THE CHANGING PARADIGM OF PROPERTY AND THE FRAMING OF REGULATION AS A 'TAKING'

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The past two decades have seen a concerted attempt by landowner groups to shift the paradigm of property rights from a 'discrete asset' to a 'bundle of rights', and to characterise many restrictions on use rights as a taking of property. Evidence from two recent Commonwealth inquiries into land clearing laws indicates that the reframing of property rights may be affecting the willingness of landowners to tolerate regulatory restrictions on their land use. The arguments advanced by the property rights groups draw on contested concepts from American jurisprudence and scholarship on the 'Takings Clause' in the Fifth Amendment to the US Constitution. The arguments are beginning to present themselves in cases arising under section 51(xxxi) of the Australian Constitution.

I INTRODUCTION

In Australia, as in the US and other countries, closer regulation of land use and more comprehensive planning controls have produced a strong backlash from landowners. Since the 1990s, opposition from diverse landowner groups has become better organised and has attracted intellectual support from conservative think tanks, academics, journalists and politicians.[1] This has led to heated demands by owners for compensation for regulatory measures, particularly relating to water use rights,[2] and management of vegetation on private land.[3]

The emergence of a powerful political coalition for protection of private property rights against regulation, known as the Property Rights Movement, has been analysed by academic commentators in the United States since the 1990s.[4] The movement, which is led and funded by mining, farming and property

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1 The landowner groups include Property Rights Australia, National Farmers Federation, State Farmers' Associations, State Pastoralists and Graziers Associations. See the submissions of landowner and rural interest groups to the Senate Financial and Public Administration Committee, Parliament of Australia, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (30 April 2010) ('*Senate Native Vegetation Laws Report*').

2 See *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, where the regulatory cancellation of bore water licences was held not to be an acquisition of property to which s 51(xxxi) of the *Australian Constitution* applied (Heydon J dissenting).

3 *Senate Native Vegetation Laws Report,* above n 1, ch 4 (discussed below).

4 See, eg, a collection of essays analysing the movement in the US: Phillip D Brick and R McGregor Cawley (eds), *A Wolf in the Garden: The Land Rights Movement and the New Environmental Debate* (Lanham Md, 1996).

development industries and conservative political interests,[5] presents as 'citizen resistance to burgeoning [environmental and natural resources regulation] based on claims of property rights'.[6] It funds test cases in the courts,[7] and has proved very effective in lobbying for legislative controls on land regulation, [8] particularly at state level.[9] The movement's arguments are highly developed, thanks to the intellectual patronage of neo-conservative think tanks[10] and prominent academic commentators such as Richard Epstein.[11]

The movement's message is libertarian, based on a Lockean view of property as a natural right,[12] with an admixture of utilitarianism, free market economics and public choice theory. Epstein draws expressly on Locke's theory of civil government to support his argument that the social contract from which civil government derives its power does not authorise it to take away any part of the property rights of citizens without compensation.[13] From Michelman comes the utilitarian proposition that uncompensated takings create 'demoralisation costs', which include the future production that is lost when property rights are less secure and incentives to invest are impaired.[14] Economics contributes the argument that, to the extent that the law allows use rights to be curtailed without compensation, it creates a 'fiscal illusion' that regulation is costless.[15] Government will tend to over-regulate in an inefficient manner, unless a legal requirement to provide compensation forces the government to internalise the costs of its regulation.[16] Public choice theory adds a challenge to the integrity of the regulatory process. It

5 Danaya Wright, ' 'The Anti–Boomer Effect: Property Rights, Regulatory Takings and a Welfare Model of Land Ownership' (1999) 5 *Australian Journal of Legal History* 63, 80–1, 83–4.

6 Charles Wise, 'Property Rights and Regulatory Takings' in R Durrant, D Fiorino and R O'Leary (eds), *Environmental Governance Reconsidered: Challenges, Choices and Opportunities* (MIT Press, 2004) 289, 289.

7 See, eg, Wright, above n 5, 65.

8 Ibid 66, 81–2. Wright concludes that 'this is a movement primarily funded by corporate development interests who use the plights of individuals to appeal to politicians while seeking to halt land-use controls that would restrict their development and exploitation rights': at 84.

9 Of the 23 US states which have enacted statutes, only a few of the statutes require compensation to be paid to owners for regulation which reduces the value of land, while the majority merely require government agencies to assess the impact of their actions on private property rights: Stephen Eagle, 'The Birth of the Property Rights Movement' (2001) 404 *Policy Analysis* 1, 1, 3.

10 Wright cites the Cato Institute, the Olin Foundation and the Competitive Enterprises Institute: Wright, above n 5, 64.

11 The best–known exposition is Richard A Epstein, *Takings, Private Property and the Power of Eminent Domain* (Harvard University Press, 1985), arguing that even regulation which effects a partial taking of property rights is compensable by the state.

12 Carol M Rose, 'Property and Expropriation: Themes and Variations in American Law' [2000] *Utah Law Review* 1, 15.

13 Epstein, above n 11, 14, citing John Locke, *Second Treatise of Government* (first published1690) section 138. Epstein argues that the takings clause is based on Locke's theory, but modified to allow taking upon provision of just compensation.

14 Frank Michelman, 'Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 *Harvard Law Review* 1165, 1214.

15 Nestor M Davidson, 'The Problem of Equality in Takings' (2008) 102 *Northwestern University Law Review* 1,13–14. The term 'fiscal illusion' is attributed by Davidson to Robert C Ellickson and Vicki L Been, *Land Use Controls: Cases and Materials* (3rd ed, Aspen Publishers, 2005) 149.

16 Davidson, above n 15, 13, citing Michael J Heller and James E Krier, 'Deterrence and Distribution in the Law of Takings' (1999) 112 *Harvard Law Review* 997, 999; Wise, above n 6, 311.

teaches that regulation of use rights is redistributive, implemented by bureaucratic government at the behest of dominant factions who use their political influence to win benefits for themselves at the expense of others.[17]

Similar arguments are now frequently heard in Australian public debate, and even in the High Court. The dissenting judgment of Heydon J in *ICM Agriculture Pty Ltd v Commonwealth* draws upon Lockean, utilitarian, economic and public choice arguments, with the addition of an argument from Hayek that payment of compensation for 'infringements of the private sphere' is necessary to uphold the rule of law.[18] The discourse of the property rights movement is also shaping public debates about whether compensation should be provided for regulatory controls on the use of property. For example, the Director of the Institute of Public Affairs, Mr John Roskam, said in a press release that 'State and Federal environmental regulations are undermining property rights across Australia', and that 'billions of dollars of property … has been appropriated' by at least a dozen state and federal environmental laws in New South Wales alone, including laws such as the *Native Vegetation Act 2003* (NSW) and the *Threatened Species Conservation Act 1995* (NSW).[19] Roskam asserted that '[i]t is a fundamental principle that property owners should be compensated when they are stopped from using their land as they choose'.[20]

The arguments advanced by property rights advocates such as Roskam have encountered in Australia little of the critical academic scrutiny seen in the US. There are several explanations for this difference. The first is that American legal scholars are primed to respond to propositions which draw upon contested conceptions originating in the jurisprudence relating to the 'takings clause' in the Fifth Amendment to the US Constitution. The clause prohibits federal and state authorities from taking private property for public use without just compensation.[21] References to the US takings discourse do not have the same resonance for Australian lawyers.[22]

A second factor is that Australians are accustomed to the idea that the provision of compensation is a matter for state legislatures to determine as part of the design for particular statutory schemes. Most of the environmental and planning regulation

17 See, eg, Saul Levmore, 'Just Compensation and Just Politics' (1990) 22 *Connecticut Law Review* 285, 305–14.

18 (2009) 240 CLR 140, 208–9 [177]–[179], citing Friedrick von Hayek, *Constitution of Liberty* (University of Chicago Press, 1960) 218.

19 Institute of Public Affairs, 'Hunger Strike Farmer Highlights Erosion of Private Property Rights in Australia' (Media Release, 5 January 2010) <http://www.ipa.org.au/publications/1779/hunger-strike-farmer-highlights-erosion-of-private-property-rights-in-australia>. The Institute describes itself on its website as 'a free market think tank'.

20 Ibid.

21 The Takings Clause is made applicable to the states through the Fourteenth Amendment's Equal Protection Clause: *Reagan v Farmers' Loan & Trust Co*, 154 US 362, 399 (1894); Donna R Christie, 'A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia, and Canada' (2006–07) 32 *Brooklyn Journal of International Law* 343, 359 n 123.

22 But see Karla Sperling, 'Going Down the Takings Path: Private Property Rights and Public Interest in Land Use Decision–Making' (1997) 14 *Environmental and Planning Law Journal* 427, expressing concern at the influence of US 'takings' concepts in Australian environmental debates.

affecting landowners is state law, and the states are under no constitutional duty to provide compensation.[23] State legislatures adopt a more contextualised approach in determining whether compensation should be provided under particular statutory schemes. As a consequence, Australians are less inclined by tradition to take the view that the provision of compensation for regulatory impacts should be determined by reference to broad constitutional principles and enforced through judicial review.

This article draws on American jurisprudence and scholarship on the US takings clause to analyse the arguments of property rights advocates, and to assess the extent to which they are accepted by the US Supreme Court, the High Court of Australia, and state legislatures. Part II analyses three concepts and techniques of reasoning that are commonly used to argue that regulation of the use of property constitutes a 'taking' or acquisition, and evaluates their degree of acceptance by the US Supreme Court. Turning to Australia, Part III examines the scope for these arguments to influence the interpretation of the 'just terms' provision in s 51(xxxi) of the Constitution. Part IV shows how current debates over compensation for planning changes and land clearing laws are challenging state legislatures to extend the circumstances in which compensation is provided for regulation of land use.

