Property, Planning and Human Rights

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Chief Justice Robert French AC
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Planning, in the way that that term is used in the Planning Institute of Australia's Constitution, is an important and challenging function of government and governmental authorities. It often involves the determination of what the public interest requires and the resolution of tensions between the public interest and the legitimate interests of individuals, groups and organisations within the community. Nowhere is this more acute than in relation to the effects of planning decisions on the use and enjoyment of property rights. It is that tension which is the focus of this address.

Property rights and interests are valued and protected in the legal tradition of the common law, which is part of the Australian legal tradition. They are also protected to varying degrees by statute law, limiting the purposes for which property can be affected by planning decisions, and providing compensation for compulsory acquisition and injurious affection. The Australian Constitution guarantees just terms for acquisitions of property by the Commonwealth. That guarantee covers all species of property. A recent example of its application was the decision of the High Court in *Wurridjal v Commonwealth*[1] which concerned the validity of laws supporting the Northern Territory intervention. A Commonwealth law creating compulsory statutory five year leases over Aboriginal land in favour of the Commonwealth, designed to support rights of entry for the purposes of the intervention, was held to constitute an acquisition for the purposes of the Constitution and to give rise to an entitlement to compensation. A more recent but unsuccessful attempt to apply it was made in the *Tobacco Plain Packaging Case*[2] in which the High Court held that statutory requirements for the plain packaging of tobacco did not constitute an acquisition of the intellectual property rights of the cigarette companies in their trademarks, designs and get up.

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1 (2009) 237 CLR 309.

2 *JT International SA v Commonwealth* (2012) 86 ALJR 1297; (2012) 291 ALR 669.

Property is sometimes spoken of as a human right. Article 17 of the Universal Declaration of Human Rights provides:

> 1. Everyone has the right to own property alone as well as in association with others.
>
> 2. No one shall be arbitrarily deprived of his property.

Its drafting was accompanied by controversy which reflected different national perspectives on the content of the right and the protections that should be afforded to it. Neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights includes a right to property. However property rights are recognised in the European Convention on Human Rights, the Inter-American Convention on Human Rights and the African Charter on Human and Peoples Rights. Article 1 of the First Protocol to the European Convention provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
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> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The reference to laws to control the use of property 'in accordance with the general interest' may be seen as the kind of qualification which would be applied to land and waters to allow for their planned use in the public interest. That does not mean that, under the European Convention, any interference with rights is able to be justified on that basis. Interference must be proportional, that is to say there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Under established principles of administrative law in Australia, not human rights law, the validity of delegated legislation and legislative instruments may be judged by reference to whether the delegated law or instrument is a reasonably proportional exercise of the power conferred by the statute under which it is made. Questions of proportionality were canvassed in some of the reasons for judgment in the High Court's recent decision concerning by-laws of the City of Adelaide which regulated certain kinds of public speech in and around roads in the central

business district.[3] The relevant by-laws had been challenged on a basis which had nothing to do with property rights but had to do with the common law freedom of speech and the implied constitutional freedom of political communication.

Neither the Australian Constitution nor the Constitutions of the States of Australia contain guarantees of human rights and freedoms of the kind set out in many other national constitutions.[4] There are, however, important Commonwealth statutes which implement human rights conventions directed against discrimination by reference to such matters as race, sex, age and disability. Native title rights and interests which are recognised at common law are in part protected by the *Racial Discrimination Act 1975* (Cth) ('the RDA'). The RDA prohibits discrimination against people on the basis of their race which has the purpose or effect of impairing the recognition on an equal footing of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. The Act defines such rights or fundamental freedoms by reference to Art 5 of the Convention on the Elimination of all Forms of Racial Discrimination. Article 5 includes:

> The right to own property alone as well as in association with others.

The validity of a key provision of the RDA was upheld in an important decision of the High Court delivered in 1982 in *Koowarta v Bjelke-Petersen*.[5] That case involved a land use decision based on race. In 1974, the Aboriginal Land Fund Commission, which was a Commonwealth authority, had entered into an agreement to take a transfer of a Crown Lease of a pastoral property in Queensland. The Minister for Lands in Queensland refused consent to the transfer under the *Land Act 1962* (Qld). He did so in furtherance of a government policy which opposed the acquisition by Aboriginal people of large areas of land in the State. Koowarta was a member of the indigenous group for whom the Commission had agreed to buy the Crown Lease. He commenced proceedings in the Supreme Court of Queensland against the Premier, Bjelke-Petersen and other members of the Queensland Government. He claimed damages under the RDA. Queensland challenged the validity of the RDA. Four of the seven Justices of the High Court held that the relevant provisions of the RDA were valid

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3 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197.

