ENVIRONMENTAL OBLIGATIONS AND THE WESTERN *LIBERAL* PROPERTY CONCEPT

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[In environmental and planning cases the idea is often expressed that the powers of a property owner are limited only by express legislation, and such limitations are to be construed strictly. Blackstone's well-known expression that ownership is a 'despotic dominion' rested upon his theological views which are not held in mainstream contemporary religions, if they were current in Blackstone's own time. The correct position found in other legal material and supported on strong environmental policy grounds, is that the owner's right to beneficial use and enjoyment of the object of property is limited by inherent social and environmental obligations. This paper explores such obligations in the common law world, and then compares them with the recognition of social and environmental obligations in German law, particularly in the field of compulsory acquisition. It seeks to elucidate the obligation to the environment which is embraced by the western liberal concept of property applied in the common law world.]

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I THE PROBLEM

The environmental obligation implicit in property has too frequently been overlooked. Too often the error is made of unquestioningly accepting the tired old dogma that, in principle, property owners may do whatever they wish with what they own, subject only to legislation, such as planning law or environmental pollution law, and that construed as narrowly as possible. This dogma is often asserted with no citation of a binding or even authoritative source, as though it is enough simply to state the dogma as self-evident truth. The dogma is mistaken.

One illustration of the 'good old style' is the otherwise progressive decision of the Administrative Appeals Tribunal of Victoria ('AAT') in *Department of Conservation and Natural Resources v Robson*.[1] Rural land owners sought permission to clear 3000 square metres of native vegetation from their private land with a view to establishing a wholesale plant nursery. The local authority granted a permit and the State government Department of Conservation and Natural Resources ('the Department') appealed against the grant of that permit to the AAT. The Department was actively seeking to rescue from extinction Victoria's rarest bird species, and State bird emblem, the helmeted honey eater. Seventy individuals were estimated to remain, and of these there were 21 breeding pairs. The bird is listed for protection under the *Flora and Fauna Guarantee Act 1988* (Vic). Clearly the population of the bird has already been so decimated that it will forever have problems with respect to lack of genetic diversity.

The Department was attempting to re-establish colonies of the bird in its former habitats. Some of these habitats were on private land. The bushland that was the subject of the application was very close to one habitat. In view of this the AAT decided against granting the permit to clear the land, observing that:

> The incremental effect of clearing native vegetation has been demonstrated before this Tribunal time and time again. Clearance of small parcels, taken in isolation, appears to be innocuous. Taken together, the cumulative effect is considerable. It can lead to degradation of land, the destruction of habitat and the loss of entire species of flora and fauna. Thus, in areas such as this, great care must be taken to ensure that areas of ecological significance are not further undermined.[2]

That is all undoubtedly correct. That is the self-evident truth for which one need cite no authoritative source, not the dogma that the owners of land may in principle do with it exactly as they wish. But then the AAT turned, almost by way of apology, to consider the impact of its decision on 'freedom of property':

> At first glance, this decision may appear to visit an unreasonable hardship on the [land owners] in that it prevents them from removing what they see as an impediment in maximising the economic return they receive from their land. ... However, it must be understood that a property 'right' is the ability to carry out what is not restricted or prohibited by the rules of society. Thus control over native vegetation should be exercised, the Tribunal believes, only when it has

[1] (1995) 14 Administrative Appeals Tribunal Reports (Victoria) 359.
[2] Ibid 362.

> been clearly demonstrated that exercising that control is necessary in the public interest. Such is the case here.[3]

The AAT did not assert that a person who wants a farm devoid of native bush should acquire such land in the first place, rather than acquiring forested land and clearing it. The conclusion reached by the AAT, that the indigenous habitat must be preserved, is plainly correct. However, the AAT seems to have regarded its conclusion as exceptional. No justification was given, and no authoritative source was cited, for the rule which it would have applied in the ordinary case of habitat destruction, just as in other cases where property rights are allowed unqualified free play.[4] If indigenous habitat on private land will be protected only when a species is pressed to the edge of extinction, and perhaps only in aid of a State or national fauna or flora emblem at that, then more is to be expected than a replay of mistaken old dogma about 'freedom of property' without so much as citation.

A related aspect of the problem concerns compensation. It seems to be generally assumed that rights of property include unlimited development rights. If the land is to be made subject to a conservation order, it is claimed, the loss of these hypothetical development rights must be compensated. Because funds to finance such compensation are scarce, the result is that orders are made for environmental purposes with incredible infrequency. With respect to an Interim Conservation Order under Part 5 of the *Flora and Fauna Guarantee Act 1988* (Vic), for example, compensation might be payable to private land owners under s 43. Not one such order has been made with respect to private land in the 10 years of the Act's operation.[5] Yet, it is by no means clear why the right of a property owner to beneficial use of the property extends to environmental destruction and why the owner should be compensated for desisting from it.

II THE WESTERN LIBERAL PROPERTY CONCEPT

For legal purposes, the western liberal concept of ownership is a 'bundle of rights' held by a person, relative to others, with respect to some phenomenon which is suitable for individual appropriation.[6] Essentially, the bundle comprises three rights:

1 the power to exclude others;
2 the power to transfer ownership to someone else, or to encumber it in some way; and

[3] Ibid 363.

[4] See, eg, *Guiness Mahon Pty Ltd v SJB Planning Pty Ltd* (1995) 15 Administrative Appeals Tribunal Reports (Victoria) 176, 177, the result of which is not in question.

[5] The one determination of critical habitat on private land made in the same period, with respect to the small golden moths orchid, was revoked without further protective action: *Victoria Government Gazette*, 8 May 1997, 1024.

[6] Generally, in legal systems derived from the English common law system, different technical expressions are used to designate 'ownership' according to the relevant phenomenon. With respect to land, the 'owner' is generally the person entitled beneficially to a fee simple estate in freehold tenure. With respect to phenomena which are not suitable for individual appropriation, see generally Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252.