II THE PROPERTY RIGHTS MOVEMENT AND THE US TAKINGS JURISPRUDENCE

A *Three Propositions*

The arguments of the property rights advocates are premised on a series of propositions, each strongly influenced by judicial pronouncements and scholarship on the US takings clause. The first is that the property rights of a landowner are not just a unitary estate or interest in land, but a bundle of rights which include the rights to use and enjoy the land, to dispose of or alienate it, and to exclude others from it.[24] For Epstein, the owner's use rights extend to any use or non-use that does not constitute a nuisance.[25] Gray calls this an 'atomic' conception of property, which he contrasts with the common lawyer's 'molecular' understanding of property as an integrated set of rights.[26]

23 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409–10. The self–government statutes passed by the Commonwealth for the territories limit the legislative power of the territory to an acquisition of property on just terms: *Northern Territory (Self–Government) Act 1978* (Cth) s 50; *Australian Capital Territory (Self–Government) Act 1988* (Cth) s 23(1).

24 Wright observes that 'part of the rhetorical strategy of the property rights movement is to occlude the distinction between the object and the legal rights associated with it': above n 5, 63 n 1.

25 Epstein, above n 11, 66–73.

26 Kevin Gray, 'Can Environmental Regulation Amount to a Common Law Taking of Property Rights?' (2007) 24 *Environmental and Planning Law Journal* 161, 170–1.

The second proposition is premised on the idea of property as 'an ad hoc collection of rights in resources'.[27] It holds that any regulation which curtails one or more of the rights in the owner's bundle is a prima facie 'taking'.[28] Radin calls this idea 'conceptual severance',[29] which she defines as a strategy of 'delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken'.[30] The US Supreme Court has generally rejected the conceptual severance technique in determining whether a taking has occurred, although, as shown below, it has enjoyed some judicial support.[31]

The third proposition is that compensation must be paid whenever a disproportionate burden has been unfairly imposed on some citizens for the benefit of the public as a whole. This distributional fairness norm is expressed in a statement of the US Supreme Court in *Armstrong v United States*.[32] Black J, delivering the opinion of the Court, said that the purpose of the takings clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole'.[33]

Although the three propositions are essentially normative, they are clothed with legal language and concepts which are drawn from judicial pronouncements on the US takings clause. Because they sound like legal propositions, their use in public debate may tend to raise expectations about legal rights to compensation.[34]

B *The 'Bundle of Rights' Conception of Property*

Common and civil law systems have conventionally viewed property rights as coming in a limited range of relatively standardised packages, such as the fee simple absolute or the chose in action.[35] In the civil law system, this concept is

27 Thomas W Merrill and Henry E Smith, 'What Happened to Property in Law and Economics?' (2001) 111 *Yale Law Journal* 357, 359.

28 Epstein, above n 11, 112–21. See also John Forbes, 'Taking Without Paying: Interpreting Property Rights in Australia's Constititution' (1995) 2 *Agenda* 313, 316, stating: 'When government removes or diminishes rights to property without assuming full ownership, it should be seen as "acquiring" a proportionate number of the rights in the proprietary "bundle"'.

29 Margaret Jane Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *Columbia Law Review* 1667, 1676.

30 Ibid.

31 Ibid 1676–7, referring to the dissenting judgment of Rehnquist CJ in *Penn Central Transport Co v City of New York*, 438 US 104, 142–4 (1978) (*'Penn Central'*) and Scalia J in *Nollan v California Coastal Commission*, 107 S Ct 3141 (1987). In delivering the opinion of the court in *Hodel v Irving*, 481 US 704, 716 (1987), O'Connor J said that the statutory abrogation of the right to pass an interest in land by will resulted in a confiscation of property. See also Gregory S Alexander, 'Ten Years of Taking' (1996) 46 *Journal of Legal Education* 586, 594.

32 364 US 40 (1960).

33 Ibid 49; see also *Lingle v Chevron USA Inc,* 544 US 528, 538 (2005) ('*Lingle*'); *Monongahela Navigation Co v United States*, 148 US 312, 325 (1893).

34 Christie, above n 21, 390.

35 Bernard Rudden, 'Economic Theory v Property Law: The *Numerus Clausus* Problem' in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence: Third Series* (Clarendon Press, 1987) 239, 241; Merrill and Smith, above n 26, 358–9, 385–7.

known as the *numerus clausus*, or closed list.[36] Bernard Rudden pointed out that common law systems also recognise only a limited class of property rights, and that the courts rarely admit new rights unless they are expressly created by statute.[37]

In the 1920s and 1930s, the traditional understanding of property as a 'discrete asset' was transformed by Hohfeld's theory of jural relations.[38] Hohfeld proposed a relational scheme in which property could be broken down into rights, powers, privileges and immunities, each element of which is matched with corresponding duties, 'no-rights', immunities and disabilities cast upon other people.[39] Hohfeld's followers popularised the idea that property was reducible to a 'bundle of rights'.[40] While Hohfeld did not use the term 'bundle of rights', his theory of jural relations and his analysis of property into component use rights provided the theoretical basis for the popularisation of the term by legal realists such as Felix S Cohen.[41] Cohen suggested that property could be reduced to specific collections of rights such as the right to use, to exclude others, and to sell or transfer.[42]

Although not without its critics,[43] Hohfeld's jural relations model, and the associated 'bundle of rights' metaphor, has become the dominant understanding of property in the social sciences, and in legal theory.[44] This 'atomic' conception is also axiomatic for economists, a fact which Merrill and Smith attribute to the dominance of Coase in economic theory.[45] In Coase's theory of transaction costs, the existing allocation of property serves as the baseline for the contractual exchange of use rights, which are presumed to exist in infinitely variable clusters and to be severable and separately assignable.[46] This leads economists to assume that, since parties can agree on any contractual terms they wish, they can create novel property rights by freely customising the components of the bundle.[47]

36 Rudden, above n 34. The term comes from the French Civil Code.

37 Examples of new property rights arising through judicial creation are: the restrictive covenant in cases beginning with *Tulk v Moxhay* (1848) 41 ER 1143 (Ch); and native title as a right cognisable at common law in cases beginning with *Mabo v Queensland No 2* (1992) 175 CLR 1. On the rarity of judicial recognition of new property at common law, see Brendan Edgeworth, 'The Numerus Clausus Principle in Contemporary Australian Land Law' (2006) 32 *Monash University Law Review* 387.

38 Merrill and Smith, above n 26, 365.

39 Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied to Judicial Reasoning' (1913) 23 *Yale Law Journal* 16, 30.

40 On the development of this concept, see Merrill and Smith, above n 26, 365, and other sources cited at n 34 therein.

41 Merrill & Smith, above n 26, 364–6; Felix S Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 357.

42 Cohen, above n 41,369–70. Cohen's conceptual scheme was used by Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 171 (Supreme Court Northern Territory).

43 James E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 25–31, arguing that Hohfeld's jural relations model overlooks the fundamental nature of property as a right in rem.

44 D H Cole and Peter Z Grossman, 'The Meaning of Property Rights: Law versus Economics' (2002) 78 *Land Economics* 317, 319.

45 Merill and Smith, above n 26, 365, citing R H Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law & Economics* 1, 44.

46 Merill and Smith, above n 26, 359, 367–74.

47 Ibid 387, 397. For an analysis of the interaction between the atomic conception and the use of market–based instruments in regulation, see Pamela O'Connor, 'The Extension of Land Registration Principles to New Property Rights in Environmental Goods' in M Dixon (ed), *Modern Studies in Property Law* (Hart Publishing, 2009) vol 5, 363, 363–74.

The conception arose when the bundle of rights metaphor made the leap from an analytic description of existing property to a normative prescription for the creation of new property.[48]

Over the last century, the 'bundle of rights' conception of property has become pervasive in American legal scholarship,[49] and is integral to the US takings jurisprudence. It is generally assumed in the legal literature that laymen still subscribe to the 'discrete asset' or molecular conception of property,[50] due to the phenomenon of reification (the tendency to define property as the 'thing' or object rather than the rights held by somebody in the 'thing').[51] The discourse of the Property Rights Movement represents a concerted attempt to shift the paradigm of property. The psychological and political effects of such a shift should not be underestimated. There is some empirical evidence that the way that property rights are 'framed', whether as a 'discrete asset' or as a 'bundle of rights', affects the owners' perceptions of their rights and their willingness to accept regulatory interference with them.[52]

C *The Development of the Concept of Regulatory Takings*

The American doctrine of regulatory takings owes its genesis to the Supreme Court's 1922 decision in *Pennsylvania Coal Co v Mahon*.[53] Prior to this decision, the application of the takings clause was assumed to be confined to cases where government compulsorily acquired the title to property or otherwise took possession of it.[54] In *Mahon*, the Court decoupled the takings clause from the paradigm of physical appropriation. In this case, a coal mining company sought to invoke the takings clause to challenge a Pennsylvania statute that prohibited the mining of coal in a manner that would cause subsidence of dwellings. While holding that the statute was a valid exercise of the state's 'police power' (that is, its regulatory power), Holmes J said that 'if a regulation goes too far, it will be recognized as a taking'.[55]

The Court in *Mahon* gave little guidance as to when a regulation might be found to 'go too far'. Holmes J acknowledged that 'some values are enjoyed under an implied limitation and must yield to the police power'. His Honour indicated that

48 Susan Bright, 'Of Estates and Interests: A Tale of Ownership and Property Rights' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 529, 533.

49 Bruce Ackerman, *Private Property and the Constitution* (Yale University Press, 1977) 26–9.

50 Jonathan Remy Nash, 'Packaging Property: The Effect of Paradigmatic Framing of Property Rights' (2009) 83 *Tulane Law Review* 691, 693–702.

51 Bentham observed that is by an ellipsis of speech that we refer to land as being 'owned' by someone — we substitute the land itself for the legal object of the property right: Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Hafner Publishing, first published 1823, 1948 ed) 230–1. See also Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 299.

52 Nash, above n 50, reporting on the outcome of an experiment to test this hypothesis.

53 260 US 393 (1922) ('*Mahon*').

54 *Lucas v South Carolina Coastal Council*, 505 US 1003, 1014 (1992) (Scalia J delivering the opinion of the Court).