4 The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) create statutory charters which affect the interpretation of Victorian and ACT statutes and the exercise of administrative powers in Victoria and the ACT. They also provide for the courts to make declarations of incompatibility between statutes and specific human rights. They do not provide a basis for invalidating incompatible legislation.

5 (1982) 153 CLR 168.

laws giving effect to the Convention on the Elimination of all Forms of Racial Discrimination. The case was then remitted to the Supreme Court of Queensland which ultimately found in favour of Koowarta in 1988. Before the sale could proceed however, the Queensland Government declared the property a national park to ensure that no one could ever own it. Ultimately on 6 October 2010, Premier Bligh announced that 75,000 hectares of the park be made available to the Wik-Mungkana Peoples as freehold land.

The RDA was again invoked against Queensland when, in the course of the *Mabo* litigation, that State enacted a preemptive strike – a law purporting to extinguish all native title in Queensland even before the High Court had decided whether native title could be recognised at common law. In December 1988, a majority of the High Court held that the Queensland statute was inconsistent with the RDA.[6] Section 109 of the Constitution provides that when a State law is inconsistent with a law of the Commonwealth, the Commonwealth law shall prevail and the State law shall, to the extent of the inconsistency, be invalid. That decision, sometimes known as *Mabo (No 1)*, had the important general consequence that after the enactment of the RDA in 1975 native title could not validly be extinguished by State laws in a way that was any less favourable to the native title owners than any other property owner whose property was the subject of a compulsory acquisition by the State. That raised the question of the validity of many grants of title, vesting orders, mining tenements and laws and executive acts affecting land which had unwittingly extinguished native title.

The scheme of the *Native Title Act 1993* (Cth) ('the NTA') included provision for the validation of past laws and executive acts and decisions that might have been invalid because they were discriminatory in their effects upon native title. The price of validation was that where native title had been extinguished by such dealings the native title owners could claim compensation. They would of course, have to show that they had had native title and that it had been extinguished. The nature and content of such compensation is an as yet unexplored area of native title law.

The NTA also provided for the protection of native title in relation to future laws and dealings which might extinguish or impair it. This involved the creation of the so called right to negotiate and arbitral processes for determining whether certain classes of dealings with

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6 *Mabo v Queensland* (1988) 166 CLR 186.

land could go ahead and if so on what conditions. Other sections of the NTA provided for compulsory notification and consultation mechanisms.

For the system to be workable it had to provide mechanisms for negotiated outcomes. One of those is the Indigenous Land Use Agreement, which has been much used since it was created in the light of experience in the early years of the NTA. There are now many registered Indigenous Land Use Agreements throughout Australia. They enable a degree of certainty to be achieved for land use decisions including planning decisions and major project developments.

Planning law and policy must interact with native title rights and interests within the statutory framework laid down by the NTA. As to its intersection with property rights and interests generally, it is governed principally by State and Territory statutes. They of course continue to apply to decisions affecting native title rights and interests to the extent that they are consistent with native title legislation.

The large canvas of public law and administration is an important background to all such decisions. So too are rules of interpretation which the common law imposes in respect of statutes affecting property rights and interests generally. Before talking further of these things, I should say something about my own background in planning law and in practice. Some of you may take the view after having heard this that you can doze off for the rest of the presentation.

It began in the halcyon days of the 1960s at the University of Western Australia. Another student and I staged an exhibition debate for first year students. I think it was part of an Orientation Week. Our proposition was – that there is too much sex in town planning. I argued for the proposition, my opponent argued against it. Our arguments were replete with undergraduate double entendres, which I will not inflict upon this Congress. In the absence of an adjudicator, each of us claimed victory. Neither of us knew anything much about town planning.

My next experience was as a member of the Claremont Town Council and a member of its Town Planning Committee in the 1970s. That experience gave me the beginnings of an awareness that planning issues are complex and can stir deep passions. It also gave me the beginnings of some skepticism about people seeking major development approvals who say

that they want to give something back to the community. The complexity of evidence gathering for planning purposes was also brought home to me during that time. At my instigation the Council undertook a careful survey of the needs of the elderly in the Claremont area to assess the respective merits of more nursing homes over enhanced domiciliary assistance programs. Our findings in relation to the need for institutional care were to feed into our town planning scheme. I cannot now recall all the ramifications of that survey however a prominent finding which it yielded was that the elderly did not like being surveyed.