3 the right to beneficial use and enjoyment of the phenomenon over which ownership is claimed.

When Honoré sought a modern pan-European concept of ownership,[7] he identified eleven attributes of ownership. Honoré formulated his basic conception of property as 'the greatest possible interest in a thing which a mature system of law recognizes.'[8] This formulation reflects the powers of an owner as set out in the great European civil codes, such as § 903 of the 'radically liberal' *Bürgerliches Gesetzbuch* ('German *Civil Code*'). Honoré maintained that it is also represented in § 544 of the French *Code Civile*, and even § 58 of the *Civil Code* of the former Soviet Union.[9] He noted that the limitations on use are generally precisely defined, while permissible uses constitute an open list.[10] His account of the duty to prevent harm through use of property was restricted to harm which might occur to others, and he does not appear to have considered that one might be restrained from arbitrarily harming what one owns.[11] Nevertheless, Honoré believes the 'use rights' of the owner are a *discretion*, and thus not a right exercisable at *arbitrary pleasure*, a proposition which is consistent with § 903 of the German *Civil Code*.[12] This interpretation also accords with that expressed by Gierke in his account of property law published only five years after the German *Civil Code* took effect:

> When the concept of ownership is considered in isolation it cannot be viewed as an unlimited right of dominion. Only in comparison with the other rights of property can it be described as unlimited. If on the other hand it is to be measured beside the illusion of absolute power, it carries limitations within its very concept today as well.[13]
>
> ...
>
> It confers not arbitrary power but power bound by right. ... The power of the owner to deal with the thing at pleasure is today narrowed through extensive limitations of free consumption, and in part virtually eliminated. ... Here the continuation of the German legal idea reveals itself — ownership is pervaded by responsibilities.[14]

[7] Tony Honoré, 'Ownership' (first published 1961) in Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (1987) 161. See generally Joseph Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711.

[8] Honoré, above n 7, 162.

[9] Ibid 163.

[10] Ibid 168.

[11] Ibid 174.

[12] German *Civil Code* § 903 provides:

> Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache *nach Belieben verfahren* und andere von jeder Einwirkung ausschließen. Der Eigentümer eines Tieres hat bei der Ausübung seiner Befugnisse die besonderen Vorschriften zum Schutz der Tiere zu beachten.
>
> [trans: The owner of a thing can, so far as it is not contrary to law or the rights of third parties, *deal with the thing at discretion* and exclude others from every use or misuse of it. The owner of an animal has to observe the particular provisions for the protection of animals in the exercise of his powers.]

The relevant expression remains translated as 'deal with the thing as he pleases' in Simon Goren, *The German Civil Code* (revised edition, 1994) 169.

[13] Otto von Gierke, *Deutsches Privatrecht* (1905) vol 2, 347. Here Gierke compares the medieval concept referred to at 358

[14] Ibid 364–5.

In *Milirrpum v Nabalco Pty Ltd*,[15] Blackburn J expressed the 'bundle of rights' conception in this way:

> I think this problem has to be solved by considering the substance of proprietary interests rather than their outward indicia. I think that property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate. I do not say that all these rights must co-exist before there can be a proprietary interest, or deny that each of them may be subject to qualifications.[16]

Blackburn J went on to note that according to relevant Aboriginal law the clan had obligations to care for the land. 'This is not without parallels in our law, which sometimes imposes duties of such a kind on a proprietor,' his Honour noted, '[b]ut this resemblance is not, or at any rate is only in a very slight degree, an indication of a proprietary interest.'[17] It follows that when the existence of the proprietary interest is not in question, the duty to care for land in the western tradition, which his Honour contemplated, could be given full play.

Not all courts have equivocated about an obligation of care. In *Backhouse v Judd*[18] Napier J of the South Australian Supreme Court had to deal with cruelty to domestic animals, which are recognised as property. In discussing the source of a common law obligation to care for them his Honour said:

> Apart from cases of this sort [obligations arising from moral duty, the existence of a penalty and contractual duty], it seems to me that the only satisfactory basis for the duty is that of ownership. There is nothing novel in the idea that property is a responsibility as well as a privilege. The law which confers and protects the right of property in any animal may well throw the burden of the responsibility for its care upon the owner as a public duty incidental to the ownership.[19]

Indeed, obligation as an element of the liberal concept of property is not novel. Attendant upon the dramatic birth of European liberalism in the aftermath of the French Revolution, Robespierre proposed the following 'Truths' for the French *Declaration of Civil and Human Rights* of 1789:

> Article 1: Ownership is the right of each citizen to deal freely with that part of the social wealth which the law guarantees to him.
>
> Article 2: The right of ownership is, like every other right, restricted by the duty to respect the rights of the next.
>
> Article 3: Ownership may impair neither the security, the freedom, the existence nor the property of our fellow humans.[20]

[15] (1971) 17 FLR 141 ('*Milirrpum*'). This case was overruled in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, so far as it implemented the doctrine of extended terra nullius, denied a common law concept of native title, and sought to assess the proprietary qualities of indigenous land uses beside the western liberal 'bundle of rights'.

[16] *Milirrpum* (1971) 17 FLR 141, 272.

[17] Ibid.

[18] [1925] SASR 16.

[19] Ibid 21.

[20] *Declaration of Civil and Human Rights* of 1789, cited in Horst Welkoborsky, 'Die Herausbildung des bürgerlichen Eigentumsbegriffs' in Wolfgang Däubler and Ulrike Sieling-Wendeling

III DOES THE COMMON LAW REALLY SEE PROPERTY AS ABSOLUTE EGOCENTRIC DOMINION?

In contrast to the view that the liberal conception of property embodies a sense of obligation, there is the dogma to which I have referred, that the common law right of an owner to enjoy beneficial use of property is so extreme that it also embraces destruction of the property regardless of its environmental value or its value to others who do not hold a conventional property interest in it, such as a mortgage or an interest in reversion or in remainder. As noted, this view is often stated as a self-evident truth without the extensive reference to authoritative sources which one might expect with respect to such a dramatic conclusion.

