

## SENATE PRIVATE MEMBER'S BILL FOR PROTECTION OF PRIVATE PROPERTY

## NOTE:

On 10 May 1984, Senator Janine Haines (Australian Democrat) introduced into the Senate a private member's Bill providing for the protection of private property from unjust acquisition under Australian law. The Bill, which would rely on the external affairs power for its validity if enacted, is set out below. It will be noted that the right to compensation which would be created by cl 7 is retrospective to 13 November 1980 (the date the Civil and Political Rights Covenant came into force for Australia). The Act makes no provision for just terms for acquisition of land in a Territory by (as distinct from under) Commonwealth law. It is established that s 51(xxix) of the Constitution does not apply in such cases: Tau v Commonwealth (1969) 119 CLR 564. This is presumably an oversight.

The validity of ss 6 and 7 of the Bill, if enacted, under s 51(xxix) is far from clear, despite the breadth of that power according to the High Court's decision in Commonwealth v Tasmania (1983) 46 ALR 625. The Civil and Political Rights Covenant imposes no obligation on Australia to accord 'just terms' for the acquisition of property: compared with Art 17 of the Universal Declaration of Human Rights the Covenant is remarkably, and deliberately, reticent in its protection of property rights. But even Art 17(2) of the Universal Declaration refers only to 'arbitrary deprivation' of property: it is not necessarily arbitrary to deprive a person of property without paying just terms. The High Court has not yet decided that legislation implementing a General Assembly resolution is as such within the scope of the external affairs power, and in any event the Bill does not purport to implement the Universal Declaration as a whole, or even Art 17. As it stands the Bill would fairly clearly not be valid under s 51(xxix) (apart from s 5(2), which is incapable of operating alone). It will be interesting to see to what extent private property rights are protected in the proposed draft Australian Bill of Rights, which will be in substance based on the Civil and Political Rights Covenant.

## A BILL

FOR

### An Act to protect private property from unjust acquisition under certain laws

WHEREAS the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in the year 1948 provides, in Article 17, that everyone has the right to own property and that no-one shall be arbitrarily deprived of his property:

AND WHEREAS customary international law is in accordance with this declaration:

AND WHEREAS the International Covenant on Civil and Political Rights, to which Australia is a party and which entered into force for Australia on 13 November 1980, provides, in Article 26, that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law and that, in this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as (inter alia) property:

AND WHEREAS that Covenant provides, in Article 50, that its provisions extend to all parts of federal States without any limitations or exceptions:

AND WHEREAS, by Article 2 of that Covenant, Australia, as a party to that Covenant, undertakes to ensure that any person whose rights or freedoms as recognised by the Convention are violated shall have an effective remedy:

AND WHEREAS the Constitution of the Commonwealth of Australia, by paragraph (xxxi) of section 51, ensures that no law of the Commonwealth, other than a law as applicable to a Territory of the Commonwealth, can cause the property of a person to be acquired otherwise than on just terms, but the Constitutions of the States do not make any corresponding provision:

AND WHEREAS it is expedient that the Parliament should protect the rights of persons in respect of property, as referred to in the foregoing recitals, against any law of a State, or any law of a Territory made by a legislature or authority empowered by the Parliament to make such laws, that seeks to infringe those rights:

BE IT THEREFORE ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

#### Short title

1. This Act may be cited as the *Property Rights Protection Act 1984*.

#### Commencement

2. This Act shall come into operation on the day on which it receives the Royal Assent.

#### Act to bind Crown

3. This Act binds the Crown in right of the Commonwealth and of every State and Territory.

#### Extension to Territories

4. This Act extends to every external Territory.

### **Interpretation**

**5. (1)** In this Act, unless the contrary intention appears—

“law to which this Act applies” means—

- (a) a law of a State; or
- (b) a law of a Territory made by a legislature or authority (including the Governor-General acting with the advice of the Executive Council) empowered by the Parliament to make such laws,

whether made before or after the commencement of this Act;

“prescribed day” means 13 November 1980, being the day on which the International Covenant on Civil and Political Rights entered into force for Australia;

“property” includes all rights in respect of real or personal property, including rights in respect of minerals on or below the surface of land.

**(2)** An acquisition of property of a person that involves discrimination against that person on the ground of property shall be deemed not to be an acquisition on just terms.

### **Protection of property**

**6. (1)** After the commencement of this Act the acquisition of property by or under a law to which this Act applies, other than an acquisition by a State from an instrumentality or agency of the Crown in right of that State, shall be on just terms.

**(2)** Any purported acquisition that does not comply with this sub-section is of no effect.

### **Compensation**

**7. (1)** Where, before the commencement of this Act but on or after the prescribed day, there has been an acquisition of property of a person that would have been contrary to section 6 if it had occurred after the commencement of this Act, that person is entitled to recover, by action in a court of competent jurisdiction, from the person (including a State or an authority of a State) by whom the property was acquired, such compensation as is just.

**(2)** The Parliament declares that an acquisition of coal, other than coal that was vested in an instrumentality or agency of the Crown in right of New South Wales, effected by the Coal Acquisition Act, 1981 of New South Wales, is an acquisition to which sub-section (1) applies.