55 260 US 393, 415 (1922).

it was necessary to consider the extent to which the value of the affected property had been diminished, and the sufficiency of the public interest consideration which was claimed to justify the diminution in value of private property.[56]

For many years, the Court largely ignored the ruling in *Mahon*.[57] Between 1922 and 1987, there was no case in which a 'taking' was held to have occurred on the basis that a property right had been diminished in value by regulation.[58] During this period, the Court rejected arguments based on conceptual severance.[59] The general approach was that 'the destruction of one stick in the "bundle" is not a taking because the aggregate must be viewed in its entirety'.[60]

In 1978, Brennan J, delivering the opinion of the court in *Penn Central Transport Co v City of New York*, said that there was no set test for determining when a regulatory taking occurs.[61] His Honour indicated that the court's approach to the question involved two stages. First comes an essentially factual inquiry, evaluating three factors of particular significance: namely, the character of the government action; the extent to which the regulation interfered with 'distinct investment–backed expectations'; and the economic impact of the regulation upon the claimant through diminution in the value of property.[62] The second stage involved a balancing test to determine whether in 'justice and fairness', the economic losses caused by the regulation should be borne by the government through compensation rather than fall disproportionately upon a minority of owners.[63]

From 1987, there was a shift in the Supreme Court's approach to regulatory takings.[64] While in some cases, the Court continued to reject conceptual severance,[65] in other cases it began to accept arguments premised on this technique. In *Hodel v Irving*,[66] O'Connor J, giving the opinion of the Court, held that a federal statute effected a taking in providing that an undivided ownership share in Indian tribal lands did not pass to the owner's heirs but escheated to the tribe. Her Honour explained that the right to pass property on death was an

56 Ibid 413–15.

57 Carol M Rose, 'Mahon Reconstructed: Why the Takings Issue is Still a Muddle' (1984) 57 *Southern California Law Review* 561, 595 n 175.

58 Alexander, above n 31, 590.

59 Ibid, citing as examples *Andrus v Allard*, 444 US 51, 65–6 (1979); *Penn Central*, 438 US 104 (1978).

60 *Andrus v Allard*, 444 US 51, 65–6 (1979) (Brennan J delivering the opinion of the Court); *Keystone Bituminous Coal Association v DeBenedictus*, 480, 497 US 470 (1987) (Stevens J).

61 438 US 104 (1978). In *Stop the Beach Renourishment v Florida, Dept of Environmental Protection* 130 S. Ct. 2592 (2010), four judges in a Supreme Court bench of eight considered that the takings clause might also be violated by a court decision which alters the effect of a state property statute, although none found any such 'judicial taking' had occurred in the case before them. It is not clear whether the *Lingle* test would apply in a judicial takings case.

62 Ibid 124.

63 Ibid.

64 Wright suggests that the change occurred when the justices appointed by the conservative Reagan administration began to be able to shift the majority of the Rehnquist Supreme Court: Wright, above n 5, 77; Alexander, above n 31, 592.

65 *Penn Central*, 438 US 104 (1978); *Concrete Pipe and Products of Cal Inc v Construction Labourers Trust for So Cal*, 508 US 602 (1993); *Keystone Bituminous Coal Association v DeBenedictus*, 480 US 470, 497 (1987).

66 481 US 704 (1987).

essential stick in the bundle that constitutes property.[67] Further, in *Kaiser Aetna v United States*,[68] a taking was found when a private marina became subject to public access. The right to exclude was declared to be 'a fundamental element of the property right' which could not be taken without compensation.[69]

More recently, in *Lingle v Chevron USA Inc*,[70] the Court has reaffirmed the ad hoc balancing approach from *Penn Central*, indicating that the aim is 'to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain'.[71] The Court left undisturbed earlier authority that there is a categorical or 'per se' taking in two cases. The first is where the regulation effects a permanent physical invasion of property, no matter how minor.[72] The second is where regulation deprives an owner of 'all economically beneficial uses' of the property.[73]

In other cases which do not amount to a 'per se' taking, the Court indicated in *Lingle* that the *Penn Central* balancing test must be applied to assess 'the severity of the burden that government imposes upon private property rights'.[74] While deferring to the legislature's judgment as to whether the regulation is necessary and likely to be effective,[75] the court will consider two questions: first, the 'magnitude or character of the burden a particular regulation imposes on private property rights',[76] and second, 'how the regulatory burden is distributed among private property owners'.[77]

D *Conceptual Severance and the Denominator Problem*

Conceptual severance is essentially a technique for inflating the magnitude of the burden, which is the first part of the *Lingle* test. Assessment of the private loss

67 Ibid 716.

68 444 US 164, 176 (1979).

69 Ibid 179–80.

70 544 US 528, 538 (2005) (O'Connor J delivered the judgment of the Court).

71 Ibid 539.

72 For example, in *Loretto v Teleprompter Manhattan CATV Corp,* 458 US 419 (1982), a law that required landlords to permit cable companies to run cable wires on their land was held to be a taking. In *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992), it was said that regulations that compel a property owner to suffer physical invasions of his or her property were a categorical taking.

73 *Lingle*, 544 US 528, 539 (2005), referring to *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992), in which a regulation directed to preventing coastal erosion prohibited the Lucases from building on their lot. The regulation was found to be a taking as it deprived them of all 'economically beneficial uses' of the land, which was rendered 'valueless'. See also *First English Evangelical Lutheran Church v County of Los Angeles*, 482 US 304 (1987), where a temporary ban on construction on the claimant's land was declared to be an unconstitutional taking on the basis that it temporarily deprived the owner of all economically viable use.

74 *Lingle*, 544 US 528, 539 (2005).

75 Ibid 545. This represents a retreat by the Court from its view in *Agins v City of Tiburon*, 447 US 255 (1980), that the regulation must 'substantially advance legitimate state interests', and a return to its more traditional concern with the evaluation of the burden on the owner: Wright, above n 5, 78.

76 *Lingle*, 544 US 528, 545 (2005).

77 Ibid 539.

caused by a regulation raises what Michelman called the 'denominator' problem.[78] In assessing the diminution in the value of property caused by a regulation, some comparison of values is implied. If the loss in the value of the affected property is the 'numerator' in the fractional expression of the burden imposed by the regulation, the question is 'how to define the "particular thing" whose value furnishes the denominator of the fraction'. [79] The more narrowly the 'particular thing' is defined, the easier it is to conclude that there has been a taking.

For example, if a regulation prevents me from draining a wetland on my land, the magnitude of my loss depends on how the denominator is defined. If it is defined as the whole of my estate in the land, the magnitude of the loss in value resulting from the regulation may be small. But if the property in question is defined as my right to drain my land, then the regulation can be said to have totally destroyed that 'particular thing'. As Rose observes, 'contracting the relevant property interest ... may turn every regulation into a taking'.[80]

Conceptual severance arguments involving land usually reduce the 'denominator' to a spatially defined portion, or a specific right such as the right to exclude or the right to alienate. An example is the case of *Hodel v Irving*,[81] noted above, in which the right to devise one's land to one's heirs was taken away by a federal statute which sought to prevent the alienation of Indian tribal land by will.

Radin maintains that the use of conceptual severance in these cases is a 'slippery slope to the radical Epstein position'.[82] 'Every regulation of any portion of an owner's "bundle of sticks" is a taking of the whole of that portion considered separately.'[83] Conceptual severance uses definitional argument,[84] or tautology — the technique of selectively defining the affected property in such a way as to dictate the conclusion that a 'taking' has occurred.[85]

E *Response of US Supreme Court to Conceptual Severance Arguments*

Although Rehnquist CJ and Scalia J were strong supporters of conceptual severance,[86] the trend of recent cases, as well as the weight of authority, is against it.[87] The Supreme Court has on many occasions stated that the property in question in a takings case is the totality of the owner's rights in the land.[88]

78 Michelman, above n 14, 1232–3.

79 Ibid 1192.

80 Rose, 'Mahon Reconstructed', above n 57, 568.

81 481 US 704 (1987).

82 Radin, above n 29, 1678.

83 Ibid 1678.

84 The term is Michelman's: Michelman, above n 14, 1203 n 79.

85 Cf Michelman's discussion of how wordplay is used to characterise minor physical interference with property rights as a 'taking' of 'property': ibid 1187–9.

86 Alexander, above n 31, 592.

87 Davidson, above n 15, 3; Christie above n 21, 382 n 290; see also cases discussed below in text.

88 Radin, above n 29, 1677.

In *Penn Central*, Brennan J delivering the opinion of the court said that '"[t] taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated'.[89] In *Penn Central*, the Court took the denominator to be not just the owner's interest in the building directly affected by the regulation, but also the owner's other properties in the area. In *Tahoe–Sierra Preservation Council Inc v Tahoe Regional Planning Agency*,[90] the Court refused to accept that a temporary moratorium on development amounted to taking a slice of the property in time; affirming that the land parcel should be considered as 'an aggregate ... in its entirety'.[91] In *Palazzolo v Rhode Island*,[92] a petitioner argued that the uplands portion of his land parcel should be segmented from the wetlands portion directly affected by a regulation, and he should be able to assert a taking of the latter. The Court said that the case must be decided on the premise that the entire parcel served as the basis for his takings claims, and on that basis it failed.

The 'whole parcel' approach makes it more difficult to find that a regulatory taking has occurred, since most regulations have only a limited impact on an owner's property rights when considered in their entirety.[93]

F *Distributional Fairness or the Equality Norm*

The second aspect of the *Lingle* test is how the burden of the regulation is distributed among private property owners. This consideration had been mentioned in earlier takings cases, but it assumed greater prominence after 1987.[94] As noted above, the balancing approach outlined in *Penn Central* requires a consideration of whether fairness and justice require the government to pay compensation rather than allow the economic losses to fall disproportionately on a few owners.[95] Distributional fairness is an integral part of the test for determining whether a taking has occurred. It is also now widely accepted as furnishing the principal justification for the compensation requirement,[96] and has been linked to the right of individuals to equal treatment by the state.[97]

The equality explanation for the takings clause has received wide support across the political spectrum, but particularly from proponents of public choice theory. Public choice theory regards the political process as a zone of competing interests, in which 'rent-seeking' interest groups lobby politicians to obtain special benefits

89 *Penn Central*, 438 US 104, 123–4 (1978).

90 (2002) 535 US 302.

91 Ibid 331–2 (Stevens J delivering the opinion of the Court); see also *Palazzolo v Rhode Island*, 533 US 606, 633 (2001) (Kennedy J delivering the opinion of the Court).

92 533 US 606 (2001).

