. \textsuperscript{562} S 211(1)(a) PDA. \textsuperscript{563} S 252(2) PDA, and considered in Planning Bulletin No 76, above n 429. \textsuperscript{564} See s 253(1)(b) PDA, considered in G McLeod (ed), above n 439, [1.4220]. This right was originally introduced by the Planning Legislation Amendment Act 1999 (WA). \textsuperscript{565} See s 138(2) PDA. \textsuperscript{566} See WA Planning Commission and Diggins [2008] WASAT, [29] (Barker J), cited in D McLeod (ed), above n 430, [3.138.5]. \textsuperscript{567} Slarke, above n 557, citing s 37 State Administrative Tribunal Act 2004 (WA).
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subjected to the scrutiny of the broader public interest. Overall, however, it appears that the SAT, through a process of facilitative dispute resolution, has been effective in resolving planning disputes.

6.7 Key Area 6 - Environmental laws

Until 1986, the level of environmental legislative activity and environmental litigation remained quite low in WA relative to other states. The Environmental Protection Act 1986 (‘EPA’) replaced the 1971 Act, and in doing so brought about a new state disregard for property rights through the elevation of public interest considerations, which might operate effectively to divest a landowner of property rights, and without compensation. Most significant was the introduction of a new environmental impact assessment process (‘EIA’), increasingly restrictive provisions in relation to land clearing and pollution, and the introduction of the Heritage of Western Australia Act 1990 (‘HWAA’). However, state regard for property rights is evident in new statutory carbon rights in land. These developments are considered below.

6.7.1 EPA and public interest considerations

The Environmental Protection Authority (‘the Authority’) continued under the EPA. The EPA’s stated objectives were the use of best endeavours ‘to protect the environment and to prevent control and abate pollution and environmental harm.’

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569 DR Parry, ‘The use of facilitative dispute resolution in the State Administrative Tribunal of Western Australia–Central rather than alternative dispute resolution in planning cases’ (2010) 27 EPLJ 113.
570 D Grinlinton, ‘The ‘Environmental Era’; and the Emergence of ‘Environmental Law in Australia—A Survey of Environmental Legislation and Litigation 1967-1987’ (1991) 7 EPLJ 74, 78, Table 1; 89, Table 4. This can be contrasted with the significant increases in the number of enactments dealing with environmental planning, conservation and hazardous substances, and increase in litigation involving environmental planning, noted at 79, 84. There were only a few minor amendments to the Environmental Protection Act 1971: Western Australia, Parliamentary Debates, Legislative Assembly, 24 July 1986, 2537 (referring to the Environmental Protection Act 1971–1980)
571 Assented to 10 December 1986.
572 Assented to 22 December 1990.
573 See Carbon Rights Act 2003 (WA); Tree Plantation Agreements Act 2003 (WA); s 104B(1)(a) and s 104N(2)(a) Transfer of Land Act 1893 (WA).
574 S 7(1) Environmental Protection Act 1986 (WA).
575 S 15(2) Environmental Protection Act 1986 (WA); see also s 3A for a definition of ‘pollution’ and ‘environmental harm’. Note sustainability principles were later added to the objects of the EPA, being ‘to protect the environment of the State having regard to ...the precautionary principle... the principle of intergenerational equity... the principle of the conservation of biological diversity and ecological integrity... principles relating to improved valuation, pricing and incentive mechanisms... [and] the principle of waste minimisation’: s 122 Environmental Protection Amendment Act 2003 (WA). The content of each of these principles is further set out in s 4A EPA.
‘Environment’ was more broadly defined. For independence, the Authority and its chairman were not subject to ministerial directions.

Key principles considered to underlay the EPA included community participation in the development of environmental protection policies and the establishment of community-based advisory groups to assist with preparation of advice to the Government, formalising the need for an EIA process, new provisions for dealing with development proposals approved subject to environmental conditions, the consolidation of pollution control responsibilities, and new appeal provisions to ensure no section of the community was disadvantaged.

These key principles provided the framework for a new state disregard of a landowner’s property rights in the name of the public interest.

(a) EIA, development and subdivision

The state EIA process was the most significant environmental law affecting a land development. Any development or subdivision of land constitutes a ‘proposal’. Any ‘significant proposal’ must be referred to the Authority. The minister may also refer a proposal to the Authority, which then determines whether an EIA is

576 Compare s 3(1) EPA with the former s 4(1) EPA 1971. ‘Environment’ is no longer limited to ‘physical factors prevailing’. On the definition of ‘environment’, see Coastal Waters Alliance of WA Inc v Environmental Protection Authority (1996) 90 LGERA 136, 148 (Rowland J).
577 S 8 Environmental Protection Act 1986 (WA).
578 Western Australia, Parliamentary Debates, Legislative Assembly, 24 July 1986, 2537–2538 (Mr Hodge, Minister for Environment). Note, however, that the appeal provisions of the EPA have been considered ‘highly unsatisfactory’ on the basis that it is ‘closed and not transparent’: see G McLeod (ed), above n 439, [1.4100].
579 Note from 16 July 2000, the Commonwealth has had a separate EIA process under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (‘EPBCA’) which applies to matters including ‘actions’ which have a ‘significant impact’ on ‘matters of national environmental significance’: see Environment Protection and Biodiversity Conservation Act 1999 (Cth). While the EPSCA operates alongside the State Act, the assessment process under the EPBCA will not apply to an action in Western Australia if it has been assessed by the Authority: G McLeod (ed), above n 439, [5,4290]. The grant of subdivision or development approval will not be an ‘action’ for the purposes of the EPBCA: s 542(2) EPBCA, noted in Samec and Andre, above n 72, 129, and see 111–132 on environmental planning.
580 See s 3(1): ‘proposal’ means a project, plan, programme, policy, operation, undertaking or change in land use, or amendment of any of the foregoing, but does not include scheme’. Note ‘scheme’ is also defined in s 3(1).
581 A ‘significant proposal’ is a proposal which if implemented is likely to have a significant effect on the environment: s 37B(1) EPA. The proposal must cause change to the environment: see Environmental Protection Authority; Ex parte Chapple (1995) 89 LGERA 310, 321 (Pidgeon J); see also Roe v Director General, Department of Environment and Conservation for the State of WA [2011] WASCA 57 in G Bates, Environmental Law in Australia (LexisNexis, 8th ed, 2013) [9.43].
582 S 38(5) EPA as amended.
583 See 38(4) EPA: Ministerial referral may occur if ‘it appears to the Minister that there is public concern about the likely effect of a proposal, if implemented, on the environment’. Note the proponent of a strategic policy may also refer the proposal to the Minister: s 38(3) EPA. This enables the Authority to become involved in early, conceptual strategic planning; see Western Australia, Parliamentary Debates,
required. As a result, subdivision or land development may now be subjected to the approval of the Authority and the minister.

As part of an EIA, the Authority reported on key ‘environmental factors’, but excluded extraneous commercial considerations. The proponent had to be informed within 28 days whether the Authority intended to assess the proposal. Where the Authority determined assessment was required, the proponent was required to submit an environmental scoping document. The Authority then advised the minister whether the proposal could be implemented. The minister then determined whether to authorise the local government to make a decision on the proposal. Until the Authority completed its EIA, the local government and SAT is restrained from making any decision concerning the proposal. Conditions are usually imposed by the Minister for the Environment regarding any local government authorisation.

(b) EIA concerns

EIA has been criticised for inflating public interest considerations, and for the public interest being determined by unelected persons. Underlying EIA is that the Government, rather than landowners, is best placed to manage the environment. Despite potentially constraining development, and benefiting the public by protecting...
environmentally sensitive areas, the EIA process does not attract compensation for the landowner, since there is no land taken.\textsuperscript{596}

A landowner may be faced with the Authority misunderstanding the scope of its powers under the Act.\textsuperscript{597} The Government has revealed a preparedness to pursue legislative amendment where a Court finds the Authority lacking in power.\textsuperscript{598} Although an EIA ministerial appeals process exists,\textsuperscript{599} this may be ‘secretive’ and contravene the rules of natural justice.\textsuperscript{600} Ministerial appeals have tended to be dismissed.\textsuperscript{601}

(c) Environmental protection policies

Environmental protection policies may present a further challenge to the exercise of property rights. Before the EPA, the Authority had been unable to implement declarations of environmental protection policies due to ‘legal technicalities’.\textsuperscript{602} The EPA embodied most of the policy directions under the former Act,\textsuperscript{603} and provided for the preparation of draft environmental protection policies by the Authority\textsuperscript{604} for ministerial approval.\textsuperscript{605} Any person could make a submission in relation to a draft policy within the prescribed period.\textsuperscript{606} Upon approval by the minister, a draft policy had the force of law.\textsuperscript{607}

An approved policy might control land use,\textsuperscript{608} create offences and prescribe penalties.\textsuperscript{609} Potential environmental dangers might bar a subdivision.\textsuperscript{610} Private land might also be

\begin{thebibliography}{9}
\bibitem{596} See McMurdo, above n 62, 4.
\bibitem{597} See G McLeod, above n 593, 61, fn 4, citing Palos Verdes Estates v Carbon (1992) 6 WAR 223, \textit{Environmental Protection Authority: Ex parte Chapple} (1995) 89 LGERA 310, and Coastal Waters Alliance of Western Australia Inc v Environmental Protection Authority (1996) 90 LGERA 136.
\bibitem{598} See e.g. Environmental Protection Authority: Ex parte Chapple (1995) 89 LGERA 310; see \textit{Environmental Protection Amendment Bill 2002}, discussed in Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 27 June 2002, 12302a.
\bibitem{599} See \textit{s 101 EPA}.
\bibitem{600} G McLeod, above n 593, 62, fn 5. See also G McLeod (ed), above n 439, [1.4100].
\bibitem{601} See JM Bailey and S Brash, ‘The Environmental Protection Act 1986 (WA). An Experiment in Non-Judicial Appeals’ (1989) \textit{EPLJ} 197, 211. The authors noted that 95\% of appeals lodged under \textit{s 100(2)} of the EPA were dismissed, although the authors conclude that this was due to political rather than substantive matters often being the subject of the appeals.
\bibitem{602} Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 24 July 1986, 2537 (Mr Hodge, Minister for Environment); see also \textit{s 40 Environmental Protection Act 1971–1980} (WA).
\bibitem{603} Western Australia, \textit{Parliamentary Debates}, \textit{ibid}.
\bibitem{604} \textit{S 26 EPA}.
\bibitem{605} \textit{S 31 EPA}.
\bibitem{606} \textit{S 27 EPA}.
\bibitem{607} \textit{S 33(1) EPA}. Note, however, that policies may not be mandatory relevant conditions, such that the EPA may not be required to consider its published policies: \textit{Jacob v Save Beeliar Wetlands (Inc)} [2016] WASCA 126
\bibitem{608} See \textit{s 35(1)(b) EPA}; eg \textit{Environmental Protection Swan Coastal Plain Lakes Policy 1992}.
\bibitem{609} \textit{S 35(1a) EPA}.
\bibitem{610} \textit{Anglo Estates v Shire of Beverley} (1997) 17 SR (WA) 151, 163.
\end{thebibliography}
affected by the implementation of a management plan for the community’s benefit, without relief to the owner.611

6.7.2 Restrictions on native vegetation clearing

Land clearing is the most significant cause of state biodiversity loss.612 Agricultural land clearing of native flora contributed to soil salinization,613 the most important environmental challenge facing Australia.614 On the other hand, land clearing made WA a world leader in agriculture.615 Landowners were subjected to an increasingly strict regime concerning land clearing,616 which was dealt with as a public interest issue, rather than as a matter between the State and the landowner.617 This approach further diminished state regard for property rights.

(a) Notification

From 1986, land clearing was regulated by the Soil and Land Conservation Act 1945 (WA).618 The Act regulates actions causing ‘land degradation’.619 Until July 2004, the Act permitted agricultural clearing through notification.620 An unacceptable level of land degradation risk was limited to where a local government district had less than 20% remnant vegetation.621 However, the onus shifted to landholders to prove that any

611 Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management (2012) 42 WAR 287, [110], [120], [124] (McLure P). In this case, an action in negligence and nuisance failed.
612 M Bennett, ‘Regulation of Land Clearing: Reforming the Law in Western Australia’ (18 January 2002) Environmental Defender’s Office WA (Inc), 1.
615 Standing Committee on Public Administration and Finance, above n 52, [7.33].
617 Standing Committee on Public Administration and Finance, above n 52, [7.103].
618 This Act is treated as supplementary to the EPA: s 3 Soil and Land Conservation Act 1945 (WA), and Schedule; see also s 51D EPA. See also chapter 5 for a consideration of the Soil and Land Conservation Act 1945 (WA).
621 See Bennett, above n 612, 10, citing Memorandum of Understanding for the Protection of Remnant Vegetation on Private land in the Agricultural Region of Western Australia, between the Commissioner for Soil and Land Conservation, Environmental Protection Authority, Department of Environmental Protection, Agriculture WA, Department of Conservation and Land Management and Water and Rivers Commission (Perth, 1997) 4.
The proposed clearing of native vegetation could also be referred to the minister.\(^{623}\)

(b) **EPA controls**

Clearing native vegetation did not constitute pollution.\(^{624}\) Accordingly, an offence of serious or material environmental harm was created.\(^{625}\) The notification process was replaced by statutory controls,\(^{626}\) which prohibited the clearing\(^{627}\) of native vegetation\(^{628}\) except in accordance with the EPA.\(^{629}\) The EPA required that regard be had to prescribed principles and instruments of clearing when determining an application for a clearing permit, which made no reference to a landowner’s needs.\(^{630}\) A clearing permit might be conditional.\(^{631}\) Clearing restrictions reduced rural land productivity and value\(^{632}\) without compensation to the affected landowner,\(^{633}\) except where the landowner agreed to set land aside.\(^{634}\) Courts treated the preservation of native

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\(^{622}\) *Ibid.*

\(^{623}\) S 44 EPA. A recommendation that a proposal not be implemented could also be made: see eg ‘Clearing of Native Vegetation on Kent Location 1766, Needilup Road North and Townsend Road, Shire of Kent’, Mr W O’Halloran, *Report and Recommendations of the Environmental Protection Authority*, Bulletin 1000 (Environmental Protection Authority, Perth, Western Australia, December 2000).

\(^{624}\) *Palos Verdes Estates Pty Ltd v Carbon* (1992) 6 WAR 223, 241 (Malcolm CJ); 251–252 (Rowland J).

\(^{625}\) See Western Australia, *Parliamentary Debates, Legislative Assembly*, 27 June 2002, 12302a–12307a (Dr Judy Edwards); ss 50A and 50B EPA as amended (inserted by s 37 Act No 54 of 2003).

\(^{626}\) See ss 51A-51T EPA. This was despite calls for a 12-month moratorium on the clearing of native vegetation ‘for the purpose of addressing property rights and any imposition on private land holders’: Standing Committee on Public Administration and Finance, above n 52, [7.260], citing submission no 113 from the Western Australian Farmers Federation (Inc) (7 May 2002) 2.

\(^{627}\) ‘clearing’ is defined in s 51A EPA.

\(^{628}\) ‘native vegetation’ is defined in s 51A EPA.

\(^{629}\) Except where a permit is not required, or the clearing is of a prescribed kind, and is not done in an environmentally sensitive area, a clearing permit is required: see s 51C EPA and regulation 5, *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA). For a list of the circumstances where a clearing permit is not required, see Schedule 6, EPA.

\(^{630}\) S 51O(2) EPA.

\(^{631}\) For example, conditions might require the permit holder to carry out works or enter into a conservation covenant or agreement to reserve the land: see ss 51H and 51I EPA.


\(^{633}\) See Law Reform Commission of WA, *Final Report*, above n 66, 75–76. The absence of statutory provision for compensation is in marked contrast to compensation for injurious affection that might be awarded due to a clearing prohibition in a water catchment area: s 12E *Country Areas Water Supply Act 1947* (WA). The counterargument to the case for compensation is that there is no land acquisition. It may even be that there is no absolute right of a landholder to clear land: see eg submission of the Conservation Council of WA (Inc) to the Standing Committee on Public Administration and Finance, above n 52, [7.29]–[7.31]. However, whether clearing restrictions may constitute an acquisition of property other than on just terms where the restrictions involve informal arrangements between a State and the Commonwealth is not yet resolved: see *Spencer v Commonwealth* (2010) 241 CLR 118.

vegetation seriously. Severe financial penalties might be imposed for illegal clearing,\textsuperscript{635} and imprisonment for breach of a ‘clearing injunction’.\textsuperscript{636}

6.7.3 Pollution controls

Prior to the EPA, responsibility for pollution management vested with agencies powerless to require amelioration or to prosecute offences.\textsuperscript{637} Pollution remained broadly defined,\textsuperscript{638} but the EPA contained more extensive mechanisms for the prevention, control or abatement of pollution.\textsuperscript{639} The Authority could draft environmental protection policies in relation to ‘the prevention, control or abatement of pollution’.\textsuperscript{640} The use of premises might require a works approval,\textsuperscript{641} and licences might be required for emissions.\textsuperscript{642} Offences for causing pollution or allowing pollution to be caused were created.\textsuperscript{643} Severe penalties might be imposed.\textsuperscript{644} Many offences did not require any mental element.\textsuperscript{645} The criminal standard of proof was not required.\textsuperscript{646} A modified penalty might be imposed without any conviction,\textsuperscript{647} and defences were limited.\textsuperscript{648}

\textsuperscript{635} See s 99Q and Schedule 1, EPA. A daily penalty of $50,000 is prescribed for individuals and a daily penalty of $100,000 for corporations.
\textsuperscript{636} Chief Executive Officer, Department of Environment and Conservation v Szulc [2010] WASC 195, [40] (Martin CJ).
\textsuperscript{637} Western Australia, Parliamentary Debates, Legislative Assembly, 24 July 1986, 2538 (Mr Hodge, Minister for Environment). However, statutory measures for the reporting of pollution did exist: see chapter 5 of this thesis; s 57 EPA 1971 (WA).
\textsuperscript{638} Compare s 3A(1)(a) EPA with s 4(1) of the Environmental Protection Act 1971 (WA). Because of the broad definition, the Court has looked to the purpose of the Act and an ordinary definition of ‘pollution’ in determining whether a person has caused pollution contrary to the Act: Palos Verdes Estates Pty Ltd v Carbon (1992) 6 WAR 223, 235, 237 (Malcolm CJ); 251 (Rowland J).
\textsuperscript{639} See in particular the 2003 amendments; see Environmental Protection Amendment Act 2003 (WA), assented to on 20 October 2003.
\textsuperscript{640} S 26(1)(b) EPA.
\textsuperscript{641} See ss 52-54 EPA.
\textsuperscript{642} S 56 EPA.
\textsuperscript{643} Ss 49(2) and 49(3) EPA
\textsuperscript{644} See EPA Schedule 1 and the inclusion of imprisonment; see also Environmental Protection Authority v McMurtry (Court of Petty Sessions (WA) Michelides M, No 3414/94, 9 March 1995, unreported), cited in Z Lipman and G Bates, Pollution Law in Australia (Lexisnexis, 2002) 188.
\textsuperscript{645} See Lipman and Bates, \textit{ibid}, 145–146, citing Tier 2 offences and s 49(5) EPA.
\textsuperscript{646} BP Australia Pty Ltd v Contaminated Sites Committee (2012) 191 LGERA 113, 127–129 (Martin CJ) with reference to s 49(2) EPA.
\textsuperscript{647} s 99A EPA, Lipman and Bates, above n 644.
\textsuperscript{648} WA is alone in not affording a defence of due diligence for corporate office holders: Lipman and Bates, above n 644, 167, 188, 189. The defence of accident or emergency is provided for: s 74 EPA. Ordinarily, the onus would be on the prosecution to negate an accident (see s 23 Criminal Code), but the Act requires the defendant to prove an accident: see Lipman and Bates, \textit{ibid}, 166, citing J Thompson, ‘Criminal and Civil Consequences of Corporate Environmental Policies in Western Australia’ (1992) 9 \textit{EPLJ} 111, 112; also 167, 188, 189.
6.7.4 Contamination

The *Contaminated Sites Act 2003* (‘CSA’)\(^{649}\) requires the reporting by a landowner or occupier of any known or suspected contaminated land.\(^{650}\) Land is classified according to the level of contamination and actual or proposed use,\(^{651}\) which classification may require remediation of the land\(^{652}\) and may restrict future land use.\(^{653}\)

The CSA imposes a new and ‘significant burden’ upon innocent landowners to remEDIATE contaminated land.\(^{654}\) The CSA adopted the polluter pays principle,\(^{655}\) but the Government’s introduction of the CSA\(^{656}\) failed to mention that generally\(^{657}\) an innocent owner would be liable for remediation to the extent that the liability of a polluter or previous owner or occupier could not be established, was insolvent, not locatable,\(^{658}\) or the State was not responsible.\(^{659}\) That responsibility extends to the remediation of other land which, although not the source of the contamination, is affected by the contamination migrating to that land.\(^{660}\)

6.7.5 Biodiversity conservation

Biodiversity conservation continued to affect property rights.\(^{661}\) From a private interest perspective, this may be seen as an uncompensated loss,\(^{662}\) and provided for a royalty to the State.\(^{663}\)

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\(^{649}\) Act No 60 of 2003, assented to on 7 November 2003, but only commenced on 1 December 2006. For a discussion of the CSA, see *BP Australia Pty Ltd v Contaminated Sites Committee* (2012) 191 LGERA 113.

\(^{650}\) S 11(3) CSA. For a definition of ‘contaminated’ see s 4 CSA.

\(^{651}\) See s 13 CSA and Schedule 1.

\(^{652}\) S 23 CSA.

\(^{653}\) S 13 CSA and Schedule 1. A memorial over contaminated or possibly contaminated land must be registered: s 58(1) and (2) CSA. A registered memorial may then prevent the subdivision, amalgamation or development of the land: s 58(6) CSA.


\(^{655}\) S 8 CSA. This principle is revealed in the hierarchy of responsibility for remediation: see s 24 CSA.

\(^{656}\) Western Australia, Parliamentary Debates, Legislative Assembly, 27 November 2002, 3479b–3482a.

\(^{657}\) Note very limited protection existed. An exemption certificate from liability for remediation could be applied for by an innocent owner, but applications had to be made within two years of the commencement of the CSA: ss 64 and 65 CSA. Note also s 27(3) pursuant to which a person may be exempted by a determination of the Contaminated Sites Committee, which is not confined by the 2-year limitation.

\(^{658}\) S 27(2) CSA.

\(^{659}\) On state responsibility, see s 29 CSA.

\(^{660}\) S 27(2a) CSA. Note notice of responsibility must be given to the person against whom responsibility is proposed before any decision is made as to responsibility (s 37 CSA), but this notice does not attract any obligations to afford that person procedural fairness: *Coffey LPM Pty Ltd v Contaminated Sites Committee (No 2)* [2013] WASC 98, [47]. Note, however, a person upon receiving notice of a decision as to liability for remediation may appeal: see ss 40, 77 CSA.

\(^{661}\) See eg *Wildlife Conservation Act 1950* (WA); Bridgetown/Greenbushes Friends of the Forest Inc & Ors v Executive Director of the Department of Conservation and Land Management and Ors* (1997) 18
6.7.6 Heritage laws

Heritage laws represented a new and significant threat to property rights, chiefly through the HWAA.\(^664\) The HWAA had the appearance of state regard for property rights, providing for ‘due regard to the rights of property ownership.’\(^665\) Although parts of the HWAA required only voluntary commitment,\(^666\) the conservation of places of significance to the State’s cultural heritage did not.\(^667\) Ministerial direction dictates the entry of a place on the Register of Heritage Places.\(^668\) Land may be placed on a municipal inventory to facilitate the Heritage Council locating places appropriate for placement on the Register.\(^669\) The Council is required to seek and consider submissions from the owner and other likely affected or interested persons.\(^670\) Upon receiving advice from the Council as to the cultural significance of the place (which precondition to the
exercise of the minister’s discretion is regarded as an important provision to protect landowners), the minister may direct that a sufficient description of the property be entered on the Register.

The Council states that ‘entry in the State Register does not mean a place cannot be changed to meet contemporary needs or adapted for a new use.’ Entry does not sterilise land use, but it does impose ‘significant restrictions,’ in particular the exclusive right to make decisions regarding the property solely on ‘economic grounds.’ A landowner may be prevented from carrying on business from the property. All applications and licences for demolition or subdivision are halted, and permanent registration revokes existing applications and permissions. A memorial is placed on the title. The future development or alteration of the land and other similar actions is then subject to the decision of the Council, and the minister. Authorisation may be conditional. A dissatisfied applicant may refer the conditions to the minister, but no provision exists for the referral of a refusal by the Council to the minister. Even land not entered on the Register may be affected by a conservation order. Enforcement and penalty provisions are provided for, and conviction may result in a lengthy moratorium on development.

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671 Re Hon GD Kierath, Minister for Heritage; Ex parte City of Fremantle (2000) 22 WAR 342, 348 (Pidgeon J).  
672 S 51(1)(a) HWAA. The Minister may alternatively direct that a place not be entered on the Register or that it be removed from the Register; S 54 HWAA. Note that the ministerial decision cannot be made arbitrarily: Re Hon GD Kierath, Minister for Heritage; Ex parte City of Fremantle, 348 (Pidgeon J).  
674 Re Hon GD Kierath, Minister for Heritage; Ex parte City of Fremantle (2000) 22 WAR 342, 357 (Wheeler J).  
675 Re Hon GD Kierath, Minister for Heritage; Ex parte City of Fremantle, (2000) 22 WAR 342, 348 (Pidgeon J). For an example of heritage considerations preventing the demolition of a building, see French v City of Stirling [2012] WASAT 25 noted in G Bates, above n 5, [9.72].  
676 Re Hon GD Kierath, Minister for Heritage; Ex parte City of Fremantle (2000) 22 WAR 342, 348 (Wheeler J).  
677 Ibid.  
679 S 56 HWAA.  
680 S 78 HWAA. See also Re Hon GD Kierath, Minister for Heritage; Ex parte City of Fremantle (2000) 22 WAR 342, 348 (Pidgeon J); 357 (Wheeler J). Note, however, s 11(1) HWAA.  
681 S 79(3) HWAA.  
682 S 79(6) HWAA.  
683 Re Hon GD Kierath, Minister for Heritage; Ex parte City of Fremantle (2000) 22 WAR 342, 356 (Wheeler J). Her Honour regarded this position as odd.  
684 S 59 HWAA; Re Hon GD Kierath, Minister for Heritage; Ex parte City of Fremantle (2000) 22 WAR 342, 356 (Wheeler J).  
685 HWAA, Part 6, Div 1, Conservation orders; Div 2, Restoration orders; note also Div 4, s 68 regarding injunctions.  
686 See HWAA, Div 4.  
687 S 80(1) HWAA.
(a) Compensation

A landowner may request the acquisition of land incapable of reasonably beneficial use.\(^\text{688}\) The Council may also acquire a place of heritage value by consent,\(^\text{689}\) or compulsorily,\(^\text{690}\) for which compensation is provided.\(^\text{691}\) However, mere entry of a place on the Register is not compensable,\(^\text{692}\) and tax relief is limited.\(^\text{693}\) Injurious affection is not compensable,\(^\text{694}\) nor is loss of profits or future profits.\(^\text{695}\) Compensation for the effects of registration is limited to ‘costs thrown away’.\(^\text{696}\) There is conflicting opinion on the adequacy of compensation,\(^\text{697}\) and criticism of the HWAA from lawyers.\(^\text{698}\) The cost of the public interest in heritage has been unfairly borne by private landowners.\(^\text{699}\) Submissions by the Valuer-General to a standing committee noted the de-facto downgrading of zoning and the negative uncompensated impact of heritage laws on the development potential of land.\(^\text{700}\) The HWAA may even threaten heritage.\(^\text{701}\)

6.7.7 Carbon rights

From 23 March 2004, a new statutory interest in land was created in the form of carbon rights\(^\text{702}\) and plantation interests,\(^\text{703}\) as part of a greenhouse gas abatement policy

\(^{688}\) S 76 HWAA.

\(^{689}\) S 74(1) HWAA.

\(^{690}\) S 73 HWAA.

\(^{691}\) S 73(2) HWAA.

\(^{692}\) S 77(1)(a) HWAA.

\(^{693}\) Tax relief may be provided as a conservation incentive: S 33 HWAA. However, placement of a property on the Register does not entitle a landowner to tax relief. See Land Tax Assessment Act 1976 (WA); Stowe v Commissioner of State Revenue (2001) 26 SR (WA) 251, 255; Property Nominees Pty Ltd v Valuer-General (2002) 31 SR (WA) 42, 50, also noting that this position is in contrast to that of eg s 22B(1) Valuation of Land Act 1971 (SA).


\(^{695}\) Re Hon GD Kierath, Minister for Heritage; Ex parte City of Fremantle (2000) 22 WAR 342, 356 (Wheeler J). Parliament may have considered that recovery for economic loss or loss of opportunity arising from the HWAA would have been inconsistent with the community interest in heritage preservation: 356 (Wheeler J).