Examples drawn from the judicial interpretation of legislation in the field of environmental and planning law illustrate this observation. Such legislation is usually enacted with a reforming intent. This intent would be more workable if the legislation were interpreted with only its preambles, parliamentary speeches made in support of it, the general social consensus on the culpability of environmental degradation,[21] and the deafening local, regional and international concern about environmental issues in mind;[22] and if it were applied only in the light of environmental data presented. Unfortunately, because of a misunderstanding of the liberal conception of property, the expressions of democratic will embodied in legislation are often overwhelmed by the common law presumption in statutory interpretation that Parliament does not intend to detract from freedom of property unless the relevant statute states this expressly or by necessary intendment.[23] This presumption has thus been drawn upon to justify a restrictive reading of environmental legislation.

An example is the decision by Gillard J in *Protean (Holdings) Ltd v Environment Protection Authority*,[24] which dealt with the conditions which may be imposed by the Victorian Environment Protection Authority on a licence to pollute under the *Environment Protection Act 1970* (Vic). Gillard J was clear in his view of the ambit of the Act:

> Although it may be readily conceded that the purposes and objects of this Act are praiseworthy, the means adopted to achieve them seem to be quite authoritarian, if not draconian in character. ... Because of these features, I am of opinion that the legislature must be taken to have intended that although the statutory provisions of this Act might appear to confer powers upon the subor-

(eds), *Eigentum und Recht: Die Entwicklung des Eigentumsbegriffs im Kapitalismus* (1976) 38 [trans: 'The Formation of the Civil Property Concept' in *Property and Law: The Development of the Concept of Ownership in Capitalism*].

21 See, eg, P Grabosky, J Braithwaite and P Wilson, 'The Myth of Community Tolerance toward White Collar Crime' (1987) 20 *Australian and New Zealand Journal of Criminology* 33, which found that the seriousness of a death caused by industrial pollution was perceived by Australians to rank third behind stabbing and heroin trafficking: at 38–44.

22 See, eg, World Commission on Environment and Development ('WCED'), *Our Common Future* (1987) ('*The Brundtland Report*'); WCED, *Our Common Future* (2nd ed, 1990); Ecologically Sustainable Development Steering Committee, *National Strategy for Ecologically Sustainable Development* (1992); Stanley Johnson (ed), *The Earth Summit* (1993).

23 See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988) 101–3; *Springhall v Kirner* [1988] VR 159, 165.

24 [1977] VR 51.

> dinate bodies, which would enable them to invade or erode the existing rights and privileges of the individual, either of a personal or proprietary character, such provisions if at all ambiguous should be strictly construed in favour of the subject.[25]

It followed that the proprietor of an abattoir which was then located in Richmond, an inner suburb of Melbourne, could not be restricted under the *Environment Protection Act 1970* (Vic) from producing odours and noises generally. Only pollution discharged from particular 'point sources', such as chimneys, required licences. The interests of residential neighbours were thus subjugated to those of the abattoir proprietor. Again, no binding authority was cited to support this exceptional deference to private property. It could have been contended that 'the existing rights and privileges of the individual, either of a personal or proprietary character'[26] were not being invaded or eroded by the legislative scheme because beneficial proprietorship of the abattoir business, or the relevant leasehold of the land, did not carry with it the power to impair environmental quality.[27]

IV WHAT IS THE SOURCE OF THE 'DESPOTIC' VIEW OF PROPERTY?

One of the most influential depictions of property drawn upon in the common law world is set out in a somewhat offhand and ambiguous passage in a historiographically flawed introduction to a volume on property law, the first edition of which was written in the 1760s. This is the familiar passage penned by Sir William Blackstone:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that *sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual* in the universe.[28]

In view of the theological connections of the passage which will be explored, it is interesting to contemplate whether the passage does not indeed ring of late

[25] Ibid 55–6.

[26] Ibid.

[27] The impact which might have been made on the view of Gillard J by a later High Court case has not been tested in the Victorian Supreme Court. In *The Phosphate Co-operative Company of Australia Ltd v Environment Protection Authority* (1977) 138 CLR 134, 136–7, a more balanced view was taken by Stephen and Mason JJ when they interpreted the statutory powers of the Victorian Environment Protection Authority and concluded that it was authorised to take into account *only* environmental considerations:

> For those concerned with the formulation of environmental policies there must always exist a problem in the reconciliation of conflicting aims: the individual should ideally be able to enjoy an environment of acceptable quality and at the same time to experience as high a degree of economic well-being as possible But the attainment of the one may prejudice the achievement of the other.

Unusually for a High Court authority, the dissenting judgment of Aicken J and his academic consternation about discharges of water from a garden hose (at 147) received more attention in *Parlos Verdes Estates Pty Ltd v Carbon* (1992) 6 WAR 223.

[28] William Blackstone, *Commentaries on the Laws of England* (first published 1765, 1982 ed) vol 2, 2 ('*Commentaries*') (emphasis added).

