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THE LAW OF RESUMPTION AND COMPENSATION IN  
AUSTRALIA

BY MARCUS JACOBS QC

FOREWORD

The Hon Justice Michael Kirby AC CMG

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This is a practical book for busy lawyers. It contains up to date extracts from the applicable Australian legislation governing compensation for public acquisition of property in Australia. It also contains useful extracts and references to judgments, law reform reports and other materials, included to illustrate this highly developed area of the law. It is written by an experienced barrister who first cut his teeth on these subjects in South Africa and who has brought his practice in to Australia a most useful interest in comparative law.

Because compulsory acquisition of property for public purposes is a universal phenomenon of the modern state, the author has been able to draw on judicial discourse not only in Australia and in his native South Africa but also in England, the United States, Canada and many other jurisdictions. One of the most important developments in legal practice in Australia at the close of the 20th century is the greater willingness of judges and lawyers to look

beyond the courts of England for comparative materials and also to look more closely and more often to the decisions of the jurisdictions of Australia other than one's own for guidance on the solutions to analogous problems.

The capacity of a sovereign to acquire a subject's property is as ancient as organised human society. But in the place of confiscation by rapacious kings and war lords, civilised communities have developed complex rules to control and regulate compulsory acquisition. In the English legal tradition, to which our legal system is heir, the principle that property should not be confiscated except in accordance with law, can be traced to *Magna Carta*. In Article 52 of that document of 1215, King John promised:

"To any man whom we have deprived or dispossessed of lands, castles, liberties or rights, without the lawful judgment of his equals, we will at once restore these".

There you have the two concepts that have been refined by the many subsequent statements of basic principle: the requirement of authority of law and the obligation of restoration and proper satisfaction.

In the French Declaration of the Rights of Man and of the Citizen of 1789, the formulation took on the colour of a basic civil right. Article 17 provides:

"Property, being an inviolable and sacred right, none can be deprived of it except when public necessity,

legally ascertained, evidently requires it, and on conditions of a just and prior indemnity".

There can be little doubt that this formulation influenced James Madison when he was drafting the *Bill of Rights* for the United States Constitution. The Fifth Amendment provides that:

"No person shall be ... deprived of ... property without due process of law; nor shall private property be taken for public use, without just compensation".

This formulation in turn influenced the Founders in the provision they made in s 51(xxxi) of the Australian Constitution. However, that formulation governs only acquisitions under federal law. An attempt to extend its protections to the Australian States was rejected by the electors in the bicentennial referendum of 1988<sup>1</sup>.

The notion of providing fair compensation to those whose property is resumed by the state and affording a legal regime for the procedures of resumption, the avenues of redress and challenge and the principles of compensation has remained on the national and international agenda. The *Universal Declaration of Human Rights* now in its fiftieth year, declares in Article 17:

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<sup>1</sup> Proposed new s 119A. See T Blackshield, G Williams, B Fitzgerald, *Australian Constitutional Law and Theory* 1996, at 974. The proposed law was joined with other more controversial proposals. 68% of the electors voted against the amendment of the Constitution. Only 20% voted for the amendment.

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".

Putting flesh on these concepts, of proper legal procedures and fair compensation, is the purpose of a great deal of lawmaking: legislative and judicial. Expounding and explaining those laws as they apply in every jurisdiction of the Australian Commonwealth is the business of this book.

To those who wander onto the landscape of the law of compulsory acquisition of property, there are many minefields to be avoided and mysterious byways to be negotiated. The latter are marked with such curious sign posts as "Pointe Gourde", "Betterment", "Disturbance", "Special Value" and looking up the mountain, "Highest and Best Use". It is easy for the intrepid traveller to get lost. The principles have been fairly constant companions for me since, in the Australian Law Reform Commission in the 1970s I worked with Murray Wilcox and others on the reform of federal law<sup>2</sup>. Several cases came before me in the New South Wales Court of Appeal. But in the High Court of Australia, cases involving the constitutional guarantee of just terms are regular companions. Even

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<sup>2</sup> The Law Reform Commission.

in my short service, I have met them twice<sup>3</sup>. As I am writing this foreword, the Court has reserved its decision in yet another such case<sup>4</sup>. This is therefore an important and busy area of legal practice. It is necessary to have both a precise knowledge of the applicable law and a perspective of the whole landscape. This is what Mr Jacobs has aimed to provide.

One value of the comparative statutory material contained in this book is specially relevant to work in the High Court. A study of the nuances of different statutory language is often necessary or useful to understand the context in which various judicial observations have been offered. It is also helpful to allow the mind to play on the concepts involved and the different ways in which general objectives have been secured by particular statutory language. Most importantly, in special leave applications, it is usually helpful, where State law is involved, to be able to point to the significance of the statutory formulation in one jurisdiction for other jurisdictions of the Commonwealth. I have no doubt that the comparative material in this book will be put to good use in the gruelling moments of such applications. Practitioners and judges will

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<sup>3</sup> *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 and *The Commonwealth v WMC Resources Ltd* (1998) 72 ALJR 280.

<sup>4</sup> *The Commonwealth v Western Australia* (No C4 of 1998, resvd 27 May 1998).

find this book a helpful guide through a mass of material where complex and subtle concepts must be mastered. It will, of course, be essential as time passes, to ensure that the legislation remains unamended.

When I was young, I knew a distinguished Silk in Sydney, a wise and gentle man, who had the most admirable card index of every conceivable case and statute on the area of his chosen expertise. It was a source of marvel. It elicited admiration and even jealousy on the part of his professional colleagues. I often stole a glance at his cards, when appearing as his junior. I begged him to share them with his colleagues or at least the Floor of his Chambers or at least with me. But there was no way that he was going to part with his precious intellectual capital - accumulated wisdom and knowledge of the years. They went with him to the Bench. I suspect that he may even have taken them to the grave. Marcus Jacobs, on the other hand, has shared his intellectual capital with his professional colleagues. For that, they will be most grateful.

High Court of Australia  
CANBERRA  
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D Kirby