\(^{696}\) Re Hon GD Kierath, Minister for Heritage; Ex parte City of Fremantle (2000) 22 WAR 342, 356 (Wheeler J); see further s 75(2) HWAA.

\(^{697}\) See eg D McLeod, ‘Compensation Issues’, above n 73, 13, where the compensation provisions are described as ‘virtually useless’; c.f. contra e.g. G McLeod, above n 435, [3.5220], who describes the compensation provisions as ‘adequate’.

\(^{698}\) The Act has been described by one planning lawyer as ‘perhaps the most draconian piece of legislation under which land can be significantly reduced in value by the actions of a government agency’: see D McLeod, above n 73, 13.


\(^{700}\) See e.g. Standing Committee on Public Administration and Finance, above n 52. The Heritage Council is only noted at [8.218].

\(^{701}\) L Staley, Property Rights in Western Australia–Time for Change (Institute of Public Affairs, Occasional Paper, July 2006) 4. Staley suggest that ‘property owners have a strong disincentive to maintain and preserve their buildings.’

\(^{702}\) S 6(1)(a) Carbon Rights Act 2003 (WA).
encouraged by the Commonwealth. These developments reveal a State regard for property rights in addressing the public interest in greenhouse gas abatement. A carbon right can be owned by the landowner. A carbon right, carbon covenant, or plantation interest cannot affect a landowner’s right of possession, and cannot be created without ‘the written consent of each person who has a registered interest in the freehold land’. Once registered, carbon covenants and plantation interests will run with the land. Carbon rights may afford landowners new commercial benefits, and the registration of these new statutory interests provides security for the interest holders. This carbon rights regime has been commended in the creation of new statutory property interests over reliance on common law servitude.

6.8 Key Area 7 - Criminal property confiscation

Criminal law has traditionally provided a means for the State’s protection of private property. Although possession and property rights did not translate easily into the exactness of the criminal law, the Criminal Code provided an array of indictable and simple offences for the protection of property interests. The absence of criminal law in public and private perspectives of the State’s regard for property may be explained by

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703 S 7(1)(a) Tree Plantation Agreements Act 2003 (WA).
705 S 6(2) Carbon Rights Act 2003 (WA). For the interest in land created on registration of a carbon right, see s 6(1) of the Act.
706 For the interest in land created by a registered carbon covenant, see s 12 of the Carbon Rights Act 2003 (WA).
707 A plantation interest is a hereditament and an encumbrance: see s 7(3) Tree Plantation Agreements Act 2003 (WA).
708 ss 8(2)(a) and 15, Carbon Rights Act 2003 (WA); s 10(1) Tree Plantation Agreements Act 2003 (WA).
709 ss 104B(1)(a) and 104N(2)(a) Transfer of Land Act 1893 (WA); see also s 104G Transfer of Land Act 1893 (WA ) on required consents for carbon covenants; s 10(1) of the Carbon Rights Act 2003 (WA) on the voluntary nature of a carbon covenant.
710 S 12(3) Carbon Rights Act 2003 (WA); s 9 Tree Plantation Agreements Act 2003 (WA).
712 The requirement of registration was intended to secure the carbon rights and carbon covenants in favour of the holder over the landowner: see S Hepburn, ‘Carbon Rights as new Property: The benefits of statutory verification’ (2009) 31 Syd Law Rev 239, 252, fn 82, citing Western Australia, Parliamentary Debates, Legislative Council, 24 October 2002, 2340 (Mr N Griffiths). Hepburn also cites s6 Carbon Rights Act 2003 (WA) in her observation that WA carbon rights are a new statutory property interest.
713 Ibid.
715 Ss 370–539 Criminal Code Act Compilation Act 1913 (WA). Note also the Prohibitive Behaviour Orders Act 2010 (WA), which is designed ‘to enable courts to make orders that constrain offers that have a history of anti-social behaviour’: see Long Title. Under s 3, antisocial behaviour includes ‘damage to property’. The Code also quite closely follows the common law regarding property offences: E Colvin and J McKechnie, Criminal Law in Queensland and Western Australia (LexisNexis, 2008) [7.3].
the traditional adherence of the State to conviction-based forfeiture regimes.\textsuperscript{716} This principle balances the competing interests of the State in the confiscation of property associated with crime and the interests of innocent parties in such assets.\textsuperscript{717} The retrospective shift from conviction-based forfeiture to non-conviction-based forfeiture as a result of the \textit{Criminal Property Confiscation Act 2000} (WA) (‘CPCA’)\textsuperscript{718} marks a new State disregard for property rights.

6.8.1 Conviction-based forfeiture

Prior to the CPCA, the preconditions to property forfeiture included conviction\textsuperscript{719} and a requirement of a charge or pending charge applied to the restraint of property.\textsuperscript{720}

The relevance of hardship\textsuperscript{721} would normally confine forfeiture to the offender’s property.\textsuperscript{722} The protection of the property of innocent persons was generally but not always secured by the Act,\textsuperscript{723} even where that property was used in connection with the commission of an offence,\textsuperscript{724} and without any substantial abrogation of the concept of

\textsuperscript{716} See for example the ancient common law right of the Crown to seize property upon conviction for a felony, noted in \textit{Permanent Trustee Co v Western Australia} (2002) 26 WAR 1, 5 (McKechnie J).

\textsuperscript{717} For an illustration of the State Government’s regard for this principle, see Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 18 October 1988, 3831–3832, (Mr Pearce, Leader of the House) (Crimes (Confiscation of Profits) Bill 1988, second reading).

\textsuperscript{718} The Act operated retrospectively from 1 January 2001: s 5(1) \textit{Criminal Property Confiscation Act 2000} (WA).

\textsuperscript{719} See \textit{Crimes (Confiscation of Profits) Act 1988} (WA), s6. Note that the estate of a person who was charged with a serious offence but died before conviction was liable for forfeiture: see s 3(2)(d) of the Act; \textit{Silbert v DPP (WA)}(2004) 217 CLR 181. An order of forfeiture also required the Crown to demonstrate that the defendant’s property was ‘used in, or in connection with, the commission of the offence; or... was derived or realized, directly or indirectly, by the person convicted of the offence or another person, or is subject to the effective control of the person convicted of the offence, as a result of the commission of the offence or of any other unlawful act’: s 10(1) \textit{Crimes (Confiscation of Profits) Act 1988} (WA). S 10(1)(a) required actual use, not merely intended use: \textit{Queen v Tarzia} (1991) 5 WAR 222, 226. For a list of the factors relevant to the determination of whether forfeiture should be ordered, see \textit{Bowman v Queen} (1995) 14 WAR 466, 473 (Parker J).

\textsuperscript{720} See s 20 \textit{Crimes (Confiscation of Profits) Act 1988} (WA).

\textsuperscript{721} S 10(2) \textit{Crimes (Confiscation of Profits) Act 1988} (WA). Note that the language of the Act was to be construed strictly: see \textit{DPP v Kinred} (1995) 15 WAR 133.

\textsuperscript{722} \textit{Bowman v Queen} (1995) 14 WAR 466, 471 (Parker J). A person who suffered forfeiture of property and who was not the offender also had a right of appeal under s 58(1)(b) of the Act. For the civil standard applied in relation to the making of a forfeiture order, see \textit{Langridge v Queen} (1996) 17 WAR 346, 387 (Murray J).

\textsuperscript{723} Certain innocent parties remained vulnerable such as infants and beneficiaries: see e.g. \textit{John Wilford Walsh, J Walsh Nominees Pty Ltd, John Walsh & Co Pty Ltd} (1989) 43 A Crim R 266, 280 (Seaman J) on the Proceeds of Crime Act 1987 (Cth); on a dismissal of alleged beneficial interest under the \textit{Criminal Property Confiscation Act 2000} (WA), see \textit{Smith v State of Western Australia} [2009] WASC 189. A person charged with an offence and who subsequently died before conviction might be to the ultimate detriment of the beneficiaries of the deceased’s estate: see s 3(2) and 3(5) \textit{Crimes (Confiscation of Profits) Act 1988} (WA); and \textit{Silbert v Director of Public Prosecutions for Western Australia} (2004) 217 CLR 181.

\textsuperscript{724} \textit{Bowman v Queen} (1995) 14 WAR 466, 471 (Parker J).
indefeasibility of title. 725 Innocent persons might be granted an interest in the property or the value of that interest. 726

6.8.2 Non-conviction-based forfeiture

Following influential adverse studies of a conviction-based regime, 727 the 1988 Act was replaced by the CPCA. While its purpose was similar to the 1988 Act, 728 there were critical differences in approach. 729 Proof of an offence was not a precondition to confiscation. 730 Confiscation could occur without evidence of an owner’s criminal conduct. 731 Where a confiscation offence 732 was committed, 733 property owned or effectively controlled 734 or given away property declared to be crime-used property 735 or crime-derived property 736 or property constituting a criminal benefit 737 was

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725 See B Clarke, ‘A Man’s Home is his Castle – or is it? How to take houses from people without convicting them of anything: the Criminal Property Confiscation Act 2000 (WA)’ (2004) 28 Crim LJ 263, 272. Note, however, that the writer is uncomfortable with the deeming provisions concerning conviction which deemed a person charged with an offence and who subsequently died before conviction as having absconded, and therefore being a convicted person, to the ultimate detriment of the beneficiaries of the deceased’s estate: see s 3(2) and 3(5) Crimes (Confiscation of Profits) Act 1988 (WA); Silbert v Director of Public Prosecutions for Western Australia (2004) 217 CLR 181.


727 Criminal Property Confiscation Act 2000 (WA), long title: ‘to provide for the confiscation in certain circumstances of properly acquired as a result of criminal activity and property used for criminal activity’.

728 For a table summarising the key differences, see B Clarke, above n 725, 271–272.

729 For the definition of ‘confiscation offence’, see s 141 Criminal Property Confiscation Act 2000 (WA).


731 For the definition of ‘effectively controls’, see s 156 Criminal Property Confiscation Act 2000 (WA).

732 For the definition of ‘effectively controls’, see s 156 Criminal Property Confiscation Act 2000 (WA).

733 See s 4 Criminal Property Confiscation Act 2000 (WA); for the definition of ‘crime-used property’ see s 146.

734 See s 4 Criminal Property Confiscation Act 2000 (WA); for the definition of ‘crime-derived property’, see s 148.

735 See s 4 Criminal Property Confiscation Act 2000 (WA); for the definition of ‘criminal benefits’ see s 145.
confiscable.\textsuperscript{738} A declared drug trafficker was liable to the automatic confiscation of all property.\textsuperscript{739}

Confiscation vests property absolutely in the State,\textsuperscript{740} free from all registered and unregistered interests, including trusts, mortgages, charges, obligations and estates, and any caveat is deemed to have been withdrawn.\textsuperscript{741} Indefeasibility of title is disturbed.\textsuperscript{742} Proceeds from confiscated property are applied under the Criminal Property Confiscation Grants Program.\textsuperscript{743} Any objection to confiscation must be made within the prescribed period.\textsuperscript{744}

Lawfully acquired property could be confiscated to satisfy liability to the State.\textsuperscript{745} A declaration of unexplained wealth\textsuperscript{746} required the person to ‘pay to the State an amount equal to the amount specified in the declaration as the assessed value of the respondent’s unexplained wealth.’\textsuperscript{747} Upon a declaration of unexplained wealth, the onus is upon the affected person to prove the property is not unexplained wealth.\textsuperscript{748} Freezing orders may also be made to preserve property.\textsuperscript{749} Only limited grounds are afforded for the setting aside of a freezing order.\textsuperscript{750}

\begin{itemize}
  \item \textsuperscript{738} S 142 Criminal Property Confiscation Act 2000 (WA). Note confiscation might extend to property in other States: DPP (WA) v Hafner (2004) 28 WAR 486.
  \item \textsuperscript{739} S 8 Criminal Property Confiscation Act 2000 (WA).
  \item \textsuperscript{740} Ss 9, 10(1) Criminal Property Confiscation Act 2000 (WA).
  \item \textsuperscript{741} S 9(2) Criminal Property Confiscation Act 2000 (WA).
  \item \textsuperscript{742} See P Beekink, ‘Criminal Property Confiscation Act 2000: Implications for real property and the concept of indefeasibility’ (October 2001) Brief, Law Society of WA, 10, 11.
  \item \textsuperscript{743} See s 131(2) Criminal Property Confiscation Act 2000 (WA); see also Government of Western Australia, Policy Concerning Payments out of the Confiscation Proceeds Account under the Criminal Property Confiscation Act 2000 Grants Program, Policy Framework, (9 March 2010). As at 30 June 2009, there had been 24 unexplained wealth declarations, of which 14 had led to confiscation: see L Bartels, ‘Unexplained Wealth Laws in Australia’ Trends and Issues in Crime and Criminal Justice (Australian Institute of Criminology No 395, July 2010).
  \item \textsuperscript{744} Ss 7(1) and 79(2) Criminal Property Confiscation Act 2000 (WA). By virtue of s 7 of the Act there can be no judicial or administrative intervention to confiscation, once the time for lodgement of an objection has expired: DPP (WA) v Le (2006) 44 SR (WA) 77, 80-81 (Groves DCJ).
  \item \textsuperscript{745} S 6 Criminal Property Confiscation Act 2000 (WA). See also s 43; DPP (WA) v Bridge & Ors [2005] WASC 36, [24]–[26].
  \item \textsuperscript{746} For the definition of ‘unexplained wealth’, see s 144 Criminal Property Confiscation Act 2000 (WA).
  \item \textsuperscript{747} S 14 Criminal Property Confiscation Act 2000 (WA).
  \item \textsuperscript{748} S 12(2) Criminal Property Confiscation Act 2000 (WA).
  \item \textsuperscript{750} See s 82 Criminal Property Confiscation Act 2000 (WA) in relation to the release of crime-used property; s 83 in relation to the release of crime-derived property; s 84 in relation to the release of other frozen property; s 87 in relation to the release of confiscated property. There are five conditions that must be satisfied for the release of frozen property: see ss 87–91(a)–(e). It is thought that these grounds present difficulties for innocent parties: see Skead, ‘Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory’, above n 730, 304.
\end{itemize}
The State’s pursuit of the ‘crime does not pay’ principle represents a further case of State disregard of property rights.\textsuperscript{751} Of particular concern is that an innocent party’s\textsuperscript{752} property rights may be curtailed or extinguished without sufficient regard to due process.\textsuperscript{753} Difficulties typically arise with a single piece of land with multiple encumbrances.\textsuperscript{754} Where a charged co-owner is at risk of being a declared drug trafficker, the land may be held in a ‘legal limbus’ until the proceedings are concluded, to the detriment of an innocent party.\textsuperscript{755} The remedy of the value of an innocent party’s share after confiscation may be unsatisfactory where that person is a registered fee simple owner.\textsuperscript{756} The CPCA ignores questions of fairness, justice or hardship regarding confiscation,\textsuperscript{757} and is applied by the Courts despite possible unfairness,\textsuperscript{758} and is ‘draconian in its operation.’\textsuperscript{759} The Government’s view that the CPCA affords appropriate protection to innocent owners\textsuperscript{760} is disputed.

6.9 Conclusion - the public interest threat to property rights

This chapter revealed significant changes to the State’s treatment of property rights. Of most significance is the public interest as a critical factor shaping the State’s regard for property rights across all seven key areas. On a positive note, this period reveals that the State can advance the public interest while at the same time embracing a respect for private property rights. This is most evident in the approach of the legislature with respect to carbon rights. When the public interest disturbs property rights, as in the case

\textsuperscript{751} Skead, above n 730, 313–314; see also A Tan, above, n 727, 26-29.
\textsuperscript{752} For the definition of ‘innocent party’ see s 153 Criminal Property Confiscation Act 2000 (WA).
\textsuperscript{753} See Permanent Trustee Co Ltd v WA (2002) 26 WAR 1, 6 (McKechnie J). On possible reform measures to protect innocent parties, see A Tan, above, n 727, 41-43.
\textsuperscript{754} Smith v State of Western Australia [2009] WASC 189, [10].
\textsuperscript{755} Permanent Trustee Co Ltd v Western Australia (2002) 26 WAR 1, 15 (McKechnie J). it has even been suggested that a landlord may face the confiscation of his property merely because of the criminal activities of a tenant: Beekink, above n 742, 11.
\textsuperscript{756} Skead, above n 730, 304, 306.
\textsuperscript{757} Whittle v Western Australia [2012] WASC 244, [47] (Allison J), noted in Skead, ibid, 306.
\textsuperscript{758} See Smith v State of Western Australia [2009] WASC 189, [18] considered by Skead, above n 749, 214. Note, however, the recent construction of the Act adopted by the Supreme Court, which protected the interests of an innocent beneficiary of trust property in Pearson v Western Australia [2012] WASC 102, [41] (Simmonds J). However, a proper constriction of the Act may render such property liable to confiscation: see Skead, above n 730, 302. Also note the vulnerability of equitable interests: Smith v State of Western Australia 2009] WASC 189.
\textsuperscript{760} See Western Australia, Parliamentary Debates, Legislative Assembly, 29 June 2000, 8613/1 (Mr D Barron-Sullivan). Note, however, that it was not considered appropriate to afford protection to spouses and dependants for property derived from a confiscation offence because it was considered that such persons should not receive any benefit from the property.
of water rights, it is also possible to provide new benefits to landowners instead, as in the case of tradeable quasi-property rights with respect to water licences. However, the State Parliament’s pursuit of public interest considerations has overall led to increased State disregard of property rights.

With respect to land tenure, public interest considerations appear to have been the stimulus for ever-increasing exceptions to a freehold interest holder’s indefeasibility of title. The improved certainty and security of title for those dealing in crown interests is acknowledged, but does not diminish the disregard to freehold interest holders. Although the formal extinguishment of resumption by crown grant without payment is of legal significance, this represents little more than the law catching up with what had long been a defunct State practice. Any conclusion that this represented State regard for property rights without compensation is diminished when considered alongside other State practices, including at its most extreme the occasional preparedness of the legislature to enact sui generis legislation for the purpose of defeating property rights and without compensation. Similarly, it would be easy to conclude the State’s commitment to acquiring land for public works by agreement with the landowner rather than by compulsory taking as a commitment of the State to regard a landowner’s property rights. The requirement that 90% of an offer be made as an advance payment pending settlement of a claim, the replacement of the concept of damage due to injurious affection with damage due to a reduction in value of the adjoining land, and generous allowances for solatium, all represent a State regard for property rights. However, there are also many factors indicating otherwise, such as the disadvantage that acquisition by agreement instead of compulsory taking may present. The lack of opportunity for an affected owner to challenge the merits of a proposed taking ensures that the affected landowner is excluded from any participation in the determination of whether the State’s taking is in the public interest. Despite this disregard, it appears that Western Australia has fewer disputes regarding compensation for a State taking than other States. State regard for property rights may partially explain this, but this is only relative at best.

A continuing disregard of a landowner’s property is evidenced by the retrospective confiscation of property without compensation. The broader definition of ‘minerals’ under the Mining Act 1978 may have also retrospectively confiscated further substances. Similarly, the continued assertion of crown ownership over petroleum was extended to a retrospective confiscation of geothermal resources and energy, without compensation to
affected landowners. It remains to be seen whether potential greenhouse gas formations and injection sites further impact on the property rights of landowners. However, despite the Crown’s assertion of ownership, and the Government’s attempts to remove a landowner’s rights of veto, landowners have continued to enjoy broadly framed rights of veto over surface mining, although the Petroleum and Geothermal Energy Resources Act 1967 is less favourable. The troubled legislative history of this veto, however, would suggest that its survival cannot be assumed.

The Government’s expanded vesting provisions have also exposed all surface water usage beyond personal or domestic to the requirements of statutory licencing. Government attempts to abolish common law riparian rights once again highlight the vulnerability of a landholder. Although water licence holders may now enjoy quasi property rights and compensation provisions for affected water rights have been much improved, water users have been presented with new statutory duties to minimize degradation, the possibility of directions which may override water rights to limit water usage, and the express recognition that the public interest is a relevant consideration in relation to the terms set for the holding of a water licence, without corresponding recognition of the landowner’s interest. Perhaps of most long term significance will be WA’s commitment to the National Water Initiative.

Further control and regulation over land use characterizes both planning and environmental laws during this period. New concepts such as sustainability have subjected land use to broader public interest considerations. The influence of planning schemes has increased. Public interest conditions have become the norm in relation to development approvals. Compensation provisions for injurious affection arising from a planning scheme appear more favourable to affected landowners than existed previously, but other statutes may operate to deny compensation. Rights of appeal against an unfavourable decision of the Commission have been widened, but still remain subject to significant hurdles.

Environmental law has vested significant power in government authorities to control land use. EIA processes, restrictions on land clearing, and heritage laws may operate to divest a landowner of land use and development rights, without compensation. It appears that the State has taken the view that the community interest in the environment warrants the inclusion of community views regarding what private land developments will be permitted.
A final and most concerning matter is the apparent willingness of the State to prejudice the interests of innocent parties vested with property rights in furtherance of public interest agendas. For example, the Government’s inclusion of the termination of old strata schemes by majority agreement in its current strata reform agenda may represent a newly emerging risk akin to ‘private to private’ eminent domain claims. Other examples include the criminal law shift from a conviction-based regime for the forfeiture of property to a non-conviction-based regime, the remediation of contaminated land, and the imposition of penalties without conviction with respect to environmental laws. The absence of judicial discretion to aid justice and fairness is alarming regarding not only the forfeiture of property, but also the Court’s treatment of the prescribed heads of compensation in takings involving special circumstances. Where a landowner affected by the State seeks relief from a court, that relief will likely rest on matters of statutory interpretation. Both these factors contribute to the State’s overall increasing departure from private interest perspectives of property.
Chapter 7: Real Property Rights and the State of Western Australia: Findings and implications

7.1 Introduction

The principal aim of this thesis has been to present a study of the State’s treatment of property rights, and to determine whether there has been an increased disregard for real property rights in WA by the State, having regard to the treatment of private property rights by the legislature and executive since 1829. A proposition advanced by this thesis is that, subject to particular historical contexts and circumstances, the regulatory taking or diminishment of a landowner’s bundle of rights without a corresponding provision for just terms to the affected landowner is an indicator of State disregard for property rights. The importance of this study has been established by the contextualisation of property rights, the identification of property rights as a human right, and contemporary debate surrounding the State’s regard for property rights. Fundamental concepts shaping the State’s treatment of property rights, in particular land resumption as a proprietary aspect of parliamentary sovereignty and the absence of any justiciable right to property, provided the legal background to this study. Although absolute notions of property rights are rejected, the construction of a landowner’s property rights as nothing more than a product of statute is also rejected on the basis that it was inconsistent with the purpose and principles underpinning the Torrens system, and was inconsistent with the contextualized significance of property rights.

A review of literature on the State’s regard for property rights in WA identified the need to move away from the commonly narrow focussed enquiries to a broader focussed enquiry in order to determine the State’s regard for property rights. Frequently conflicting private interest and public interest perspectives were identified across the literature, heavily influenced by whether the State’s regard was considered according to common law notions of land, or from the perspective of land title as a product of statute. Six common areas of focus were identified across both perspectives, being land tenure, mineral rights, water rights, resumption, compensation (with particular attention to the adequacy of compensation and just compensation) and injurious affection, planning
laws and environmental laws. These key areas have been the focus of enquiry across the three distinct historical periods studied in the preceding chapters.

Areas of consensus emerged, such as public interest perspectives having been dominant in shaping mineral rights and water rights, and that the resumption of land should not be a precondition to the recovery of compensation when State processes diminish property rights. However, significant divisions within the literature were also identified. There was little consensus on whether protection, if any, was required to address the State’s treatment of property rights, a point not surprising since there was also no consistent position on whether compensation should be afforded to a landowner negatively affected by planning and environmental laws. Deficiencies were also identified across the literature. In particular, it was unclear whether the contemporary treatment of property rights represented a fundamental shift in the State’s regard for property rights, and there was little attention given to WA’s colonial history. Attention to relevant legal authority was also often unsatisfactory. Conclusions reached by much of the literature were partisan, pushing either private interest or public interest perspectives without sufficient acknowledgement of the other.

7.2 Conclusions on the three periods

The preceding three chapters presented a transition from private interest perspectives to public interest perspectives of property rights, with increasing State disregard for property rights. The first period displayed a high regard for land tenure through generous land regulations, a spirit of compromise with respect to the treatment of crown grant reservations and the performance of location duties. If the dominion of the State to deal with property rights absolutely was better secured in 1865, it certainly was not acted on. Public interest considerations such as tenure, planning and resumption were accommodated without any substantial disturbance of property rights, through the use of crown land grant reservations and land regulations. While the assertion of crown ownership of minerals and the exploitation of minerals in private land is acknowledged, restrictions and compensation provisions ensured property rights were mostly accounted for in the State’s pursuit of public interest considerations. By 1874, land title was being granted which was indefeasible, subject only to limited express exceptions.

The second period revealed a very mixed State regard for property rights. New Land Acts brought often improved crown grant terms, but the State was also willing to displace property rights attaching to tenure through the exercise of crown powers.
Provisions for resumption were expanded, but so too were the statutory ingredients for compensation, although these fell short of reinstatement costs. Important features of this period included new statutory controls over water rights and land use. Regard was afforded to property rights through the farmers’ veto, and the collaborative approach taken with respect to environmental matters. However, disregard was most evident in the retrospective expropriation of property rights without compensation, as for example with respect to petroleum, watercourse beds, and ability to deal with native fauna and flora, and restrictions on subdivision and development rights attaching to land.

The third period revealed public interest considerations to be generally dominant in shaping the State’s regard for property rights. The occasional creation of quasi property rights might benefit some landowners (e.g. water licences), and compensation provisions were improved, particularly for a landowner suffering injurious affection. However, dominant public interest considerations more often heightened the State’s disregard of property rights. Landowners everywhere faced increasing statutory exceptions to the indefeasibility of their land title. Significantly increased statutory controls over a landowner’s bundle of rights characterized planning and environmental laws, with public interest considerations such as sustainability shaping land use considerations. State disregard by the retrospective expropriation of property rights without compensation continued with geothermal resources and energy, which process may soon be extended to greenhouse gas formations and injection sites. Adoption of a non-conviction-based statutory regime in criminal law and environmental law presented a new State disregard of property rights in the pursuit of new public interest agendas, in this case regarding criminal property confiscation, and land remediation. A shift from a collaborative approach with landowners in the second period to a punitive regime in the third period is evident with environmental laws.

7.3 Common themes

From the broad enquiry undertaken by this thesis, it is now possible to go beyond the conclusions made in relation to each of the six key areas studied and identify common themes shaping the State’s regard for property rights as a whole, rather than in constituent parts. This chapter seeks to present a synthesis of themes shaping the State’s treatment of property rights. Conclusions in respect to these themes form the basis for the final chapter of this thesis regarding law reform. Five identified themes are as follows.
7.3.1 State regard for property rights is more about the political influence of sectional interest groups, than principle

State regard for property rights, particularly from the second period onwards, reveals that the treatment of property rights has more to do with the political influence of sectional interest groups, rather than any principled approach to property rights. While this may be true of many other areas to which the legislature and executive turn their minds, the ramifications are more significant when fundamental rights such as property rights are affected. Unlike many other matters receiving the legislature’s and executive’s attention, property rights are a fundamental underpinning of our Western society; it might be thought, therefore, that the State’s treatment of property rights would be principled, rather than merely the outcome of political processes. However, the study of property rights reveals the State’s treatment of property rights to be often unprincipled. This is not to suggest that politicians are without principles, or that the State is inherently ill-disposed to property rights. Indeed, common agreement across private and public interest perspectives that resumption should be compensated, albeit often inadequately, suggests that the political process will generally involve some regard for property rights. However, key areas, such as planning and environmental laws, show the State to increasingly consider public interest considerations to be inconsistent with or to outweigh regard for property rights, rather than regarding the two as consistent and not inherently incompatible.

A number of factors have contributed to and shaped the extent to which public interest considerations have been considered to be either consonant with or apposite to private property rights. Firstly, where persons likely to be affected by State processes have constituted a powerful industry group, State regard for property rights is often heightened. The State’s regard towards mineral rights provides a case in point, with lobbyists for farmers and prospectors shaping the State’s treatment of the farmers’ veto in 1970. The protection of property rights provided a political platform for the defeat of later State Government attempts to remove the farmers’ veto in 1985, rather than there being any principled approach shaping regard for property rights. The same may also explain the survival of water rights over surface waters within private land, the quasi property rights now attaching to water licences, the Government’s resistance to charging water licence fees, and the provisions made for compensation regarding affected water licences. The political influence of industry groups, however, may need to be considered alongside the reduction and eventual abandonment of property as a
qualification for franchise and election to Parliament. Given the high regard towards property rights during the propertied franchise of the first period, the increasing later disregard alongside the abandonment of property qualifications for franchise may be more than coincidental. Research on the relationship between universal franchise and State regard for property rights is required, however, to take this point any further.

