



*Australian Property Institute*

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7 April 2009

National Human Rights Consultation Secretariat  
Attorney-General's Department Central Office,  
National Circuit  
Barton ACT 2600

Dear Sir,

Re: National Human Rights Consultation

This submission constitutes a response to the invitation from the National Human Rights Consultation Committee to the Australian community to respond to the Terms of Reference that the Australian Government has given the Committee, namely:

1. Which human rights (including corresponding responsibilities) should be protected and promoted?
2. Are these human rights currently sufficiently protected and promoted?
3. How could Australia better protect and promote human rights?

The NSW Division of the Australian Property Institute (API) and the Spatial Industries Business Association Australia (SIBA) was represented by John Sheehan LFAPAI Past President at the Community Round Table convened by the Committee held at the National Convention Centre on 30 March.

The overall need for a discourse between the Australian community and the Australian Government regarding expectations about human rights is supported by the API and SIBA and the following comments and recommendations have been framed to respond to the Terms of Reference:

**RESPONSE**

**1. Which human rights (including corresponding responsibilities) should be protected and promoted?**

**(a) Human right to own property**

API and SIBA are concerned that deprivation of property ought not to occur arbitrarily, and the human right to own property should be more effectively protected and promoted in Australia. Where private property is compulsorily acquired by any Government for its purposes, such acquisition should be only upon just terms.

Abrogation of private property rights by Government must be compensated for through the payment of full compensation in an efficient manner, to ensure that the Australian Government's international obligations pursuant to *Article 17* of the *Universal Declaration of Human Rights* are not transgressed.

### **(b) Human right to information and to know**

API and SIBA are concerned that the human right to receive and impart information and to know about Governmental workings should be more effectively protected and promoted in Australia. Critique and dissent is important for the protection of all human rights, and access to information is a fundamental tool. Information should be provided in a manner which is readily available, at a reasonable or nominal cost, and in forms which are readily understandable by an educated albeit lay Australian community.

### **(c) Human right to distinct culture**

API and SIBA are concerned that distinct cultural groups in the community such as Aboriginal and Torres Strait Islands should have their distinctive human rights to property (native title) protected according to custom and traditional law.

## **2. Are these human rights currently sufficiently protected and promoted?**

### **(a) Human right to own property**

API and SIBA is concerned that State legislation such as the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) does not have similar provisions as the *Land Acquisition Act 1989* (Cwth), which at ss55-58 provide the reader with a clear understanding of the basis of assessment of compensation arising from the compulsory acquisition of property rights by the Commonwealth.

As the Committee is aware, the Commonwealth legislation reflects the guarantee contained in the *Constitution* at s51(xxxi), namely:

*The Parliament shall subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*

*...(xxxi) The acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws*

Interpreting s51(xxxi), the High Court has stated that:

*[t]he terms of s.51 (xxxi) were intended to recognise the principle of the immunity of private and provincial property from interference by the federal authority, except on fair and equitable terms.*

*(Kirby, J in Newcrest Mining (WA) Ltd & or. –v- The Commonwealth of Australia & or ((1997) 147 ALR 42)*

While there is little guidance as to the nature of “just terms” notwithstanding that all existing compensation assessments involving Commonwealth legislation, must respect s51 (xxxii), there is at least an understanding that compensation has a benchmark.

This guarantee of compensation has no equivalent in any State constitution such as the NSW *Constitution* or in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). Accordingly, API and SIBA are of the view that because the phrase “just terms” compensation is used in the NSW legislation, it follows that this notion should be a right similar to the guarantee of s51(xxxii) of the *Australian Constitution*.

Legal development and constitutional interpretation of the fundamental right that a citizen ought not to be arbitrarily deprived of property rights is also reflected not only in the previously mentioned *Universal Declaration of Human Rights*, and also in earlier benchmark documents such as the 1789 French *Declaration of the Rights of Man and of the Citizen*. Importantly, this latter document recognises that where public need necessitates compulsory acquisition of property rights, this action can only occur “on condition of a just and prior indemnity”.

More recent documents such as the Indian *Constitution* allude to a necessity to provide for compensation when compulsory acquisition of property occurs. The Malaysian *Constitution* requires adequate compensation, while the Japanese *Constitution* perhaps reflecting American influence states that private property rights compulsorily acquired can only be taken “upon just compensation”.

The human right to own property remains inadequately protected and promoted when compulsory acquisition by State and State agencies occurs, and there is compelling evidence that just terms should be extended to cover State and local Government. One example is in respect of the *Land Acquisition (Just Term Compensation) Act 1991* (NSW) which clearly does not provide just terms.