93 Davidson, above n 15, 30.

94 Davidson describes it a previously 'submerged theme' in the cases: ibid 1.

95 *Penn Central*, 438 US 104, 124 (1978); see also *Palazzolo v Rhode Island*, 533 US 606, 633 (2001).

96 Davidson, above n 15, 3–4, 101.

97 Ibid 20; John E Fee, 'The Takings Clause as a Comparative Right' (2003) 76 *Southern California Law Review* 1003, 1003–4.

for themselves and distribute the costs to others. According to this account, the 'public interest' is amorphous and indiscernible to legislators. Legislative outcomes tend to be systematically skewed in favour of dominant organised interests or coalition, and redistributed costs fall disproportionately upon individuals and groups who are dispersed or disorganised in the political process.[98] Public choice theorists tend to view the takings clause as counterbalancing the structural failure of the political system, by forcing government to provide compensation to vulnerable parties who would otherwise bear an unfair regulatory burden.[99]

1 *Defining the Reference and Comparator Groups*

While there is broad support for distributional justice as part of the test for determining whether a regulatory taking has occurred, there are difficulties in its application. In a takings case, the assessment of distributional fairness commences by identifying the class of property owners upon whom the uneven burden falls (the 'comparator group'), and another class of property owners who do not share the burden at all or to the same extent (the 'reference group').

Take, for example, a regulation that prohibits landowners from clearing native vegetation without a permit. The regulation is of general application to all landowners. Let us assume that one group of landowners have little or no remnant native vegetation, a second group consists of those who are content to retain their native vegetation, and the third group of landowners were hoping or expecting to clear their vegetation at some time in the future. Only the third group are adversely affected by the regulation, so there will be a tendency for these landowners to argue that they are subjected to a disproportionate burden.

If we designate the third group as the 'comparator group', a finding of differential burden seems a foregone conclusion, because we have already defined the group as comprising the landowners whose expectations have been disappointed by the regulation.[100] We are at risk of applying the same kind of tautological reasoning or definitional argument that we have already observed in conceptual severance. Davidson describes this type of argument as 'distributional conceptual severance', which he criticises on the following grounds:

> Identifying a group of property owners for the purpose of asserting political process failure solely based on differential impacts on their property is plain circularity: it carves out the existence of regulation itself as dispositive, slicing the conceptual polity by the very regulation that is being challenged. [101]

98 Saul Levmore, 'Just Compensation and Just Politics' (1990) 22 *Connecticut Law Review* 285, 305–14.

99 James M Buchanan, 'How Can Constitutions Be Designed so that Politicians Who Seek to Serve "Public Interest" Can Survive and Prosper?' (1993) 4 *Constitutional Political Economy*, 1, 6.

100 For an example of a submission arguing that the third group is unfairly disadvantaged in comparison to the first group, see the discussion of Richard Golden's submission summarised in *Senate Native Vegetation Laws Report,* above n 1, [3.17], citing Submission 95, 2.

101 Davidson, above n 15, 39.

There is also scope for definitional argument in the way we identify the reference group, in comparison to which the comparator group is disproportionately burdened.[102] In the example above, the comparator group cannot argue that they are disadvantaged in relation to the first group of landowners, who have no native vegetation on their land and for whom the regulation is irrelevant. Nor can they argue that they are disadvantaged in relation to the second group, who are content to leave their native vegetation undisturbed. The reference group with which the disgruntled landowners would wish to compare themselves are those landowners who have already cleared their native before the regulation came into effect.[103] The claim of disproportionate burden dissolves into an argument against the regulation of what was previously unregulated,[104] or a claim that those who owned land at the time the regulation commenced should be exempted under transitional provisions.[105]

2 *Reciprocal Benefit*

Any evaluation of the distributive fairness of a regulation should take account of reciprocal benefits as well as burdens.[106] There are many regulations which curtail our individual freedoms as owners of land, cars or other property, but confer benefits upon us through the restraints imposed on others.[107] For example, a regulation that bans the keeping of pigs in suburban allotments restricts our use of land, but also benefits us as members of the public by protecting us from the nuisance of our neighbours' pig–keeping.

It is well established in the US takings jurisprudence that no compensation is required where a regulation is directed at protecting the public from threatened harm or detriment, as opposed to the conferral of benefits on the public.[108] The principle can be justified by the argument that nobody's property rights include the right to cause harm or detriment to others or to create a nuisance.[109]

102 Ibid.

103 The Productivity Commission reported that many of the submissions received in its 2004 inquiry argued that the burden of land clearing laws falls most heavily on those who have retained native vegetation: Productivity Commission, *Impacts of Native Vegetation and Biodiversity Regulations* (Report No 29, 8 April 2004) 215 <http://www.pc.gov.au/__data/assets/pdf_file/0005/49235/nativevegetation.pdf > ('*Productivity Commission Report No 29*').

104 See, eg, the submissions from individuals and from the Pastoralists and Graziers Association of Western Australia summarised in *Senate Native Vegetation Laws Report,* above n 1, [3.18]–[3.19].

105 Sax argues that 'each similarly situated acre of land ought to have the same land use' irrespective of the timing of the decision to develop. A change in zoning laws takes away the landowners' rights to develop the land at the time most propitious for them: Joseph L Sax, 'Why America Has a Property Rights Movement' [2005] *University of Illinois Law Review* 513.

106 Gray, above n 26, 163 n 7, citing many cases in which this idea has been acknowledged.

107 Mark W Cordes, 'Property Rights and Land Use Controls: Balancing Private and Public Interest' (1998–99) 19 *Nothern Illinois University Law Review* 629, 644–5.

108 See, eg, *Miller v Schoene*, 276 US 272 (1928); *Just v Marinette County,* 201 NW 2d 761 (Wis, 1972); *Lucas v South Carolina Coastal Council,* 505 US 1003, 1027 (1992); Alexander, above n 31, 589.

109 *Mahon*, 260 US 393, 417 (1922); *Lucas v South Carolina Coastal Council*, 505 US 1003, 1027–31 (1992). Gray finds this idea also in English law: Gray, above n 26, 163 n 10, citing *Re Ellis and Ruislip-Northwood Urban DCs* [1920] 1 KB 343, 372 (Scrutton LJ). See also Cole and Grossman, above n 44, 319–21.

Michelman challenged the method of distinguishing between harm–abating and benefit–conferring regulations for purposes of determining when compensation is required by the takings clause.[110] Many environmental and planning regulations are directed at preventing incompatible land use rather than controlling a nuisance. Michelman argues that if the legislature decides to ban pig–keeping in the suburbs, it is making a 'naked distributional decision'.[111] It is in effect conferring a benefit on others with different land use preferences. Michelman concedes that the distinction between harm–preventing and benefit–conferring regulation is not altogether fallacious, but warns against improper application of the nuisance abatement category.[112]

3 *Equalisation of Burdens over Time*

Michelman suggested that the distributional effects of a regulation should not be evaluated in isolation, but as part of an ongoing process of political accommodation, in which the benefits and burdens tend to even out in the long run.[113] The idea is premised on the Madisonian idea of a 'logrolling' legislature, in which political factions or shifting coalitions make deals and trade votes in order to advance their interests, and all groups get their chance at some time to form part of the majority.

While the logrolling model has a grain of truth, its weaknesses are well documented. Critics have pointed to the difficulty of forming coalitions in local government and small communities,[114] and the fact that some minority interests remain disenfranchised over many years.[115] The capacity of logrolling to distribute benefits fairly over time is strongly challenged by public choice theory, which tends to portray legislatures as hostages to dominant lobby groups whose interests will usually prevail.

Michelman subsequently acknowledged that the assumption that logrolling would equalise burdens and benefits over the longer term was 'heroic'.[116] He suggested that reliance on logrolling might be confined to regulations for which the 'settlement costs' of compensation were so high as to preclude individual accounting. These may include regulations for which the impacts are remote, idiosyncratic or untraceable, the value of the compensation inestimable, or the settlement machinery so costly as to cancel out the efficiency gains.[117]

110 Michelman, above n 14, 1196–1203.

111 Ibid 1198.

112 Ibid 1201.

113 Frank I Michelman, 'Political Markets and Community Self–Determination: Competing Judicial Models of Local Government Legitimacy' (1977–78) 53 *Indiana Law Journal* 145, 156–7, 172–7. For an argument that gains and losses should be assessed over the long term on the basis of 'general reciprocity', see Cordes, above n 107, 647–9.

114 Rose, 'Mahon Reconstructed', above n 57, 584, citing Waggoner, 'Log–Rolling and Judicial Review' (1980–81) 52 *University of Colorado Law Review* 33.

115 Rose, 'Mahon Reconstructed', above n 55, 584, citing John H Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 80–8.

116 Michelman, above n 14, 1178.

117 Ibid 1177–9.

III PROPERTY RIGHTS ARGUMENTS IN AUSTRALIA: SECTION 51(XXXI) OF THE CONSTITUTION

Many of the arguments used by property rights groups and conservative think tanks in Australia are drawn from American jurisprudence, scholarship and public discourse arising under the US takings clause. It follows that critical analysis and conceptual tools drawn from the extensive judicial and theoretical literature on the US takings clause could be used to inform debate and to evaluate arguments about whether compensation should be provided under legislation for regulation of land use.

A *Section 51(xxxi) of the Constitution*

Australia, as already noted, lacks a direct constitutional equivalent to the takings clause, which limits the power of eminent domain by vesting rights in persons. Section 51 (xxxi) of the *Australian Constitution* takes the form of a grant of a legislative power of compulsory acquisition to the Commonwealth for limited purposes and subject to a requirement of 'just terms',[118] although it also operates as a constitutional guarantee of property rights.[119] The differences in wording are sufficiently great that American decisions are not directly applicable to the interpretation of s 51(xxxi).[120] One important difference is that while the US takings clause requires a 'taking', deprivation of property rights is not sufficient to amount to a breach of s 51(xxxi). The latter provision does not apply unless there has been an 'acquisition' whereby the Commonwealth or another party acquires an interest in property. In *Commonwealth v Tasmania*, Mason J said:

> To bring the constitutional provision [s 51(xxxi)] into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.[121]

In *Mutual Pools & Staff Pty Ltd v Commonwealth*,[122] Deane and Gaudron JJ said that for there to be an acquisition of property for the purposes of s 51(xxxi), it is

118 Patrick H Lane, *Lane's Commentary on the Australian Constitution* (Law Book, 1986) 216. See also *Mutual Pools Pty Ltd v Commonwealth* (1994) 179 CLR 155, 169 (Mason CJ); *Commonwealth v Tasmania* (1983) 158 CLR 1, 60 (Mason J).