State disregard for property rights appears most evident in the pursuit of public interest agendas such as planning, which resulted in the bundle of rights being diminished and replaced by statutory provisions as illustrated with respect to the right of subdivision in *Lloyd v Robinson*. Some caution must be exercised, however; since a more principled approach to property rights might be indicated by other State processes. For example, voluntary payments made by the State with respect to land resumption pursuant to crown grant terms might evidence a principled regard for property rights, as might the eventual extinguishment of resumption by crown grant reservation without payment or the collaborative approach of the State with respect to environmental laws in the second period. However, such characterization is ultimately problematic; a principled approach to property rights would not tolerate the acquisition of property, either by voluntary agreement or resumption, without a requirement of at least fair compensation to the affected landowner. Voluntary State compensation without recourse to the terms of crown reservation grants which the State could in the past have relied upon to avoid compensation probably had more to do with widespread uncompensated resumption being politically unsustainable than any principled approach to property rights. Were the State’s approach to property rights principled, the expropriation of land resources such as petroleum, geothermal energy, and native fauna and flora, the vesting of certain land such as watercourse beds in the Crown, and the reduction of the bundle of rights attaching to land, as for example with respect to subdivision and development, would not have been without compensation to affected landowners, nor would the expropriations have often been retrospective, given the accepted notion that retrospectivity is unjust.¹

State disregard for property rights is also evident where the State seeks to influence the distribution of property rights as a matter of public policy. An example was land policy in the second period regarding closer settlements, group settlements and soldier

¹ See generally P Herzfeld and T Prince, *Statutory Interpretation Principles in Australia: The Laws of Australia* (Lawbook Co, 2014) [4.190]. However, note that retrospectivity may sometimes be unjust for an individual but just upon a broader view: [10.8], citing *George Hudson Ltd v Australian Timber Workers’ Union* (1923) 32 CLR 413, 434 (Isaacs J).
settlements. Other examples of an unprincipled approach of the State to property rights abound. At its most extreme, it is evident in the possibility of sudden and dramatic legislative shifts by the government of the day affecting property rights. The State Government’s ultimately unsuccessful attempts to extinguish freehold tenure in 1912 and common law riparian rights in 1912, 1914 and 1990 provide graphic examples.

Alongside the ability of industry groups to shape the State’s regard for property rights is provision for third parties to participate in State decision-making processes affecting land. Although the State has been often unwilling to open the exercise of its own powers to participation by landowners affected by State processes, the State has been increasingly willing to allow third parties to participate in State processes affecting a landowner. External influences promoting public interest agendas affecting property rights are also evident. Examples include Australia’s international obligations, which provided the initial impetus for State reforms with respect to the confiscation of crime-derived property, international guidelines which shaped environmental planning such as Bush Forever, and a national water policy now influencing State water policy.

Only with respect to certain rights of appeal does there appear to be a shift to a more principled approach. Planning appeals, for example, have shifted from de novo hearings by the minister to SAT hearings, while heritage matters provide for only limited ministerial appeal rights. This is not to suggest, however, that property rights will receive any more regard by improved rights of appeal. Indeed, reduced ministerial appeals may have simply distanced the political consequences of executive action away from responsible ministers to external courts and tribunals.

7.3.2 The common law is only a limited protector of private property rights

The importance of property rights has been a repeated comment by the courts across the three periods. However, literature asserting that the common law safeguards property rights or balances public and private interests with respect to property rights is challenged. On the one hand, courts may be precluded from making any determination

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2 See for example the inability of a landowner to challenge land resumption by appeal to the Minister until 1955, and the continuing inability of a landowner under the LAA to appeal to the Minister in relation to matters of compensation.

3 Examples include the consideration of submissions with respect to the entry of land upon a heritage register, the community participation in the development of environmental protection policies, the ability of any person to refer a significant proposal to the Minister concerning EIA, the submissions made by members of the public with respect to draft environmental protection policies, and leave which may be given by the SAT for third parties to intervene regarding planning matters: see chapter 6 of this thesis.
of what is for the common good. The absence of a justiciable right to property as a matter of parliamentary sovereignty, and the almost certain absence of any such guarantee at common law, has meant that, at least since 1865, no guarantee of compensation has existed upon the State’s resumption of property rights. Instead, any entitlement to compensation has, subject to constitutional arrangements, been a matter of judicial construction of the relevant statutory provision.

Although legislation is not approached with any preconception of common law rights which may be affected by legislation, a court will presume that Parliament did not intend to interfere with property rights in the absence of clear intention, with vested property rights being a fundamental right and of constitutional character. The exact content and expression of the common law presumption appears unclear, but legislation is presumed not to alienate vested proprietary interests without adequate compensation. Consequenly, through the interpretation of legislation, courts have afforded some protection against the uncompensated expropriation of property rights. Where regulation is in effect a deprivation, the statutory presumption that a ‘proprietary deprivation’ must ordinarily be compensated may be applied.

This thesis has revealed WA examples of the application of statutory presumptions. The 1899 decision of Dixon v Throssell showed regard to what was considered just and equitable in the construction of a statutory compensation provision. The survival of common law riparian rights were upheld in Rapoff v Velios. More recently, the High Court decision in Mandurah Enterprises confirmed that land cannot be resumed by a

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4 See generally King v Jones (1972) 128 CLR 221, 224 (Barwick CJ); Clark King & Co Pty Ltd v Australian Wheat Board (1978) 21 ALR 1, 23 (Barwick CJ), cited in P Ryan, Urban Development Law and Policy (The Law Book Co Limited, 1987), [1.20]; see also Westminster Bank Ltd v Beverley Borough Council [1969] 1 QB 499, 533 (Salmon LJ).

5 See Anthony Lagoon Station Pty Ltd v Aboriginal Land Commissioner (1987) 15 FCR 565, 584 (Ryan J).

6 See e.g. Wilson v Anderson (2002) 213 CLR 401, [140] (Kirby J). Note also the presumption that legislation does not limit the Crown’s property rights: Commonwealth v Western Australia (1999) 196 CLR 392, 411 (Gleeson CJ and Gaudron J).

7 Momcilic v R (2011) 245 CLR 1, [44] (Heydon J) (dissenting) and noted in P Herzfeld and T Prince, Statutory Interpretation Principles (LBC, 2014) [4.35].


9 Pearce and Geddes, ibid, [5.21], citing Commonwealth v Hazeldell Ltd (1918) 25 CLR 552.

10 See e.g. R & R Fazzolari Pty Ltd v Parramatta City Council (2009) 254 ALR 1, [40]–[43] (French CJ).

11 K Gray, ‘Can Environmental Regulation Constitute a Taking of Property at Common law?’ (2007) 24 EPLJ 161, 170
public authority to avoid other statutory obligations. Although the statutory presumption against interference with vested property rights is not always strictly expressed, the reluctance by courts to find that legislation is to take away vested property rights without compensation has been noted, despite changing perspectives on land ownership. Limitations or qualifications to a statutory right to compensation will not be implied through statutory construction, where the terms of the statute make no such limitation or qualification, and a right of compensation will be construed with all the generality that the statutory provision permits.

The comfort afforded to a landowner by the principles of statutory interpretation quickly falls away, however, where Parliament’s intention is ‘unambiguously clear.’ The general principle against the construction of statutes that enables property rights to be resumed without compensation provides no foundation for the reading down of legislation that expressly takes away property rights without compensation, of which many examples have been provided across the second and third periods. A court’s application of strict rules of construction may serve to deny just compensation to a party affected by State processes. It appears unclear whether a statute providing for uncompensated expropriation is to be read with the same strictness as a statute which provides for full compensation. Only occasionally does it seem that courts may interpret legislation widely, notwithstanding that this may be a departure from the unambiguous meaning the legislation would otherwise have. It may also be that the

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13 See Obeid v Victorian Urban Development Authority [2012] VSC 251, [92] (Cavanough J), comparing R & R Fazzolari Pty Ltd v Parramatta City Council (2009) 237 CLR 603, 603, 608 and 618–620 (French CJ) with Mandurah Enterprises Pty Ltd v WA Planning Commission (2010) 240 CLR 409, [32]–[34] (French CJ, Gummow, Crennan and Bell JJ), and discussed in Pearce and Geddes, above n 8, [5.22].
14 Ibid. [5.21].
16 Bropho v Western Australia (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). The legislature’s clear intention to confiscate property will be applied, even if a different interpretation is more consonant with property rights: Mansfield v DPP (WA) (2005) 31 WAR 97, 108–109 (Steytler P).
17 Lloyd v Robinson (1962) 107 CLR 142, 154 (Kitto, Menzie and Owen JJ). Note the application of the statutory presumption against the interference with property rights will also not prevent Parliament subsequently amending legislation which has previously been strictly construed by the High Court in defence of property rights: R & R Fazzolari Pty Ltd v Parramatta City Council (2009) 237 CLR 603; Land Acquisition (Just Terms Compensation) Amendment Act 2009 (NSW).
18 See e.g. Cerini v Minister for Transport [2001] WASC 309, [282] (Parker J).
19 Obeid v Victorian Urban Development Authority [2012] VSC 251, [93] (Cavanough J), discussed in Pearce and Geddes, above n 8, [5.22].
Australian judiciary shares the American judiciary’s fear that a damages remedy (or at least a widened damages remedy) for regulatory takings will attract a multitude of litigants.\textsuperscript{21}

The application of the statutory presumption will also not apply where legislation requires the forfeiture of property.\textsuperscript{22} A declaration of invalidity may depend upon a finding that there was a remedy for what was done \textit{without power}, such that only after the availability of a remedy is decided may it be appropriate to declare a taking order for land is invalid.\textsuperscript{23} It may be beset by the problem of whether the mere regulation of property rights is sufficient to attract the operation of the rule, or where land is surrendered in exchange for the grant of statutory approvals.\textsuperscript{24} Even where the presumption operates in the favour of a landowner, Parliament may subsequently amend legislation which has previously been strictly construed in defence of property rights.\textsuperscript{25}

The prima facie presumption that legislation will not operate retrospectively so as to affect substantive rights is also subject to a sufficient indication of contrary intention from the legislature.\textsuperscript{26} Numerous examples of retrospective expropriations across the second and third periods reinforce the limited comfort provided by this rule. Unlike all other States, WA also has no statutory limitation on the retrospective operation of delegated legislation.\textsuperscript{27}

Perhaps because of the absence of any constitutional restraint over the State’s taking of property, a critical appraisal of the importance of just compensation in the relationship between State and citizen has been absent from case law affecting property rights in WA. The High Court has commented that in the absence of a statutory provision providing any legally enforceable obligation against the State, the ‘ultimate sanction must be political only.’\textsuperscript{28} This is in marked contrast to the numerous and sometimes


\textsuperscript{22} Pearce and Geddes, above n 8, [5.22].


\textsuperscript{24} WA Planning Commission v Temwood (2004) 221 CLR 30, 50 (McHugh J); 68–69 (Gummow and Hayne JJ).

\textsuperscript{25} See e.g. R & R Fazzolari Pty Ltd v Parramatta City Council (2009) 237 CLR 603; \textit{Land Acquisition (Just Terms Compensation) Amendment Act 2009} (NSW).

\textsuperscript{26} See e.g. Maxwell v Murphy (1957) 96 CLR 261, 291(Fullager J).

\textsuperscript{27} Pearce and Geddes, above n 8, [10.11].

\textsuperscript{28} Lloyd v Robinson (1962) 107 CLR 142, 155 (Kitto, Menzies and Owen JJ).
critical pronouncements of the High Court with respect to Commonwealth relations.\(^{29}\)

The High Court might observe that WA legislation is draconian and unfair in the treatment of property rights;\(^{30}\) however, unless legislation excludes a fundamental aspect of the judicial process\(^{31}\) or is otherwise unconstitutional, a landowner faced with legislation manifesting a clear intention to take away property rights without compensation has no remedy where the State processes are properly executed. While legal, it is argued that this position not only is unjust, but also may bring into question the very assumptions underpinning our society, since ‘...the security of pre-existing rights to...property is the great motive and object of individuals for associating with governments.'\(^{32}\)

Other examples of the limited protection afforded by the common law relate to the State’s ability to cause a nuisance in the carrying out of public works, where the defendant demonstrates the nuisance was an ‘inevitable’ consequence of the authorised undertaking and was not negligently performed.\(^{33}\) Finally, the already qualified protection that the common law provides with respect to property rights may be further undermined by the legislature. For example, the present absence of any judicial discretion under the LAA limits the court’s ability to extend compensation where justice requires. Ultimately, legislative authority over property rights is dominant, once land is granted by the Crown.\(^{34}\)

### 7.3.3 The increasing insecurity of land tenure

A consequence of the State’s unprincipled treatment of property rights is the inherent insecurity attaching to land tenure. The content of this theme concerns the State’s preparedness to exploit the vulnerability of land tenure to dilution or displacement by the exercise of crown powers, while conversely being prepared to address any insecurity that might exist with respect to crown land tenure. This theme is not an attempt to

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\(^{29}\) See e.g. *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, 208–209 (Heydon J); see also *Westminster Bank Ltd v Beverley Borough Council* [1969] 1 QB 499, 521 (Danckwerts LJ).


\(^{33}\) C Sappideen and P Vines, *Fleming’s The Law of Torts*, (LBC, 10th ed, 2011), [21.220]. However, for examples of where the exercise of a statutory power wrongfully interfered with property rights, see *Gaunt v West Guildford Road Board* (1921) 23 WALR 36, 39–40 (Northmore J) and *Jones v Shire of Perth* [1971] WAR 56, 60 (Jackson CJ) noted in chapter 5 of this thesis, paragraphs 5.3(b)(ii), fn 168, 5.3(d), fn 226, and 5.5(c), fn 397. On the unfairness of the defence of statutory authority, see *Tock v St John’s Metropolitan Area Board* [1989] 2 SCR 1181, discussed in Sappideen and Vines, *ibid*.

resurrect archaic notions of the absolute dominion of property, nor is it an admission that interests in land are nothing more than the product of statute.

It might be thought that the insecurity of land tenure is unremarkable. Although the reception of English common law brought rights which were inconsistent with property rights being nothing more than a product of statute to the Colony, the early reception of the doctrine of tenure firmly established the Crown’s ownership over all land (qualified only more recently by the recognition of native title), while the existence of resumption as a proprietary aspect of sovereignty was also well established. What is remarkable, however, is that it was the vesting of the management and control of waste lands in the legislature with the grant of Responsible Government that appears to be the source of the subsequent realisation of insecurity with respect to land tenure. Debate over Responsible Government concerned crown land rather than private land. No evidence of debate over regard for private property rights with respect to Responsible Government was found; perhaps it was simply assumed.

The insecurity of tenure quickly emerges after Responsible Government. Previously, the worst fear of a landowner was the strict enforcement of known crown reservations and location duties. From the second period, new infirmities attaching to land emerged, with the preparedness of the State to rely on new statutory provisions to defeat property rights, even if the exercise of such powers were undiscoverable at the time of the crown grant. 35 A process of statutory interpretation enabled the terms of land tenure set by land regulations at the time of a crown grant to be displaced by later statutory provision, 36 including retrospective expropriation. 37 The reluctance of appellate courts to determine constitutional arguments on the legislature’s competency to pass laws diminishing property rights granted previous to Responsible Government 38 compounded the infirmity of land tenure; it also reinforces the second theme considered above. Today, environmental laws sterilising land value and utility without compensation may not be considered as inconsistent with prior crown grants of land tenure. 39

35 See e.g. Steere v Minister for Lands (1904) 6 WALR 178, 183 (Parker J).
36 See Moore and Scroope v State of Western Australia (1907) 5 CLR 326; Worsley Timber Pty Ltd v State of WA [1974] WAR 115.
38 Moore and Scroope v State of Western Australia (1907) 5 CLR 326, 341, 343; State of WA v Midland Railway Co of WA Ltd [1956] 3 ALL ER 272, 279; but c.f. Steere v Minister for Lands (1904) 6 WALR 178; Kennedy v Minister for Works [1970] WAR 102.
39 See Bone v Mothershaw [2002] QCA 120, 609, 612 (McPherson JA).
While the above examples indicate the State’s willingness to exploit the infirmities attaching to a landowner’s tenure, the same cannot be said for infirmities which might attach to crown land title. This is evident in the State’s preparedness to pass legislation to retrospectively validate resumption processes which might have been invalid.\textsuperscript{40} Another example is legislation barring claim of possessory title against crown land title, while recognizing possessory title claims over a private landowner’s title.

More contemporary examples of the infirmities of land tenure include the uncompensated expropriation of resources, such as geothermal energy and resources, and reduction in the extent of land ownership, as for example with respect to the resumption of property in watercourse beds. Increasing statutory exceptions to a landowner’s indefeasibility of title also compound the insecurity of land tenure. Thus, the grant of tenure did not guarantee the security of property rights. By the third period, tenure emerged as having something far from the regard accorded to it in the first period, being vulnerable to multiple qualifications and change in the pursuit of public interest considerations. A current proposal to permit the termination of older strata schemes confirms the currency of this phenomenon.

Only rarely is there evidence of attempts to increase the security of land tenure in the third period, as, for example, with limited improvements concerning strata title entitlements, and improved certainty and security for dealings in crown land. The extinguishment of resumption by crown grant reservation without payment evidences acceptance of the importance of compensation. Exposure to the insecurity of land tenure may be lessened where landowners make up a powerful industry body, as for example with respect to the veto over land under cultivation noted in the first theme.

\subsection*{7.3.4 Public purpose limitations regarding resumption}

Land resumption qualified by a requirement of public works is a theme common across the three periods.\textsuperscript{41} Although this requirement provides no guarantee that land once resumed will be applied for that public purpose,\textsuperscript{42} the presence of this statutory

\textsuperscript{40} See e.g. \textit{Yallingup Foreshore Land Act 2006} (WA).
\textsuperscript{41} \text{s 15 Land Act 1898} (WA); \text{s 26(1) Public Works Act 1902} (WA); \text{s 161 Land Administration Act 1997} (WA).
\textsuperscript{42} See e.g. the circumstances surrounding part of resumed land relating to the \textit{Yallingup Foreshore Land Act 2006} (WA) considered in Western Australia, \textit{Parliamentary Debates, Legislative Assembly}, 7 April 2005 (Yallingup Foreshore Land Bill 2005–Second Reading) (Mr JA McGinty, Attorney General). Similarly, there is no legal requirement that where land is surrendered pursuant to conditions attaching to a subdivision approval that the surrendered land be used for the purpose for which surrender was required: see \textit{Lloyd v Robinson} (1962) 107 CLR 142, 155 (Kitto, Menzies and Owen JJ).
qualification demonstrates that land resumption processes have observed an essential feature of resumption jurisprudence—that resumptions be for a public benefit.\textsuperscript{43} The presence of this qualification, therefore, provides qualified support for a State regard for property rights.

The themes identified earlier, particularly that the State’s treatment of property rights is influenced by the political influence of sectional interest groups, suggest, however, that the continuing presence of public purpose qualifications to resumption powers should not be automatically assumed to be beyond the possible contemplation of removal by the legislature. Section 43(1) of the \textit{Lands Acquisitions Act} (NT) is illustrative, providing ‘the Minister may acquire land under this Act for any purpose whatsoever’. The provision no longer requires that acquisition is ‘for public purpose’.\textsuperscript{44} In the \textit{Griffiths} case,\textsuperscript{45} notices of the proposed acquisition of seven lots of crown land were properly issued in order that the minister could then grant freehold or leasehold interests for private pastoral, agricultural or commercial use. Although a majority of the High Court found it unnecessary to determine whether there were limits to the scope of s 43,\textsuperscript{46} and could find nothing to suggest that the land was being acquired for an ulterior purpose,\textsuperscript{47} a majority held that the removal of the ‘public purpose’ requirement conferred to the minister the power to acquire land privately owned solely to enable the land to be sold or leased for another person’s private use.\textsuperscript{48} This was so even though the LAA (NT) did not expressly so provide. Only Kirby J in dissent warned of the grave ills that dispensing with public purpose limitations may bring, including the risks of

\textsuperscript{43} See T Allen, \textit{The Right to Property in Commonwealth Constitutions} (Cambridge Studies in International and Comparative Law, 2000), 14–15; see also \textit{Entick v Carrington} (1765) 19 Tr 1030, cited in G Williams, S Brennan and A Lynch, \textit{Blackshield and Williams Australian Constitutional Law & Theory, Commentary & Materials} (The Federation Press, 6\textsuperscript{th} ed, 2014) [2.42]. It also reflects the English compulsory purchase theory of acquisition, which has, in the words of Blackstone, the ‘general good of the whole community’ as the underlying justification: Jacobs, above n 32, [1.10], citing from K Davies, \textit{Law of Compulsory Purchase and Compensation}, (Butterworths, 4\textsuperscript{th} ed, 1984) 6–7; see also \textit{R & R Fazzolari Pty Ltd v Parramatta City Council; Mac’s Pty Ltd v Parramatta City Council} (2009) 237 CLR 603, [40]–[41] (French CJ).

\textsuperscript{44} See s 10, \textit{Lands Acquisition Amendment Act 1982} (NT); D Brown, \textit{Land Acquisition: an examination of the principles of law governing the compulsory acquisition or resumption of land in Australia} (LexisNexis, 6\textsuperscript{th} ed, 2009) [1.15], states ‘As to whether each of the members of the territory’s legislature realised it was giving such wide power to its government is an unanswerable question.’

\textsuperscript{45} \textit{Griffiths v Minister for Lands, Planning and the Environment} (2008) 235 CLR 232.

\textsuperscript{46} \textit{Ibid}, [30] (Gummow, Hayne and Heydon JJ). Their Honours did not find it critical to their position that the acquisition had been regarded by the Court of Appeal as a ‘legitimate Territory purpose’: [31] (Gummow, Hayne, and Heydon JJ).

\textsuperscript{47} \textit{Ibid}, [33] (Gummow, Hayne and Heydon JJ). Their Honours observed that an ulterior purpose would make the exercise of power ostensible but not real and referred to \textit{Samrein Pty Ltd v Metropolitan Water Sewage & Drainage Board} (1982) 56 ALJR 678.

\textsuperscript{48} \textit{Ibid}, [1] (Gleeson CJ); [34] (Gummow, Hayne and Heydon JJ); [155] (Crennan J); c.f. \textit{contra} [172] (Kiefel J).
promoting unfair advantage to big business, cronyism, government corruption, and the use of public funds for private profits.\(^{49}\) If there is any reason for the Crown’s taking of one owner’s private property for the benefit of another private owner, the reason for sanctioning that expropriation must rest on the ‘democratic will of the people as expressed in Parliament’.\(^{50}\)

It might be argued that there should be no public purpose limitation on the ability of the State to acquire property, since both the common law and the legislature have long countenanced the involuntary taking of one individual’s property rights by another in recognized circumstances.\(^{51}\) Adverse possession, for example, continues to be a recognized exception to a landowner’s indefeasibility of title\(^{52}\) which will, upon satisfaction of the requisite limitation period,\(^{53}\) extinguish a registered proprietor’s land title\(^{54}\) without any requirement for payment of any compensation to the dispossessed owner. Other examples include encroachment\(^{55}\) and prescriptive rights.\(^{56}\) With company shares,\(^{57}\) a shareholder’s right to retain shares is not absolute.\(^{58}\) Minority holdings can be eliminated.\(^{59}\) However, such qualifications to property rights present no case for the

\(^{49}\) *Ibid.*, [119], [128], [131], [132], [133] , [148], [149] (Kirby J). The majority failed to address the concerns raised by Kirby J, instead applying a literal reading of the LAA (NT). Concerns similar to that of Kirby J have been raised in the USA: see e.g. *Kelo v City of New London*: 125 S.Ct.2655 (2005), 2671 (O’Connor J, dissenting)

\(^{50}\) See *Builders Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372, 404 (Kirby P).

\(^{51}\) For example, the Imperial Parliament vested powers of compulsory acquisition in private companies. Note, however, that these Acts were themselves subject to parliamentary scrutiny, thereby ensuring acquisition in the public interest: see Allen, above n 43, 15. Allen acknowledges that the public interest was broadly defined. By 1845, private Acts had been replaced by the introduction of Inclusion Commissioners: Jacobs, above n 32, [1.15], citing the *Inclosure Act 1845* (UK).

\(^{52}\) S 68 *Transfer of Land Act 1893* (WA); see also s 60 (1) *Transfer of Land Act 1958* (Vic); c.f. contra, e.g. s 198 *Land Title Act 2000* (NT). Note, however that adverse possession has not been treated uniformly in Australia: see T Hunter, ‘Uniform Torrens Title Legislation: is there a will and a way?’ (2010) 18 *APLI* 201, 213.

\(^{53}\) In Western Australia, the limitation period is 12 years: s 19 *Limitation Act 2005* (WA).

\(^{54}\) S 75 *Limitation Act 2005* (WA). An application for registration as proprietor by the adverse possessor can then be made: s 222 *Transfer of Land Act 1893* (WA); c.f. contra the former position that a mere negative title existed: *McGellin & Fuchsbichler v Button* [1973] WAR 22, 25.


\(^{56}\) See the doctrine of lost modern grant in *Pekel v Humich* (1999) 21 WAR 24, 28 (Templeman J); *Prescription Act 1832* (Imp) in *Ganelli v Watson* (1944) 11 WAR 505, 508 (Seaman J).

\(^{57}\) Prior to issue, shares do not exist as a piece of property: *FCT v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336, 427. Upon issue, shares are personal property: s 107OA(1)(a) *Corporations Act 2001* (Cth). However, shares do not give a shareholder any interest in the company’s assets: *Macaura v Northern Ass’ce Co Ltd* [1925] AC 619.


\(^{59}\) See e.g. Pt 6A.1, Pt 6A.2, *Corporations Act 2001* (Cth). Note that adherence to the statutory procedure is required, unless there are otherwise exceptional circumstances: *Gambotto v WCP Ltd* (1995) 182 CLR 284
State acquiring property rights for a private purpose. With a private party, there is no expectation that the party will act other than out of self-interest within the law, while with the State, the doctrine of responsible government requires that the executive be responsible to the legislature. Ministers are ultimately responsible to the people.

Where the law permits the acquisition of private property of one individual by another, there have been underlying policy reasons and/or special protection afforded to the property owner, which are not relevant to State land resumption. For example, adverse possession ‘… prohibits stale claims brought by the original owner; second, it grants repose to the adverse possessor; third, it encourages the development of otherwise idle property; and finally, it grants title in the equitable owner of the land.’

Protection is afforded through the requirement that adverse possession must be ‘open not secret; peaceful, not by force…’ and the probable requirement in WA that the adverse possessor must demonstrate acts that are inconsistent with the true owner’s enjoyment of the land. A 12-year limitation period of continuous adverse possession is

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432. The common law prevented takeover bids in favour of dissenting shareholders on the basis that this would involve the ‘involuntary acquisition by a private interest of the property of another-an exceptional interference with rights of individual ownership’: Blue Metal Industries Ltd v Dilley (1969) 117 CLR 651, 659 (Lord Morris of Borth-Y-Gest), referred to in IA Renard and JG Santamaria, Takeovers and Reconstructions in Australia (Butterworths, 1990), [1202]. Australian courts have resisted this approach, regarding the language of Australia’s statutory company law regime on compulsory acquisition as ‘commercial, rather than juristic’: Australian Consolidated Press Ltd v Australian Newsprint Mills Holdings Ltd (1960) 105 CLR 473, cited in Renard & Santamaria, above; see also Australian Securities and Investments Commission v DB Management Pty Ltd (2000) 199 CLR 321, 339–340 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ), in Renard & Santamaria, above. For those reasons, and others, the modification powers of the Australian Securities and Investments Commission (now s 669 Corporations Act 2001 (Cth)) apply to compulsory acquisition without any restrictive implied common law limitations.


61 Keyzer, ibid, citing New South Wales v Bardolph (1934) 52 CLR 455, 509 (Dixon J).


64 Clement v Jones (1909) 8 CLR 133, 140 (Griffith CJ); Radonich v Radonich [1999] WASC 165, 163, 173 (Parker J); but c.f. contra, Whittlesea City Council v Abbatangelo [2009] VSCA 188, [6] (h) (Ashley and Redlich JJA and Kyou AJA); see Butt, ibid, [22 23]. The matter rests upon whether Leigh v Jacks (1879) 5 Ex D 264 should be followed.
also prescribed, ensuring that a registered proprietor should have ample opportunity to prevent the accrual of that cause of action. The adjustment of property rights with encroachment and mistakes as to the boundary or identity of land does not enable the acquisition of land by a neighbour against the owner’s will, without ‘sufficient reason’, and compensation may be awarded. In the case of easements by prescription, the law ‘clothes the fact with right.’ In the case of the elimination of minority shareholdings, the threat of a takeover assists in ensuring that companies are best managed to return value to their shareholders. The bidder must already hold a prescribed percentage of the shares, and the shareholder can challenge the bidder’s notice to acquire the shares on grounds that the shareholder has not been offered fair value for the shares. An affected shareholder is entitled to receive payment for the acquired shares at the bid price.