This NSW legislation provides that compensation is not to be paid where a subsurface easement or right to use land is acquired by the State for the construction and maintenance of public works (vide s.62). The API is aware of many instances where the acquisition of such subsurface rights have diminished the value of private property above the subsurface right notably in the Sydney CBD diminishing excavation potential for the construction of basements for major retail and commercial buildings.

In addition, where an owner requires the State or State agency to acquire land nominated for a public purpose due to individual hardship, no compensation is payable for special value, loss attributable to severance or disturbance, nor for solatium (vide s.26). In addition, the heads of compensation payable under the NSW legislation are restricted to those items listed at s.55, nevertheless excluding such important compensation issues as reinstatement. The maximum amount of compensation also payable in respect of solatium is \$15,000 (vide s.60(2)) which in many cases is arguably insufficient.

All of the above demonstrates the insufficient protection and promotion of the human right to own property particularly when such right is abrogated by State or local Government.

## **(b) Human Right to information and to know**

API and SIBA believe that the protection of the human right to information and knowledge is insufficiently protected and promoted throughout the three levels of Government in Australia. It is recognised that there can be a potential conflict within any human rights framework regarding access to information, however in a complex multi cultural social democracy such as Australia the quality and quantum of data required by the community is very significant.

Security issues raised to inhibit access to data notably cadastral, property titling and natural resources mapping are doubtless a legitimate concern of government, especially the Commonwealth Government with its external affairs and military powers, and international obligations. However, the intersectional nature of human rights protection requires that such issues be carefully balanced preserving to the fullest extent possible the right to information and knowledge.

The rapid expansion of GIS and other far reaching spatial information has raised expectations within the Australian community that access should be not only be encouraged but also promoted.

## **(c) Human right to distinct culture**

API and SIBA believe the human right to distinct cultural rights notably those of the Aboriginal and Torres Strait Islanders remain insufficiently protected and promoted. Indigenous property rights and interests arising from the survival of native title are the subject of protection under the *Native Title Act 1993* (Cth.), however subsequent amendments such as the *Native Title Amendment Act 1998* (Cth.) reveal how potentially fragile these property rights are. The operation of the *Racial Discrimination Act 1975*(Cth.) has been suspended to permit the legislature to pass not only the above related statutes but more recently the *Northern Territory National Emergency Response Act 2007* (Cth.).

In 1997 API raised concerns over the then *Native Title Amendment Bill 1997* (Cth.) stating that limitations upon compensation claims by native title holders would constitute a highly undesirable precedent for all holders of property rights in Australia indigenous and non indigenous. It was the view of the API that any dilution of the just terms compensation provisions would be regarded as reactionary, and as a result the proposed time limit on native title claims lodgement was not proceeded with in the resultant 2008 legislation.

It remains of concern to API and SIBA that a valuable Australian property right such as native title can still be compromised, hence the concern that ethnocentric discrimination ought not to be permitted in respect of distinct cultural rights. Indeed, this issue highlights the vulnerability if not fragility of non indigenous property rights to diminution or even abrogation without adequate compensation.

## **3. How could Australia better protect and promote human rights?**

### **(a) Human right to own property**

As stated earlier, it is the firm view of API and SIBA that the just terms provisions of the Australian *Constitution* should be extended by way of a specific statement of human rights to own property in any emerging document from the current consultation such as a Charter

of Human Rights. Such statement must encompass the compulsory acquisition of property by not only Commonwealth but also State and local Government and their agencies

**(b) Human Right to information and to know**

As stated earlier, it is the firm view of API and SIBA that the human right to information and knowledge should be protected and promoted. This should occur by way of a specific statement of human rights to information and to knowledge in any emerging document from the current consultation such as a Charter of Human Rights. Such statement must specify that information and knowledge in its fullness should be available to the broad Australian community expeditiously, equitably and in a manner which is readily discernable.

**(c) Human right to distinct culture**

API and SIBA firmly consider that special property rights and interests such as those held by distinct cultural groups in Australia such as Aboriginal and Torres Strait Islanders should be more specifically protected in a subsequent Charter of Human Rights if adopted. In addition Commonwealth and State legislation dealing in particular with compulsory property acquisition should be amended to ensure that such special property rights and interests are afforded the identical compensation provisions that apply to established Anglo Australian property rights.

API and SIBA have been pleased to provide the above submission and would be grateful for the opportunity to provide further amplification to the Committee. The API NSW Divisional Executive Officer Ms Gail Sanders (telephone 92991811) or the SIBA Chief Executive Officer Mr David Hocking (telephone 62825793) can be contacted once the Committee has a timetable established for any focussed consultation subsequent to the Community Round Table consultations.

The Chair of the API Government Liaison Committee Mr John Sheehan would be providing the further amplification to the Committee if requested, and will be able to answer any questions that may be raised in response to the above submission by API and SIBA.

Yours sincerely



Robert Hecek  
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NSW Division  
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David Sinclair  
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Australia