Augustan wit, perhaps in answer to the monarchist poet Dryden.[29] If not late Augustan humour, then we might sense at least a hint of irony, or astonishment on the part of the author that this might be so, but Blackstone later continued on a more serious theological note:

> In the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to man 'dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.' This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the gift of the creator.[30]

This natural law conception of property echoes the writings of Grotius[31] and Locke, but even Locke's assertion of a power to destroy what one owns was qualified by considerations of need; the preservation of people, right and property; the good of the governed; the distinction between fruits consumed and the earth itself; reason; and a limitation of the divine gift itself: 'Nothing was made by God for man to spoil or destroy.'[32]

Further reference must be made to the 17th century English jurist Sir Matthew Hale, whose larger work, *The Analysis of the Law*,[33] was claimed by Blackstone to be the most scientific and comprehensive analysis of common law made to that time, and Blackstone adopted it as the basis of the arrangement of his *Commentaries*.[34] Hale wrote:

> In relation to this inferior World of Brutes and Vegetables, the End of Man's Creation was, that he should be the Vice-Roy of the great God of Heaven and

[29] In his political poetry, the Restoration monarchist poet Dryden set out to lampoon his liberal revolutionary opponents. In this passage in *Absalom and Achitophel* (1681) he has drawn his pen in the debate over the identification of dominion and property with divine right:

> For who so fit for reign as Aaron's race,
> If once *dominion* they could found in *grace*.
> ...
> But far more numerous was the herd of such,
> Who think too little, and who talk too much.
> These, out of mere instinct, they knew not why,
> Ador'd their fathers' God and property;

William Frost (ed), *John Dryden: Selected Works* (2nd ed, 1971) 35–6 (emphasis added).

[30] Blackstone, above n 28, vol 2, 2–3. Before the publication of Darwin's work on evolution, the *Book of Genesis* was widely considered to be a literal account of the history of the world: see generally Jacques Barzun, *Darwin, Marx, Wagner: Critique of a Heritage* (2nd ed, 1958).

[31] In Grotius' view, the divine grant of *dominion* belonged to the time of early simplicity when people were few and friendly. Private property was a later development: Thomas Horne, *Property Rights and Poverty: Political Arguments in Britain 1605–1834* (1990) 12.

[32] John Locke, *Two Treatises of Government* (first published 1698, 1967 ed) vol 2, [31]. See also vol 1, [92] and vol 2, [32]; Eugene Hargrove, *Foundations of Environmental Ethics* (1989) 71.

[33] Sir Matthew Hale, *The Analysis of the Law* (first published 1713, 1978 ed). See further Murray Raff, 'Matthew Hale's Other Contribution: Science as a Metaphor in the Development of Common Law Method' *Australian Journal of Law and Society* (forthcoming).

[34] On Blackstone's admiration of Hale, see William Holdsworth, 'Sir Matthew Hale' (1923) 39 *Law Quarterly Review* 402, 421. See also S F Milsom, 'The Nature of Blackstone's Achievement' (1981) 1 *Oxford Journal of Legal Studies* 1, 3.

> Earth in this inferior World; his Steward, *Villicus*, Bayliff or Farmer of this goodly Farm of the lower World, and reserved to himself the supreme Dominion, and the Tribute of Fidelity, Obedience and Gratitude, as the greatest Recognition or Rent for the same, making his Usufructuary of this inferior World to husband and order it, and enjoy the Fruits thereof with sobriety, moderation, and thankfulness. ... And hereby Man was invested with power, authority, right, dominion, trust and care, to ... preserve the *species* of diverse Vegetables ... to preserve the face of the Earth in beauty, usefulness, and fruitfulness. And surely, as it was not below the Wisdom and Goodness of God to create the very Vegetable Nature, and render the Earth more beautiful and useful by it, so neither was it unbecoming the same Wisdom to ordain and constitute such a subordinate Superintendent over it, that might take an immediate care of it.[35]

Further support for the view that Blackstone intended a despotic, absolute or atomistic concept of property has been found in this passage:

> 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.[36]

Blackstone nevertheless acknowledged both public and private nuisance, and the doctrine of waste.[37] It follows that Blackstone did not necessarily have in mind, as an incident of property, the possibility of antisocial beneficial use and enjoyment. At a time when common lands were being enclosed,[38] and memory of the English Revolution was not so distant, it is not surprising that he would have had in mind the power to exclude others from private property — especially the Crown. Blackstone illustrated his point about the good of the community with the situation of private land being required for a public use, such as a road. His conclusion was that the land could not be taken without the owner's consent or due process of municipal law.[39]

Blackstone's preoccupation with the power to exclude others, as an incident of property, is also clear in the first and second passages quoted above from his *Commentaries*.[40] Far more indistinct is the possibility of a right of unlimited use being encapsulated in his reference to 'despotic dominion' in the first passage, which suggests a link to the passage in *Genesis* 1:28, on which he relied in the second passage. We should note here that Blackstone omitted the preceding part of that same biblical verse — the direction from God to '[b]e fruitful, and multiply, and replenish the earth, and subdue it'.[41] In Blackstone's mind, the direction to *subdue* seems to have been singled out subtextually to inform his notion of *despotic*

[35] Sir Matthew Hale, *The Primitive Origination of Mankind* (1677) 370. See also John Passmore, *Man's Responsibility for Nature* (2nd ed, 1980) 30.

[36] Blackstone, above n 28, vol 1, 138–9; see also Daniel Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (1973) 171.

[37] With respect to the doctrine of waste, see Blackstone, above n 28, vol 2, 122–3, 381–4; and vol 3, 223–9. With respect to nuisance, see vol 3, 216–23; and with respect to toxic vapours, see vol 3, 217.

[38] See generally Edward Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975).

[39] Blackstone, above n 28, vol 1, 138–9.

[40] See above nn 28 and 30, and accompanying text.

[41] *The Holy Bible* (King James version), *Genesis* 1 28.

dominion, despite the other injunctions from God directed to fertility and nurturing which Blackstone could have found in the same verse. Unless his writing in this section is totally chaotic, or he intended humour or irony, Blackstone's only source for a *despotic dominion*, as distinct from a *sole dominion* denoting a power to exclude, is his selective reading of *Genesis* 1:28.