Current government proposals with respect to the termination of older strata schemes by majority rather than the unanimous agreement of lot owners may suggest a new shift by circuitous means to extinguish property rights by effectively vesting a power of extinguishment with individuals. However, presence of public purpose limitations across the three periods, and the application of the Northern Territory legislation to crown land rather than freehold, suggests that the likelihood of wider ‘private to private’ land acquisition threatening private property rights is remote. Nevertheless, the Northern Territory experience cannot be ignored. Griffith may yet provide fertile ground for private to private expropriation by the Crown becoming attractive to State legislatures.

### 7.3.5 A flawed approach to compensation

A final related theme is the flawed approach to the matter of compensation to a landowner affected by State processes. Firstly, the legislature’s approach to

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65 ss 19, 65 Limitation Act 2005 (WA). This may be extended in the case of minors and those under disability: see Part 3 Limitation Act 2005 (WA).
67 In Western Australia, see s 122 (4) and 123 (5) Property Law Act 1969 (WA).
68 Butt, above n 63, [16 63], citing Moody v Steggles (1879) 12 Ch D 261, 265 (Fry J).
69 R Baxt, K Fletcher and S Fridman, Corporations and Associations Cases and Materials (Butterworths, 9th ed. 2003) [16.1].
70 S 661A Corporations Act 2001 (Cth).
71 S 661E(2) Corporations Act 2001 (Cth); see also s 667C.
72 S 661C Corporations Act 2001 (Cth). Note, however, that the court may be unwilling to determine if a shareholder has been offered a fair valuation for the shares, as required by s 661E(2): see Re Grierson Oldham and Adams Ltd [1968] Ch 17 discussed in Baxt et al, above n 69, [16.22].
73 This possibility was considered by Kevin Gray prior to the decision of the High Court in the Griffiths case, in K Gray, ‘There’s No Place Like Home!’ (2007) (11) Journal of South Pacific Law 73, 85–87.
compensation can be best characterized as piecemeal; many takings are compensable to some extent, but not all. On the other hand, the impact of some regulatory controls over property rights is compensable, such as injurious affection from planning schemes, but other controls, particularly relating to planning and environmental laws, are not.

A general consensus within much of the literature is that resumption as a precondition to compensation when State processes impact on property rights is unsound. This view is maintained. If property rights are one of the fundamental underpinnings of our society, then a focus upon the object over which property rights are exercised, instead of the rights, must surely be flawed. In WA, statutory provision on the taking of an interest in land as the basis of an entitlement to compensation is flawed because the focus has consistently been on the *estate in land*,74 rather than on the various *property rights* attaching to that estate. Accordingly, compensation still depends much upon whether the affected landowner establishes a taking of an interest in land by the extinguishment of that interest. The contextualisation of property rights in chapter 2 established that it is the property rights attaching to an estate in land such as alienability and possession that underpin the importance of property for our society, rather than the estate per se. While an estate-based compensation system was less problematic when there were few regulations restricting property rights in the first period, increasing regulatory restrictions from the second period has left the basis of compensation antiquated and unsatisfactory. Unsatisfactory consequences of a focus on the taking of an interest in land by extinguishment are illustrated by the difficulty with respect to establishing a taking regarding State corridor rights and the difficulty in establishing an entitlement to compensation when land use is restricted by regulation but the estate remains intact. The focusing of statutory compensation provisions on the taking of an interest in land may also serve public interest perspectives of property; an enquiry into whether there has been the taking of an interest in land requires the identification of an estate in land which itself is tied to the doctrine of tenure and the State ownership of land.

The State’s treatment of compensation is also unsatisfactory from public interest perspectives, particularly regarding the failure to recover betterment from landowners where the value of land is increased by local government expenditure. As a matter of principle, just consideration of the State and the landowner must require that landowners be compensated where property rights are diminished, while property owners also account to the State where their property rights are benefited. The State’s

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74 See e.g. the definition of ‘interest’ in ss 151(1) and 202, *Land Administration Act 1997 (WA).*
failure to recover betterment suggests that difficulties identified in the literature with respect to recovery have not been addressed and require further close investigation. Common public interest perspectives which object to compensation for the mere regulation of property rights on the basis of cost are also hollow, when considered alongside the failure to recover for betterment. That legislative provision for the recovery of betterment is already in existence is significant when attention is turned to the funding of the various reforms for the protection of property rights considered in chapter 8.

A further notable feature of the State’s approach to compensation is the absence of any guarantee of compensation as a matter of constitutional or statutory provision; in particular, there is no requirement that compensation be just, despite public benefits that may be secured by the State. Instead, the legislature has focused upon statutory provisions prescribing the ingredients of compensation upon the taking of an interest in land. These typically have been land value, loss or damage, injurious affection and severance, and solatium. As to the absence of a guarantee of just compensation, this is unremarkable to the extent that it has already been the subject of comment as discussed in the literature review. However, the research undertaken with respect to compensation makes a contribution to existing literature in a number of respects. Firstly, the often polarised partisan perspectives with respect to the question of just compensation may be less warranted than previously thought. Although the absence of just compensation has been a concern more consonant with private interest rather than public interest perspectives, a requirement of just compensation at least by statutory provision may actually align with public interest perspectives. For example, a requirement of just compensation may protect the State from the unintended consequences of legislation, such as the double recovery of compensation or the recovery of compensation for matters beyond a landowner’s entitlements. The absence of a requirement that compensation be just suggests that the law will continue to fall short of both private and

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75 Reference to ‘just’ in s 241 (6) LAA is framed too narrowly to impose a requirement of just compensation. Assertion by the State Government that ‘there are well-established common law rules to require that there be just compensation’ (Western Australia, Parliamentary Debates, Legislative Assembly, 27 November 2014, Mr C Barnett, Premier, on Land Acquisition Legislation Amendment (Compensation) Bill 2014) are probably incorrect; but see Battista Della-Vedova v State Planning Commission, Supreme Court of Western Australia Compensation Court 2 of 1986, No 3 of 1986 BC8800828, 16.

76 See e.g. Cerini v Minister for Transport (2001) WASC 309, [199] (Parker J).

77 See for example the use of the farmers’ veto to secure compensation indirectly for crown mineral values and paragraph 6.4.6 (b) of this thesis.
public interest perspectives with respect to compensation, since fairness is not guaranteed.

A contribution to the question of whether compensation should be provided by statutory provision, or whether an entrenched guarantee is required, is also made by the research undertaken, and further considered in chapter 8. From the second period, general compensation provisions under the relevant land acts have provided a qualified entitlement to compensation only, since property rights may be taken by other legislation which separately prescribes whether compensation is available. This point is now reinforced by the absence of any provision under the LAA for judicial discretion with respect to special circumstances. State agreements may override statutory entitlements, and in the extreme, legal proceedings together with accrued compensation entitlements may be defeated by retrospective legislation. The ultimate vulnerability of property rights to a legislature and executive determined to disregard a landowner’s property rights is accordingly manifest in the absence of any guarantee of just compensation.

7.4 Conclusion

Broadly focussed research across land tenure, mineral rights, water rights, resumption, compensation, and planning and environmental laws has enabled the State’s treatment of a landowner’s property rights to be studied as a whole, rather than in constituent parts. Although property rights may be seen to be respected by the State when attention is narrowly focussed on particular areas, there is a concerning State disregard for a landowner’s property rights when regard is had to the whole. The importance of property rights to society is not limited to the State’s regard towards constituent parts of a landowner’s property rights such as water or mineral rights, but instead requires that property rights be considered as a whole.

Although the common law presumptions of statutory interpretation reflect the importance of the security of property rights, regard for parliamentary sovereignty has left the security of property rights in the lap of the legislature. While most State takings of interests in land have been accompanied by statutory provision for compensation, the same cannot be said for the regulation of property rights falling short of the taking of an interest in land, where, with the exception of injurious affection arising from planning schemes, compensation is often not provided for.

The retrospective expropriation of property rights by the legislature and executive in the pursuit of public interest agendas, with no provision for compensation to affected landowners, reveals an unprincipled State approach to property rights. Although not yet realized, that approach has the capacity to remove public purpose limitations to State land resumption processes. The consequent vulnerability of property rights is reinforced by the ability of State processes to diminish the security of land tenure, and the absence of any requirement that a landowner affected by State processes be treated justly. On the basis that the expropriation of property rights without any requirement that the affected landowner be compensated justly is inconsistent with the importance of the security of property rights to our society, it is concluded that law reform is required to ensure that landowners are treated justly when affected by State processes and to secure the fundamental underpinnings of property rights to our society.

As to whether there has been a change in the State’s regard for property rights and, if so, from when, it cannot be said that State disregard for property rights is a new experience. The practice of retrospective expropriation of property rights without compensation was an established practice from early in the second period. What has changed, however, are dominant public interest perspectives of property rights from the third period, which find their expression in comprehensive planning and environmental laws which may curtail the enjoyment of a landowner’s bundle of rights, without attracting compensation provisions that attach to the taking of an interest in land.
Chapter 8: Real Property Rights and the State of Western Australia: Law reform options

8.1 Introduction.

The contextualisation of property rights has identified the fundamental importance of the security of property rights. However, this thesis found the State to increasingly disregard a landowner’s property rights in the pursuit of public interest agendas, particularly when the impact of state processes is considered as a whole rather than in constituent parts. An unprincipled state approach to property rights, the very qualified protection afforded by the courts to property rights through common law presumptions with respect to statutory interpretation, the infirmities attaching to land tenure, the inherent limitations of statutory provision for compensation requiring a taking of interest in land, and the absence of any requirement that a landowner affected by state process be compensated justly, all serve to highlight the vulnerability of property rights.

Consideration of law reform for the protection of property rights such as the adoption of an overriding requirement that compensation for resumption be on just terms or that there be an entrenched constitutional requirement of just terms is not new. The literature review identified a range of private and public interest perspectives on law reform, but these perspectives have not produced any consensus on what reform should be undertaken. Guided by the four identified themes shaping the State’s treatment of property rights, this chapter considers reform options and proposals. Given the previously identified State disregard of property rights, this chapter focuses chiefly upon reform affecting the legislative process which may either improve regard for, or limit disregard of, property rights by the legislature and executive. To the extent that this or any other law reform considered herein creates new costs to the State, the possibility that such costs could be diluted or offset by the activation of existing statutory provision for the charging of betterment should be considered.

8.2 The classification of law reform

Any law reform to protect property rights can be classified by whether that protection is to be entrenched as a limitation upon Parliament, partially entrenched, or not entrenched. Law reform is considered below in this classification.¹

¹ At the outset, the writer wishes to acknowledge that the structure and focus of this chapter with respect to reform regarding property rights legislation and scrutiny committees has been inspired by S Evans,
8.2.1 Non-entrenched reform

The enactment of a bill to protect property rights by Parliament requires only a simple majority (i.e. half of the total vote of members present and voting) of both the Legislative Assembly and the Legislative Council.\(^2\) By the same process, however, the protection this bill affords once proclaimed may also be amended or repealed by the passage of a further bill by Parliament, a not insignificant risk given that most bills presented to Parliament are sponsored by ministers.\(^3\) Non-entrenched law reform may take several forms.

(a) Legislation Amendment Acts

Unentrenched law reform may occur by the amendment of existing statutory provision. In 2014, the Government acknowledged that ‘…in some cases current legislation does not strike a balance between the interests of affected landholders and the interests of the broader community.’\(^4\) The Government announced legislative amendment to ensure that landholders are justly compensated for the adverse impacts of government action, together with planning and environmental law reforms.\(^5\)

The Land Acquisition Legislation Amendment (Compensation) Bill 2014 (WA) proposes that the statutory ingredients of compensation under the LAA be applied to justly compensate a person from whom an interest in land is taken.\(^6\) Curiously, the Government stated:

…this bill will enshrine in the LAA the requirement that compensation be provided to landholders on just terms. Although in practice there are well-established common law rules to require that there be just compensation, the

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\(^1\) Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good’ in T Campbell, J Goldsworthy and A Stone (eds), _Protecting Rights Without a Bill of Rights_ (Ashgate, 2006) Ch 8.

\(^2\) Parliament of Western Australia, Standing Order 125 (LA) and Standing Order 77 (LC).

\(^3\) See e.g. N Miragliotta, _Understanding the Western Australian Constitution: A Guide for Beginners_ (Proclamation Day Grants Report, 2002) 34, noting that between 80% and 90% of Bills receive ministerial sponsor through the management of the legislative timetable by the party with a majority support in the Legislative Assembly. The author cites _The Parliament of Western Australia Digest_ (Legislative Assembly, Perth, Volume 27, 1999–2000).

\(^4\) Western Australia, _Parliamentary Debates_, Legislative Assembly, 27 November 2014, 8993 (Land Acquisition Legislation Amendment (Compensation) Bill 2014, Second Reading) (Mr CJ Barnett, Premier).

\(^5\) Ibid.

insertion of an express reference to just terms will ensure that all parties must recognise this.\textsuperscript{7}

Of significance is the government’s admission that the introduction of a requirement of just terms will not create new costs.\textsuperscript{8}

Amending legislation, such as this bill, however, is problematic. Firstly, the requirement of just compensation is hardly ‘enshrined’ since the LAA may be amended by normal legislative processes. Aside from the almost certainly wrong assertion that well-established common law rules require just compensation,\textsuperscript{9} the bill seeks to address compensation to affected landowners within the flawed framework of the LAA. Although provision is made for just compensation, the bill continues to confine the determination of the amount of compensation solely to the matters referred to in s 241 of the LAA.\textsuperscript{10} The taking of an interest in land as a precondition to compensation is also not disturbed, although the bill does make improved provision with respect to the taking of an interest in land by removing some existing impediments regarding recovery for injurious affection.\textsuperscript{11} However, where land is part of a subdivision, the landholder cannot claim compensation for injurious affection resulting from public works required as a condition of the subdivision, since the benefit of subdivision is considered to outweigh the injurious affection.\textsuperscript{12} This ignores the State’s previous uncompensated expropriation of the right to subdivide. The bill also improves the State’s position concerning set off for enhancement.\textsuperscript{13} Indeed, the bill has been criticised for legitimising state intrusions over property rights.\textsuperscript{14}

A possible further approach for the protection of property rights is for amending legislation to broaden the farmers’ veto under the Mining Act 1978 so that landowners

\begin{itemize}
\item \textsuperscript{7} Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 27 November 2014, 8993 (Land Acquisition Legislation Amendment (Compensation) Bill 2014, Second Reading) (Mr CJ Barnett, Premier)
\item \textsuperscript{8} \textit{Ibid.}
\item \textsuperscript{9} See chapter 2 of this thesis, paragraph 2.2.1(d); c.f. \textit{contra Battista Della-Vedova v State Planning Commission}, Supreme Court of Western Australia Compensation Court 2 of 1986, No 3 of 1986 BC8800828, 16 (Pidgeon J, Mr Gauntlett and Mr Myer).
\item \textsuperscript{10} See clause 4 Land Acquisition Legislation Amendment (Compensation) Bill 2014 (WA).
\item \textsuperscript{11} See clauses 7, 11, 14 Land Acquisition Legislation Amendment (Compensation) Bill 2014 (WA). Losses arising from loss of enjoyment or amenity value, or a change in the aesthetic environment, with respect to works from energy operators and water agencies, are now provided for.
\item \textsuperscript{12} See ‘Explanatory Memorandum’, Land Acquisition Legislation Amendment (Compensation) Bill 2014, and clauses 4, 7, 11 and 14 of the Bill.
\item \textsuperscript{13} See clause 4 Land Acquisition Legislation Amendment (Compensation) Bill 2014; proposed sections 241 (7) and 8A; Explanatory Memorandum. However, note this proposed change accords with recommendations 11 and 12 of the Law Reform Commission of WA, \textit{Final Report}, above n 6, 30, 32, 81.
\item \textsuperscript{14} J Strutt and J Kagi, ‘Liberal MP says party’s property rights policy ‘theft’’ \textit{ABC News Online}, 28 November 2014.
\end{itemize}
have a veto, for example, with respect to petroleum projects.\textsuperscript{15} However, the politics attaching to the farmers’ veto suggests this would not offer any long term certainty for the protection of property rights and would at best afford piecemeal protection. An improved mandatory land access code to ensure that landowners and industry are on an equal platform for the negotiation of access to land for onshore petroleum mining is a further alternative.\textsuperscript{16}

Amending legislation might begin addressing the concerns identified earlier regarding criminal property confiscation legislation by shifting away from a non-conviction based forfeiture regime, and guided by the consideration of the rule of law\textsuperscript{17}

The protection of property rights might also be aided by for the narrowing or effective abolition of common law principles which continue to make property rights vulnerable to State intrusions, as for example, regarding the common law defence of statutory authority.\textsuperscript{18} A narrowing of the defence might be achieved by the adoption of a ‘practical impossibility test’ which requirements include that it must be ‘practically impossible’ for the public activity to be carried out without causing the nuisance, for the defence to apply.\textsuperscript{19}

Amending Acts are ultimately, however, unlikely to remedy the inherently flawed approach to compensation identified in the last chapter, where they fail to disturb fundamental principles underpinning the State’s approach to compensation. However, if regard is had to other jurisdictions where property rights have received greater regard, amending acts may better improve state regard for property rights. The approach of commonwealth legislation\textsuperscript{20} to property rights offers some insight. Although not devoid

\begin{itemize}
\item \textsuperscript{15} See discussion of the Lock the Gates Alliance in Western Australia, \textit{Parliamentary Debates}, Legislative Council, 14 May 2015, 3677–3686a, (Hon J Boydell).
\item \textsuperscript{16} \textit{Ibid.} Hon J Boydell proposes amendment to s 17 \textit{Petroleum and Geothermal Energy Resources Act 1967} (WA).
\item \textsuperscript{17} See N Skead and S Murray, ‘The Politics of Proceeds of Crime Legislation’ (2015) 38 \textit{UNSWLJ} 455, 479. The authors argue for legislation which ‘should aim to be clear, avoid retrospective operation, allow for fair processes constraining arbitrary or unrestrained power and be amenable to judicial monitoring.’
\item \textsuperscript{18} See C Sappideen and P Vines, \textit{Fleming’s The Law of Torts}, (LBC, 10\textsuperscript{th} ed, 2011), [21.220] and chapter 7 of this thesis, [7.3.2]. For Canadian authority questioning the appropriateness of the common law defence of statutory authority, see \textit{Tock v St John’s Metropolitan Area Board} [1989] 2 SCR 1181; (1989) 64 DLR (4\textsuperscript{th}) 620, 647 (La Forest and Dickson CJ), discussed in \textit{ibid.}
\item \textsuperscript{19} \textit{Ibid.}, fn 244. Fleming refers to the Canadian legal scholar Klar, \textit{Tort Law} (Carsell, 4\textsuperscript{th} ed, 2008) 739 that the ‘practical impossibility test’ will make establishment of the statutory defence ‘very difficult’.
\item \textsuperscript{20} Common wealth legislation has been as follows: \textit{Property for Public Purposes Acquisition Act 1901}; \textit{Lands Acquisition Act 1906} (Cth); \textit{Lands Acquisition Act 1912} (Cth); \textit{Lands Acquisition Act 1955} (Cth); \textit{Lands Acquisition Act 1989} (Cth). This legislation, unlike its state counterpart, is subject to the Commonwealth Constitution. There has never been a finding that the Commonwealth Acts offended Commonwealth constitutional requirements: see D Brown, \textit{Land Acquisition: an examination of the
\end{itemize}
of problems, commonwealth land acquisition appears to have caused few compensation claims in WA. Protection to landowners has included that all notices of acquisitions be presented to Parliament, which could declare a notification void, and that a landowner in receipt of a pre-acquisition declaration may apply for a ministerial reconsideration of the declaration, and a review of the declaration. Considerations to be taken into account upon review include ‘whether there is some other means of accommodating the relevant authority’s needs’. In this respect, commonwealth pre-acquisition procedures show greater regard for property rights than WA laws, where failing ministerial review, a challenge to the taking of land is often restricted to questions of statutory interpretation. Unlike the LAA, there is no requirement that the

principles of law governing the compulsory acquisition or resumption of land in Australia (LexisNexis, 6th ed, 2009) [1.12].

21 See for example the findings of inadequacy with respect to injurious affection as regards the Working Party on Compensation for Land Acquired or Adversely Affected by Works or Use by Public Authorities, First Report (Department of Services and Property, 1975) 57–58. Only in 1955 was provision made that the Commonwealth must first invite the owner to sell the land before acquiring the land by compulsory process: ss 9(1) and 10(1) Lands Acquisition Act 1955 (Cth), but note s 9(8) which permitted the minister to avoid this requirement upon certification of ‘special reasons’. In that regard, see Jones v Commonwealth (No 2) (1964) 112 CLR 206.

22 See e.g. Australian Law Reform Commission Lands Acquisition and Compensation, Report No 14 (Australian Government Publishing Service, Canberra, 1980). The Report did reveals that for the period 1971 to 1979, Western Australia had the smallest number of compensation claims for compulsory acquisition against the Commonwealth compared with other states and territories: 13, Table B. WA had 22 compensation claims settled with no court writ, while the highest, NSW, had 1,520 such claims. Nearly 100% of all Commonwealth acquisitions in Western Australia during the 1970s were by agreement, rather than by compulsory process. Spencer v Commonwealth (1907) 5 CLR 418 which concerned the resumption of land for the fortification of Fremantle harbour is the only WA reported case found by the writer regarding Commonwealth acquisition of WA private land.

23 See e.g. Australian Law Reform Commission Lands Acquisition and Compensation, Report No 14 (Australian Government Publishing Service, Canberra, 1980). The Report did reveals that for the period 1971 to 1979, Western Australia had the smallest number of compensation claims for compulsory acquisition against the Commonwealth compared with other states and territories: 13, Table B. WA had 22 compensation claims settled with no court writ, while the highest, NSW, had 1,520 such claims. Nearly 100% of all Commonwealth acquisitions in Western Australia during the 1970s were by agreement, rather than by compulsory process. Spencer v Commonwealth (1907) 5 CLR 418 which concerned the resumption of land for the fortification of Fremantle harbour is the only WA reported case found by the writer regarding Commonwealth acquisition of WA private land.

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26 See e.g. Australian Law Reform Commission Lands Acquisition and Compensation, Report No 14 (Australian Government Publishing Service, Canberra, 1980). The Report did reveals that for the period 1971 to 1979, Western Australia had the smallest number of compensation claims for compulsory acquisition against the Commonwealth compared with other states and territories: 13, Table B. WA had 22 compensation claims settled with no court writ, while the highest, NSW, had 1,520 such claims. Nearly 100% of all Commonwealth acquisitions in Western Australia during the 1970s were by agreement, rather than by compulsory process. Spencer v Commonwealth (1907) 5 CLR 418 which concerned the resumption of land for the fortification of Fremantle harbour is the only WA reported case found by the writer regarding Commonwealth acquisition of WA private land.
acquiring authority initially state the market value of the land, thereby potentially disadvantaging the claimant.  

Of most significance is the requirement that the acquisition of land is made on just terms. Regard must be had to all relevant matters as will justly compensate the claimant. This includes regard to losses beyond land valuation principles. Where the acquisition includes the owner’s principal place of residence, additional payment provisions for an indexed amount and for compensation to enable the occupation of a reasonably equivalent dwelling apply.

(b) Taking Legislation

Limitations attaching to reform through amending legislation may be diminished by sui generis taking legislation. Most notable is the recent private member’s bill, Taking of Property on Just Terms Bill 2014, which is expressed to bind the State. This bill requires that taking of property by public authorities be on just terms. Property is defined to be ‘property of every kind…and any interest in property’. The bill is not

29 Brown, ibid, 15. Note, however, s 70(1)(c) Lands Acquisition Act 1989 (Cth).
30 See e.g. s 31(1) Lands Acquisition Act 1955 (Cth). See for example Albany v Commonwealth (1976) 60 LGRA 287, 317–318(Jacob J) that the statutory rate of interest did not infringe s 51(xxxi) of the Constitution (Cth). Note, however, the suggestion that a landowner faced with the resumption of land by the State would probably receive the same compensation whether the resumption was exercised by the State of Western Australia or by the Commonwealth under the 1955 Act: see D Brown, Land Acquisition (Butterworths, 2nd ed, 1983) [1.04]. Note also EF Downing ‘Some Aspects of Compensation’ (1966) 7(3) UWA Law Review 352, 361, who states that although the Commonwealth provisions provided only for value of land taken plus damage for severance and injurious affection, the courts always took into account the various matters dealt with by statutory provision in the Public Works Act 1902 (WA).
31 See s 55(1) and 93 Lands Acquisition Act 1989 (Cth). This extends to the mere exercise of powers under Part III of the Act without acquisition of the land: s 95 of the 1989 Act. No such requirement of just compensation is found in s 19(1) of the 1955 Act. Brown, above n 28, 14, acknowledges the possibility that in some cases, a landowner may get more compensation under the 1989 Act than under the former 1955 Act. In his latest text, Brown leaves the question open: see D Brown, Land Acquisition (Lexisnexis, 6th ed, 2009) [1.12].
32 See s 55(2)(c) Lands Acquisition Act 1955 (Cth) regarding ‘...any loss, injury, or damage suffered or expenses reasonably incurred by the person’: see Brown, above n 28, 15.
33 S 61(2)(a) Lands Acquisition Act 1955 (Cth).
34 Ibid, s 61(2)(b).
35 See also Western Australia, Parliamentary Debates, Legislative Assembly, 25 June 2014, 4597.
36 Cl 4 Taking of Property on Just Terms Bill 2014 (WA). The Bill also purports to bind the Crown ‘so far as the legislative power of the State permits’. The bill is said to be necessary because ‘our state Constitution is deficient’ when it comes to protecting property rights: Western Australia, Parliamentary Debates, Legislative Assembly, 13 August 2015, 5330b (Mr Murray Cowper, on the reason for restoring the Bill to the Legislative Assembly Notice Paper).
37 Cl 6 Taking of Property on Just Terms Bill 2014 (WA). Other taking legislation that has been proposed includes compensation based on ‘the amount equivalent to any reduction in the fair market value of the property’: see cl 19(2) Private Property Protection Bill 2004 (Qld).
38 Cl 3 Taking of Property on Just Terms Bill 2014 (WA). This is far wider than other taking legislation that has been proposed in Australia. See, for example, the Private Property Protection Bill 2003 (Qld). This restricted private property to land, including any interest in land, and a right to take or use water: cl
confined to land resumption; ‘take’ includes ‘to lower the value of property, or to restrict the use and enjoyment of property by its owner’.

Although not entrenched, the bill ‘applies in addition to any other law, excluding taxation or a penalty’.

The bill’s provisions are most advantageous. Although the possibility of overreach is acknowledged, this risk is inherent in any legal reform until interpreted by the courts, and merely reinforces the need to draft any provision with exactness. Many of the limitations attaching to the compensation provisions of legislation considered across the preceding chapters could be overcome by the requirement that just terms be afforded, not only upon the extinguishment of a property interest, but also whenever a public authority restricts the use or enjoyment of property or lowers the value thereof.

With a single provision, disregard presented by statutory restrictions such as planning and environmental laws to property rights is overcome by the bill. However, the assumption that the bill is merely a restatement of common law principles is wrong.

The significance of the bill is evident when compared with earlier proposed taking legislation in Queensland. There, proposed taking legislation merely provided for ‘the proper consideration of the impact of legislation on private property, and for payment of compensation for the impact.’ The bill defined ‘private property impact legislation’ as legislation that has the ‘effect of diminishing, removing or restricting a person’s rights to the lawful use or enjoyment of the person’s private property.’ A private property impact statement was to be presented before any such proposed legislation was presented to Parliament.

An affected property owner might lodge an objection

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3(1) Private Property Protection Bill 2003 (Qld); see also cl 3(1) Private Property Protection Bill 2004 (Qld).

39 Cl 3 Taking of Property on Just Terms Bill 2014 (WA). This is wider than other proposed taking legislation, such as cl 19(1) Private Property Protection Bill 2004 (Qld) which provided for compensation arising from ‘diminishing, removing or restricting of the person’s rights to the lawful use or enjoyment…’

40 Cl 5(1) Taking of Property on Just Terms Bill 2014 (WA). Note this qualification may be unnecessary. Regarding matters of taxation, penalty and criminal forfeiture, the imposition of a requirement of ‘just’ terms ‘...is not concerned with laws in connection with which just terms is an inconsistent or incongruous notion’: Theosphanous v Commonwealth of Australia (2006) 225 CLR 101, 124 (Gummow, Kirby, Hayne, Heydon and Crennan JJ).


42 See Western Australia, Parliamentary Debates, Legislative Assembly, 25 June 2014, 4597.

43 Summary Case for a State Property Takings and Just Compensation Bill, annexed to Taking of Property on Just Terms Bill 2014 (WA).