In 1983 my opponent in the student debate of the 1960s had become Minister for Town Planning in the Western Australian State Government. I was practicing as a barrister in Perth. Perhaps recalling our debate, he appointed me as Deputy Chairman of the Town Planning Appeal Tribunal. The Chairman of the Tribunal at that time was David Malcolm QC, later to become Chief Justice of Western Australia. The Deputy Chairman, whom I succeeded, was Daryl Williams QC, later to become Commonwealth Attorney-General. When I became Chairman of the Tribunal in 1986, my Deputy was Roger Macknay QC, who later became a District Court Judge and who is now the Chairperson of the Crime and Corruption Commission of Western Australia.

The appointments made to the Town Planning Appeal Tribunal of Western Australia in the early 1980s suggest two possibilities:

- being appointed to the Town Planning Appeal Tribunal was seen as a positive career move for budding Judges, Attorneys-General and Chief Justices;
- more plausibly — planning law was something which it was safe to entrust to generalist practitioners.

The latter possibility is not only more plausible but also more significant for the theme of this address. Planning law and practice are located in a much larger framework of law and public policy than is discerned by simply knowing the relevant planning Acts, legislative instruments, the decision-making authorities and their current policies and practices.

Planning law and practice attracts specialists, but is not for specialists with a blinkered mentality. It takes its place on the canvas of Australian public law which includes the Commonwealth Constitution and laws made under it, the Constitutions of the States and laws

made under them, the public authorities including local governments which are the creatures of State laws and the delegated legislation including statutory schemes which those authorities and local governments are authorised to make. That canvas also includes the common law or judge-made law which affects the way in which statute law is interpreted and applied. It includes statutory mechanisms of general application for administrative and judicial review of decisions made in the exercise of official powers conferred by statute or under delegated legislation, including the exercise of discretions under the various species of planning schemes and similar instruments.

Planning decisions, whether at the level of large scale regional development, the formulation of particular schemes relating to land use in urban, semi-rural and rural areas, the practical application of such schemes, or the formulation and application of regulations and by-laws — all involve the exercise of public power conferred by law. Planning, to the extent that it involves the exercise of such power is, like every other field of official decision-making, subject to the rule of law. No official can make a decision which affects the legal rights and interests or liberties of a person or body unless such decision is authorised by law. There is no such thing as an unfettered discretion. Even the widest ranging discretion must be exercised consistently with the scope, subject matter and purpose of the law under which it is exercised. This applies to decisions affecting property rights generally. It applies to decisions affecting native title rights and interests subject to the particular provisions of the NTA and other specific legislation such as State and Commonwealth Heritage Acts.

The sensitivity of planning decisions and their impact on the rights and interests and freedoms of organisations, groups and individuals within our society mean that it is subject to administrative review through tribunals given jurisdiction for that purpose, and to judicial review in the courts. In addition, such decisions can be subject to scrutiny in parliaments and through parliamentary committees and by Ombudsmen who report to parliaments. Where a lack of probity is alleged in connection with such decisions, they may be examined by bodies such as the Crime and Corruption Commission in Western Australia, and its equivalents in other States and otherwise by law enforcement agencies. This is not the occasion to enter upon a detailed discussion of the technicalities of administrative or judicial review of such decisions. It is, I think, useful however to mention the concept of administrative justice. While there is ongoing debate about its content, it provides a conceptual and normative

framework within which planning decisions, like all other official decisions, are made. That framework is based in part upon the standards that inform judicial review by the courts.

The standards of administrative justice are inevitably linked to the constitutional framework in which laws and official decisions operate. That includes the Australian and State Constitutions, the institutions of representative democracy, the rule of law, the formal or conventional separation of legislative, executive and judicial powers, and a milieu of common law rights and freedoms.