We tend to assume that the common law system is secular, and perhaps there is evidence of some rationalisation in Weber's sense,[42] but in practice oaths are still sworn on the basis of a sacred text, from the witness stand or in support of affidavits, in virtually all court cases.[43] In Victoria, denominational and ecumenical religious ceremonies are an important part of the celebration of each new curial year. Theological considerations still provide significant inspiration for courts seeking a deeper moral and ethical context for legal principles. In formulation of at least two of the most fundamental legal doctrines in the common law system, the judicial search for ethics reached into theological sources. When the administrative law rule of natural justice was being set down in the early stages of discretionary state intervention in the built environment, Byles J drew upon the hearing accorded by God to Adam before expulsion from Eden.[44] Towering in significance is Lord Atkin's formulation of the *neighbour principle* which, as the common law world knows so well, is the modern origin of the law of negligence:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.[45]

In more recent history, in *Jaensch v Coffey*,[46] Deane J in the High Court of Australia emphasised the limitations of the common law standard of care with respect to negligence beside its biblical inspiration.

It should not surprise us that judges have sought inspiration in sacred texts when building ethical foundations for emerging legal principle, even in an apparently secularised legal system. Clearly, sacred texts have great cultural significance. While there are, doubtless, important differences between theological interpretative method and the legal method, there is also considerable common ground at a deep level.[47] There is, specifically, one clear parallel between the judicial use of past

[42] Richard Willen, 'Rationalization of Anglo-Legal Culture: The Testimonial Oath' (1983) 34 *British Journal of Sociology* 109. See also Weber's five postulates of rationalised legal science in Max Weber, *Wirtschaft und Gesellschaft: Grundriß der verstehenden Soziologie* (first published 1922, 5th ed, 1976) 397; Max Rheinstein (ed), *Max Weber on Law in Economy and Society* (1954) 64.

[43] See, eg, *Evidence Act 1958* (Vic) ss 100, 110–11 and with respect to affirmations, see ss 102–3.

[44] *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 195. Byles J obtained the reference from the judgment of Fortescue J in *R v Chancellor of Cambridge* (1723) 8 Mod 148, 164.

[45] *Donoghue v Stevenson* [1932] AC 562, 580.

[46] (1984) 155 CLR 549, 578–9.

[47] Wolfhart Pannenberg, 'Über Menschenwürde, persönliche Freiheit und Freiheit der Kunst: Theologische Erwägungen aus Anlaß des Falles "Mephisto"' in Manfred Fuhrmann, Hans Jauß and Wolfhart Pannenberg (eds), *Text und Applikation: Theologie, Jurisprudenz und Literaturwissenschaft im hermeneutischen Gespräch* (1981) 137 [trans: 'Concerning Human Dignity, Personal Freedom, and Artistic Freedom: Theological Considerations Inspired by the Case/Fall

legal cases in the common law method and the theological method of finding lessons in biblical parables and formulating moral aphorisms for guidance in issues of the present day. Indeed, one might consider that legal method has more in common with theological analysis than with theory of literary criticism,[48] which does not apply so clearly as a hermeneutic to the interpretation of legal texts.[49] For instance, the theoretical debate about the nature of subjectivity in literary interpretation and criticism is in many respects at cross purposes with intention in the creation and interpretation of legal texts.[50] This is *not* to claim that in a legal system maintained by a multicultural and secular society the differences between legal and theological hermeneutics should be overlooked, or that religious ideas about the good and proper life should be directly carried over into law.

Nevertheless, as I have pointed out, some basic norms in the common law system were originally deliberately derived, sometimes crudely, from theological sources. No doubt others have been more subtly inspired by theological sources and any distinction between cultural and religious practice can never be entirely clear.[51] We are entitled to ask in this situation, 'What happens when a jurist gets his or her theology wrong?' A court today, hopefully, would not hesitate to reject the method of Sir Matthew Hale, who resorted to the Bible in the witchcraft case of *R v Cullender*.[52] Surely, the world of the past cannot dictate that we must perpetuate spurious details of its religious beliefs, as well as its time-specific legal norms.[53]

So what can we say about the perpetuation of Blackstone's view of a 'despotic dominion' inherent in ownership selectively devised on the basis of *Genesis*? Blackstone was raised in a devout Church of England family. His two brothers both became clergymen of that denomination. Warden described Blackstone as a very religious lawyer.[54] Blackstone's justification of property, formulated at the historical confluence of modern natural law, liberalism and early utilitarianism, was actually threefold. In addition to the natural law source in *Genesis* under discussion, Blackstone also advanced, secondly, the application of labour to matter as a reason

of Mephistophilis' in *Text and Application: Theology, Jurisprudence and Literary Studies in Hermeneutical Dialogue*].

48 Giuseppe Zaccaria, 'Hermeneutics and Narrative Comprehension' in Patrick Nerhot (ed), *Law, Interpretation and Reality* (1990) 251, 260.

49 See generally Karl-Heinz Ladeur, 'From the Deductive to the Argumentative Rationality of Law' in Nerhot (ed), above n 48, 168, 183.

50 There remains ground for analogy between legal method and literary criticism at other levels. See the heated and instructive exchange between Stanley Fish, 'Why No One's Afraid of Wolfgang Iser' (1981) 11 *Diacritics* 2; Wolfgang Iser, 'Talk Like Whales: A Reply to Stanley Fish' (1981) 11 *Diacritics* 82.

51 Eg, contrary to general western European expectations placing high non-religious value on eye-to-eye contact when evaluating honesty, when women from a culture with an Islamic cultural background lower their eyes in court they would usually be expressing deference to the esteem of the judge. This is both a cultural and a religious value of Islamic society: see interview with Mohammed Jalal Uddin-Coleman of Khalid Islamic College (Melbourne, 20 January 1994) (record on file with author).

52 (1665) 6 Howell's State Trials 647, col 692.

53 For an extremely interesting and insightful discussion of these problems in *jus non scriptum* see Dieter Nörr, 'Triviales und Aporetisches zur juristischen Hermeneutik' in Fuhrmann, Jauß and Pannenberg (eds), above n 47, 235, 237–8 [trans: 'Triviality and Aproria in Juristic Hermeneutics'].