44 Private Property Protection Bill 2003 (Qld); Private Property Protection Bill 2004 (Qld).

45 Cl 4 Private Property Protection Bill 2004 (Qld).

46 Ibid, cl 5(2); see also cl 6(2) in relation to subordinate legislation. The contents of the private property impact statement were prescribed, and importantly included ‘an examination of the alternatives to causing, through the proposed legislation, the rights any person has to the lawful use or enjoyment of the person’s private property to be diminished, removed or restricted’: cl 7(1)(f).
regarding the contents of a private property impact statement.\(^{47}\) However, provision for a private property impact study\(^ {48}\) was criticised as ‘superficial’, because any court that ordered redrafting of legislation may require the responsible department ‘to have regard to particular evidence given by expert witnesses in the hearing of the objection’,\(^ {49}\) the process thereby being at the risk of influence by interest groups at the expense of others.\(^ {50}\) The costs associated with private property impact statements may also have been problematic.\(^ {51}\) While this bill would likely have compelled the executive to consider more fully the impact of proposed legislation, whether regulatory or by expropriation, a failure to comply with the requirements of a property impact study did not affect the validity of legislation, nor did it create rights or enforceable obligations upon the State with respect to private property impact studies.\(^ {52}\)

Although the fate of the WA bill is yet to be determined,\(^ {53}\) passage through Parliament appears unlikely given the Government’s already declared approaches to protecting property rights through the Land Acquisition Legislation Amendment (Compensation) Bill 2014 and the Private Property Rights Charter. Difficulties in securing support for the Queensland bill\(^ {54}\) also may not bode well for the WA bill. The availability of

\(^{47}\) Ibid, cl 9(1).

\(^{48}\) See cls 5–8 Private Property Protection Bill 2003 (Qld); see also cls 5–8 Private Property Protection Bill 2004 (Qld).

\(^{49}\) Cl 15(2) Private Property Protection Bill 2003 (Qld); cl 15(2) Private Property Protection Bill 2004 (Qld). The involvement of a court in the legislative process is also undesirable as a matter of principle, but it does assist in securing drafting independently of the Executive: see Evans, ‘Constitutional Property Rights in Australia’, above n 1, Ch 8, 219.

\(^{50}\) Evans, ibid, Ch 8, 218.

\(^{51}\) The experience of similar American taking statutes suggests that the administrative burden of the required impact assessments may outweigh the marginal benefits likely to be produced from such assessments: see MW Cordes, ‘Leapfrogging the Constitution: The Rise of State Takings legislation’ (1997) 24 Ecology Law Quarterly 187, 241. The writer acknowledges S Evans in bringing this article to the writer’s attention. However, note that with respect to the Queensland bill, the explanatory notes to the Bill indicated that the cost to the government ‘will be more than justified by the benefits of the legislation’: Private Property Protection Bill 2003 (Qld) Explanatory Notes, 1; see also Private Property Protection Bill 2004 (Qld), 1. Cost has also been an argument raised by the Government of Western Australia in the past as a reason for not making compensation more widely available to landowners affected by the State: see e.g. Government of Western Australia, Response of the Western Australian Government to the Western Australian Legislative Council Standing Committee on Public Administration and Finance in relation to the Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia, 8. Such objections generally ignore the possibility of raising state review via betterment charges: see e.g. the former s 11 (2) Town Planning and Development Act 1928 (WA); s 184 Planning and Development Act 2005 (WA). LA Stein, Principles of Planning Law (Oxford University Press, 2008) 16, notes betterment charges are not levied in WA.

\(^{52}\) Cl 17 Private Property Protection Bill 2003 (Qld); cl 17 Private Property Protection Bill 2004 (Qld).

\(^{53}\) The Taking of Property on Just Terms Bill 2014 (WA) was restored to the Legislative Assembly Notice Paper on 13 August 2015, following its removal on 11 August 2015: see Western Australia, Parliamentary Debates, Legislative Assembly, 13 August 2015, 5330b.

\(^{54}\) Private Property Protection Bill 2003 (Qld); Private Property Protection Bill 2004 (Qld). The 2003 Bill lapsed on 13 January 2004, and a motion that the 2004 Bill be read a second time was resolved in the negative: Queensland, Parliamentary Debates, Legislative Assembly, 18 August 2004, 1948, 1966

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compensation cast so widely may also attract much opposition from public interest perspectives considered in chapter 3. As with the Queensland bill, the compensation provisions may also make Parliament averse to any further regulating of private property rights, despite other public benefits that may flow from that regulation. One possible solution might be offered by taking legislation in the United States where some statutes set a certain percentage diminution in value, while another state, Florida, only requires compensation where the State ‘inordinately burden[s] real property use.’ In the United States, it has been suggested that the more open-ended position of Florida is preferable, as it better accommodates competing public and private interests.

(c) Human rights and the ‘dialogue model’

Human rights legislation may provide for the greater protection of private property rights. Commonwealth human rights legislation is a possibility and may offer some advantage. For example, while a Commonwealth Bill of Rights might be unentrenched, it may have the effect of entrenchment as regards the States, since a Commonwealth bill of rights applied to state legislation would render conflicting state legislation inoperative under s 109 of the Constitution. However, Commonwealth constitutional power to pass legislation which includes a ‘right to property’ would require a Commonwealth head of power to do so, which has been doubted, except using the external affairs power. The inclusion of a ‘right to property’ was included within a recommended federal human rights dialogue model but was not acted on by the Federal Government. For these reasons, attention is instead focused on State human rights legislation.
rights legislation adopting the ‘dialogue model’, which has been proposed in WA and already adopted in Victoria.

The ‘dialogue model’ seeks to promote a dialogue between the executive, Parliament and the judiciary concerning recognised human rights, and as such shares some similarities with the Private Property Protection Bill (Qld) considered above. Statements of compatibility must be tabled with all bills introduced into Parliament. So far as is possible, statutory provisions must be interpreted in a way which is compatible with recognised human rights. However, courts may adopt a narrow approach and require that there be ambiguity before applying such a requirement. Under the Victorian Charter, Parliament may expressly override the human rights provisions, and a declaration of inconsistent interpretation does not create in any person any legal right or create any civil cause of action. In WA, it was contemplated that where an inconsistent written law would result in a declaration of incompatibility, this would not create any enforceable rights or cause of action or affect the validity of the inconsistent law. While government agencies were required to act compatibly with human rights, a breach of a human right did not create any effective enforceable rights or cause of action.

The treatment of property has not been consistent under the ‘dialogue model’. Although the draft WA bill did not expressly include property rights, a consultation
committee recommended that a human rights act be enacted by the State legislature, which included the recognition of ‘the right not to be deprived of property other than in accordance with the law, and on just terms’. There was some inconsistency, however, in this recommendation given the committee stated that such a right could be modelled on s 20 of the Victorian Charter, while at the same time stating that there should be an express right to compensation. The Victorian Charter affords procedural fairness only to the holder of private property rights faced with a deprivation of human rights, with no open-ended right to compensation for property deprivation. The protection of property rights is also potentially limited by the qualification ‘in accordance with the law’, the usefulness of which is questionable. Compulsory acquisition without compensation and without the acquisition being subject to reasonable limits is left open. Provided that the executive acts within its power when resuming property, the circumstances where the right might be invoked appear limited. The Victorian Government does, however, appear to recognize the possibility that the arbitrary or capricious deprivation of property could offend s 20.

Although the dialogue model has certain advantages concerning legislative determination and government decision-making, it is ultimately ill-equipped to

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77 In the context of privacy, the Bill recognized the right of a person not to have the family home unlawfully or arbitrarily interfered with: s 3(5)(b) Charter of Human Rights and Responsibilities Act 2006 (Vic); cl 11 Human Rights Bill 2007 (WA).
78 Consultation Committee for a Proposed Human Rights Act, above n 64, [4.3.3].
79 S 20 provides: ‘A person must not be deprived of his or her property other than in accordance with law.’
80 Consultation Committee for a Proposed Human Rights Act, above n 64, [4.3.2].
81 See National Human Rights Consultation Committee, Rights, Responsibilities and Respect (November 2005) [2.4.3]. The Charter adopts those recommendations.
82 See the comments of the Tasmania Law Reform Institute, above n 76; s 7(2) of the Victorian Charter.
83 See generally J Webber, ‘A Modest (but Robust) Defence of Statutory Bills of Rights’ in T Campbell, J Goldsworthy and A Stone (eds), Protecting Rights Without a Bill of Rights (Ashgate, 2006), Ch 11, 275–283. Webber concludes (283–284) that statutory bills promote the process of attention and revision in the process of legislative determination, without the division created in institutional roles by entrenched bills.
84 G Williams, ‘Who best protects rights: legislatures or the courts? Implications for the bill of rights debate: The case for a role for the judiciary’ (Legislatures and the Protection of Human Rights International Conference, University of Melbourne, 20–22 July 2006).
provide any meaningful protection to private property rights. Firstly, the dialogue model varies in the extent to which property rights are included. Secondly, the recognition of human rights remains subservient to parliamentary sovereignty, since legislation may override human rights by declaration.\(^8\) Thirdly, a dialogue model often relies on a parliamentary scrutiny committee to report compatibility,\(^9\) which reports may rarely be referred to in parliamentary debates,\(^10\) and which do not consider issues of government policy.\(^9\) Finally, the experience of overseas jurisdictions may not be encouraging. Canada, which has a similar legal tradition of adherence to parliamentary sovereignty, enacted the unentrenched Canadian Bill of Rights in 1960,\(^2\) which recognised the enjoyment of property as a human right.\(^3\) The Bill probably had no impact on the protection of private property rights, possibly because it only guaranteed due process of law.\(^4\) Human rights legislation may also have unintended consequences, with insufficient consideration as to how a charter or bill of rights may impact on the common law.\(^5\)

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\(^8\) See Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1289, 1293 (Second Reading–Charter of Human Rights and Responsibilities Bill) (Mr Hulls, A-G), and in particular s 31 *Charter of Human Rights and Responsibilities Act 2006* (Vic). Notwithstanding, however, dialogue models have been criticised on the basis that they represent a challenge to democracy and the rule of law: see A Zimmerman, ‘The Wrongs with a Charter of Rights for Victoria’ http://www.saltshakers.org.au/take-action/campaigns/completed-campaigns/299-c-vic-charter-of-rights. In the writer’s respectful opinion, however, this charge is only sustained against s 3 of the *Human Rights Act 1998* (UK), which has been increasingly applied by English Courts to give priority to the interpretation of laws consistent with recognized human rights over parliamentary intent: see H Charlesworth, ‘Human Rights and Statutory Interpretation’ in S Corcoran & S Bottomley (eds), *Interpreting Statutes* (The Federation Press, 2005), 106–114.

\(^9\) See e.g. s 38(2) *Human Rights Act 2004* (ACT).

\(^10\) C Evans and S Evans, above n 69, [2.35].

\(^11\) *Ibid*, [2.41].


\(^5\) See ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (May 2003) [2.72]. By way of example, in the United Kingdom, it was thought for some time that possessory title might be inconsistent with recognised human rights: *JA Pye (Oxford) Ltd v United Kingdom* [2005] ECHR 921; c.f. *contra* *JA Pye (Oxford) Ltd v United Kingdom* [2007] ECHR 700 upholding adverse possession on the basis that this was a permissible control of land use in the public interest. However, in Australia, possessory title would be unlikely to be affected: see B Edgeworth, ‘Adverse Possession and human rights: The last act in *JA Pye (Oxford) Ltd v United Kingdom*’ (2007) 15 *APLJ* 107.
(d) Scrutiny Committees

An alternative or complement to human rights legislation\(^96\) is to prescribe by statutory terms of reference that parliamentary committees scrutinize bills to determine whether bills are inconsistent with fundamental rights. In Queensland, the Scrutiny of Legislation Committee is directed to consider whether ‘legislation has sufficient regard to rights and liberties of individuals’,\(^97\) which includes whether property is compulsorily acquired with fair compensation.\(^98\) The Australian Senate Scrutiny of Bills Committee\(^99\) has recognized that bills should not readily override fundamental rights, including private property rights, without full compensation.\(^100\) The use of scrutiny committees may overcome many of the objections to the judicial review of a bill of rights, because a consideration of these rights remains part of the parliamentary process, while still stimulating careful consideration of the merits of bills which infringe upon fundamental rights.\(^101\)

There are no specific statutory criteria in WA against which the Standing Committee on Legislation of the Legislative Council is to consider legislation. It is desirable that similar statutory criterion to Queensland be introduced in WA so as to bring private property rights to the fore in the scrutiny of legislation.\(^102\) However, this model will not secure the protection of private property rights. Scrutiny committees do not guarantee rights,\(^103\) and may favour parliamentary supremacy at the expense of the judicial

\(^96\) See e.g. B Horrigan, ‘Improving Legislative Scrutiny of proposed laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making’ in T Campbell, J Goldsworthy and A Stone (eds), Protecting Rights Without a Bill of Rights (Ashgate, 2006), Ch 3, 76–78 on the Human Rights Act 2004 (ACT) and the Standing Committee on Legal Affairs; see also C Evans and S Evans, above n 69, [2.35]–[2.37].

\(^97\) S 103 Parliament of Queensland Act 2001 (Qld); see also Evans, ‘Constitutional Property Rights in Australia’, above n 1, Ch 8, 215.

\(^98\) See s 4(3) Legislative Standards Act 1992 (Qld) which provides that ‘Whether legislation has sufficient regard to rights and liberties of individuals depends on whether the legislation…(i) provides for the compulsory acquisition of property only with fair compensation;’.

\(^99\) See Senate Standing Order 24(1)(a) (Parliament of Australia) on the appointment of a standing committee for the scrutiny of Bills.


\(^102\) On the benefits of this scrutiny more generally, see Horrigan, above n 96, Ch 3.

\(^103\) Hiebert, above n 101, 137. Hiebert goes so far as to say that ‘the very idea that rights can be guaranteed is simplistic and misleading’. The writer respectfully disagrees, since there are many rights guaranteed by the law, with only the scope and application of that right being a matter for parliamentary debate and judicial review.
enforcement of rights. The Queensland experience demonstrates that a parliamentary scrutiny committee is unable to prevent the passage of legislation which erodes private property rights without compensation. As observed by Mackenzie J on the *Legislative Standards Act 1992* (Qld):

Two things may be said about the Act. One is that it is not an entrenched piece of legislation. Legislation inconsistent with it may therefore, as a matter of ordinary principle, be passed by Parliament. The second is that s 23(1)(f) of the Act clearly implies that Parliament is not prohibited from considering a Bill inconsistent with fundamental legislative principles. All that is required is a statement in an Explanatory Note for the Bill explaining the reason for the inconsistency with fundamental legislative principles.

The influence of Commonwealth scrutiny committees on parliamentary debate has been noted, although that influence is not always effectual. The Commonwealth Senate Committee acknowledged that Parliament retains the ultimate power to override fundamental rights. Ultimately, although desirable, parliamentary review of legislation is an inadequate substitute for the judicial enforceability of rights.

(e) Rights Council

A State Rights Council has been proposed as a more viable alternative to a parliamentary committee for the protection of rights by ‘pre-enactment, abstract, quasi-judicial review’. In the absence of a State bill of rights, the Council would have

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105 The erosion of private property rights by environmental regulation in Queensland is testimony to the inability of a scrutiny committee to protect property rights: see e.g. *Wild Rivers (Environmental Management) Act 2010* (Qld); *Vegetation Management Act 1999* (Qld) discussed by L Finlay, ‘The Attack on Property Rights’ (Paper presented at the Annual Conference of the Samuel Griffith Society, 28 August 2010), 9–12.
106 *Bell and Anor v Beattie and Ors* [2003] QSC 333, [24]. MacKenzie J further noted [27] that ‘Even after the passage of legislation, and before presentation of the Bill to the Governor for royal assent, the courts will “virtually never” issue an injunction or make a declaration at that stage. It will be left to the applicant to seek relief after the royal assent has been given and the Bill has become law.’
108 See e.g. Evans, ‘Constitutional Property Rights in Australia’, above n 1. Evans notes that the Senate Committee’s scrutiny of legislation which infringed s 51 (xxxi) of the Commonwealth Constitution ultimately had to go to the High Court to be found invalid, in *Smith v ANL Ltd* (2003) 204 CLR 493.
109 See Evans, *ibid*, Ch 8, 216, fn 112.
regard to international human rights instruments against which proposed legislation would be reviewed. The lack of any current State bill of rights, the limited recognition given to property rights under international human rights instruments, together with the view that Parliament may override adverse recommendations of the Council, ultimately limits the utility of this model.

(f) Property rights charter

A final measure to improve State regard for property rights is the adoption of a property rights charter, such as the draft Charter released by the Government in 2014. The purpose of the Charter is to set out guiding principles to be applied by government agencies when their actions may adversely affect property rights. While a charter may aid adherence to the law by government agencies, it does not change State laws.

8.2.2 Entrenched Reform

Entrenched reform for the protection of property may take the form of State and/or Commonwealth legislation. Each is considered below. Unlike unentrenched reform, entrenched reform, if valid, presents the possibility of overcoming many of the common themes characterising the State’s treatment of property in the previous chapter, in particular the risks presented to property rights through ordinary legislative process.

(a) Entrenched State plenary power

A solution to the risk that new legislation to protect property rights might be subsequently amended or repealed may be to include within the legislation itself a provision which seeks to control future parliaments with respect to that legislation. The attempted entrenchment of State legislative provision concerning property matters is not new. Justice Kirby considered the possibility of State constitutional amendment for the protection of property rights, and Chief Justice French has opined that a State bill of rights could be entrenched. However, entrenched State legislation is likely problematic. It is contrary to the plenary power enjoyed by future parliaments for a prior

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112 Ibid, 797. Winterton rejects the French model in that regard.
113 Government of Western Australia, A Private Property Rights Charter for Western Australia, Premier’s Circular 2014/04 (27 November 2014).
114 Western Australia, Parliamentary Debates, Legislative Assembly, 27 November 2014, 8993 (Mr CJ Barnett).
115 See e.g. s 6 Real Property Act 1886 (SA); see also s 42(3) Real Property Act 1900 (NSW), considered in P Butt, Land Law (LBC, 6th ed, 2010) [20 118]
legislature to seek to control or command how a later legislature may express its intentions.\textsuperscript{118} It is not possible to provide by statutory provision that in any later statute, providing for the same subject matter, there can be no implied repeal.\textsuperscript{119} Later statutes will be given effect at the expense of the earlier.\textsuperscript{120} Government cannot limit future executive action.\textsuperscript{121} It appears permissible, however, to provide that legislation will operate so far as a contrary intention does not appear.\textsuperscript{122} The possibility of the use of interpretative provisions by State Parliament to protect a bill of rights is also a possibility.\textsuperscript{123}

State plenary legislative power,\textsuperscript{124} including the power to amend and repeal existing legislation, is entrenched by manner and form provisions.\textsuperscript{125} The conferral of State legislative power is also entrenched by the Australia Act.\textsuperscript{126} The Australia Act entrenches the conferral of legislative power upon each of the States,\textsuperscript{127} save regarding a law respecting the Constitution and the powers or procedures of Parliament.\textsuperscript{128} Subject to the Australia Act, s106 of the Commonwealth Constitution also secures the continuance of each State’s constitution.\textsuperscript{129} Ultimately, whether a State Parliament can

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  \item \textsuperscript{118} South Eastern Drainage Board (SA) v Savings Bank of South Australia (1939) 62 CLR 603, 633–634 (Evatt J). See also the concern expressed by Latham CJ (618) on legislation seeking to ‘prescribe the contents’ of future legislation, a point also noted in G Williams, S Brennan and A Lynch, . Blackshield & Williams Australian Constitutional Law and Theory Commentary and Materials (The Federation Press, 6th ed, 2014) [16.57]. On plenary state legislative power, see s 2(1) Constitution Act 1889 (WA).
  \item \textsuperscript{119} Ellen Street Estates Ld v Minister of Health [1934] 1 KB 590, 597 (Maugham LJ).
  \item \textsuperscript{120} South Eastern Drainage Board (SA) v Savings Bank of South Australia (1939) 62 CLR 603, 625 (Dixon J).
  \item \textsuperscript{121} Rederiaktiebolaget Amphitrite v King [1921] 3 KB 500, 503 (Rowlatt J).
  \item \textsuperscript{122} See South Eastern Drainage Board (SA) v Savings Bank of South Australia (1939) 62 CLR 603, 633–634.
  \item \textsuperscript{124} See s 2(1) Constitution Act 1889 (WA).
  \item \textsuperscript{126} The Australia Act ‘takes its force and effect from the reference of power to the federal Parliament made under s 51(38), and the operation that the Act is to be given as a law of the Commonwealth in relation to state law by s 109 of the Constitution’: A-G (WA) v Marquet (2003) 217 CLR 545, 570–571 (Gleeson CJ, Gummow, Hayne, and Heydon JJ).
  \item \textsuperscript{127} See s 2(2) Australia Act 1986 (Cth) discussed in Twomey, ‘The Effect of the Australia Acts on the Western Australian Constitution’, above n 125, 274–275; see also s 6 Australia Act 1986 (Cth).
  \item \textsuperscript{128} See s 6 Australia Act 1986 (Cth). Note s 6 does not apply to state executive power: see P Congdon, ‘The History, Scope and Prospects of Section 73 of the Constitution Act 1889 (WA)’ (2013) 36(2) UWA Law Rev 83, 100, citing A-G (NSW) v Trethowan (1931) 44 CLR 394, 429 (Dixon J).
  \item \textsuperscript{129} A-G (WA) v Marquet (2003) 217 CLR 545, 574.
\end{itemize}
bind itself independently of s 6 of the *Australia Act* may be unanswerable except through policy considerations applied by the High Court.\footnote{S Ratnapala and J Crowe, *Australian Constitutional Law Foundations and Theory* (Oxford University Press, 3rd ed, 2012) [16.3.5.3].}

(b) **Entrenching a State guarantee with respect to property rights**

Unlike s 51(xxxi), which has traditionally been interpreted as primarily a grants power,\footnote{See s 51 (xxxii) Constitution (Cth), and e.g. *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J), 291, (Starke J), 295 (McTiernan J). Note the ‘orthodox view’ of s 51(xxxi) is that it has a dual purpose, that is to provide the power to acquire property, as well as protecting a property owner against State interferences without just compensation: see J Clarke, P Keyzer and J Stellios, *Hanks Australian Constitutional Law Materials and Commentary* (LexisNexis, 2013) [10.2.2], citing *Bank of NSW v Cth* (1948) 76 CLR 1 at 349–350 (Dixon J).} a State guarantee of just terms by constitutional provision would likely operate as a bill of rights, limiting Parliament’s plenary legislative power and invalidating inconsistent legislation which did not afford just terms.\footnote{It could not, for example, be compared to a mere ‘Dog Act’: see *McCawley v R* [1920] AC 691. On a bill of rights, see Joint Select Committee on Constitutional Affairs, *Final Report*, Volume 1, 27 (presented by Mr J Kobelke MLA, 24 October 1991 in the Legislative Assembly, and by Hon D Tomlinson in the Legislative Council, 24 October 1991).} The critical issue is, firstly, whether it is even possible to entrench a guarantee of this kind, and secondly, even if so, whether the obstacles that must be overcome in securing the passage of such legislation could be overcome. Each issue is addressed below.

(i) **A law with respect to Parliament’s powers and procedures?**

A State may restrict its own legislative powers by restrictive manner and form provisions, but subject to a number of qualifications.\footnote{Note in the absence of manner and form, a state parliament may effect constitutional change by an ordinary Act of Parliament: Ratnapala and Crowe, above n 130, [16.3.3].} Firstly, the provisions cannot amount to a surrender of legislative power, by either intent or effect.\footnote{See e.g. G Carney, ‘An Overview of Manner and Form in Australia’ (1989) 5 *Qld Uni Tech Law J* 69, 82, cited in G Winterton, HP Lee, A Glass and J Thomson, *Australian Federal Constitutional Law Commentary and Materials* (LBC, 2nd ed, 2007) [11.250]. See also *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 397 (King CJ).} Any attempt to overcome this limitation by the unlikely State reference of power with respect to property to the Commonwealth\footnote{See s 51(xxxvii) Constitution (Cth).} would be of little assistance since the reference of power could probably be revoked.\footnote{See *ANA Case* (1964) 113 CLR 207, 226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ), *Graham v Paterson* (1950) 81 CLR 1, 25 (Webb J) and *SA v Cth* (1942) 65 CLR 373, 416 (Latham CJ).} Secondly, the restriction is enforceable only with respect to a law concerning ‘the constitution, and Parliament’s powers or procedures’.\footnote{See s 6 *Australia Act 1986* (Cth); on manner and form, see e.g. *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 420 (Rich J).} Where a law is ‘respecting the power of the legislature’, the legislature may ‘prescribe
the mode in which laws respecting these matters must be made….no degree of rigidity greater than this can be given by the legislature to the constitution.\textsuperscript{138} If a restrictive law does not meet these qualifications, later legislation to the extent of any inconsistency will prevail over the requirements of the earlier Act.\textsuperscript{139} The critical question is, therefore, whether a guarantee with respect to property rights, e.g. just terms, would qualify as a law regarding ‘the constitution, and Parliament’s powers or procedures’,\textsuperscript{140} such that manner and form restrictions may be attached to it. This question cannot be answered with certainty.\textsuperscript{141} A law should be characterised by its substance.\textsuperscript{142} Whether a law protecting property relates to ‘Parliament’s powers or procedures’ is difficult to determine since the outer limits of this term remain unclear.\textsuperscript{143} It has been said that the reference to Parliament’s powers concerns laws which ‘deal with its own legislative authority’.\textsuperscript{144} Unfortunately, much opinion in support of the possibility of entrenched State constitutional reform\textsuperscript{145} either does not consider the \textit{Australia Act} limitations attaching to Parliament’s power to restrict its own legislative powers, or has instead been concerned with the representative character of the State’s constitution.\textsuperscript{146}

In the only case where the High Court has examined the question of whether a property law concerned Parliament’s powers, the High Court considered whether the law purported to define or qualify in some way the legislature’s powers,\textsuperscript{147} but the precedential value of this case may be doubtful.\textsuperscript{148} If the High Court’s characterisation

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  \item \textsuperscript{138} \textit{A-G (NSW) v Trethewan} (1931) 44 CLR 394, 431 (Dixon J).
  \item \textsuperscript{139} \textit{South Eastern Drainage Board (SA) v Savings Bank of South Australia} (1939) 62 CLR 603. Note it has been suggested that this case is of little precedential value because a majority of the High Court considered whether the earlier Act rather than the later Act was a law ‘respecting the constitution, powers and procedure of such legislature’: see Williams, Brennan and Lynch, above n 118, [16.56]. See for example Dixon J (625). While Evatt J reasoned differently (633), Evatt J has also been criticised: see e.g. JD Goldsworthy, ‘Manner and Form in the Australian States’ (1988) 16 \textit{Melb UL Rev} 403, 419.
  \item \textsuperscript{140} See s 6 \textit{Australia Act} 1986 (Cth).
  \item \textsuperscript{141} Note, for example, \textit{A-G (WA) v Marquet} (2003) 217 CLR 545, 572 (Gleeson CJ, Gummow, Hayne and Heydon JJ) where members of the High Court declined to define the boundaries of constitution, powers or procedure of a legislature. On the non-binding effect of restrictions on substantive powers, see A Twomey, ‘Manner and Form Limitations on the Power to amend State Constitutions’ (2004) 15 \textit{PLR} 169.
  \item \textsuperscript{142} Ibid, 184. I wish to acknowledge my colleague, Mr Toby Nisbet, Lecturer, Edith Cowan University, in drawing this article to my attention.
  \item \textsuperscript{143} \textit{A-G v Trethewan} (1931) 44 CLR 394, 430 (Dixon J).
  \item \textsuperscript{144} \textit{Durham Holdings Pty Ltd v State of NSW} (2001) 205 CLR 399, 429 (Kirby J); French, above n 117, 346.
  \item \textsuperscript{145} See e.g. \textit{A-G (WA) v Marquet} (2003) 217 CLR 545, 573 (Gleeson CJ, Gummow, Hayne and Heydon JJ).
  \item \textsuperscript{146} \textit{South Eastern Drainage Board (SA) v Savings Bank of South Australia} (1939) 62 CLR 603, 625 (Dixon J).
  \item \textsuperscript{147} Williams, Brennan and Lynch, above n 118, [16.56] A majority of the High Court considered whether the earlier Act rather than the later Act was a law ‘respecting the constitution, powers and procedure of
is correct, then a law which requires that any taking of property be on just terms and which is entrenched by a restrictive manner and form provision may be a law which qualifies the legislature’s power, although the law could do no more than prescribe the mode in which laws concerning the taking of property must be made. 149

It has also been suggested that legislation inconsistent with a bill of rights might be found to concern Parliament’s powers because of an inconsistency with the bill of rights; in that event, the guarantees under the bill of rights would be effective. 150 Such constructions, however, construe reference to ‘Parliament’s powers’ most broadly. Where attention has been focussed on the Australia Act as must be done, it has been thought that a bill of rights would be unlikely to be considered a law respecting the constitution, and the powers or procedures of Parliament, and that consequently any purported entrenchment could be overridden by further legislation. 151 Alternatively, it has been argued that the rule against a Parliament surrendering its legislative power would not be offended by State Parliament entrenching a bill of rights by ordinary enacted legislation which curtailed legislative power to make laws that derogate from prescribed rights without the approval of electors by referendum. 152 Accordingly, the question of whether a property rights bill can be entrenched remains a question yet to be resolved. There may be other more obscure methods for entrenching a bill of rights, such as by a partial reconstitution of Parliament for special purposes, but this also appears problematic. 153

If a constitutional property provision can be characterized as respecting the power of Parliament, a manner and form provision applying to the provision would need to entrench not only the provision but also the manner and form provision as well, in order

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149 A-G v Trethowan (1931) 44 CLR 394, 431 (Dixon J).
150 Goldsworthy, above n 139, 419. Note, however, that this view itself may be problematic. It appears to rely heavily on Commonwealth Aluminium Corporation Ltd v A-G [1976] Qd R 231, 248 (Hoare J). See Goldsworthy further, 415. I wish to acknowledge my colleague, Mr Toby Nisbet, Lecturer, Edith Cowan University, for drawing this article to my attention.
151 Twomey, ‘The Effect of the Australia Acts on the Western Australian Constitution’, above n 127, 275. The possibility that s 15 of the Australia Act 1986 (Ctb) might provide a means to entrench a bill of rights is also doubted by Twomey (291–292). I wish to acknowledge my colleague, Mr Toby Nisbet, Lecturer, Edith Cowan University, for drawing this article to my attention.
152 Ratnapala and Crowe, above n 130 [16.3.4.2], citing A-G v Trethowan (1931) 44 CLR 394 and West Lakes Ltd v South Australia (1980) 25 SASR 389.
153 Goldsworthy, above n 139.
to avoid repeal of the entrenching provision by ordinary legislation. If a new manner and form were provided for, it may also not follow that future Parliaments are bound by this manner and form.