119 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349 (Dixon J); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 305 (Mason CJ, Deane and Gaudron JJ); Simon Evans, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 197.

120 Christie, above n 20, 361–2; *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290 (Dixon J).

121 *Commonwealth v Tasmania* (1983) 158 CLR 1, 145 (Mason J); see also at 247–8 (Brennan J), 282–3 (Deane J); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1991) 176 CLR 480, 499–500 (Mason CJ, Brennan, Deane and Gaudron JJ), 528 (Dawson and Toohey JJ); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 196 (Hayne, Kiefel and Bell JJ).

122 (1994) 179 CLR 155.

not enough that an owner has been deprived of a right in relation to property.[123] There must at least be some 'identifiable and measurable countervailing benefit or advantage' to the Commonwealth or another party resulting from the deprivation,[124] although it seems that what is gained need not correspond exactly with what is lost.[125] Alternatively, a prohibition or regulation which produces an effect 'akin to applying the property, either totally or partially, for a purpose of the Commonwealth', may amount to an acquisition.[126]

Although the distinction between acquisition and mere deprivation of property is not coherent in the authorities,[127] the requirement to show that there has been an acquisition (and not merely a taking) is a significant barrier to 'regulatory takings' arguments in Australia.[128] As Allen observes, '[t]ypically, regulation does not involve an acquisition of property by the government, but merely a deprivation or extinction of property rights'.[129]

B *Conceptual Severance in Section 51(xxxi) Cases*

Despite these differences from the US takings clause, there is room for conceptual severance arguments to be advanced in s 51 (xxxi) cases. As noted above, the conceptual severance technique proceeds by defining the relevant property as a bundle of rights, comparing the contents of the bundle before and after the regulatory intervention, and asserting that the difference represents property taken (or acquired). A shorter version of the same technique is to define the relevant property (the 'denominator') as a discrete use right, being the very right which is negated by the regulation.

The bundle of rights conception of property is already well–accepted by the High Court, not just in native title cases, but also in cases arising under s 51(xxxi).[130] In *Telstra Corporation Ltd v Commonwealth*,[131] the High Court gave its qualified

123 Ibid 185, cited with approval in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 179 (French CJ, Gummow and Crennan JJ). For a detailed discussion of the application of s 51(xxxi), see Tom Allen, 'The Acquisition of Property on Just Terms' (2000) 22 *Sydney Law Review* 351; Simon Evans, 'When is an Acquisition of Property Not an Acquisition of Property? The Search for a Principled Approach to Section 51(xxxi)' (2000) 11 *Public Law Review* 183.

124 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 185 (Deane and Gaudron JJ).

125 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 305 (Mason CJ, Deane and Gaudron JJ); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

126 *Commonwealth v Tasmania* (1983) 158 CLR 1, 283 (Deane J).

127 Evans, above n 121, 199.

128 See, eg, the reasoning of Hayne, Kiefel and Bell JJ in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 201–2 [147] – [149], that although the bore water licences cancelled by the state were 'property' for purposes of section 51(xxxi), there was no 'acquisition' because the cancellation conferred no advantage on the state. Forbes finds that the narrowness of the interpretation of 'acquisition' is the weakest link in the 'just terms' clause: John Forbes, 'Taking Without Paying: Interpreting Property Rights in Australia's Constititution' (1995) 2 *Agenda* 313, 315.

129 Allen, above n 125, 377.

130 *Yanner v Eaton* (1999) 201 CLR 351, 365–7 (Gleeson CJ, Gaudron, Kirby and Hayne JJ), 388–9 (Gummow J); *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 285 (Rich J).

131 (2008) 234 CLR 210.

approval to the use of the bundle of rights conception of property in cases under s 51(xxxi). In its joint judgment, the Court said:

> In many cases, including at least some cases concerning s 51(xxxi), it may be helpful to speak of property as a 'bundle of rights'. At other times it may be more useful to identify property as 'a legally endorsed concentration of power over things and resources'.[132]

It is clear that the 'property' which may be the subject of an acquisition is not confined to recognised classes of property rights such as leaseholds and choses in action,[133] but can extend to 'innominate and anomalous interests',[134] such as confidential information and broadcaster licences,[135] and 'the assumption and indefinite continuance of exclusive possession and control' of property.[136]

In *Telstra Corporation Ltd v Commonwealth*,[137] Telstra used conceptual severance technique to argue that the Commonwealth had contravened s 51(xxxi) in giving access to other service providers to use Telstra's telecommunications infrastructure. Telstra argued that the new competitive access regime effected an acquisition of its property in some of its local 'loops', which would be physically disconnected from its equipment and connected to the equipment of another service provider.

The High Court observed that Telstra's argument depended on comparing the content of its 'bundle of rights' before and after the loop was connected to another provider's equipment.[138] In rejecting Telstra's argument, the Court observed that both before and after the relevant legislative change, Telstra's rights were subject to the rights of its competitors to require access.[139] Since there was no relevant change in the bundle, the Court did not discuss whether a diminution in the bundle of rights could be used to identify 'property' that had, for the purposes of s 51(xxxi), been acquired.

Judicial pronouncements in favour of conceptual severance are rare in Australia. In *Western Australia v Commonwealth*,[140] Callinan J (in dissent) held that by excluding the State from exploration and mining in an area of Crown land of the State declared to be a defence practice area, the Commonwealth had acquired

132 Ibid 230–1. See also *Attorney General (NT) v Chaffey* (2007) 231 CLR 651, 664 where it was said that the first task is to identify the 'bundle of rights' which is said to have been acquired (Gleeson CJ, Gummow, Hayne and Crennan JJ).

133 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284–5 (Rich J).

134 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349 (Dixon J); Georgiadis v *Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 305 (Mason CJ, Deane and Gaudron JJ).

135 ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140, 215 [149] (Heydon J), citing *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Dept of Community Services and Health* (1990) 22 FCR 73, 120–2 (Gummow J) (confidential information); *Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 166, 198–9 (Dawson J) (broadcaster licence).

136 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349 (Dixon J).

137 (2008) 234 CLR 210.

138 Ibid 231 (joint judgment per curiam).

139 Ibid 232–4.

140 (1999) 196 CLR 392. The majority of justices found that no acquisition of property had yet occurred.

property from the State on other than just terms. His Honour cited with approval R L Hamilton's remark that 'property is a bundle of rights, *and each right in that bundle is itself property the subject of acquisition*'.[141] Kirby J, also in dissent, held that there had been an acquisition not on just terms, but did not rely on conceptual severance. While Callinan J characterised the relevant 'property' as the State's rights of mining and exploration on its land, Kirby J emphasised the comprehensive control exercised by the Commonwealth's control over the land while it remained a defence practice area.[142]

The court does not need to resort to conceptual severance arguments in cases where the Commonwealth takes possession or control of land, even for a limited duration, without acquiring the title. The taking of indefinite possession or control is regarded as an acquisition of property. As Dixon J explained in *Minister for the Army v Dalziel*,[143] possession is a substantive root of title. In such cases the courts expect the Commonwealth to exercise its powers of compulsorily acquisition.[144]

Nor does the court need to use conceptual severance in cases such as *Newcrest Mining (WA) Ltd v Commonwealth*,[145] where the owner's property right is limited, and the totality of the right is taken.[146] In *Newcrest*, the appellant held a mining tenement over land which was subsequently proclaimed a National Park. Mining operations in the park were prohibited. The proclamation of the park was held to be an acquisition of the substance of Newcrest's mining right.[147]

C *Distributional Fairness in Section 51(xxxi) Cases*

We have seen that in the US, distributional fairness is widely accepted as a justification for the takings clause, and is also an element in the *Lingle* test. In *ICM*

141 Ibid 489, citing with approval R L Hamilton, 'Some Aspects of the Acquisition Power of the Commonwealth' (1972–73) 5 *Federal Law Review* 265, 291 (emphasis added).

142 (1999) 196 CLR 392, 453–7.

143 (1944) 68 CLR 261, 285–6. In that case, an acquisition was found to have occurred when the Army took possession of vacant land for an indefinite period for use as a parking lot. In other common law countries, the taking of physical possession is generally regarded as tantamount to compulsory acquisition: Gray, above n 26, 173. See also *Penn Central*, 438 US 104, 124 (1978); *Lingle*, 544 US 528, 539 (2005), explaining that physical takings always require compensation because of the unique burden they impose.

144 In *Minister for the Army v Dalziel* (1944) 68 CLR 261, 285, Rich J expressed concern that the Commonwealth might otherwise avoid the just terms requirement 'by taking care to seize something short of the whole bundle [of rights] owned by the person whom it was expropriating'. See also *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349 (Dixon J).

145 (1997) 190 CLR 513 ('*Newcrest*').

146 Christie, above n 21, 399–400. Christie argues that cases such as *Newcrest* fall into a special category, and should not be regarded as extending the concept of regulatory taking into land use controls. She notes that in *Newcrest*, as in *Mahon*, the regulations had sterilised the mining right, taking away the 'the only thing of value'.

147 (1997) 190 CLR 513, 634 (Toohey, Gaudron and Kirby JJ agreeing on this issue). The question of what the Commonwealth had 'acquired' was unclear, but the decision has been subsequently explained on the basis that the release of the land from the mining right augmented the Commonwealth's radical title: see *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 17 [17] (Brennan CJ); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 179 [82] (French CJ, Gummow and Crennan JJ); 202–3 [152] (Hayne, Kiefel and Bell JJ).