54 Lewis Warden, *The Life of Blackstone* (1938) 20.

for the person responsible for the labour excluding others from use of the resulting product,[55] and thirdly, that property was created by the state to maintain peace and order.[56] This suggests that the natural law justification which Blackstone found in *Genesis*, which he had no doubt adopted from Locke,[57] formed Blackstone's sole basis for a power of 'despotic dominion' if we are, indeed, to take it seriously.[58] We have already seen that for Locke an owner's power of destruction was heavily qualified.[59]

Today, the Church of England does not share Blackstone's simplistic view of *Genesis* 1:28.[60] The Church might not have held it as doctrine in Blackstone's own times.[61] Today, so far as that denomination conceives human obligation to Creation theologically by analogy to property concepts, greater emphasis is now accorded to a tenant status ordained in *Leviticus* 25:1–35.[62]

In other religious denominations there are also, to say the very least, important theological conclusions that humans do not hold Creation in their hands for their 'sole and despotic' enjoyment, and generally that humans have positive duties to the environment.[63] From all of these theological viewpoints, our companions in Creation, the plants and animals which were also created by divine hand, also have a right to enjoy the universe created for them, and are generally themselves considered divine. With direct relevance to Blackstone's view is the conclusion of Rabbi Dr Norman Solomon:

> There has been discussion amongst Christian theologians as to whether the opening chapters of *Genesis* call on humans to act as stewards, guardians of creation, or to dominate and exploit the created world. There is little debate on this point amongst Jewish theologians ... So perverse is it to understand 'and rule over it' (*Genesis* 1:28) — let alone *Psalm* 8 — as meaning 'exploit and destroy' (is that what people think of their rulers?) that many Christians take such interpretations as a deliberate attempt to besmirch Christianity and not a few

[55] Plainly adopting the labour theory attributed to Locke.

[56] Boorstin, above n 36.

[57] Ibid 168–9; see also Hargrove, above n 32, 64–5, 71.

[58] See, eg, Frost (ed), above n 29, and accompanying text.

[59] See above n 32, and accompanying text.

[60] Board for Social Responsibility, Church of England, *Our Responsibility for the Environment* (1986) 17.

[61] As indicated above, Blackstone could have drawn on the legal-theological view of his mentor in legal science, the 17th century jurist Sir Matthew Hale: see generally Hale, *The Primitive Origination of Mankind*, above n 35. Hale was nevertheless of Puritan origin: see generally Gilbert Burnet, *The Life and Death of Sir Matthew Hale* (first published 1682, 1972 ed).

[62] Hugh Monteiore (ed), *Man and Nature* (1975). This project of the Doctrine Commission was appointed by the former Archbishop of Canterbury, Dr M Ramsey. See generally Board for Social Responsibility, above n 60, 18–19.

[63] See, eg, Australian Catholic Bishops' Conference, *Common Wealth for the Common Good* (1992) 25–8; W Chew, 'We Will Drown Reading the Book: Thomas Berry and a Touch of Wild Theology' [1994] *St Mark's Review* 12; Lilly de Silva, 'The Hills wherein My Soul Delights' in Martin Batchelor and Kerry Brown (eds), *Buddhism and Ecology* (1992) 18; His Holiness the Dalai Lama, 'A Zone of Peace: Excerpts from 1989 Nobel Peace Prize Lecture' in Batchelor and Brown (eds), *Buddhism and Ecology* (1992) 110; Al-Hafiz Masri, 'Islam and Ecology' in Fazlun Khalid and Joanne O'Brien (eds), *Islam and Ecology* (1992) 1; Mawil Dien, 'Islamic Ethics and the Environment' in Khalid and O'Brien (eds), *Islam and Ecology* (1992) 25; Ranchor Prime, *Hinduism and Ecology: Seeds of Truth* (1992) 8–21, 36–52; Norman Solomon, 'Judaism and the Environment' in Aubrey Rose (ed), *Judaism and Ecology* (1992) 19.

> Jews have read the discussions as an attempt to 'blame the Jews' for yet another disaster in Christendom. The context of *Genesis* 1:28 is indeed that of humans being made in the image of God, the beneficent creator of good things; its meaning is therefore very precise, that humans, being in the image of God, are summoned to share in his creative work, and to do all in their power to sustain creation.[64]

In emphasising 'subdual' in the first chapter of *Genesis*, Blackstone has read the text very selectively. Blackstone also failed to recognise the unfolding narrative of the whole *Book of Genesis*. For example, if the verses *Genesis* 1:28–9 were all that God had to say about our relationship to nature, humans would in theological contemplation be necessarily vegetarian. Further, God saw that the world was *good* even before man and woman were created.[65] Human powers of *dominion* and *subdual* are, after the Fall from Eden and the corruption which led to the Flood, conspicuously absent. The positive theological duty of humans to exercise enlightened and caring dominion over nature stems, not least, from God's covenant with *all of the world* after the Flood, sealed by the rainbow, containing a new relationship in which humans are only 'keepers', and destruction of the earth is discarded even from divine contemplation.[66] The unfolding narrative instructs that the powers accorded to humans at Creation, and selectively claimed by Blackstone as the basis of 'sole and despotic dominion', were curtailed largely because of the sin and wickedness which resulted from human exercise of those very powers. Humans may not exercise a power of destruction which God would not.[67] In Christian theology, the *New Testament* adds another dimension which the Christian Blackstone did not consider at all.[68]

In conclusion on this point, the biblical foundation selected by Blackstone for a natural law human power of absolute and unrestrained use of property is today widely regarded as false by theologians. The essence of property might well lie in the owner's power of alienation and ability to exclude others, as well as the right to beneficial use and enjoyment of the object of ownership, but there is no sound jurisprudential basis to exercise that right in disregard of obligations to human society or to other species and their habitats.