(ii) Practical obstacles to State constitutional amendment

Although State constitutional reform does not require a majority of votes in a majority of States as is the case with respect to Commonwealth constitutional reform, State constitutional amendment cannot be secured without agreement of an absolute majority of the Legislative Assembly and Legislative Council, and a majority of the State electorate. This process is itself entrenched. The Australia Act also cannot be varied except in accordance with the requirements of the Act.

The practicalities of satisfying the requirements for State constitutional amendment may not be straightforward. The electorate has supported State constitutional amendment in the past, but securing endorsement by a majority of the State electorate at a referendum cannot be assumed. There also has been only limited support for a citizen-initiated referendum on constitutional matters.

A further practical obstacle to State constitutional amendment is the very qualified State Government support identified earlier in chapter 3 for whether State constitutional provision for just terms should be made. The opposition of some key government

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155 Congdon, above n 128, 89, 90. Congdon notes that State Parliament may, subject to satisfying existing manner and form requirements, enact new manner and form requirements without satisfying s 73(2) of the Constitution.
156 See s 128 Commonwealth Constitution. However, Williams, Brennan and Lynch, above n 118, [30.10], argue that this requirement has not been responsible for the failure of many Commonwealth constitutional referenda, because only twice in 1946 and once in 1977 would this have made any difference to the outcome of the referendum.
157 Standing order 201, Standing Orders of the Legislative Assembly of the Parliament of Western Australia.
158 See s 73(2)(f) Constitution Act 1889 (WA); s 6 Australia Act 1986 (Cth).
159 S 73(2)(g) Constitution Act 1889 (WA).
162 Durham Holdings Pty Ltd v State of NSW (2001) 205 CLR 399, 429 (Kirby J).
163 See e.g. Acts Amendment (Constitution) Act 1978 (WA).
164 Ibid.
166 See Joint Select Committee on Constitutional Affairs, above n 132, 13–19.
167 Government of Western Australia, Response, above n 51, 15–18.
departments to State constitutional reform is a matter of record.\textsuperscript{168} The Government has expressed concern that a requirement of just terms may have unintended consequences.\textsuperscript{169} However, many of its concerns are unfounded. Fear that a requirement of just terms could apply to matters of taxation, penalty, forfeiture or confiscation is unwarranted.\textsuperscript{170} Other fears, such as that a guarantee might extend to environmental restrictions, are probably unfounded, at least if the guarantee were expressed to be limited to the acquisition of property.\textsuperscript{171} Objections on grounds that it may be appropriate to enact laws which would contravene a just terms requirement appear unprincipled,\textsuperscript{172} while concern that a guarantee of just terms could have unintended application, as for example with respect to matters of oversight,\textsuperscript{173} is hardly compelling given the extent to which the State has disregarded property rights.

(c) Entrenchment by extension of Commonwealth constitutional provision

Constitutional provision for the acquisition of property on just terms\textsuperscript{174} has been interpreted to provide ‘the individual…with a protection against governmental interferences with…proprietary rights without just recompense.’\textsuperscript{175} However, s 51(xxxi) does not secure just terms with respect to a Commonwealth acquisition; rather, it merely invalidates a law providing for acquisition which does not afford just terms.\textsuperscript{176} Although s 51(xxxi) is limited to an acquisition for a Commonwealth purpose, it does not apply to

\begin{footnotesize}
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\item[168] The WA Planning Commission has regarded state constitutional reform as unnecessary, while the Water Corporation has simply affirmed that the LAA is satisfactory, with any problems relating merely to enabling legislation for specific government agencies overriding the LAA: see Standing Committee on Public Administration and Finance, Report of the Standing Committee on Public Administration and Finance in relation to The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia, Report 7 (May 2004) [5.82], [5.84].
\item[169] Government of Western Australia, Response, above n 51, 16–17.
\item[170] Theosphanous v Commonwealth of Australia (2006) 225 CLR 101, 124 (Gummow, Kirby, Hayne, Heydon and Crennan JJ) that the concept of just terms does not apply to laws ‘in connection with which just terms is an inconsistent or incongruous notion.’ The High Court expressly refers to the ‘Australian colonies’ (126). This reasoning may also extend to state powers regarding taxation, penalty, forfeiture and confiscation.
\item[171] See e.g. The Tasmanian Dams case, (1983) 158 CLR 1, 145 (Mason J); see also ICM Agriculture v Commonwealth (2009) 240 CLR 140; c.f. contra Smith v ANL Ltd (2000) 204 CLR 493, [166] (Callinan J).
\item[173] The State Government provides the example of proposals to vest property in the Kambalda sewage works to the Water Corporation, which had been inadvertently not reserved on sale of the land by WMC. Here, there was no physical disruption to landowners: see Western Australia, Parliamentary Debates, Legislative Assembly, 9 November 2004, 7707c (Kambalda Water and Wastewater Facilities (Transfer to Water Corporation) Bill 2004 (WA), Second Reading).
\item[174] S 51(xxxi) Constitution.
\item[175] Bank of NSW v Cth (1948) 76 CLR 1, 349 (Dixon J); Minister of State for the Army v Dalziel (1944) 68 CLR 261, 284 (Rich J).
\item[176] Commonwealth v Tasmania (1983) 158 CLR 1, 289 (Deane J).
\end{itemize}
\end{footnotesize}
an acquisition effected pursuant to a State constitution. Constitutional amendment to remove this limitation and extend the Commonwealth constitutional provision in similar or amended form to the States has been proposed, on the basis that there is no compelling argument why the State Governments should not be subject to the same constitutional requirements as the Commonwealth. Before these proposals can be considered, however, two concepts fundamental to an understanding of how s 51(xxxi) has been applied to interests in land must be examined, these being the term ‘property’ and the related term ‘acquisition’. With respect to ‘just terms’, the reader is referred to chapter 2. Following a consideration of proposals for constitutional reform, the challenges of securing constitutional amendment are considered.

(i) **The broad concept of ‘property’**

Section 51(xxxi) applies to ‘property’. The concept of ‘property’ has consistently been broadly interpreted according to ‘general principles of jurisprudence’. The bundle of rights theory has been applied in considering whether the Commonwealth has acquired property in WA. Property is not limited to an estate or interest in land. Therefore, the acquisition of a benefit rather than a full proprietary interest will be sufficient. Property will include ‘every species of valuable right and interest’.


179 See Constitutional Commission, above n 178, [9.782]; see also [9.775] on suggestions that a requirement to provide just terms also be extended to local government and semi-government or statutory bodies.

180 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 285 (Starke J). See also *Bank of NSW v Cth* (1948) 76 CLR 1, 349 (Dixon J).

181 *Commonwealth v Western Australia* (1999) 196 CLR 392, 389 (Callinan J).


183 See *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 where a lessee’s loss of a right to mine was held to constitute an acquisition of property by the Commonwealth. On ‘acquisition of property, in particular that the interest or benefit acquired must be proprietary in character, see *JT International SA v Commonwealth* (2012) 250 CLR 1, 33-34 (French CJ), 52-59, 61 (Gummow J).

184 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 290 (Starke J). Note, however, a statutory right may not be included: see e.g. *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 51–52 (McHugh J); however, note *Attorney General for Northern Territory v Chaffey* (2007) 231 CLR 651, 664 (Gleeson CJ, Gummow, Hayne and Crennan JJ) that ‘further analysis is imperative’ in order to determine whether statutory proprietary rights fall within s 51 (xxxi).
interpretation applied to ‘property’ is attractive, given the focus of State statutory compensation provisions on the taking of an estate in land.186

(ii) The uncertain limitation of ‘acquisition’

Property must be ‘acquired’ to attract just terms. This requires regard to substance over form.187 An ‘acquisition’ is not limited to conventional conveyancing,188 but it will not apply to a negotiated acquisition.189 What will be sufficient to constitute an ‘acquisition’ has been the subject of varied comment by the High Court; the acquisition of a proprietary interest of some kind has been required,190 other times a ‘sufficient derivation of an identifiable and measurable advantage’191 and which involves a ‘sterilisation’ rather than mere ‘impairment’ of property rights192 has sufficed. With land, the matter appears most contentious when statutory rights enjoyed over land are affected.193 Section 51(33xi) requires an acquisition and does not extend to a taking, deprivation or destruction of property.194 Moreover, a wide group of statutes which merely resolve or adjust property rights as ‘an incident of the regulation of their relationship’195 may fall outside of s 51(33xi). Most Commonwealth regulatory legislation has not attracted a requirement of just terms,196 but the possibility for regulation to be reinterpreted as an acquisition is evident, particularly if the distinction

186 See e.g. the definition of ‘interest’ in s 151(1) LAA and s 202 LAA.
188 Mutual Pools & Staff Pty Ltd v Commonwealth (1994) 179 CLR 155, 185 (Deane and Gaudron JJ).
189 J Clarke, P Keyzer and J Stellios, Hank’s Australian Constitutional Law, Materials and Commentary (LexisNexis, 9th ed, 2013) [10.2.3].
190 See e.g. Commonwealth v Tasmania (1983) 158 CLR 1, 145 (Mason J), and discussed in A Macintosh and J Cunliffe, ‘The significance of ICM and the evolution of s 51(33xi)’ (2012) 29 EPLJ 297, 304.
191 See Newcrest Mining (WA) Ltd v Cth (1997) 190 CLR 513, 634 (Gummow J) and discussed in Macintosh and Cunliffe, ibid, 306; see also ICM Agriculture v Commonwealth (2009) 240 CLR 140, 201 (Hayne, Kiefel and Bell JJ).
192 Newcrest Mining (WA) Ltd v Cth (1997) 190 CLR 513, 635; see also Brennan CJ (530) and discussed in Macintosh and Cunliffe, above n 190, 307.
193 Compare e.g. ICM Agriculture v Cth (2009) 240 CLR 140 (bore licences) and Cth v WMC Resources Ltd (1998) 194 CLR 1 (exploration permit), with Newcrest Mining (WA) Ltd v Cth (1997) 190 CLR 513 (mining lease).
194 ICM Agriculture v Commonwealth (2009) 240 CLR 140, 179 (French CJ, Gummow and Crennan JJ); see also Heydon J (dissenting) (215) excluding termination, destruction or interference with property; see also Commonwealth v Tasmania (1983) 158 CLR 1, 145 (Mason J).
195 ICM Agriculture v Commonwealth (2009) 240 CLR 140, 227 (Heydon J); see also Mutual Pools & Staff Pty Ltd v Cth (1994) 179 CLR 155, 171 (Mason CJ).
196 Re Director of Public Prosecutions; Ex parte Lawler (1994) 179 CLR 270, 283 (Deane J); see also AJ Van der Walt, Constitutional Property Clauses: A Comparative Analysis (Klewra Law International, 1999) 47. Van der Walt considers as the foundation of this assumption that the Commonwealth’s regulatory power is not generally subject to a guarantee of compensation.
between ‘take’ and ‘acquire’ is narrowed. It may yet be that environmental restrictions upon the use and development of land are found to attract just terms where property rights are sterilised and there is corresponding enhancement of radical title, but this remains to be resolved.

(iii) Commonwealth constitutional amendment to guarantee just terms in States

Unlike the States, the Commonwealth probably lacks power to establish restrictive legislative procedures, except through amendment of Australia’s Constitution. Accordingly, attention is confined to constitutional amendment. Proposals for amending Australia’s Constitution may seek to recognize by constitutional provision a guarantee of property rights, which if secured would offer the greatest protection for property rights. Of the proposals for constitutional amendment which include the protection of property rights, most sought to do so by the application of s 51(xxxi) or similar provision to the States. Commonwealth delegates to the Australian Constitutional Convention in 1975 suggested that the ‘just terms’ requirement of s 51(xxxi) extend to ‘any acquisition of property by a State in the State,’ but it was later resolved that the extension of just terms be confined to the Territories. In order to protect against the arbitrary deprivation of property so as to guarantee the economic right of property ownership, it was proposed by an advisory committee in 1987 that a new section 108A be added to the Constitution which provided ‘The power of each State to make laws for the peace, order and good government of the State with respect to the acquisition of

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198 Macintosh and Cunliffe, above n 190, 315. The authors rely particularly upon Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513, 634–635 (Gummow J).


201 Winterton, ‘An Australian Rights Council’, above n 60, 792.

202 C.f. contra, however, the Human Rights Bill 1973, which was based upon the International Covenant on Civil and Political Rights. The Bill lapsed in 1974: see Williams, above n 59, 9.


property shall be exercised so as to provide just terms for the acquisition of property from any person. It was further recommended that s 80 of the Constitution be substituted with a new provision which provided for procedural protection, being that ‘The Commonwealth or a State shall not…(ii) deprive any person of…property except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.’

It was recommended by the Constitutional Commission in 1988 that Australia’s Constitution be amended such that ‘a law of a State may not provide for the acquisition of property from any person except on just terms’. A proposal was then put to take a proposed new s 115A to the electorate in the 1988 referendum, seeking approval with respect to ‘fair terms for persons whose property is acquired by any government’. However, the procedural protection set out above was not considered appropriate and was not put to the electorate. A guarantee of property rights by Commonwealth constitutional amendment has the capacity to render invalid inconsistent State legislation. Its benefits may be identified from what has been said of s 51(xxxi):

…s 51(xxxi) has the effect of barring “Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”. Acquiring property without compensation imposes high costs on a small social group, sometimes at the behest of other groups having influence with the legislature: the need to pay compensation protects the position of the former and diffuses the relative power of the latter.

However, a number of qualifications must be made. Firstly, the inconsistency of State legislation permitting the acquisition of property without just terms cannot be automatically assumed. The High Court has noted the ‘...ease with which the Commonwealth can avoid contravening s. 51(xxxi) when acquiring a property right’. A State might operate with similar impunity. The risk that Commonwealth legislation

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207 See e.g. Constitutional Commission, above n 178, [9.747].
208 Cl 3 Constitution Alteration (Rights And Freedoms) Bill 1988 (Cth).
209 Constitutional Commission, above n 178, [9.785].
210 S 109 Constitution (Cth).
permitting the compulsory acquisition of property (on unjust terms) is characterised as made under an alternative head of power and, therefore, outside of the application of s 51(xxxi) is not present under the State constitution, where legislative power is not enumerated. However, compensation may still be incongruous in the context of the relevant legislation, or the relevant law may be construed as merely incidental to a law legitimately providing for the adjustment of property rights. The plenary nature of State legislative power carries a further risk if the application of just terms to the States is considered within a Commonwealth context. Unlike with enumerated Commonwealth powers, the adoption of a just terms requirement without qualifications as to public purpose provides no guarantee that the land will not be resumed for non-public purposes. The 1988 referendum made no reference to any public purpose qualification to the proposed s 115A. This is probably because there is no public purpose requirement concerning s 51(xxxi).

More significantly, the constitutional proposals remain wedded to the requirement of an ‘acquisition,’ which, as discussed earlier, may exclude the application of just terms to a mere limiting of property rights. The Constitution Alteration (Just Terms Bill) 2010 (Cth) did propose that both acquisitions of property and restrictions on the exercise of property rights could be undertaken only after the provision of compensation on just terms. However, the Bill lapsed upon the dissolution of Parliament. In summary, restrictive interpretations applied to s 51(xxxi) may also apply to any new State constitutional provision guaranteeing just terms.

214 S 2(1) Constitution Act 1889 (WA); note also s 2 Australia Act 1986 (Cth).
216 See e.g. ICM Agriculture v Cth (2009) 240 CLR 140, 227 (Heydon J).
217 See [7.3.4] of chapter 7 for a consideration of private to private land acquisition through the application of state powers of land resumption. Chapter 7 establishes the importance of ‘public purpose’ limitations to state land resumption laws.
218 On this bill, see Commonwealth, Parliamentary Debates, House of Representatives, 21 June 2010, 5995 (Constitution Alteration (Just Terms) Bill 2010, First Reading) (Mr Katter MP); see also D Spooner “‘Property’ and acquisition on just terms’ Law and Bills Digest Section (Parliament of Australia, 2010).
219 ‘A law of a State may not provide for the acquisition of property from, or any restrictions on the exercise of property rights enjoyed by, any person except on just terms’: Constitution Alteration (Just Terms) Bill 2010, cl 3, Schedule 1, cl 2. Note also clause 1 which provided for the substitution of s 51(xxxi) with a new provision which extended the application of just terms to ‘any restrictions on the exercise of property rights.’
220 19 July 2010.
(iv) Difficulties regarding constitutional amendment

Australia’s Constitution cannot be amended without an amending bill approved by absolute majority by both houses of the Federal Parliament (or one house in the event of a deadlock), supported by a majority of all electors, and a majority of all electors in a majority of the States. The initiation of reform is, therefore, vested in the Federal Government of the day. Even with bipartisan support, securing Commonwealth constitutional amendment is most difficult. Of 44 proposals for constitutional change, 36 were not carried at a referendum. This includes the 1988 proposal that just terms apply to the States, which was not carried nationally or in any State, and which received the lowest support of any of the referendum proposals. Arguably, the 1988 referendum may not suggest that the electorate does not support the extension of just terms to the States, particularly given the grouping of the just terms proposal alongside proposals for the guarantee of trial by jury and religious freedom, and the generally poorly prepared electorate leading up to the referendum. Common opinion at the time was that amendment would give nothing to the States, while carrying the risk of increased Commonwealth power at the States’ expense. More recently, constitutional amendment in the form of an entrenched bill of rights has been perceived as a threat to parliamentary sovereignty.

221 An absolute majority is a majority of all members entitled to vote, therefore requiring a minimum of 76 votes out of the 150 members in the House of Representatives, and a minimum of 38 votes out of the 76 members of the Senate.
222 S 128 Constitution (Cth). Note it has been suggested the amending power of s 15 Australia Act 1986 (Cth) may provide the means to amend s 128, but this argument is only academic at this point: see Ratnapala and Crowe, above n 130, [16.2.4].
223 Constitutional Commission, above n 178, [13.16].
225 Ibid, 1452. In Western Australia, 27.68% voted in favour of just terms, 70.67% voted against, and 1.65% voted informally.
227 See J McMillan, ‘Constitutional Reform in Australia’ in One people, One destiny (Paper on Parliament, No 13, Department of the Senate, November 1991) McMillan argues that referendum results do not necessarily indicate that Australians are inherently opposed to constitutional change.
229 See e.g. National Human Rights Consultation Committee, Consultation Report, above n 62, 383.
8.2.3 Partially entrenched reform

Partially entrenched reform seeks a balance between restricting fundamental rights and parliamentary sovereignty through legislation which has constitutional status but which does not create absolute rights, and which does not limit Parliament’s plenary power. An example is the Canadian Charter of Rights and Freedoms, which guarantees recognized rights and freedoms but ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ Parliament remains free to enact inconsistent legislation. However, the Canadian Charter does not include any right to property, despite property rights having been earlier recognized under the former Canadian Bill of Rights. The reasons for this may be the unwillingness of provincial governments to affect their legislative authority (it is possible the WA Parliament might also share this concern) and the fear that its inclusion would encourage judicial activism. Some Canadian provinces believed that inclusion would adversely affect zoning legislation and foreign land ownership regulations. There was also an erroneous assumption from supporters of the inclusion of property that property rights would be protected anyway through section 7 of the Charter on the right to life, liberty and security. Despite the omission of property rights, and the

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230 R Sackville, ‘A Bill of Rights: Form and Substance’ (2000) 19 Australian Bar Review 101, 106 fn 24. Justice Sackville points out with the exception of Quebec, s 33 of the Charter had only been used once to enact legislation expressly inconsistent with the Charter.


232 S 1, Charter of Rights and Freedoms.

233 See s 33, Charter of Rights and Freedoms; Sackville, above n 230, 106.

234 Compare s 7 of the Charter of Rights and Freedoms, Constitution Act 1982 enacted by the Canada Act 1982, with s 1(a) Canadian Bill of Rights, RSC 1970, App III, discussed in McBean, above n 92, 548. S 7 of the Charter provides:

Everyone has the right to life, liberty of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.

S (1)(a) of the former Bill of Rights provided:

It is hereby recognized there have existed and shall continue to exist without discrimination the following human rights and fundamental freedoms, namely (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof, except by due process of law.

235 Augustine, above n 94, 67–68.

236 McBean, above n 92, 550, referring in particular at footnote 7 to the objections of Prince Edward Island. Foreign investment would not be a concern for WA, since it is a Commonwealth matter: see Foreign Acquisitions and Takeovers Act 1975 (Cth).

recognition by Canadian courts of the cost of recognizing a right to private property.\textsuperscript{238} There have since been resolutions from various provincial legislatures that property rights be added.\textsuperscript{239} Ultimately, it is thought that partially entrenched models such as the Charter offer little more than unentrenched reform such as the dialogue model, since Parliament remains free to enact inconsistent legislation. While the Canadian experience suggests this may be of minimal risk,\textsuperscript{240} the State’s frequent preparedness to diminish property rights in WA without compensation suggests otherwise.

8.3. Conclusion

An examination of the State’s treatment of property rights concluded that property rights considered as a whole has been one of increasing disregard, most evident from the third period of study. The influence of sectional interests, a lack of any principled approach to property rights, and the very qualified protection afforded by the common law, leave land tenure most vulnerable to State erosion. Moreover, the State’s approach to compensation is revealed to be fundamentally flawed, wedded to the taking of an interest in land, without regard to diminished property rights that may sterilise land use without securing any guarantee of just terms.

Entrenched law reform in the form of a constitutional guarantee of just terms with respect to any State taking of property rights is the most attractive reform to address State disregard for property rights. However, bipartisan support for either State or federal constitutional reform is required, as well as needing to be carried at a referendum. Past State and Commonwealth referenda show this to be a huge challenge. State constitutional reform is further plagued by uncertainty as to whether restrictive manner and form provisions to protect just terms would be characterised as a law with respect to ‘Parliament’s powers and procedures’. Both State and Commonwealth constitutional provision may also be limited by s 51(xxxi) jurisprudence, which has been largely ineffective in providing relief from most Commonwealth regulation affecting property. Even with State or federal constitutional amendment, many laws affecting property may not attract just terms. Extending just terms beyond the


\textsuperscript{239} McBean, above n 92, 550–551, referring in particular to the Legislative Assemblies of British Columbia, New Brunswick, and Ontario.

requirement of an ‘acquisition’ is a particular challenge at State or federal level, as support for this notion has so far been limited to private members’ bills.

Unentrenched provision for just terms avoids many of the difficulties attaching to entrenched reform. No threat to State parliamentary sovereignty is presented, and legislation can be secured by ordinary legislative process. However, while unentrenched law reform may aid legislative determination and government decision-making concerning property rights, the absence of the creation of any enforceable rights for affected property owners when considered alongside the State’s treatment of property rights means that the State’s treatment of property rights is likely to remain unprincipled. The same can also be speculated with respect to partially entrenched law reform.