A fairly simple approach to administrative justice begins with the question — When Parliament makes a law which empowers an official to make decisions affecting people, what are the minimum criteria by which those decisions and the processes by which they are made can be regarded as just? The question may be answered thus — an official empowered by law to make a decision affecting the rights and interests of other people should meet the following standards when he or she makes the decision:

- The decision should be made in accordance with the rules which the law prescribes for making it — those rules may specify matters which have to be taken into account or disregarded when the decision is made. They may, in the field of planning, include requirements for public notification, consultation and consideration of public objections or submissions. They may require the decision-maker to take into account specified factors and perhaps to disregard others. But, however wide the decision-making power, it will always be a requirement that the decision is only made in furtherance of the purposes of the law and by reference only to those considerations which are relevant to those purposes and not for collateral purposes as are referenced to irrelevant considerations.

- The decision will be rational — that is rational in the sense that the decision is logically open on the information properly before the decision-maker having regard to the law which he or she must apply. In so saying, it can be accepted that there are some cases involving evaluative or discretionary judgments in which reasonable people can honestly and rationally arrive at different results.

- The process of the decision making should be fair — this is a central requirement of any form of justice, administrative or otherwise. Fairness, and in particular

procedural fairness, is not an optional moral extra. It is linked to the requirements of lawfulness and rationality. The decision-maker should not be distracted, in assessing the evidence, making findings of fact or exercising discretion, by any actual bias which may also amount to giving effect to improper purposes. Nor should the decision-maker be handicapped by the absence of information which could have been provided by persons affected had they been given an opportunity to make a submission or comment on or to rebut adverse information before the decision-maker. The decision-maker should also avoid the appearance of bias which can undermine confidence in the integrity of the process. Pre-judgment or affiliations with interested parties can give rise to the appearance of bias.

- The decisions should be explained intelligibly — generally by the provision of reasons so that persons affected by the decision, and perhaps the wider community, will know why it has been made. The provision of reasons for administrative decisions is not a requirement of the common law. However, it is often found in statutes conferring decision-making power or in administrative or judicial review statutes. Generally speaking, it is a good idea. Absent intelligibility in the decision, the first three standards of lawfulness, rationality and fairness may be of diminished practical effect because the capacity to judge compliance with them and to seek review will be compromised.

These are what I regard as the bare bones requirements of an understanding of administrative justice. They are persuasive and supportable because they are closely aligned to the requirements of the law itself. They also overlap with the requirements of common human rights guarantees against arbitrary action affecting rights and in favour of impartial tribunals to determine their existence.

Where broad administrative discretions are concerned, common ideas of fairness, beyond procedural fairness, involve consistency in decision-making, that is to say that similar cases will be treated similarly. Such objectives are advanced by policy guidelines. Of course a tension may exist between the objective of consistency and the flexibility necessary to accommodate a case which, because of its particular circumstances, would yield an absurd result if dealt with according to the policy book. Lower level primary decision-makers may

not be equipped to make the kind of judgments necessary in such cases and internal and external merits review have an important part to play in that connection.

The preceding standards have to be applied in real life contexts. Some of these involve high volume decision-making in which the transaction costs of the process, including losses in efficiency and timeliness and undue complexity, have to be taken into account. Nevertheless, administrative justice so understood provides a useful framework within which to make the kind of judgment that is necessary in the processes of decision-making in these important areas which can affect individuals, organisations and whole communities.

The criteria of administrative justice are of general application to administrative decisions involving the exercise of statutory power. Failure to meet some of those standards, particularly those relating to lawfulness, rationality and fairness, can result in judicial review for jurisdictional error or on specific grounds of review set out in judicial review statutes. In the field of planning decisions their effect on property rights and interests plays a prominent role. Property rights in Australia are protected by the Constitution to the extent that acquisition of property by the Commonwealth must be on just terms. There is no such constitutional protection in respect of the acquisition of property by State governments or authorities under State law. Nevertheless, each of the States and Territories has laws providing for the acquisition of land for public purposes or public works and for compensation to be paid to the owners of acquired land.[7]

Acquisition is not the only way in which property rights can be affected by the exercise of public power. They may also be affected by 'acts of government that do not directly or formally touch the property in question, but which nevertheless damage its value and enjoyment'. This is what is sometimes called 'injurious affection'.[8] Compensation for compulsory acquisition and injurious affection by State or Territory governmental action depends upon statute law. The question arises why is such compensation provided for by parliamentary enactment when it is not constitutionally required? One answer is that respect for property rights is a deeply embedded aspect of our legal tradition. It is also an aspect of our culture. It was reflected in the film 'The Castle' and the immortal line 'tell them they're dreaming'.