In the closing years of the 20th century, it seems both jurisprudentially anachronistic and sadly ironic to point to theological limitations of the human relationship to the environment which stem from the new covenant in the aftermath of the Flood,[69] in order to place an 18th century jurist in his correct context. In our time we are calculating scientifically the widely acknowledged probability that by later next century *we* will have flooded many small island nations and large parts of low lying nations, such as Bangladesh, through the rise in ocean levels associated

64 Solomon, above n 63, 26–7.

65 See, eg, Claus Westermann, *Creation* (1974) 49–55; Claus Westermann, *Genesis 1:11* (1984) 470–4.

66 *Genesis* 9:1–17

67 For an interesting discussion of the concept of 'stewardship' in an analogous biblical context, see Nigel Watson, *The First Epistle to the Corinthians* (1992) 36–7.

68 One might, for a start, point to the 'Parable of the Infertile Fig Tree' in *Luke* 13:6–9.

69 *Genesis* 9:1–17

with the Greenhouse Effect,[70] and we are politically pondering where those human beings will go. However, a legal system which invokes religion at important points cannot now dismiss as anachronistic a call for correction of spurious juristic uses which have been made of sacred texts in the past and which perpetuate injustices into the future. The justification of a natural law right of unlimited dominion over an object of property is spurious in this sense. We perpetuate environmental destruction such as the Greenhouse Effect every day precisely through our 'sole and despotic' use of property — land, motor vehicles, electricity, water, furnaces, glass bottles, timber felling leases, confidential information[71] and all other manifestations of property so interpreted.

Secular natural law principles must be sought by the common law in this regard for a plural society. Such principles ought to accord with those identified by the internationally renowned jurist, His Excellency Judge Nagendra Singh, former President of the International Court of Justice, in his foreword to the *Report of the Expert Group on Environmental Law* to the World Commission on Environment and Development:

> Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature. There is at the present time an urgent need:
>
> to strengthen and extend the application of existing laws and international agreements in support of sustainable development;
>
> to recognize and respect the reciprocal rights and responsibilities of individuals and States regarding sustainable development, and to apply new norms for State and interstate behaviour to enable this to be achieved;
>
> to reinforce existing methods and develop new procedures for avoiding and resolving disputes on environmental and resource management issues.[72]

The concerns expressed by His Excellency are reinforced by a range of international accords and commitments.[73] In his separate opinion in the *Case Concerning the Gabčíkovo-Nagymaros Project*,[74] His Excellency Vice-President Weeramantry concluded that the contemporary concept of ecologically sustainable development equates with cultural limitations on the exploitation of natural resources which have underpinned the wealth of many civilisations of far greater

[70] See generally Subsidiary Body for Scientific and Technological Advice, 'Scientific Assessments: Consideration of the Second Assessment Report of the Intergovernmental Panel on Climate Change' (Paper presented at the Secretariat of the United Nations Framework Convention on Climate Change, Geneva, 27 February – 4 March 1996); Murray Raff, 'Come back King Canute! Greenhouse Effect and the Law' (1989) 6 *Environmental and Planning Law Journal* 271.

[71] On the position of art 14(2) of the German *Constitution* and 'environmental context' with regard to confidential information, see, eg, Michael Kloepfer, *Umweltrecht* (1989) 53.

[72] Expert Group of the WCED, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (1987) x. The Report was adopted in 1986.

[73] See, eg, Rio Declaration on Environment and Development, 31 ILM 874, UNCED Doc A/Conf.151/5/Rev.1 (1992); Agenda 21: Programme of Action for Sustainable Development, United Nations Conference on Environment and Development, UNCED Doc A/Conf.151/26 (1992); *United Nations Framework Convention on Climate Change*, opened for signature 9 June 1992, [1994] ATS No 2, 31 ILM 849 (entered into force 21 March 1994).

[74] *(Hungary v Slovakia) (Judgment)* (1998) 37 ILM 162 ('*Danube Dam Case*').

longevity than Western industrial civilisation has so far enjoyed.[75] The principle of ecologically sustainable development mediates or synthesises the otherwise dialectically opposed propositions of, on the one hand, the right to pursue economic development of that over which one has dominion, and on the other hand, the fact that all life depends on the existence of healthy ecosystems.[76] As such, the principle of ecologically sustainable development is a long established principle of international law[77] which was again recognised by the international community at Rio de Janeiro — it did not emanate from the Earth Summit or the *Brundtland Report*.[78]

Common law presumptions about the right to exploit that over which we have dominion should reflect this principle of international law, rather than be grounded in the mistaken 18th century theology of William Blackstone.

V OTHER COMMON LAW WORLD CRITIQUES OF UNLIMITED FREEDOM OF PROPERTY

Many legal commentators have identified an obligation inherent in the common law conception of property ownership. This writing reveals a view that the obligation must be found located somewhere deep within the legal system. I have set out below the main thrusts in this search and remarked on some limitations of each approach.

A *Stewardship*

The idea behind stewardship is that land is held by the owner of it as a steward, who must hold the interests of present and future society and ecological values in mind when exercising discretions with respect to it.[79] In North American writing, the idea of stewardship is usually united with calls for a new and ecologically respectable land ethic found in the work of Aldo Leopold.[80] The main disadvantage of this approach is that the obligations are restricted to land. Clearly land is a very important and unique object of property from environmental and legal perspectives. However, there are obligations implicit in one's exercise of dominion over other phenomena, such as dangerous chemicals, destructive machinery and industrial

75 Ibid 207–14.

76 Ibid 205.

77 Ibid 213.

78 Ibid 207. In Australia's constitutional arrangement, under which the Crown is indivisible, the State governments are also bound by this principle of international law in the exercise of their measure of sovereign dominion.