Agriculture Pty Ltd v Commonwealth,[148] Heydon J drew upon the US authorities in support of his view that the purpose of s 51(xxxi) is to protect the subject by ensuring that governments do not unfairly shift the cost of regulation to a few individuals.[149] In a passage that combines a quote from the US Supreme Court in *Armstrong v United States*,[150] with a public choice critique of the regulatory process, His Honour said:

> Like the Fifth Amendment to the United States Constitution, 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.[151]

Based on this analysis of the purpose, Heydon J concluded that s 51(xxxi) and its key terms should be given a wide purposive interpretation to serve as a constitutional guarantee of property rights.[152] His Honour cited High Court dicta which he regarded as implicitly supporting his views.[153] The dicta included the statement of Latham CJ that s 51(xxxi) 'is plainly intended for the protection of the subject',[154] and Dixon J's remark that the purpose of the 'just terms' requirement is 'to prevent arbitrary exercises of the power [of compulsory acquisition] at the expense of the State or a subject'.[155] He also quoted a statement by Kirby J that the section ensures that 'proper consideration is given to the costs for which the Commonwealth is thereby rendered accountable'.[156]

The judgment of Heydon J in *ICM Agriculture Pty Ltd v Commonwealth* is a bold attempt to redefine the purpose of s 51(xxxi) as a robust constitutional guarantee of property rights, embodying a norm of distributional fairness. Just as the norm emerged in *Penn Central* as a 'submerged theme' from earlier judicial pronouncements on the takings clause,[157] Heydon J constructs it from earlier High Court dicta on s 51(xxxi) and from economic, legal and constitutional theory. This conception of the purpose of the section challenges the Court's generally formalist approach to constitutional interpretation and its exclusion of substantive fairness considerations in applying the section.[158]

148 (2009) 240 CLR 140, 208–9 [178].

149 Ibid 208–9[177]–[179].

150 364 US 40, 49 (1960) (Black J, giving the judgment of the Court).

151 (2009) 240 CLR 140, 209 [178] (citations omitted).

152 Ibid 212 [184].

153 Ibid 207–8 [176]–[177].

154 In *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, the majority accepted that the section was intended to protect the subject and should therefore be construed generously: at 285 (Rich J), at 290 (Starke J), at 295 (McTiernan J).

155 *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 291 (Dixon J).

156 *Commonwealth v Western Australia* (1999) 196 CLR 392, 462.

157 Davidson, above n 15.

158 Evans, above n 119, 198. The High Court considers the proportionality of measures only in determining their constitutionality under other heads of power.

IV PROVISION OF COMPENSATION FOR REGULATION UNDER STATE LEGISLATION

Most legislation that regulates land use is enacted by state legislatures. The states are under no constitutional duty to provide just terms compensation, even for acquisitions.[159] State legislatures have the power to deprive a person of property for any purpose, with or without compensation.[160] Most takings of property by state and local government authorities are effected under compulsory acquisition statutes which require payment of compensation.[161] A state Act may authorise an uncompensated taking of property, provided that the intention is expressed in clear and unambiguous terms to overcome the common law presumption that a statute is not to be construed as taking away property rights without compensation.[162]

Despite being under no constitutional duty to provide compensation, it has generally been the practice of state legislatures in Australia to provide for compensation for an actual taking of private property rights under statute. Compensation for compulsory acquisition generally extends to 'injurious affection' resulting from severance, measured by the reduction in value of the owner's adjoining land resulting from its severance from the land that was taken.[163]

A *Compensation for Sterilisation of Land by Regulation*

In Australia, as in other common law jurisdictions, a fundamental distinction is recognised between an outright acquisition of property by the state, which should be subject to compensation, and regulation of use, for which compensation is not necessary.[164] The common law rule is that a prohibition or restriction on the use of land does not carry with it any right to compensation, unless a statue confers such a right.[165] While the distinction provides a useful guide for determining when

159 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409–10 (Gaudron, McHugh, Gummow and Hayne JJ). The Commonwealth cannot circumvent s 51(xxxi) by using its grants power in s 96 to require the states, as a condition of funding, to exercise their powers of compulsory acquisition otherwise than on just terms: *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140. In 1988, a referendum to extend to the states a requirement similar to s 51(xxxi) of the *Constitution* failed to obtain a majority of voters in any state.

160 *Commonwealth v New South Wales* (1915) 20 CLR 54, 77 (Barton J); *Jerusalem–Jaffa District Governor v Suleiman Murra* [1926] AC 321; *Commonwealth v Tasmania* (1983) 158 CLR 1, 145–6 (Mason J), 181–2 (Murphy J), 247–8 (Brennan J), 281–5 (Deane J); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; *Bone v Mothershaw* [2003] 2 Qd R 600, 612–13 (McPherson JA, Byrne JA concurring), 614 (Williams JA). Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20 provides that 'a person must not be deprived of his or her property rights other than in accordance with law'. The Act contains provisions to draw to the attention of Parliament any inconsistency between a Bill and the right, but Parliament may make an 'override declaration' under s 31.

161 Douglas Brown, *Land Acquisition: An Examination of the Principles of Law Governing the Compulsory Acquisition or Resumption of Land in Australia* (LexisNexis Butterworths, 5th ed, 2004) 2.

162 *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343, 359; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 111 (Deane and Gaudron JJ).

163 Such provisions date back to s 63 of the *Lands Clauses Consolidation Act 1845*, 8 & 9 Vict.

164 Gray, above n 26, 163; see also at 163 n 5.

165 Ibid; Alan S Fogg, *Australian Town Planning Law: Uniformity and Change* (University of Queensland Press, revised ed, 1982) 427; cases cited above n 159.

compensation should be available, it is not a bright line rule. There are cases where a regulatory intervention leaves an owner with intact title and undisturbed possession, but deprived of all reasonably beneficial use rights.

State legislation commonly provides compensation in the absence of a taking where land in private ownership is expressly reserved for a public purpose,[166] or where the exercise of a statutory power may deprive a landowner of all reasonably beneficial uses of the land. The paradigm case is where the legislation authorises a determination or regulation which effectively turns private land into a conservation estate. For example, the *Flora and Fauna Guarantee Act 1988* (Vic) empowers the Minister to issue interim conservation orders to conserve the habitat of a listed species on private land.[167] The order may prohibit any activity on or use of the land.[168] The Act provides that a landholder may seek compensation from the Director–General for financial loss suffered in consequence of the order.[169] Similar provision is made in Queensland's *Nature Conservation Act 1992* (Qld) when private land is compulsorily declared to be a nature refuge. This Act provides tests or criteria to be used in determining whether compensation should be awarded at all, or in assessing the amount.[170] Section 45 of Tasmania's *Threatened Species Protection Act 1995* (Tas) makes broadly similar provision for compensation to be paid to landowners whose land is the subject of an interim protection order under pt 4 of the Act.

A common justification for requiring agencies to pay compensation for regulation that effectively sterilises the use of land is to avoid moral hazard.[171] If governments can take all uses of the land without payment of compensation, there is little incentive to use their powers of compulsory acquisition.[172]

B *Compensation for Regulation of Use*

The controversial question is whether compensation should be provided for a regulation which substantially interferes with the owner's use and enjoyment, but does not preclude all uses or all current uses. The libertarian position is that

166 *Sustainable Planning Act 2009* (Qld) s 705; *Planning and Environment Act 1987* (Vic) pt 5; *Land Use Planning and Approvals Act 1993* (Tas) ss 66–9.

167 *Flora and Fauna Guarantee Act 1988* (Vic) s 26.

168 Ibid s 27.

169 Ibid s 43. See also *Wildlife Conservation Act 1950* (WA) s 23F, which provides that a landowner or occupier of land who is refused permission to take rare flora from the land may be compensated for the loss of the use or enjoyment of the land.

170 *Nature Conservation Act 1992* (Qld) s 126.

171 Therefore some planning statutes provide that where land is reserved for a public purpose and a claim for compensation is made, the planning authority may compulsorily acquire the land instead of paying compensation: see eg, *Sustainable Planning Act 2009* (Qld) s 710(2)(a). Alternatively, the Act may provide that compensation is to be assessed under the compulsory acquisition statute: see, eg, *Planning and Environment Act 1987* (Vic) s 105.

172 In *Commonwealth v Western Australia* (1999) 196 CLR 392, 487–8, Callinan J observed that through regulation, governments 'can effectively achieve the benefit of many aspects of proprietorship without actually being proprietors'.

compensation should be paid for even partial takings of property rights.[173] The common law rule is that a prohibition or restriction on the use of land does not carry with it any right to compensation, unless a statute confers such a right.[174] The question whether to depart from the common law rule and provide compensation commonly arises in relation to two types of statutes: statutes which provide for zoning controls which restrict land use, and statutes which regulate the clearing of native vegetation on private land.

C *Compensation for Zoning Changes*

There have long been demands that legislation should provide compensation for landowners who are adversely affected by a change in the zoning of their land under a planning scheme or similar policy instrument. Zoning determines the uses to which land may be put, and may impose the requirement of a permit for development. Although existing 'non-conforming' uses are commonly permitted to continue, changes to zoning may frustrate the landowner's expectations concerning future use and development, and may significantly affect land values.

Despite the potentially serious impacts of zoning changes, the general rule is that the states and territories do not provide compensation for loss of development or use right, or loss of land values, resulting from a change in the zoning of land. Some jurisdictions allow strictly limited exceptions. Western Australia provides compensation if the planning scheme prohibits *all* private uses, or prohibits a current non-conforming use.[175] Several jurisdictions allow compensation where the change leads to the cancellation or amendment of a development permit that has been granted.[176]

Queensland takes the protection of current development rights further than other states. The *Sustainable Planning Act 2009* (Qld) provides 'reasonable compensation' for loss of land value where a landowner can demonstrate an actual loss of development rights due to a change in a planning scheme or a planning scheme policy ('the planning change').[177] The landowner must have applied unsuccessfully for a development permit to be assessed by the council under the superseded planning scheme.[178] A complex list of statutory conditions must be satisfied,[179] the general purpose of which is to ensure that the loss of value can be attributed solely to the planning change. The measure of compensation is the difference between the market values of the land immediately before and

173 Cordes, above n 113, 650.

174 Gray, above n 26, 165–8; Fogg above n 165, 427; and see authorities cited above n 165.

175 *Planning and Development Act 2005* (WA) s 173(1).