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[7] See the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 37; *Land Acquisition and Compensation Act 1986* (Vic) s 30; *Acquisition of Land Act 1967* (Qld) s 18; *Land Administration Act 1997* (WA) s 202; *Land Acquisition Act 1969* (SA) s 22; *Land Acquisition Act 1993* (Tas) s 24; *Lands Acquisition Act 1994* (ACT) s 42; *Lands Acquisition Act 1978I (NT) s 59.*

[8] See discussion in *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 and especially at 622 [33]–[34] (Gleeson CJ, Gummow, Kirby and Callinan JJ).

Darryl Kerrigan's assertion of his property rights was reflective of the common law's protective approach to property rights generally. That approach was forcefully stated by William Blackstone who endeavoured in the 18th century to set out, in what became a classic treatise, the common law of England. His work also greatly affected the development of the law in the United States. Blackstone regarded the right of property as an 'absolute right, inherent in every Englishman'.[9] He wrote:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land.[10]

Recognising however, that the legislature could enact laws to override the common law, he said:

> In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[11]

What Blackstone said spoke to another age but also speaks, although in more muted tones, to ours. The common law favours interpretations of statutes which minimise the effects upon property rights. Very early in the history of the High Court the first Chief Justice, Sir Samuel Griffiths, said that:

> it is a general rule to be followed in the construction of Statutes … that they are not to be construed as interfering with vested interests unless that intention is manifest.[12]

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9 William Blackstone, *Commentaries on the Laws of England*, (University of Chicago Press, Chicago and London, 1765) vol 1, 134.

10 Ibid 135.

11 Ibid.

12 *Clissold v Perry* (1904) 1 CLR 363, 373 (Griffiths CJ), 378 (Barton and O'Connor JJ concurring). Recently cited in *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [42] (French CJ).

That approach to the interpretation of statutes has been stated more than once in the High Court. It can be regarded today as a particular aspect of the principle of legality — a principle which says that laws are not to be interpreted as interfering with common law rights and freedoms generally unless that interpretation is required by the clear words of the statute. The principle is one which we share with the United Kingdom. It has been explained in the House of Lords as requiring that Parliament 'squarely confront what it is doing and accept the political cost'.[13] Parliament cannot override fundamental rights by general or ambiguous words. The rationale of the principle is that, in the absence of clear words, the full implications of a proposed statute may pass unnoticed:

> In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[14]

The general principle finds its application in the requirement, affecting the extinguishment of native title, that native title is not to be taken as extinguished by legislative or executive actions unless they are inconsistent with its continuing survival. Thus the grant of freehold title has been held to effect extinguishment. The grant of pastoral leases under statute was held in the *Wik* decision not to do so.[15]

In thinking about the application of this common law principle to the extinguishment of native title rights and interests, it is important to bear in mind that those interests, although originating in traditional laws and customs, are property interests recognised as such at common law and, since 1993, under the NTA. They are also rights protected by the NTA in relation to future dealings which might affect them. Although they have a special character they fall within the general framework for the protection of property rights and interests in the context of planning law and practice which I have outlined. It is of course true that the protection of native title rights has a particular significance and raises practical challenges for planning decisions in regional and rural areas. The statutory framework provided by the NTA puts a premium on negotiation and the use of such tools as Indigenous Land Use Agreements to enable decisions about the use of land and waters to be made in a way that

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13 *R v Secretary of State for the Home Department Ex parte Sims* [2000] 2 AC 115, 131 (Lord Hoffman).
14 Ibid.
15 *Wik Peoples v Queensland* (1996) 187 CLR 1.

accommodates so far as possible, the continuing existence of native title rights and interests and puts in place mechanisms for the practical management of co-existing rights.

The requirements of administrative justice and the common law principles protective of property rights are applicable to indigenous and non-indigenous interests alike. There are complexities attached to all aspects of planning law and practice. Native title is one of those.

What all of this tells us is that planning law and practice is not a field for the fainthearted or the blinkered specialist. It exists within the general framework of administrative justice which seeks to ensure that public power is exercised lawfully, fairly, rationally and intelligibly. It is exercised within the framework of constitutional and statutory constraints and the great traditions of the common law applicable to the way in which our laws are interpreted and applied to all Australians in striking a balance between the public interest and the legitimate interests of individuals, communities and corporations in the use and enjoyment of their property.