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LAWS OF COMPULSORY LAND ACQUISITION

By Marcus Jacobs

FOREWORD

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The Hon. Michael Kirby AC CMG

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FOREWORD

In 1998, two years after my appointment to the High Court of Australia, I wrote a foreword to Marcus Jacobs's text *Law of Resumption and Compensation in Australia*. Now, this new work is published. Once again, I commend it to the expert audience to whom it is addressed.

So long as there have been states, problems have arisen between governments and private property owners. In war and peace, governments have conceived the need to acquire legal interests from natural and legal persons, in order to advance some conception of the public interest. As societies became more organised, it was recognised that such disturbance of private interests needed to be controlled, both to discourage unnecessary acquisitions and to compensate those where acquisitions had occurred.

As Mr. Jacobs points out, restraints and conditions were imposed, to reflect the then current notions of justice and equity, back to Roman times. The *Magna Carta* of 1215, extracted from King John at Runnymede, promised controls over the deprivation of lands, property, liberties and rights by the Crown and redress where such deprivations had occurred. Similar guarantees became a common feature of modern statements of basic constitutional rights. There was a reflection of those statements in the Australian Constitution of 1901. Section 51(xxxi) empowered the Federal Parliament to make laws "for the acquisition of

property ... from any State or person for any purpose in respect of which the Parliament has powers to make laws"; but only "on just terms".

In a sense, this entire work is devoted to the explanation of what "just terms" require where there has been an acquisition of property in Australia for public purposes, either under federal or Territory laws or under the laws of the States. Necessarily, federal law imports the constitutional protection guaranteed in par(xxxi). The recent decision of the High Court of Australia in *Wurridjal v The Commonwealth*[1], on one view, holds that the constitutional norm also applies to acquisitions of property by or under Territory laws[2]. Although the same constitutional protections do not apply with respect to State acquisition (indeed were rejected at a referendum in 1988 designed to introduce them), many similar protections are enacted by State legislation to impose equivalent obligations[3]. This book collects and describes those laws.

Although the focus and purpose of the book have changed somewhat, this new volume can still be seen as a continuation and updating of the 1998 text. As with its predecessor, it is encyclopaedic both in its objectives and its presentation. Drawing on a lifetime's professional experience, Marcus Jacobs has assembled the details of federal, State and Territory laws that govern compulsory land acquisition in Australia. To these provisions have been added references to judicial decisions concerning the text of such laws.

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1 (2009) 237 CLR 309.

2 (2009) 237 CLR 309 at 336-8 [13], 359 [86], per French CJ; 387 [186]-[189], per Gummow and Hayne JJ; 419 [287] per Kirby J.

3 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

One subject upon which the High Court of Australia has spoken with a single voice during the thirteen years of my service was the necessity, where statutory provisions were applicable to the resolution of a legal problem, to start with, and concentrate upon, the statute. Not to be deflected needlessly into common law elaborations where the law-maker had enacted rules, expressed with the special democratic legitimacy of a legislature[4].

Although judicial expositions of the governing laws are cited throughout this work, it demonstrates, on virtually every page, that this is a corner of the law that is overwhelmingly governed by statute. The starting point (and often the end point) for the resolution of a legal problem concerning acquisition is therefore, ordinarily, a provision made by or under statute. That is why every chapter of this book commences with relevant statutory provisions. Such provisions lay out, in fastidious detail, the applicable sections and paragraphs of the enacted law in each of the several Australian jurisdictions. Necessarily, this adds to the size of the work. However, it affords a highly useful collection of comparative law materials. Sometimes it will be possible to secure a better understanding of the law of one's own jurisdiction by contrasting its provisions with those enacted elsewhere.

This is also the case with constitutional provisions. Whereas the drafters of the Fifth Amendment to the Constitution of the United States of America adopted the formulation, "Nor shall private property be taken for public use, without just compensation", the drafters of the Australian constitutional provision elected, instead, to impose a requirement of "just

[4] Cf. *Visy Paper Pty Ltd v Australian Competition & Consumer Commission* (2003) 216 CLR 1 at 10 [24] and cases there cited.

terms". Is there a difference? The distinction was drawn to notice in 1947 by Justice Dixon in *Nelungaloo Pty Ltd v The Commonwealth*[5]. That great judge observed that "unlike 'compensation', which connotes full money equivalence, 'just terms' are concerned with fairness". It was this point of distinction between a constitutional obligation to accord "just compensation" and one that requires "just terms" that lay at the heart of my dissent in *Wurridjal.*

That case concerned the arguability of the Aboriginal claimants' objections to the provisions of federal law authorising the Northern Territory Intervention into their land and personal interests. The indigenous people affected were not consulted, nor involved in, the intrusive laws enacted to authorise the Intervention. I considered that their pleading of a constitutional defect in the laws was not demurrable and that they should have their day in court. The majority held otherwise. However, the case illustrates nicely the value of comparing and contrasting the mass of statutory and constitutional material collected in this work, in order to elucidate the precise meaning of the governing text.