176 See, eg, *Planning Act* (NT) ss 142–3; *Planning and Environment Act 1987* (Vic) s 94. The provisions are anomalous in that they do not compensate for the loss of development rights for which no permit is required. They are also liable to be abused by landowners who make applications for development in anticipation of a planning change in order to claim compensation.

177 *Sustainable Planning Act 2009* (Qld) s 704.

178 Ibid. A similar provision was found in the predecessor Act, the *Integrated Planning Act 1997* (Qld).

179 *Sustainable Planning Act 2009* (Qld) ss 704–6.

after the planning change, taking into account any conditions or restrictions on development that might reasonably have been applied under the superseded planning scheme. Adjustment may also be made for any benefit accruing to the applicant's land due to the effects of the planning change.[180]

The general denial of compensation for the effect of zoning changes on landowners does not necessarily mean that Australian legislatures have rejected the case for compensation in principle. Some jurisdictions used to have compensation provisions, but repealed them because of deleterious effects on planning.[181] Experience has shown that where councils are left to finance the compensation out of their own resources, they will conduct planning in an overly cautious manner to minimise the risk of claims.[182] This may lead to inadequate provision of public environmental services through the planning process.

Where compensation is linked to a particular process for making planning changes, local authorities will look for other ways to implement their planning policies, which may be less efficient. Fogg gives an example of earlier Queensland legislation which provided that compensation was payable when a planning scheme had come into operation.[183] To avoid liability, councils operated under draft plans for as long as possible and made interim control orders.[184]

If compensation depends on the type of planning instrument used to effect a change, other types of planning instrument will tend be used instead. For example, s 706 of Queensland's *Statutory Planning Act 2009* (Qld) provides *inter alia* that no compensation is payable for a change to a planning scheme if the change has the same effect as another statutory instrument (other than a temporary local planning instrument), or if the change is made to include a mandatory part of the standard planning scheme provisions. Nicholls reports that under similar provisions in the predecessor Act, state statutory instruments were used to do the work of planning schemes, in order to shield councils from compensation claims.[185] The consequences of shifting planning changes from the local to the regional or state level were more complicated processes, with no compensation actually paid to landowners.[186]

It is impractical to expect councils to finance the compensation payouts when they lack the revenue to do so. One solution that has been advocated is to fund compensation out of a betterment rate or tax, to be levied on landowners who have benefited from an increase in the value of their land due to a zoning change.[187]

180 Ibid s 711.

181 Fogg, above n 165, 428.

182 Ibid.

183 Ibid.

184 Ibid.

185 David Nicholls, Hopgood Ganin Lawyers, 'Compensation for Injurious Affection Caused by Planning Instruments: Is it Withering on the Vine?' (Research Discussion Paper, October 2008) 3–4 <http://www.hopgoodganim.com.au/_upload/20081022153940023.pdf >, citing *Chang v Laidley Shire Council* (2007) 234 CLR 1 as a case evidencing the practice.

186 Nicholls, above n 184.

187 D G Hagman, 'Betterment for Worsement: The English 1909 Act and its Progeny' (1977) 10 *University of Queensland Law Journal* 29.

English and Australian experience with the implementation of betterment taxes has proved disappointing, as the following case study from Victoria demonstrates.

Victoria's Metropolitan Town Planning Commission recommended in 1929 that the State's first planning statute should include provision for a betterment rate aimed at recovering one half of the increment in the value of land resulting from the planning scheme.[188] The money raised in this way would be used to compensate landowners whose land values were diminished by the planning scheme. Victoria's planning legislation provided for betterment rates from 1944 to 1987. A 1971 report found that while betterment rates had been levied in some communities, there was no record of it having been collected.[189] This was principally due to the difficulty of assessing the increment in land value that was directly attributable to the planning scheme.[190] Another problem was that the levy was falling not upon the original owner of broadacre land who profited from the urban rezoning, but on subsequent purchasers of home sites who had paid urban prices.[191] Two subsequent Victorian inquiries concluded that without the ability to collect a betterment tax, it would be impossible for the government to fund the provision of compensation to those who were adversely affected by planning decisions.[192]

The failure of the states to provide compensation for the loss of use rights resulting from planning restrictions can be explained as a pragmatic response to their inability to find a politically acceptable way of financing a compensation scheme. The implementation of the schemes for betterment taxes also demonstrates the lack of a sound method for measuring the incremental effect on land values of a zoning change.

D *Compensation for Restrictions on Land Clearing*

The question of whether compensation should be paid for the impact of environmental regulation on land use is controversial. Environmentalists commonly object to compensation, on the ground that the 'compensation bogey' discourages regulators from providing public environmental services.[193] The

188 Tannetje Bryant and Desmond Eccles, *Statutory Planning in Victoria* (Federation Press, 3rd ed, 2006) 203–4.

189 Melbourne and Metropolitan Board of Works, *Planning Policies for the Melbourne Metropolitan Region* (Melbourne City Planning, 1971), quoted in Committee of Inquiry into Town Planning Compensation, Parliament of Victoria, *Report of the Committee of Inquiry into Town Planning Compensation* (1978) 40 ('*The Gobbo Report'*) .

190 *The Gobbo Report*, above n 188, 40.

191 Ibid 41.

192 Bryant and Eccles, above n 188, 201, citing ibid; Stuart Morris, Ministry for Planning (Vic), 'Land Acquisition and Compensation: Proposals for New Land Acquisition & Compensation Legislation — Report to the Minister for Planning Victoria' (Report, 1983).

193 Emily Cripps, Carl Binning and Mike Young, 'Opportunity Denied: Review of the Legislative Ability of Local Government to Conserve Native Vegetation' (Research Report No 2/99, CSRIO Wildlife & Ecology, 1999) 40, 82, 97, 101. See also Sperling, above n 22, 432–3; Daniel W Bromley, *Environment and Economy: Property Rights and Public Policy* (Blackwell, 1991) 7–8; Glenn P Sugameli, 'Takings Bills Threaten Private Property, People and the Environment' (1997) 8 *Fordham Environmental Law Journal* 521.

libertarian response is that regulation without compensation privatises the costs of regulation by unfairly shifting them to affected landowners. As Michelman puts it: 'any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all'.[194]

1 *The Purposes and Impacts of Land Clearing Controls*

In the 1990s, some states legislated to prohibit landowners from clearing native vegetation from their land without a permit. The purposes of the laws were to conserve biodiversity by protection of habitat, and to halt land degradation.[195] Earlier attempts at preserving biodiversity on private land had regulated the taking of protected species through a permit system.[196] By the 1990s, all Australian governments were adopting a more integrated approach to biodiversity preservation, which included the protection of habitat.[197] Some states introduced regulatory controls on the clearing of native vegetation from private land. South Australia was the first state to introduce a permit system, with substantial fines for unauthorised clearing. The *Native Vegetation Management Act 1991* (SA) and predecessor Acts were said to have 'brought a virtual halt to broad–scale clearance in the State'.[198] By 2010, all states and territories required landowners to obtain a permit to clear native vegetation from their land.[199]

The land clearing laws have had some negative impacts for landowners, including restrictions on agricultural uses of the land which reduce productivity and land values.[200] Inquiries conducted by the Productivity Commission in 2004 and by the Senate Financial and Public Administration Committee in 2010 received many submissions from landowners showing that the laws had adversely affected their land use and land values, and had flow–on consequences for rural communities.[201]

The states provide very limited compensation to landowners for the impacts of land clearing laws. The Productivity Commission found that Western Australia and South Australia have offered limited schemes under which landowners were compensated if they agreed to set land aside under a heritage agreement.[202] While Victoria, Queensland and Tasmania make provision for compensation for the effects of biodiversity legislation, the provisions were infrequently used, because the states could achieve the same effects under planning legislation without

194 Michelman, above n 14, 1181.

195 *Productivity Commission Report No 29*, above n 103, XXIV.

196 Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) 290.

197 Ibid.

198 Ibid 291, citing the Environmental Defenders Office of South Australia.

199 *Senate Native Vegetation Laws Report,* above n 1, [2.40]. The state legislative schemes are summarised in Chapter 2 of the Report.

200 *Productivity Commission Report No 29*, above n103, XXX–XXXI; ibid [3.147]. The Committee said that the effects vary between landowners and that there is a lack of empirical data.

201 *Senate Native Vegetation Laws Report*, above n 1, 62.

202 *Productivity Commission Report No 29*, above n 103, XXXII, 48–9. The South Australian compensation provision terminated in 1991.

providing compensation.[203] Some states provide financial assistance packages to landowners for specified purposes such as land management or structural adjustment, but not as compensation for losses.[204]

The introduction of controls on land clearing has been strongly criticised by organisations representing rural landowners, and by conservative think tanks. The groups argue that controls on land clearing 'constitute an unjust restriction on farmers' property rights and that farmers should not be forced to shoulder the burden of providing environmental public goods for the broader community'.[205] Some farmer's groups have pressed for 'a legal right to compensation when their property rights in land and water are restricted or extinguished for environmental purposes'.[206]

Between 2003 and 2007, the Queensland courts heard a series of collateral challenges by landowners to the validity of state and local government laws under which the landowners had been prosecuted for clearing their land without a permit.[207] The landowners argued, inter alia, that the State did not have power to pass legislation restricting the rights of the holder of a deed of grant in fee simple or a grazing homestead freehold lease, except to the extent of the reservations in the grant or lease. The argument was repeatedly rejected by the Supreme Court and the Court of Appeal, and an application for special leave to appeal to the High Court was refused.[208] In *Watts v Ellis*,[209] the Court of Appeal expressed its impatience with the repetition of arguments that had already been decisively rejected in earlier proceedings. In *Burns v Queensland*,[210] the Court of Appeal dismissed an appeal and made a costs order against a legally unqualified person, Mr Walter, who had advised and acted for the landowners in each of the cases.[211] It appears that these organised attempts to relitigate the same point were intended to produce a change in the law.

203 Ibid XXXII, 49, 27. The Senate heard evidence that compensation was 'generally not forthcoming': *Senate Native Vegetation Laws Report*, above n 1, [4.10].

204 *Productivity Commission Report No 29*, above n 105, XXXII–III. For details of the schemes, see *Senate Native Vegetation Laws Report,* above n 1, 63–5.