State regard for property rights may be improved by amending the LAA, which might also be improved by regard to Commonwealth resumption processes as a model for reform, as proposed currently by the Government. However, amending the LAA is unlikely to bring fundamental change to a compensation system wedded to the taking of an interest in land. Only in the Taking of Property on Just Terms Bill 2014 (WA) and the Constitution Alteration (Just Terms) Bill 2010 (Cth) has a capacity to address the concerns raised by this thesis been put to Parliament. Until such reforms find broader electoral support, which might be initiated at first instance through a Parliamentary Committee inviting public comment on the various reform options presented here, property rights will continue to be vulnerable to State disregard, leaving landowners at the risk of their property rights being diminished without compensation, while carrying the obligations that the legislature or the common law attach to that ownership.
REFERENCES

Books


Barker, Anthony J, and Maxine Laurie, *Excellent Connections: A History of Bunbury, Western Australia, 1836-1900* (City of Bunbury, 1992)


Bartlett, Richard H, Alex Gardner and B Humphries (eds), *Water Resources Law and Management in Western Australia* (The University of Western Australia, 1995)

Bartlett, Richard H, Alex Gardner and Sharon Mascher, *Water Law in Western Australia: Comparative Studies and Options for Reform* (University of Western Australia, 1997)


Battye, James Sykes, (ed), *The Cyclopedia of Western Australia (Illustrated) in Two Volumes* (Hussey & Gillingham Ltd, Vol. II, 1913)

Battye, James Sykes, *Western Australia: A History from its Discovery to the Inauguration of the Commonwealth* (Clarendon Press, 1924)


Bell, Justine, *Climate Change & Coastal Development Law in Australia* (The Federation Press, 2014)

Bignell, Merle, *The Fruit of the Country: A History of the Shire of Gnowangerup Western Australia* (University of Western Australia Press, 1977)


Blainey, Geoffrey, *The Tyranny of Distance* (Macmillan, Melbourne, 1968)


Brown, Douglas, *Land Acquisition: An examination of the principles of law governing the compulsory acquisition or resumption of land in Australia and New Zealand* (Butterworths, 1972)


Campbell, Tom, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights* (Ashgate, 2006)

Campbell, Tom, Jeffrey Goldsworthy and Adrienne Stone (eds), *Australian Federal Constitutional Law Commentary and Material* (Thomson Reuters, 2nd ed, 2007)

Carruthers, Penny, Sharon Mascher and Natalie Skead, *Property and Sustainability* (LBC, 2011)


City of Albany, *‘Public Open Space Contribution Policy (3 to 5 lots)’* (City of Albany, 2008)


Clement, Jean-Pierre, Michael Bennett, Ambelin Kwaymullina and A Gardner, *The Law of Landcare in Western Australia* (Environmental Defender’s Office, 2nd ed, 2001)

Colebatch, H, (ed), *A Story of a Hundred Years, Western Australia 1829-1929* (Government Printer, Perth, 1929)

Colvin, Eric, and John McKechnie, *Criminal Law in Queensland and Western Australia* (LexisNexis, 2008)


Crowley, Francis Keble, *Forrest 1847-1918, Volume 1, 1847-1891 Apprenticeship to Premiership* (University of Queensland Press, 1971)


Davies, Margaret, *Property: Meanings, histories, theories* (Routledge Cavendish, 2007)


Department of Lands, Western Australia, *Crown Land Administration & Registration Practice Manual* (July 2013)

Department of the Premier and Cabinet, *Private Property Rights Charter for Western Australia*, (Premier’s Circular 2014/04, 27 November 2014)

Department of Lands, *Registration Practice Manual* (Government of WA, July 2013)

Department of Regional Development and Lands, *Land Acquisition* (2) (Government of Western Australia, State Land Services brochure)


Ellickson, Robert C, Carol M Rose and Bruce A Ackerman (eds) *Perspectives on Property Law* (Little, Brown & Company (Canada) Ltd, 2nd ed, 1995)


Encyclopedia of the Social Sciences (Macmillan, New York, Vol. 9, 1933)


Hasluck, Alexandra, *Thomas Peel of the Swan River* (Oxford University Press, 1965)


Hepburn, Samantha, *Principles of Property Law* (Cavendish Publishing Pty Ltd, 2nd ed, 2001)


Hunt, Lyall, (ed), *Yilgran: Good Country for Hardy People: The Landscape and People of the Yilgarn Shire, Western Australia* (Yilgarn Shire, Sothern Cross, 1988)


Kerr, Donald, *The principles of the Australian Land Titles (Torrens) System: being a treatise on the real property acts of New South Wales, Queensland, South Australia and Tasmania; the Transfer of land acts of Victoria and Western Australia; and the Land transfer act of New Zealand* (LBC, 1927)

Kimberly, Warren B, *History of Western Australia: A Narrative Of Her Past Together With Biographies Of Her Leading Men* (FW Niven, 1897)

Landgate, *Strata Titles Practice Manual for Western Australia* (Government of Western Australia, edition 8.0, June 2013)

Landgate, *Strata Titles Act Reform Consultation Summary* (Government of Western Australia, 2015)


Lester, Lord, and Dawn Oliver (eds), *Constitutional Law and Human Rights* (Butterworths, 1997)

Linklater, A, *Owning the Earth. The Transforming History of Land Ownership* (Bloomsbury, 2013)

Lipman, Zada, and Gerry Bates, *Pollution Law in Australia* (Lexisnexis, 2002)

MacDevitt, Edward O, *Handbook of Western Australia, Being a short account of its history, resources, scope for settlement and land law* (Sands & McDougall Ltd Printers, Perth, 1897)


McLeod, Denis (ed) *Planning and Development WA* (Presidian Legal Publications)

McLeod, Glen, (ed), *Planning Law in Australia* (LBC, 1997)


Millett, Mrs Edward, *An Australian Parsonage or, the Settler and the Savage in Western Australia* (Edward Stanford, London, 1872)

Mining and Petroleum Legislation Service (Lawbook Co, 2010)


Parliament of Western Australia, *Legislative Council Standing Orders* (reprint February 2015)


Ratnapala, Suri, and Gabriel A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2011)


Richards, Ronald, *The Murray District of Western Australia* (Shire of Murray, 1978)


Spencer, David, and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Law Book Co, 2nd ed, 2009)

Stannage, Charles Thomas, (ed), *A New History of Western Australia* (University of Western Australia Press, 1981)


Tay, Alice Ehr-Soon, *Human Rights for Australia, A survey of literature and developments, and a select and annotated bibliography of recent literature in Australia and abroad* (AGPS, Canberra, Human Rights Commission Monograph Series No 1, 1986)


Torrens, Robert R, *A handy book on the Real Property Act of South Australia: containing a succinct account of that measure, compiled from authentic documents with full information and examples for the guidance of persons dealing; and also an index to the Act* (Advertiser and Chronicle Offices, 1862)


von Nessen, Paul, *The Use of Comparative Law in Australia* (LBC, 2006)

Western Australian Land Information Authority, *Land Titles Registration Practice Manual*, edition 9.0 (March 2010)


Western Australian Planning Commission, Metropolitan Region Scheme Amendment 1082/33 Bush Forever and related lands—Report on Submissions, *Frequently Asked Questions* (WAPC, 2010)

Western Australian Planning Commission, *Development Control Policy 2.3–Public Open Space in Residential Areas* (WAPC, May 2002)


*Year Book Australia, 1908* (Australian Bureau of Statistics)

*Year Book Australia, 1925* (Australian Bureau of Statistics)


**Articles**

Allen, T, ‘The Acquisition of Property on Just terms’ (2000) 22 *Sydney L Rev* 351


Baalman, J ‘Conflict of Federal and State Property Laws’(1942) 15 *ALJ* 345

Baalman, J, ‘The Estate in Fee Simple’ (1960) 34 *ALJ* 3


Barnett, K, ‘Western Australia v Ward; One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis’ [2000] *MULR* 17


Bennett, M, ‘Regulation of Land Clearing: Reforming the Law in Western Australia’ (18 January 2002) Environmental Defender’s Office WA (Inc)


Brown, D, ‘New legislation governing Commonwealth Resumption’ (February 1990) *The Valuer*, 14


Butt, P, ‘Some Aspects of Injurious Affection: a Case for Reform’ (1978) 52 *ALJ* 72

Butt, P, ‘Moot Point Injurious affection: proposals for reform’ (1980) 54 *ALJ* 681

Butt, P, ‘Indefeasibility and Overriding statutes: an attempted solution’ (2009) 83 *ALJ* 655


Clark, SD, ‘Redcliff and beyond: The Commonwealth Government and Environmental Planning’ (1975) 5 *Adel Law Rev* 165


Clarke, D, ‘The icon of liberty: the status and role of Magna Carta in Australian and New Zealand law’ (2000)

Cohen, MR, ‘Property and Sovereignty’ (1927) 13 Cornell LQ 8


Collier, R, ‘Unto John Doe His Heirs and Assigns Forever-An Appraisal by a Real Estate Consultant’ (July 1967), APIJ, 73


Corones, S, ‘Competition law and market regulation: When should private property rights give way to the public interest?’ (2014) 42 ABLR 124


Cox, V, ‘Environmental Protection Policies in Western Australia-Establishing Statutory Environmental Objectives for Land Managers’ (1994) 11 EPLJ 307

Crommelin, M, ‘Resources Law and Public Policy’ (1983) 15 UWA L Rev 1

Davidson, A and A Wells, ‘The Land, the Law and the State: Colonial Australia 1788-1890’ (1984) 2 Law in Context 89


Davis, PN, ‘Nationalization of Water Use Rights by the Australian States’ (1975-1976) 9 U Qld LJ 1


Diss, K, ‘Farmers call for right of veto on tracking’ ABC News, 27 May 2013


Downing, EF, QC, ‘Some Aspects of Compensation’ (1966) 7(3) UWA Law Review 352


Edgeworth, B, ‘Adverse Possession, Prescription and Their Reform in Australian law’ (2007) 15 (1) APLJ 1

Edgeworth, B, ‘Planning law v property law: Overriding statutes and the Torrens system after Hillpalm v Heaven’s Door and Kogarah v Golden Paradise’ (2008) 25 EPLJ 82


Fogg, A, ‘Significant Aspects of Land use Planning Law and Organization in Western Australia’ (1972) 10(4) UWA Law Rev 309


French, RS, ‘Manner and Form in Western Australia: an historical note’ (1993) 23 (2) UWA Law Rev 335


Galloway, K, ‘Landowners’ vs Miners’ Property Interests: The unsustainability of property as dominion’ (2012) 37(2) AltLJ 77


Gerus, M, ‘Transferable Water Entitlements in Western Australia: Water Markets and Property Rights for the Mining Industry’ 2001 AMPLA Yearbook, 474


Goldsworthy, JD, ‘Manner and Form in the Australian States’ (1988) 16 Melb UL Rev 403

Gray, K, ‘Can Environmental Regulation Constitute a Taking of Property at Common Law?’ (2007) 24 EPLJ 161


Grinlinton, D, ‘Property Rights and the Environment’ (1996) 4 APLJ 1


Hagman, DG ‘Betterment For Worsenment: The English 1909 Act and Its Progeny’ (1977) 10 U Qld LJ 29

Hardy, M, ‘Answers by a Higher Authority: a review of recent decisions of the High Court, Supreme Court and the SAT in the field of environmental planning law’ in Developments of Use in the Law of Land Use and Development (Law Society of WA, 6 September 2006)


Hiller, NR, ‘Town Planning Appeals’ (1971) 10(2) UWA Law Rev 144


Hockley, JJ, and RTM Whipple, ‘Valuation Evidence: The Comparable Sales Approach when Sales are not Comparable’ (2005) 11 APLJ 90


Hunt, M, ‘Mining Act 1978 of Western Australia’ (1979) 2 AMPLJ 1


Hunt, M, ‘Mining Act Amendments in Western Australia’ (1986) 5 AMPLA Bulletin 14


Hunter, T, ‘Uniform Torrens Title Legislation: is there a will and a way?’ (2010) 18 APLJ 201

Ireland, C, ‘Should private rights trump the public interest in renewal of the urban environment’ (2009) 15 LGLG 86

Irving, DK, ‘Should the Law Recognize the Acquisition of Title by Adverse Possession?’ (1994) 2 APLJ 112


Johnston, P, ‘Forward to the Past: Recent Encounters with the Bill of Rights 1689’ (August 2009) Brief


Kates, S, ‘Private Property Without Rights’ (Summer 2001-02) 17(4), Policy, 32


‘Land Resumption’, The Daily News (Perth), Saturday, 28 August 1897, 6

‘Land Resumption’, The Inquirer & Commercial News (Perth), Friday, 8 October 1897, 9

‘Land Resumption Arbitration Court’, The Daily News (Perth), 20 December 1897,3

‘Land Resumption For Railway Purposes’, Bunbury Herald (Bunbury), Tuesday, 28 July 1896, 3


Lewis, PJ, and SB Schroeder, ‘Indefeasibility of title and overriding statutes: Determining which prevails in the event of an inconsistency’ (2008) 16 APLJ 147


McDonald, L, SD Bradshaw and A Gardner, ‘Legal Protection of Fauna Habitat in Western Australia’ (2003) 20 EPLJ 95


McGrath, P, ‘Apartment owners could be forced to sell properties under proposed strata law shakeup’ ABC News, 12 September 2015


McLeod, G, and A McLeod, ‘The importance and nature of the presumption in favour of private property’ (2009) 15 LGLJ 97


‘Miners should respect the rights of farmers-farmer’s veto-WA Premier’ The Australian, 15 August 2011

‘Miners should respect the rights of farmers-farmers’ veto-WA Premier’ (15 August 2011) <http://coalseamgasnews.org/qld/miners>

Moran, A, ‘How a railway in remote WA is slowing down your internet’ (March 2009) 61(1) IPA Review 40


O’Connor, P, ‘Public Rights and Overriding Statutes as exceptions to Indefeasibility of Title’ (1994) 19 MULR 649


Page, J, ‘Reconceptualising property: Towards a sustainable paradigm’ (2011) 1 Prop L Rev 86


Parry, D, ‘Revolution in the West: The transformation of planning appeals in Western Australia’ (2008) 14 LGLJ 119

Parry, D, ‘Ecologically sustainable development in Western Australian planning cases’ (2009) 26 EPLJ 375

Parry, DR, ‘The use of facilitative dispute resolution in the State Administrative Tribunal of Western Australia–Central rather than alternative dispute resolution in planning cases’ (2010) 27 EPLJ 113


Potter, H, ‘Caveat Emptor or Conveyancing under the Planning Acts’ (1948) The Conveyancer 36

Pullen, JM, ‘The Betterment Levy’ (April 1968) APIJ 43


‘Resumption of Crown Grants’, Bunbury Herald (Bunbury), Saturday, 30 September 1899, 3


Spooner, D, ‘“Property” and acquisition on just terms’ Law and Bills Digest Section (Parliament of Australia, 2010)


Strutt, J and J Kagi, ‘Liberal MP says party’s property rights policy ‘theft’’ ABC News Online, 28 November 2014


Taylor, G, ‘Last but not least: The Torrens System’s path to Western Australia’ (2009) 17 APLJ 279

Taylor, G, ‘International law and mortgagee sales-Continued’ (2011) 20 APLJ 58


The West Australian (Perth), 14 November 1912, 7
The West Australian (Perth), 15 November 1912, 9
The West Australian (Perth), 27 March 1917, 24


‘Urges WA Land for Solider Settlement Plan’, The Canberra Times (Canberra), 1 September 1945


Vishneski, J, ‘What the Court Decided in Dred Scott v Sandford’ The American Journal of Legal History 32 (4)


Warnick, LA, ‘State Agreements-The Legal Effect of Statutory Endorsement’ (1982) 4 AMPLJ 1

Warnick, L, ‘State Agreements’ (1988) 62 ALJ 878


Western Australian Planning Commission, ‘Planning and Development Act 2005 and related legislation’ Planning Bulletin No 76 (January 2006)


Willey, S, and V McMullen, ‘Planning Appeals in Western Australia: where to now?’ (2004) 21 EPLJ 124
Williams, G, ‘A Charter of Rights for Western Australia’, (October 2007) Institute of Advanced Studies, Issue 6, University of Western Australia


Wilson, T, ‘Indefeasibility of Title under Torrens: Leros Pty Ltd v Terara Pty Ltd’ (1992) 22 UWALR 411


Wise, SJC, ‘Comment on Western Australia Mining Act’ (1978) 1 AMPLJ 397

Yuen d C Poustie, M, ‘Moore protection: a 2007 good news story’ (December 2007) EDO News (Newsletter of the Environmental Defender’s Office WA (Inc)), 13(4) 2


Papers


Castan Centre for Human Rights Law, ‘Submission to the National Human Rights Consultation on a Bill of Rights for Australia’ (Monash University, Melbourne, 2009)

Christensen, S, ‘Adapting the Torrens System for Sustainability-Can it be Better Utilised?’ (Paper presented at the 10th Australasian Property Teachers Conference, Property and Sustainability, University of Western Australia, 24–26 September 2010)

Crabb, R, ‘Compensation Agreements for Exploration and Mining on Private Land in Western Australia’ (Paper presented at AMPLA Annual State Conference (WA Branch), 1995)

Department of Water, ‘Looking after all our water needs’ (Proposed Water Resources Management Act background discussion paper, 2009)

Edith Cowan University, Literature review Academic Tip Sheet, 2008


French, R, ‘Property, Planning and Human Rights’ (Speech delivered at the Planning Institute of Australia National Congress, 25 March 2013)


Key, L, ‘Recaptured by the Grievous Yoke: A Practical Session Commentary’ (Law Summer School, The Law Society of WA, 1992)

Law Reform Commission of Western Australia, ‘Compensation for Injurious Affection’ (Project No 98, Discussion Paper, October 2007)

Law Society of Western Australia, ‘Snatch & Grab-Land Acquisition & Compensation’ (Seminar, 27 November 2002)


McLeod, D, ‘The Fairness of Environmental Control-A New Decade, Economic opportunity vs environmental awareness’ (Law Society of Western Australia Winter Conference, Broome, 1990)

McLeod, D, ‘Compensation Issues-Snatch and Grab-Land Acquisition and Compensation’ (Law Society of Western Australia Seminar, 27 November 2002)

J McMillan, ‘Constitutional Reform in Australia’ in One people, One destiny (Paper on Parliament, No 13, Department of the Senate, November 1991)

McMurdo, B, ‘Acting for Private Landowners–Snatch and Grab-Land Acquisition and Compensation’ (Law Society of Western Australia Seminar, 27 November 2002)

Mather, D, J Saavedra and R Kilian Polanco, ‘Mineral Property-Rights, Royalties and Rents’ (Sustainable Mining Conference, Kalgoorlie WA, 17–19 August 2010).

Musikanth, A, ‘Acting on behalf of a commercial client with an interest in the asset’ (Seizure of Client’s Assets by the State, Law Society of Western Australia, 18 March 2009)

Parry, D, ‘Coastal Law Ecologically Sustainable Development in WA Planning Cases’ (2009 NELA (WA) State Conference, State Administrative Tribunal, WA)

Samec, E, and E Andre, ‘Planning and Development Law in Western Australia’ (Lecture Materials, Edith Cowan University, 2009)

Staley, L, ‘Property Rights in Western Australia: Time for a changed direction’ (Occasional Paper, Institute of Public Affairs, July 2006)

Staley, L, ‘Reshaping the Landscape-The quiet erosion of property rights in Western Australia’ (Discussion Paper, Institute of Public Affairs & Mannkal Economic Education Foundation Project Western Australia, December 2007)


Williams, G, ‘Who best protects rights: legislatures or the courts? Implications for the bill of rights debate: The case for a role for the judiciary’ (Legislatures and the Protection of Human Rights International Conference, University of Melbourne, 20–22 July 2006)

**Theses**

**Reports**
‘Clearing of native vegetation on Kent Location 1766, Needilup Road North and Townsend Road, Shire of Kent: Mr W O’Halloran’, *Report and Recommendations of the Environmental Protection Authority* (Bulletin 1000, Environmental Protection Authority, Perth, Western Australia, December 2000)
Committee of Inquiry appointed to inquire into, and report on, the operation of the Mining Act of the State and to report on whether any and what amendments should be made to the Mining Act 1904, *Report*, (1971) and (1973) (Parliament of WA)

Department of Planning, *Review of the Planning and Development Act 2005* (September 2013)

Department of Planning, *Planning makes it happen: phase two-Review of the Planning and Development Act 2005* (September 2013)


Government of Western Australia, *Response Of The Western Australian Government to The Western Australian Legislative Council Standing Committee on Public Administration and Finance in Relation to the Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia* (2004)


*International Property Rights Index* <http://www.internationalpropertyrightsindex.org/>


Law Reform Commission of Western Australia, *Compensation for New Street Alignments, Report* (Project No 39, March 1977)


Law Reform Commission of Western Australia, *Compensation for Injurious Affection Final Report* (Project No 98, 2008)


Metropolitan Region Scheme Amendment 1236/57, ‘Bush Forever Area Definition Clause Insertion and Removal of Clause 16 (1a)(a) for New Similar Clause Insertion 16 (1a)(a) and (ba) in the Metropolitan Region Scheme Text,’ Amendment Report (October 2012)


Working Party on Compensation for Land Acquired or Adversely Affected by Works or Use by Public Authorities, *First Report* (Department of Services and Property, Canberra, 1975)
Cases
Acton v Blundell (1823) 12 M & W 324
Adamson v Hayes (1973) 130 CLR 276
A-G (NSW) v Trethowan (1931) 44 CLR 394
A-G (NT) v Chaffey (2007) 231 CLR 651
Attorney-General of Quebec v Irwin Toy Ltd (1989) 1 SCR 927
A-G (WA) v Marquet (2003) 217 CLR 545
Albany v Commonwealth (1976) 60 LGRA 287
Allen v Minister for Planning SCWA 2/11/77 No 11557/76
Anglo Estates Pty Ltd v Shire of Beverley (1996) 17 SR (WA) 151
Anthony Lagoon Station Pty Ltd v Aboriginal Land Commissioner (1987) 15 FCR 565
Arcus Shopfitters Pty Ltd v WA Planning Commission [2002] WASC 174
Ash v Harvey Drainage Board (1911) 13 WAR 133
Attorney-General v Barrington [1963] WAR 78
Attorney General (NSW) v Brown (1847) 1 Legge 312
Auld v Dampier to Bunbury Natural Gas Pipeline Access Minister (2005) 139 LGERA 52
Australian and Apple Pear Marketing Board v Tonking (1942) 66 CLR 77
Australian Communist Party v Commonwealth (1951) 83 CLR 1
Australian Conservation Foundation Inc v Cth (1980) 146 CLR 493
Bailey v Uniting Church in Australia Property Trust (Qld) [1984] 1 Qd R 42
Ballard v Tomlinson (1885) 29 CH D 115
Bamess v State of Western Australia and Conservator of Forests [1968] WAR 75
Bank of NSW v Cth (1948) 76 CLR 1
Barry v Heider (1914) 19 CLR 197
Battista Della-Vedova v State Planning Commission, Supreme Court of Western Australia Compensation Court 2 of 1986 No 3 of 1986 BC8800828
Begley and Begley and Begley Investments Pty Ltd v Shire of Wanneroo [1970] WAR 91
Belfast Corporation v O.D. Cars Ltd [1960] AC 490
Bell and Anor v Beattie and Ors [2003] QSC 333
Bennett & Co (a Firm) v DPP (WA) (2005) 31 WAR 212
BHP Billiton Iron Ore Pty Ltd v National Competition Council [2008] HCA 45
Bingham v Cumberland CC (1954) 20 LGR (NSW) 1
Blue Metal Industries Ltd v Dilley (1969) 117 CLR 651
Bond Corporation Pty Ltd v WA Planning Commission [2000] WASCA 257
Bone v Mothershaw [2002] QCA 120
Bowen v Stratigraphic Explorations P/L & Kay [1971] WAR 119
Bowman v Queen (1995) 14 WAR 466
BP Australia Pty Ltd v Contaminated Sites Committee (2012) 191 LGERA 113
Bradford v Pickles [1895] AC 587
Breskvar v Wall (1971) 126 CLR 376
Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management (1997) 18 WAR 102
Brophy v Western Australia (1990) 171 CLR 1
British Railways Board v Pickin [1974] AC 765
Builders Labourers Federation of NSW v Minister for Industrial Relations (1986) 7 NSWLR 372
Bulli Coal Mining Co v Osborne [1899] AC 35
Burton v Arcus (2006) 32 WAR 366
Bury v Pope (1585) Cr Eliz 118
Cadia Holdings Pty Ltd v State of New South Wales (2010) 269 ALR 204
Cadia Holdings Pty Ltd v State of New South Wales (2010) 242 CLR 195
Caltex Petroleum Pty Ltd v Commissioner of Main Roads [2004] WASC 239
Case of Mines (1568) 1 Plowd 310
Case of Stannaries (1606) 12 Co Rep
CC Auto Port Pty Ltd v Minister for Works and City of Fremantle [1965] WAR 148
CC Auto Port Pty Ltd v Minister for Works and Another (1965) 113 CLR 365
Central Control Board (Liquor Traffic) v Cannon Brewery Company Limited [1919] AC 744
Cerini v Minister for Transport [2001] WASC 309
Chapman v Meagher (1903) 6 WALR 5
Chief Executive Officer, Department of Environment and Conservation v Szulc [2010] WASC 195
City of Canning v Avon Capital Estates (Australia) [2008] WASAT 46
City of Perth v Metropolitan Region Planning Authority [1969] WAR 136
Cleary v Ayles (1903) 6 WALR 38
Clement v Jones (1909) 8 CLR 133
Clifford v Shire of Busselton (2007) 52 SR (WA) 58
Clissold v Perry (1904) 1 CLR 363
Coastal Waters Alliance of WA Inc v Environmental Protection Authority (1996) 90 LGERA 136
Coffey LPM Pty Ltd v Contaminated Sites Committee (No 2) [2013] WASC 98
Collie Local Board of Health v Bradbury (1907) 9 WAR 227
"Commissioner of Railways v Davis (No 2) (1915) 18 WAR 51
Commissioner of Railways v Davis Brothers (1916) 21 CLR 142
Commonwealth v Arklay (1952) 87 CLR 159
Commonwealth v Milledge (1953) 90 CLR 157
Commonwealth v New South Wales (1923) 33 CLR 1
Commonwealth v Tasmania (1983) 158 CLR 1 (Tasmanian Dams case)
Cth v Western Australia (1999) 160 ALR 638
Commonwealth v Western Australia (1999) 196 CLR 392
Commonwealth v WMC Resources Ltd (1998) 194 CLR 1
Commonwealth Aluminium Corporation Ltd v A-G [1976] Qd R 231
Conlan v Registrar of Titles (2001) 24 WAR 299
Cooper v Stuart (1889) 14 App Cas 286
Costa v Shire of Swan (1983) WAR 22
Coty (England) Pty Ltd v Sydney City Council (1957) 2 LGERA 117
Crown v White (1910) 12 WAR 31
Dagety v Murphy (1900) 2 WALR 97
Dale v Town of Cockburn WASC 7/3/1978 BC 7800019
Daniel v Western Australia [2003] FCA 666
Danielle v Shire of Swan (1998) 20 WAR 164
Davis v Commonwealth (1988) 166 CLR 79
Dermer v The Minister for Water Supply, Sewerage & Drainage (1941) 43 WALR 85
Dietrich v The Queen (1992) 177 CLR 292
Dilatte v MacTiernan [2002] WASCA (is this full citation?)
Dixon v Throssell [1899] 1 WAR 193
DPP (WA) v Bridge & Ors [2005] WASC 36
DPP (WA) v Hafner (2004) 28 WAR 486
DPP v Kinred (1995) 15 WAR 133
DPP (WA) v Le (2006) 44 SR (WA) 77
DPP v Morris (No 2) (2010) 74 SR (WA) 121
Duffy v Minister for Planning [2003] WASCA 294
Duncan v NSW [2015] HCA 13
Dunn v Collins (1867) 1 SASR 126
Durham Holdings Pty Ltd v NSW (2001) 205 CLR 399
Ellen Street Estates Ld v Minister of Health [1934] 1 KB 590
Environmental Protection Authority; Ex parte Chapple (1995) 89 LGERA 310
Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue (2011) 43 WAR 186
Estates Development Company Proprietary Limited v The State of Western Australia (1952) 87 CLR 126
Executors of the Will of Frances The Dowager Lady Vestey (Deceased) and Ors v Minister for Lands [1972] WAR 98
Ex parte Van Achterberg [1984] 1 Qd R 160
Falc Pty Ltd v State Planning Commission (1991) 5 WAR 522
R & R Fazzolari Pty Ltd v Parramatta City Council (2009) 237 CLR 603
FCT v St Helens Farm (ACT) Pty Ltd (1981) 146 CLR 336
Fejo v Northern Territory of Australia (1998) 195 CLR 96
Fermanis Investments Pty Ltd v City of Perth [1978] WAR 32
Folkestone v Metropolitan Region Planning Authority [1968] WAR 164
France Fenwick & Co v R [1927] 1 KB 458
Gambotto v WCP Ltd (1995) 182 CLR 432
Gangemi v Watson (1994) 11 WAR 505
Garbin v Wild [1965] WAR 72
Gartner v Kidman (1962) 108 CLR 12
Gatward v Alley (1940) 40 R (NSW) 174
Gaunt v West Guildford Road Board (1921) 23 WAR 36
Geneff v Shire of Perth [1967] WAR 124
George Hudson Ltd v Australian Timber Workers’ Union (1923) 32 CLR 413
Georgiadis v Australian and Overseas Telecommunications Corporation (1994) 119 ALR 629
Georgiou Corporation Holdings Pty Ltd v City of Stirling (2009) 61 SR (WA) 314
Gerhardt v Brown (1985) 159 CLR 70
Ghaidan v Godin-Mendoza [2004] 2 AC 557
Gilbert v Western Australia (1961) 107 CLR 494
Glass v Ralph [1966] WAR 91
Glentham Pty Ltd v City of Perth (1986) 65 ALR 449
Glew & Anor v Shire of Greenough [2006] WASCA 260
Grace Brothers Pty Ltd v Commonwealth (1946) 72 CLR 269
Greenwood v Minister for Water Supply, Sewerage and Drainage (1922) 24 WAR 99
Griffiths v Minister for Lands, Planning and the Environment (2008) 235 CLR 232
Grugnale v Town of Albany [1970] WAR 54
Gumana v Northern Territory (2007) 153 FCR 349
Haddy v Howard (1920) 22 WALR 48
Hall v Busst (1960) 104 CLR 206
Halliday v Nevill (1984) 155 CLR 1
Hammersmith and City Railway Co v Brand (1869) LR 4 HL 171
Hammond (as Executor of the Estate of Hammond) v Minister for Works [2001] WASC 284
Hammond (as Executor of the Estate of Hammond (Dec’d)) v Minister for Works BC9203205
Hayes v The Minister for Works (1913) 15 WAR 106
Hearle v State Planning Commission (1989) 5 SR (WA) 124
Hemmes Hermitage Pty Ltd v Abdurahman (1991) 22 NSWLR 343
Hepples v Commissioner of Taxation (1990) 22 FCR 1
Hill & Anor v Western Australian Planning Commission (2000) 107 LGERA 229
Hillpalm Pty Ltd v Heaven’s Door Pty Ltd (2004) 220 CLR 472
H Jones and Company Pty Ltd v Wardens, Councillors and Electors of the Municipality of Kingbrough (1950) 82 CLR 282
Hotel Esplanade Pty Ltd and Plowman v City of Perth [1964] WAR 51
House v The Minister for Works (1914) 17 WAR 31
Hunt v Swan Road Board (1937) 40 WALR 107
IAC (Finance) Pty Ltd v Courtenay (1963) 110 CLR 550
ICM Agriculture v Commonwealth (2009) 240 CLR 140
Iemma v Town of Vincent (2009) 61 SR (WA) 95
IF v ACT Commissioner for Housing [2005] ACTSC 80
Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW) (1993) 82 CLR 26
JA Pye (Oxford) Ltd v United Kingdom [2005] ECHR 921
JA Pye (Oxford) Ltd v United Kingdom [2007] ECHR 700
Jacob v Save Beeliar Wetlands (Inc) [2016] WASCA 126
John Wilford Walsh, J Walsh Nominees Pty Ltd, John Walsh & Co Pty Ltd (1989) 43 A Crim R 266
Jones v Commonwealth (No 2) (1964) 112 CLR 206
Jones v Shire of Perth [1971] WAR 56
Kennedy v Minister for Works [1970] WAR 102
Kettering Pty Ltd v Noosa Shire Council (2004) 134 LGERA 99
King v Jones (1972) 128 CLR 221
Kingsley’s Chicken v Queensland Investment Corporation [2006] ACTCA 9
Kingstripe Pty Ltd v Commissioner of Main Roads (2010) 71 SR (WA) 289
Khoa v West (1985) 159 CLR 550
Knezovic v Shire of Swan-Guildford [1967] WAR 129
Knezovic v Shire of Swan-Guildford (1968) 118 CLR 468
Konowalow and Felber v Minister for Works [1961] WAR 40
Langer Nominees Pty Ltd & Anor v WA Planning Commission [2007] WASAT 137
Langridge v Queen (1996) 17 WAR 346
Leigh v Jacks (1879) 5 Ex D 264
Leighton Contractors Ltd v Western Australian Government Railways Commission (1966) 115 CLR 575
Lenz Nominees Pty Ltd v Cmr of Main Roads [2012] WASC 6
Leppington Pastoral Co Pty Ltd v Dept of Administrative Services (1990) 23 FCR 148
Leppington Pastoral Co Pty Ltd v Commonwealth of Australia (1997) 76 FCR 318
Lesmurdie Heights Pty Ltd v City of Fremantle [1965] WAR 132
Lloyd v Robinson (1962) 107 CLR 142
Lombardo v Development Underwriting (WA) Pty Ltd [1971] WAR 188
Low v Swan Cove Holdings Pty Ltd v City of Subiaco (2003) 127 LGERA 36
Ludwig v Coshott (1994) 83 LGERA 22
McCaughhey v Commissioner of Stamp Duties (1945) 46 NSWR 192
McCawley v R [1920] AC 691
McCawley v King (1920) 28 CLR 106
MacDougall v Western Australian Planning Commission (2003) 129 LGERA 243
McGellin & Fuchsbichler v Button [1973] WAR 22
McGinty v WA (1996) 186 CLR 140
McKay v Commissioner of Main Roads (No 7) [2011] WASC 223
McKenna v Perecich [1973] WAR 57
McKenzie v Higgs (1918) 21 WAR 10
McKenzie v Minister for Lands (2011) 45 WAR 1
Mabo v Qld (1988) 166 CLR 186
Mabo v Queensland (No 2) (1992) 175 CLR 1
Macaura v Northern Ass’ce Co Ltd [1925] AC 619
Mac’s Pty Ltd v Parramatta City Council (2009) 237 CLR 603
Mandurah Enterprises Pty Ltd v WA Planning Commission (2010) 240 CLR 409
Mansfield v DPP (WA) (2005) 31 WAR 97
Mansfield v DPP (2006) 226 CLR 486
Mansfield v DPP (WA) [2007] WASCA 39
Margaret River Resources Pty Ltd v Calder [2008] WASCA 238
Marshall v Cullen (1914) 16 WAR 92
Marshall v Cullen [No 2] (1914) WAR 92
Maxwell v Murphy (1957) 96 CLR 261
Mayor, Aldermen and Burgesses of the Borough of Bradford v Pickles [1895] AC 587
Mercer v WA Planning Commission [2008] WASC 124
Midland Railway Co of WA Ltd v State of WA and West Australian Petroleum Pty Limited (1954) 57 WALR 1
Midland Railway Co of WA v State of Western Australia [1957] 1 WALR 1
Miller v Commissioner for Railways (1900) 2 WAR 38
Millirrpum v Nabalco Pty Ltd (1971) 17 FLR 141
Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273
Minister of State for the Army v Dalziel (1944) 68 CLR 261
Minister of Water Supply, Sewage and Drainage v Stone, Minister of Water Supply, Sewage and Drainage v Green (1915) 17 WAR 117
Mogo Local Aboriginal Land Council v Eurobodalla Shire Council (2001) 54 NSWLR 15
Momcilic v R (2011) 245 CLR 1
Moore and Scroope v State of Western Australia (1907) 5 CLR 326
Moore River Company Pty Ltd and WA Planning Commission (2008) 57 SR (WA) 255
Moreton Club v Commonwealth (1948) 77 CLR 253
Moullin v Town of Cottesloe (2002) 29 SR (WA) 44
Mount Lawley Pty Ltd v Western Australian Planning Commission (2004) 29 WAR 273
Mount Lawley Pty Ltd and WA Planning Commission [2007] WASAT 59
Mount Lawley Pty Ltd v Western Australian Planning Commission [No 3] [2008] WASCA 158
Mutual Pools and Staff Pty Ltd v Commonwealth (1994) 179 CLR 155
National Trustees Executors & Agency Co of Australasia Ltd v Federal Commissioner of Taxation (1954) 91 CLR 540
Nationwide News Pty Ltd v Wills (1992) 177 CLR 1
Naval Military and Air Force Club of South Australia v Commissioner of Taxation (1994) 51 FCR 154
Nelungaloo Pty Ltd v Commonwealth (1948) 75 CLR 495
New South Wales v The Commonwealth (1915) 20 CLR 54
New South Wales v The Commonwealth (1975) 135 CLR 337
Newcrest Mining (WA) Ltd v Commonwealth of Australia (1997) 190 CLR 513
Nicholas & Ors v State of Western Australia & Ors [1972] WAR 168
Nicron Resources Ltd v Catto (1992) 8 ACSR 219
NLS Pty Ltd v Hughes (1966) 120 CLR 583
Nokes v Doncaster Collieries [1940] AC 1014
Nolan v MBF Investments Pty Ltd [2009] VSC 244
North Ganalanja Aboriginal Corporation v Queensland (1995) 61 FCR 1
Nullagine Investments Pty Ltd v Western Australian Club Inc (1993) 177 CLR 635
Obeid v Victorian Urban Development Authority [2012] VSC 251
O’Keefe v Shire of Perth [1964] WAR 89
Olympic Holdings Pty Ltd v Windslow Corporation Pty Ltd (In liq) [2008] WASCA
Owners of Habitat 74 Strata Plan 222 v WA Planning Commission (2004) 137 LGERA 7
Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation (1970) 121 CLR 154
Palos Verdes Estates Pty Ltd v Carbon (1992) 6 WAR 223
Parsons v Queen (1999) 195 CLR 619
Pastoral Finance Association Ltd v Minister [1914] AC 1083
Pearse v City of South Perth [1968] WAR 130
Pearson v Western Australia [2012] WASC 102
Pekel v Humich (1999) 21 WAR 24
Pennsylvania Coal Co v Mahon (1922) 260 US 393
Permanent Trustee Australia Ltd v City of Wanneroo (1994) 11 SR (WA) 1
Permanent Trustees Australia Ltd v WA Planning Commission (1998) 20 SR (WA) 12
Permanent Trustee Co Ltd v WA (2002) 26 WAR 1
Perry v Clishold [1907] AC 73
PJ Magennis Pty Ltd v Commonwealth (1949) 80 CLR 382
Plant v Rollston (1894) QLJ 98
Plenty v Dillon (1991) 171 CLR 635
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
Property Nominees Pty Ltd v Valuer-General (2002) 31 SR (WA) 42
Public Trustee v Registrar-General of Land [1927] NZLR 839 at 841
Pye v Renshaw (1951) 84 CLR 58
Queen v Eastern Counties Railway (1841) 2 QB 347
Queen v Tarzia (1991) 5 WAR 222
Queen in Right of New Brunswick v Fisherman’s Wharf Ltd (1982) 135 DLR 3d 307
Radonich v Radonich [1999] WASC 165
Rapoff v Velios [1975] WAR 27
Re Blencoe (1900) 2 WALR 83