This book is encyclopaedic. Not only does it collect the detailed statutory and constitutional provisions. It also provides substantial quotations from judicial opinions explaining the statutes and describing how they are intended to operate. In addition, because of commonalities of statutory provisions in the many countries of the common law with which the author is familiar, the book is enriched with references to decisional law not only in Australia but also in England, New Zealand, Canada, the United States of America and also the author's original

[5] (1947) 75 CLR 495 at 569; cf. *Wurridjal* (2009) 237 CLR 309 at 424-425 [305]-[306].

homeland, South Africa. The richness of the comparative source materials will assist the busy decision-maker and practitioner, so long as he or she always remembers the High Court's instruction. Where a statute applies, the first port of call must always be the statute's provisions. However uncongenial it may sometimes be to grapple with the detailed and technical requirements of statute law, in problems of governmental acquisition of property, that will normally be the correct place to start.

This volume has attempted to bring up to date the applicable case law; to refer to the latest legislation; to provide a critical analysis of many of the new cases; to render the book more easily accessible with quick references to the relevant legislation; and to add a new section dealing with compulsory acquisition of interests in native title. The last addition reflects the growing impact of the law of native title upon interests in land in Australia and thus its significance for the compulsory acquisition of Aboriginal land. Doubtless this is a subject that will require much further elaboration as each new year brings important decisions concerned with the interface between *Aboriginal Land Acts* and acquisition statutes[6].

Once again, it is appropriate to thank Marcus Jacobs for sharing his legal professional knowledge (and the vast array of relevant statutory and common law materials) with his professional colleagues. He could, after all, have kept all this information to himself. Or he could have left it to others to perform the task of assembling and checking the applicable statutory provisions which pour out of our legislatures in great number

[6] See *Griffiths v Minister for Lands, Planning & Environment* (2008) 235 CLR 232; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24; *Minister Administering Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285. See also *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115.

and variety every year. He could have elected to spend his spare hours on a beach, puzzling over cryptic crosswords or playing golf. Instead, he has updated, expanded and re-focused this work. He now publishes it for the benefit of specialists in this field and also generalists. This is an act of generosity for his colleagues in his chosen homeland. I have little doubt that he is already working on a third edition.

As the legal profession of Australia becomes more national and international in its work, there is little doubt that future studies of land acquisition law will take lawyers into much comparative law material, just as this edition does. In such a mass of detail, it is easy to lose the wood for the trees. That is why good layout and systematic presentation of the material is so important for success. In addition to a more extended treatment of relevant provisions affecting Aboriginal land rights, future editions may offer more suggestions for law reform which grow out of the author's experience and comparativist approach. As well, amidst so much detail, occasional expert analysis is needed to differentiate the judicial "law" from the excrescences of "lore". Although this book is essentially a text for legal practitioners, the author is uniquely well-placed to offer a critique on where we have come from and some hints as to where we should be going. Every new year throws up unexpected problems: for example, whether land acquisition laws permit the public acquisition of Aboriginal native title interests compulsorily for immediate on-sale for the private benefit of non-public investors[7], essentially to carry out a "private to private" transaction, unconnected with any need or

[7] *Griffiths* (2008) 234 CLR 232 at 262 [104]-[105]; 236 [119].

use of the land by government for public purposes. Similar questions have lately arisen in the United States[8].

Long experience in the law teaches the judge and legal practitioner that every part of the law can present interesting and challenging puzzles for analysis, doctrine and policy. This book shows that lands acquisition law in Australia is no exception. For his devoted work in assembling this comprehensive taxonomy of materials and commentary, many judges, practitioners and officials will be greatly in the author's debt.

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[8] *Kelo v City of New London, Connecticut* 545 US 469 at 477, 494 (2005); K. Gray, "There's No Place Like Home", (2007) 11 *Journal of South Pacific Law* 73 at 75.