205 Andrew Macintosh and Richard Denniss, *Property Rights and the Environment: Should Farmers Have a Right to Compensation?* (Discussion Paper No 74, Australia Institute, November 2004) 1 (summarising views of the National Farmers Federation and Agforce Queensland). See also *Senate Native Vegetation Laws Report,* above n 1, [4.2], which refers to many submissions indicating 'strong views that [land–clearing] laws force them to bear the financial burden of public conservation objectives'.

206 .Macintosh and Deniss, ibid.

207 *Bone v Mothershaw* [2003] 2 Qd R 600, 609–10 (McPherson JA); *Dore v Penny* [2006] QSC 125 (5 May 2006); *Burns v Queensland* [2004] QSC 434 (19 November 2004); *Burns v Queensland* [2006] QCA 235 (23 June 2006); *Burns v Queensland* [2007] QCA 240 (27 July 2007); *Wilson v Raddatz* [2006] QCA 392 (10 October 2006); *Glasgow v Hall* [2007] QCA 19 (2 February 2007); *Watts v Ellis* [2007] QCA 234 (23 July 2007).

208 Ibid. Special leave to appeal to the High Court from the decision in *Bone v Mothershaw* [2003] 2 Qd R 600 was refused because of the lack of prospect of success: Transcript of Proceedings, *Bone v Mothershaw* [2003] HCATrans 829 (25 June 2003).

209 *Watts v Ellis* [2007] QCA 234 (23 July 2007) 5 (McPherson JA).

210 [2007] QCA 240 (27 July 2007).

211 *Burns v Queensland* [2004] QSC 434 (19 November 2004).

2 *Conceptual Severance Arguments against Land Clearing Laws*

Conceptual severance arguments are sometimes advanced to support the case for compensation. For example, the Australian Property Institute has submitted that landowners have 'inchoate [property] rights in biota'.[212] The difficulty with this argument is that there is no regulatory taking of the flora. The legislation merely restricts the management and development of the land by preventing the owner from clearing it.

Another argument from conceptual severance is that landowners have the right to use and manage their land as they see fit, and this amounts to a distinct property right. While property lawyers are unlikely to agree with the proposition,[213] it nevertheless commands a wide and growing acceptance among landowners. The Senate Committee, inquiring into Native Vegetation Laws, reported that many of the submissions it received expressed the view that 'farmers were being stripped of their property rights'.[214] The Committee said: 'The commonly held view of landholders is that as landholders, they have property or ownership rights over the land and therefore a right to determine how to utilise it.'[215] Witnesses to the inquiry expressed the view that the land clearing laws amounted to an uncompensated 'taking' of their property rights.[216] Similar views in submissions from landowners, academics and organisations were also made in submissions to a Productivity Commission Inquiry in 2004.[217]

Pending proceedings in the Federal Court may give that court an opportunity to consider a conceptual severance argument in a section 51(xxxi) case arising from New South Wales statutes that restricted the clearing of native vegetation from landother than in specified circumstances. The applicant, Mr Spencer, argues that the statutes effected an acquisition of property, and did so under an arrangement or understanding with the Commonwealth which had some relevant connection with grants made under Commonwealth laws.[218] He seeks, among other relief, a declaration that the Commonwealth laws were invalid to the extent that they

212 Australian Property Institute, Submission No 20 to the House of Representatives Standing Committee on Primary Industry and Regional Services, *Inquiry into Development of High Tecnology Industries in Regional Australia Based on Bioprospecting*, March 2001, 7. See also Claude Cassegrain, Submission No 345 to Senate Financial and Public Administration References Committee, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures*, 5 March 2010, arguing that compensation should be paid for transfer of the control of flora and fauna; Evidence to Senate Financial and Public Administration References Committee, Parliament of Australia, Rockhampton, 9 April 2010, 55 (Lestar Manning), who suggested that what has been taken from landowners by the laws is in the nature of a profit à prendre.

213 'It is by no means clear that a landowner's prima facie privilege to manage his land as he wills is a "proprietary right" right at all': Gray, above n 26, 171.

214 *Senate Native Vegetation Laws Report,* above n 1, [3.22],

215 Ibid [3.20].

216 Ibid [4.10]–[4.11], [4.20]–[4.25].

217 *Productivity Commission Report No 29*, above n 103, 28.

218 In *Spencer v Commonwealth* [2010] HCA 28 (1 September 2010), (Hayne, Crennan, Kiefel and Bell JJ, summarising the pleadings). The High Court allowed Spencer's appeal from a decision of the Full Federal Court which had upheld a summary judgment of Emmet J to dismiss the proceedings on the motion of the Commonwealth.

authorised the acquisition of his property other than on just terms as required by section 51(xxxi).[219] . The relevant property acquired by the state is identified in his statement of claim as 'the rights to the legal, commercial or other benefits of carbon sequestration by ... [the] vegetation and soils'.[220]

3 *The Changing Paradigm of Property*

The Senate Committee was concerned that the widely held view that farmers were being stripped of their property rights could gravely undermine investment confidence, market stability and ultimately, food security.[221] The Committee also observed a deteriorating relationship between landowners and the government agencies responsible for implementing the laws.[222]

The idea that regulation takes away property rights seems to be increasingly accepted even by some public officials. The Productivity Commission cited a submission from the Victorian government acknowledging that:

> the initiation of native vegetation retention controls in Victoria, under Planning Schemes, weakened landholders' property rights to native vegetation in some instances, transferring power from landholders to the community.[223]

The Commission itself accepted a conceptual severance argument, that 'regulation of native vegetation on private property essentially asserts public ownership of the native vegetation resource'.[224] The Commission recommended that landowners should be responsible only for measures that would directly contribute to the sustainability of their resources. Any additional 'environmental services' required by society, such as biodiversity and greenhouse objectives, should be purchased from landowners.[225] The Senate Committee subsequently approved these recommendations, and adopted the view expressed in submissions that regulation should not cause 'reductions in effective property rights'.[226]

V CONCLUSION

The boundary between a taking of property by government and the regulation of use rights has long defied precise definition or legal test. Cases arise in which the impact of regulation upon an owner's use rights is so severe that it should

219 Ibid [37].

220 Ibid [6] (French CJ and Gummow J summarising the statement of claim).

221 *Senate Native Vegetation Laws Report,* above n 1, [3.22].

222 Ibid [3.150], [5.8].

223 *Productivity Commission Report No 29*, above n 103, 27, citing Victorian Government, Submission No 185 to Productivity Commission, *Inquiry into Native Vegetation and Biodiversity Regulations*, August 2003, 18–19.

224 *Productivity Commission Report No 29*, above n 103, 30.

225 Ibid XLVII–XLIX, recommendations 10.7, 10.10.

226 *Senate Native Vegetation Laws Report,* above n 1, [5.18]–[5.20].

be deemed to be a taking. The problem commonly arises in relation to land use regulation by planning laws. Planning legislation in Australian jurisdictions reflects general acceptance that where regulation has the effect of depriving the owner of all reasonably beneficial uses of the land, the government should either acquire the land or compensate the owner on the same basis as if it had acquired it. Compensation is generally not provided for loss of future expectations concerning use or development, at least where there is no existing use or development permit to crystallise the expectation.

Landowner lobby groups argue that the effect of Australia's land clearing laws is to make some private land effectively conservation estate, depriving the owners of all economically viable uses. In Australia, as in the US, it is generally accepted that compensation should be paid when regulation crosses that threshold. The Senate Committee inquiring into land clearing laws was told that New South Wales had acquired several properties where there was 'a clear demonstration that the properties had become unviable as a result of an inability to clear'.[227]

In many if not most cases, land affected by clearing restrictions may be suitable for other viable uses, such as tourism enterprises, wind farms or as a source of forestry carbon credits. It would be inconsistent with general approach to zoning changes for landowners to be compensated for regulation which merely restricts the range of viable prospective uses without curtailing existing uses.[228] The government response has been to withhold compensation, while offering program–based financial assistance to promote the achievement of policy goals.

Of greater concern is that a shift in the paradigm of property rights has become increasingly evident in public debates about regulatory changes. It used to be assumed that laymen implicitly accepted the molecular conception of property as a 'discrete asset', or the whole package of rights in a thing. We are now seeing evidence, in submissions to government inquiries and even in government documents, that the atomic or bundle of rights paradigm and conceptual severance are gaining wide acceptance among landowners affected by regulation. If Nash is right,[229] this changing public perception of property can be expected to make a significant difference to the willingness of citizens to tolerate regulatory interference with their property.

Although the bundle of rights conception of property has been approved by the High Court for use in section 51(xxxi) cases, the High Court has not yet indicated whether conceptual severance reasoning can be used to define relevant 'property' that has been acquired by the Commonwealth. A conceptual severance argument in *Telstra Corporation Ltd v Commonwealth* failed on the facts,[230] since there was found to be no change in the bundle of rights after the relevant regulatory

227 Evidence to Senate Finance and Public Administration References Committee, Parliament of Australia, Wagga Wagga, 8 April 2010, 9 (T Grosskopf, Department of Environment (NSW)).

228 It has been argued by landowner groups that the laws restrict existing uses because some statutes prevent the clearing of old regrowth on previously cleared land: *Productivity Commission Report No 29*, above n 103, XXII, XXV–VI, XXX, XLVII.

229 Nash, above n 50. See discussion above accompanying nn 49–52.

230 (2008) 234 CLR 210.

intervention. Apart from the express reliance of Callinan J on conceptual severance in his dissenting judgment in *Western Australia v Commonwealth*, the High Court has given no indication that it is ready to accept the technique. The pending appeal in *Spencer v Commonwealth* may give the Federal Court an opportunity to express its views on the use of the technique.

Regardless of how they are received in the courts, arguments based on conceptual severance and distributional fairness will continue to be urged in public debate by property rights advocates. Disparate landowner groups are coalescing into a well–organised movement armed with arguments forged in the academic and public discourse on the US takings clause. Their refrain, that regulation of use rights is a taking of property, is raising landowner expectations of compensation and fuelling opposition to regulatory controls on land use. The inexact distinction between mere regulation and a taking or acquisition of property rights will be increasingly challenged in courts, legislatures and the public forum.