Re Director of Public Prosecutions; Ex parte Lawler (1994) 179 CLR 270

Re Hon Alannah MacTiernan MLA, Minister for Planning & Infrastructure; Ex parte McKay [2007] WASCA 35

Re Hon GD Kierath, Minister for Heritage; Ex parte City of Fremantle (2000) 22 WAR 342

Re Lehrer and the Real Property Act (1960) 61 SR (NSW) 365

Re Town Planning Appeal Tribunal; Ex parte Environmental Protection Authority [2003] 27 WAR 374

Re Warden French; ex parte Serpentine-Jarrahdale Ratepayers Association (1994) 11 WAR 315

Re Warden Heaney (1994) 11 WAR 320

R v Compensation Court of Western Australia; Ex Parte State Planning Commission (1990) 2 WAR 243

R v Compensation Court (WA); Ex parte State Planning Commission Re Della Vedova (1990) 2 WAR 242

R v McDonald (1906) 8 WAR 149

R v Public Vehicles Licensing Appeal Tribunal (Tas); ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207

R v Shire of Perth; Ex Dewar & Burridge [1968] WAR 149

R v Smith and Harley; Ex parte Crugnale [1970] WAR 43


Rederiaktiebolaget Amphitrite v King [1921] 3 KB 500

Reid Murray Developments (WA) Pty Ltd v Hall [1967] WAR 3

Reynolds Australia Gold Operations Ltd v Benedetto Panizza (unreported Southern Cross Warden’s Court, 3 March 1995)

River Bank Pty Ltd v Commonwealth (1974) 4 ALR 651

Roach v Electoral Commissioner (2007) 233 CLR 162

Robert Reed v Municipality of Claremont (1958) 60 WALR 26

Robinson v Lloyd [1962] WAR 168 at 174


St John Ambulance Assn of Western Australia Inc v East Perth Redevelopment Authority (2001) 114 LGERA 112


Sankey v Whitlam (1978) 21 ALR 505

Seleeba and Lefroy v Minister for Works [1974] WAR 161

Silbert v DPP (WA) (2004) 217 CLR 181
Shell Company of Australia Limited v Langtree and Money, Kalgoorlie Warden’s Court, 3 February 1989

Shire of Peppermint Grove v Owston Nominees No 2 Pty Ltd [2008] WASC 8

Shire of Perth v O’Keefe (1964) 110 CLR 529

Smith v ANL Ltd (2000) 204 CLR 493

Smith v State of Western Australia [2009] WASC 189

Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management (2012) 42 WAR 287

South-Eastern Drainage Board (SA) v Savings Bank of South Australia (1939) 62 CLR 603

South Staffordshire Water Co v Sharman [1896] 2 QB 44

Spencer v Commonwealth (1907) 5 CLR 418

State of Western Australia v Brown [2014] HCA 8

State of WA v Midland Railway Co of WA Ltd [1956] 3 ALL ER 272

Steere v Minister for Lands [1904] WAR 178

Steere v Minister for Lands (1904) 6 WAL R 178

Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211

Stone James & Co v Investment Holdings Pty Ltd [1987] WAR 363


Stowe v Commissioner of State Revenue (2001) 26 SR (WA) 251

Strickland v The Minister for Works (1913) 15 WALR 115

Telstra Corporation Ltd v Hornsby Shire Council (2006) 146 LGERA 10

Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2] (2002) 25 WAR 484

Theosphanous v Commonwealth of Australia (2006) 225 CLR 101

Thomas v Sherwood (1884) 9 App Cas 142

Travinto Nominees Pty Ltd v Vlattas (1970) 129 CLR 1

Treasure v Minister for Works [1967] TAR 32

Turner v Minister for Public Instruction (1956) 95 CLR 245

Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1

Uniting Church in Australia Property Trust (NSW) v Immer (No 145) Pty Ltd (1991) 24 NSWLR 510

Victoria Park Racing and Recreational Grounds Company Ltd v Taylor (1937) 58 CLR 479

Vincent v Ah Yeng (1906) 8 WALR 145

Vincent Nominees v Western Australian Planning Commission [2012] WASC 28

Wade v NSW Rutile Mining Co Pty Ltd (1969) 121 CLR 177

Waitakere City Council v Estate Homes Ltd [2007] 2 NZLR 149

Wake v Minister for Works SCWA 18/4/78 No 10910/76
Walden v Minister for Works (1915) 18 WALR 16
Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority (2007) 233 CLR 259
Walter v Selfe (1851) 4 De G & Sm 315
Wanneroo Shire Council v BP Australia Ltd [1965] WAR 179
Ward on behalf of the Miriuwung and Gajerrong People v Western Australia (1998) 159 ALR 483
Western Australia v Commonwealth (1995) 183 CLR 373
Western Australia v Ward (2000) 99 FCR 316
Western Australia v Wilsmore (1982) 148 CLR 79
WA Developments Pty Ltd and WA Planning Commission [2008] WASAT 260
WA Planning Commission v Furfaro (2007) 49 SR (WA) 165
Western Australian Planning Commission v Navarac Pty Ltd [2009] WASC 399
WA Planning Commission v Shim (2008) 58 SR (WA) 127
WA Planning Commission v Temwood Holdings Pty Ltd (2004) 221 CLR 30
Western Mining Corporation Ltd v Commonwealth of Australia (1994) 50 FCR 305
West Lakes Ltd v South Australia (1980) 25 SASR 389
Westminster Bank Ltd v Beverley Borough Council [1969] 1 QB 499
Whittlesea City Council v Abbatangelo [2009] VSCA 188
Whittle v Western Australia [2012] WASC 244
Wik Peoples v State of Queensland (1996) 187 CLR 309
William Garth Hammond as Executor of the Estate of Thomas Garfield Hammond (deceased) v Minister for Works and Ors BC9101107
Williams v Town of Claremont [1976] WAR 125
Wilson v Anderson (2002) 213 CLR 401
Wilson International Pty Ltd v International House Pty Ltd [1983] WAR 243
Wiluna Road Board v Jackson (1932) 34 WALR 130
Wily v St George Partnership Banking Ltd (1999) 84 FCR 423
Woolley v Attorney-General of Victoria (1877) LR 2 App Cas 163
Worsley Alumina Pty Ltd v Shire of Williams (1986) 64 LGRA 302
Worsley Timber Company Ltd v The Minister for Works (1933) 36 WALR 52
Worsley Timber Pty Ltd v Western Australia [1974] WAR 115
Wurridjal v Commonwealth (2009) 237 CLR 309
Yanner v Eaton (1999) 201 CLR 351
Zhu v Treasurer of the State of New South Wales (2004) 218 CLR 530

**Bills**
Constitution Alteration (Just Terms) Bill 2010 (Cth)
Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth)
Human Rights Bill 1973 (Cth)
Human Rights Bill 2007 (WA)
Human Rights and Anti-Discrimination Bill 2012 (Cth)
Land Acquisition Legislation Amendment (Compensation) Bill 2014 (WA)
Land Act Amendment Bill 1912 (WA)
Land Administration Amendment Bill 2016 (WA)
Mining Amendment Bill 1985 (WA)
Petroleum and Geothermal Energy Legislation Amendment Bill 2013 (WA)
Planning and Development Bill 2004 (WA)
Private Property Protection Bill 2003 (Qld)
Private Property Protection Bill 2004 (Qld)
Taking of Property on Just Terms Bill 2014 (WA)
Yallingup Foreshore Bill 2005 (WA), and Explanatory Memorandum

**Legislation**

*Gulielmi IV Regis No IV* (1832)

*Gulielmi IV Regis No VII* (1832)

2nd *Gulielmi IV No VII* (1832)

2nd *Gulielmi IV No V* (1832)

*Gulielmi IV No IV* (1834) (Trespass (Fencing))

4 & 5 *Vic No 17* (1841) (Roads Management)

4 & 5 *Vic No 20* (1841) (Boundary of Country Lands Ordinance)

6 *Vic No 2* (1842) (Stock Straying Amendment)

8 *Vic No 9* (1844) (Town Allotments Boundaries Act)

10 *Vic No 19* (1847) (Central Board of Works)

14 *Vic No 8* (1850) (Cattle and Stock Kept in Towns)

14 *Vic No 26* (1851) (Building Regulation)

17 *Vic No 6* (1854) (Land Resumption)

17 *Vic No 17* (1854) (Goldfields Regulations)

19 *Vic No 5* (1856) (Crown Lands (Trespass))

21 *Vic No 8* (1857) (Transfer of Real Property)

27 *Vic No 13* (1863) (Land Vesting, City of Perth)

28 *Vic No 9* (1864) (Land Resumption, Perth)

34 *Vic No 24* (1871) (Wild Horses and Cattle)

42 *Vic No 5* (1878) (Infectious or Contagious Diseases)
Acts Amendment and Repeal (Native Title) Act 1995 (WA)
Acts Amendment (Constitution) Act 1978 (WA)
Acts Amendment (Heritage Council) Act 1990 (WA)
Acts Amendment (Mining) Act 1981 (WA)
Administration Act 1903 (WA)
Agriculture and Related Resources Protection Act 1976 (WA)
Agricultural Bank Act 1894 (WA)
Agricultural Lands Act 1898 (WA)
Agricultural Lands Purchase Act 1896 (WA)
Agricultural Lands Purchase Act 1909 (WA)
Agricultural Lands Purchase Amendment Act 1898 (WA)
Agricultural Lands Purchase Act Amendment Act 1917 (WA)
Agricultural Lands Purchase Act Amendment Act 1918 (WA)
Alumina Refinery (Worsley) Agreement Act Amendment Act 1978 (WA)
Arbitration Act 1895 (WA)
Armadale Redevelopment Act 2001 (WA)
Australia Act 1986 (Cth)
Australia (Request and Consent) Act 1985 (Cth)
Australian Capital Territory Self-Government Act 1988 (Cth)
Australian Citizenship Regulations 2007 (Cth)
Australian Heritage Commission Act 1975 (Cth)
Australian Heritage Council Act 2003 (Cth)
Australian Land Sales Act 1842 (Imp)
Australian Waste Lands Act 1855 (Imp)
Canada Act 1982 (UK)
Canadian Charter of Rights and Freedoms
Carbon Rights Act 2003 (WA)
Charter of Human Rights and Responsibilities Act 2006 (Vic)
City of Perth Act 1925 (WA)
Civil Liability Act 2002 (WA)
Clean Air Act 1964 (WA)
Closer Settlement Act 1927 (WA)
Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)
Commonwealth of Australia Constitution Act 1900 (Imp)
Competition and Consumer Act 2010 (Cth)
Conservation and Land Management Act 1984 (WA)
Constitution Act 1889 (WA)
Constitution Acts Amendment Act 1899 (WA)
Contaminated Sites Act 2003 (WA)
Coolgardie Goldfields Water Supply Construction Act 1898 (WA)
Corporations Act 2001 (Cth)
Country Areas Water Supply Act 1947 (WA)
Country Towns Sewerage Act 1948 (WA)
Crimes (Confiscation of Profits) Act 1988 (WA)
Criminal Code Act Compilation Act 1913 (WA)
Crown Lands Act 1989 (NSW)
Crown Suits Act 1769 (Imp)
Dampier to Bunbury Pipeline Act 1997 (WA)
Declaration of Rights 1689 (UK)
Disability Discrimination Act 1992 (Cth)
Discharged Soldiers Settlement Act 1918 (WA)
East Perth Redevelopment Act 1991 (WA)
Environment (Financial Assistance) Act 1977 (Cth)
Environment Protection and Biodiversity Conservation Act 1999 (Cth)
Environment Protection (Impact of Proposals) Act 1974 (Cth)
Environmental Protection Act 1971 (WA)
Environmental Protection Act 1986 (WA)
Environmental Protection Amendment Act 2003 (WA)
Environmental Protection (Clearing of Native Vegetation) Regulations 2004 (WA)
Escheat Procedures Act 1940 (WA)
Family Court Act 1975 (WA)
Family Court Act 1997 (WA)
Fauna Protection Act 1950 (WA)
First Home Owner Grant Act 2000 (WA)
Foreign Acquisitions and Takeovers Act 1975 (Cth)
Game Act 1874 (WA)
Game Act 1892 (WA)
Game Act 1912 (WA)
Geothermal Energy Act 2007 (WA)
Goldfields Act 1895 (WA)
Goldfields Water Supply Act 1902 (WA)
Government Agreements Act 1979 (WA)
Government Railways Act 1904 (WA)
Group Settlement Act 1925 (WA)
Group Settlement Act Amendment Act 1925 (WA)
Group Settlers Advances Act 1925 (WA)
Health Act 1898 (WA)
Health Act 1911 (WA)
Heritage of Western Australia Act 1990 (WA)
Homesteads Act 1893 (WA)
Hope Valley-Wattelup Redevelopment Act 2000 (WA)
Human Rights Act 1998 (UK)
Human Rights Act 2004 (ACT)
Industrial Lands Development Authority Act 1966 (WA)
Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA)
Iron Ore (Wittenoom) Agreement Act 1972 (WA)
Irrigation Act 1886 (Vic)
Land Act 1898 (WA)
Land Act 1933 (WA)
Land Act Amendment Act (No 2) 1965 (WA)
Land Act Amendment Act (No 2) 1969 (WA)
Land Acquisition (Just Terms Compensation) Act 1991 (NSW)
Land Acquisition (Just Terms Compensation) Amendment Act 2009 (NSW)
Land Administration Act 1997 (WA)
Land Administration (South West Native Title Settlement) Act 2016 (WA)
Land Alienation Restriction Act 1944 (WA)
Land and Valuation Court Act 1921 (NSW)
Land Drainage Act 1900 (WA)
Land Quarantine Act 1878 (WA)
Land Quarantine Act 1884 (WA)
Land Regulations 1828 (WA)
Land Regulations 1887 (WA)
Land Tax Assessment Act 1976 (WA)
Lands Acquisition Act 1906 (Cth)
Lands Acquisition Act 1912 (Cth)
Lands Acquisition Act 1955 (Cth)
Lands Acquisition Act 1969 (SA)
Lands Acquisition Act 1978 (NT)
Lands Acquisition Act 1989 (Cth)
Lands Acquisition Act 1994 (ACT)
Lands Acquisition Amendment Act 1982 (NT)
Lands Resumption Act 1894 (WA)
Lands Resumption Act 1896 (WA)
Land Title Act 2000 (NT)
Land (Titles and Traditional Usage) Act 1993 (WA)
Legislative Standards Act 1992 (Qld)
Limitation Act 2005 (WA)
Local Government Act 1960 (WA)
Local Government Act 1995 (WA)
Main Roads Act 1930 (WA)
Married Women’s Property Act 1870 (Imp)
Married Women’s Property Act 1892 (WA)
Mental Health Act 1962 (WA)
Metropolitan Region Town Planning Scheme Act 1959 (WA)
Metropolitan Region Town Planning Scheme Act Amendment Act 1962 (WA)
Metropolitan Region Town Planning Scheme Act Amendment Act 1963 (WA)
Metropolitan Region Town Planning Scheme Act Amendment Act 1966 (WA)
Metropolitan Region Town Planning Scheme Act Amendment Act 1968 (WA)
Metropolitan Region Town Planning Scheme Amendment Act (No 2) 1965 (WA)
Metropolitan Region (Valuation Board) Regulations 1967 (WA)
Metropolitan Town Planning Commission Act 1927 (WA)
Metropolitan Water Supply Sewerage and Drainage Act 1909 (WA)
Midland Redevelopment Act 1999 (WA)
Mineral Lands Act 1892 (WA)
Mineral Resources Act 1989 (Qld)
Mineral Resources Development Act 1995 (Tas)
Mines Resources (Sustainable Development) Act 1990 (Vic)
Mining Act 1904 (WA)
Mining Act Amendment Act 1965 (WA)
Mining Act 1971 (SA)
Mining Act 1978 (WA)
Mining Act Amendment Act 1920 (WA)
Mining Act Amendment Act 1937 (WA)
Mining Act Amendment Act (No 2) 1932 (WA)
Mining Development Act 1902 (WA)
Mining on Private Property Act 1897 (WA)
Mining on Private Property Act 1898 (WA)
Mining on Private Property Act Amendment Act 1898 (WA)
Mining Regulations 1981 (WA)
Mining Rehabilitation Fund Act 2012 (WA)
Misuse of Drugs Act 1981 (WA)
Municipal Corporations Act 1906 (WA)
Municipality of Fremantle Act 1925 (WA)
National Parks Authority Act 1976 (WA)
National Trust of Australia (WA) Act 1964 (WA)
Native Flora Protection Act 1912 (WA)
Native Flora Protection Act 1935 (WA)
Native Flora Protection Act 1938 (WA)
New Zealand Bill of Rights Act 1990 (NZ)
Parliament of Queensland Act 2001 (Qld)
Parliamentary Commissioner Act 1971 (WA)
Petroleum Act 1936 (WA)
Petroleum Act 1967 (WA)
Petroleum Amendment Act 2007 (WA)
Petroleum and Geothermal Energy Resources Act 1967 (WA)
Petroleum and Geothermal Energy Resources Act 1987 (WA)
Petroleum Pipelines Act 1967 (WA)
Physical Environment Protection Act 1970 (WA)
Planning and Development Act 2005 (WA)
Planning Appeal Amendment Act 2002 (WA)
Prohibitive Behaviour Orders Act 2010 (WA)
Proceeds of Crime Act 1987 (Cth)
Property for Public Purposes Acquisition Act 1901 (Cth)

Property Law Act 1969 (WA)

Public Works Act 1902 (WA)

Public Works Act 1981 (NZ)

Public Works Amendment Act 1906 (WA)


Racial Discrimination Act 1975 (Cth)

Rail Freight System Act 2000 (WA)

Railways Act 1873 (WA)

Railways Act 1878 (WA)

Railways Amendment Act 1882 (WA)

Railways Amendment Act 1893 (WA)

Real Property Act 1886 (SA)

Registration of Deeds, Wills, Judgements and Conveyances Affecting Real Property Ordinance 1832 (WA)

Registration of Deeds Ordinance 1856 (WA) (now Registration of Deeds Act 1856 (WA))

Resource Management Act 1991 (NZ)

Retirement Villages Act 1992 (WA)

Rights in Water and Irrigation Act 1914 (WA)

Rights in Water and Irrigation Amendment Act 1914 (WA)


Rights in Water and Irrigation Regulations 2000 (WA)

Sale of Waste Lands Act 1842 (Imp)

Scab Act 1885 (WA)

Scab Act 1891 (WA)

Settled Land Act 1892 (WA)

Sex Discrimination Act 1984 (Cth)

Soil Conservation Act 1945 (WA)

Soil Conservation Act Amendment Act 1955 (WA)

Soil and Land Conservation Act 1945 (WA)

Soil and Land Conservation Regulations 1992 (WA)

State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004 (WA)

State Electricity Commission Act 1945 (WA)

State Grants (Nature Conservation) Act 1974 (Cth)
State Grants (Soil Conservation) Act 1974 (Cth)
State Housing Act 1946 (WA)
Strata Titles Act 1985 (WA)
Strata Titles Amendment Act 1995 (WA)
Subiaco Redevelopment Act 1994 (WA)
Subordinate Legislation Act 1994 (Vic)
Swan and Canning Rivers Management Act 2006 (WA)
Titles Validation Act 1995 (WA)
Titles Validation Amendment Act 1999 (WA)
Town Planning and Development Act 1928 (WA)
Town Planning and Development Act (Appeal) Regulations, 1971 (WA)
Transfer of Land Act 1873 (WA)
Transfer of Land Act 1893 (WA)
Transfer of Land Act 1958 (Vic)
Tree Plantation Agreements Act 2003 (WA)
Trustees Act 1962 (WA)
Unauthorised Occupation of Crown Lands Act (WA)
Valuation of Land Act 1971 (SA)
Vegetation Management Act 1999 (Qld)
War Service Land Settlement Agreement Act 1945 (Cth)
War Service Land Settlement Agreement Act 1945 (WA)
War Service Land Settlement Agreement Act 1951 (WA)
War Service Land Settlement Agreement (Land Act Application) Act, 1945 (WA)
War Service Land Settlement Scheme Act, 1954 (WA)
Water Agencies (Powers) Act 1984 (WA)
Water and Rivers Commission Act 1995 (WA)
Water Boards Act 1904 (WA)
Water Corporation Act 1995 (WA)
Water Services Co-ordination Act 1995 (WA)
Waterways Conservation Act, 1976 (WA)
Waterworks Act 1889 (WA)
Western Australian Constitution Act 1890 (Imp)
Western Australian Land Authority Act 1992 (WA)
Conventions and Declarations


Government Policies, Agreements, Documents etc.


*Memorandum of Understanding between the Commissioner for Soil and Land Conservation, Environmental Protection Authority, Department of Environmental Protection, Agriculture WA, Department of Conservation and Land Management and Water and Rivers Commission for the protection of remnant vegetation on private land in the agricultural region of Western Australia*, (Office of the Commissioner of Soil and Land Conservation, Perth, 1997)

Metropolitan Region Planning Authority, *Corridor Plan for Perth* (February 1971)

Metropolitan Region Scheme Amendment 1082/33, ‘Bush Forever and Related Lands: Draft Bushland Policy for the Perth Metropolitan Region Statement of Planning Policy 2.8’ (July 2004)
New South Wales Government Gazette (30 June 1843)
Western Australian Government Gazette (State Law Publisher, 18 June 1841)
Western Australian Government Gazette (State Law Publisher, 22 July 1842)
Western Australian Government Gazette (State Law Publisher, 2 March 1887)
Western Australian Government Gazette (State Law Publisher, 9 March 1906)
Western Australian Government Gazette (State Law Publisher, 19 October 1911)
Western Australian Government Gazette (State Law Publisher, 11 December 1981)

Film and television

The Castle (Directed by Rob Sitch, Working Dog Productions, 1997)

Web Resources not stated above


Web resources no longer accessible