79 See generally William Lucy and C Mitchell, 'Replacing Private Property: The Case for Stewardship' (1996) 55 *Cambridge Law Journal* 566; James Karp, 'A Private Property Duty of Stewardship: Changing Our Land Ethic' (1993) 23 *Environmental Law* 735; Lynton Caldwell, 'Land and the Law: Problems in Legal Philosophy' [1986] *University of Illinois Law Review* 319; Victor Yannacone, 'Property and Stewardship: Private Property Plus Public Interest Equals Social Property' (1978) 23 *South Dakota Law Review* 71; Richard Babcock and Duane Feurer, 'Land as a Commodity "Affected with a Public Interest"' (1977) 52 *Washington Law Review* 289.

80 Aldo Leopold, *A Sand County Almanac* (1949); Fred Bosselman, 'Four Land Ethics: Order, Reform, Responsibility, Opportunity' (1994) 24 *Environmental Law* 1439.

secrets. Some writers have considered stewardship at odds with private property because it is seen as such a constraint on private property in favour of the public sphere that it is no longer private.[81] This misses the point that the environmental obligation implicit in property which I am elucidating is not an exterior constraint. Private property is not capable a priori of a more powerful existence than one relative to the obligations which flow from the environmental and social context in which the relevant phenomenon is located. As Gierke put it, private property is 'pervaded' by responsibilities.[82]

Another criticism of stewardship, and the existence of any duty arising from ownership, is that such a limitation on property is unnecessary because there are legal prohibitions against harming others regardless of whether one causes the harm with something which one owns.[83] On the other hand, one can be harmed in one's ownership, and this is a vulnerability which society must protect.[84] Even if one accepts these observations, they do not establish that there is no obligation implicit in the exercise of property rights. One can quite easily bear obligations to others and the environment in one's capacity as an individual, and in one's capacity as a property owner. An obligation to exercise a level of care for the object of ownership could be seen as a duty not to harm the future property rights of future owners of that object. Whether the relationship can be classified as one or the other is beside the point. It can be both. This is a problem underlying the Penner critique of Honoré[85] — it takes an obsessively essentialist approach to the idea of property in the manner of the legal positivists of the 1960s.[86] In any case, it is not desirable to seek revision of the meaning of future property, in the hands of some who might not yet be born, in order to enforce an environmental obligation which in any case already exists.

B *The Law of Trusts*

This thrust in search of a source of obligation finds the legal property owner holding his or her asset on trust for future generations.[87] The argument is that such a trust and enforcement mechanism, such as an environmental ombudsman, should be established by legislation. One problem with this approach is that the equitable interest of a beneficiary is relatively weak in competition with other proprietary interests, particularly with respect to land in a registered title system. Another problem is that establishment of such a system would require lifetimes of lobbying and negotiation, whereas the legal environmental obligation stemming from ownership is already present, and requires only the judicial opportunity to elucidate

81 See especially Lucy and Mitchell, above n 79.
82 Gierke, above n 13
83 Penner, above n 7, 761–2.
84 Ibid.
85 Ibid.
86 See, eg, David Jackson, *Principles of Property Law* (1967).
87 See generally Edith Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11 *Ecology Law Quarterly* 495.

the truer and deeper understanding of Blackstone's mistake which I have explained above.

C *Common Law Principles of Intergenerational Equity*

Other than resorting to trust law to ground an environmental obligation, one might also try to justify it based on an analogy with the doctrine of waste. This is the obligation to care for property which a life tenant owes to those with interests in remainder. Naturally, the existence of the doctrine of waste is further evidence of environmental obligations inherent in property. Similar limitations could easily be found in freehold tenure. All tenants have obligations to their landlords. No doubt in feudal times a mesne lord would have had remedies against a freeholder[88] who permanently contaminated the land and threatened groundwater reserves through a leakage of petroleum from an underground tank, or pushed all the topsoil into the river with a bulldozer. It is obvious why there are no cases stating the environmental obligations of medieval freeholders — the technological capability to cause such damage is recent. The objection that there are no cases demonstrates the problem of common law method when faced with a new moral dilemma, rather than the absence of responsibilities pervading property which for Hale already existed in the 17th century. Two problems with relying upon limitations of freehold tenure are that, first, the obligation would be owed to the Crown and not to the environment or society in general, and second, that it would not apply to interests in land not held in freehold tenure.

Similar considerations apply to the estate of fee simple, which, as an estate of inheritance, can last only so long as there are heirs capable of inheriting it, and thus must carry a principle of intergenerational equity implicit within it.[89] Unfortunately, again, the obligation would be owed to a particular class of persons rather than to the environment or society in general, and would be restricted to fee simple estates in land rather than applying to all property.

D *North American Doctrine of Public Trust*

In the United States particularly, and to some extent in Canada, the title to certain public land is held in trust by the state for the people. The terms of this trust can extend to environmental care, and the doctrine is sometimes drawn upon by way of analogy to argue for an obligation of environmental care with respect to all land, including private property. One problem with this argument is that the public land to which the doctrine extends seems to remain restricted to foreshore, lake and streambeds, streets, public places and national parks.[90]

[88] In feudal times the tenure of freehold was known as free and common socage.

[89] Cf Blackstone, above n 28, vol 3, 223–4.

[90] See generally Erin Pitts, 'The Public Trust Doctrine: A Tool for Ensuring Continued Public Use of Oregon Beaches' (1992) 22 *Environmental Law* 731; James McElfish, 'Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment' (1994) 24 *Environmental Law Reporter* 10231, 10242; T Brady, '"But Most of It Belongs to Those yet to Be Born": The Public Trust Doctrine, NEPA, and the Stewardship Ethic' (1990) 17 *Environ-*

E *Environmental Impact Assessment*

Introduction in the United States of the *National Environmental Policy Act*[91] scheme of environmental impact assessment carried with it hope that the courts might creatively implement the extensive preamble to the Act, which pledges environmental improvement for the benefit of future generations as a general stewardship ethic.[92] Unfortunately, this hope has not been realised, although environmental impact assessment is plainly an appropriate rational scientific inquiry to ascertain the factual material necessary for evaluating the content of one's proprietary obligations in a particular situation.

All of these approaches point to the existence of the environmental and social obligations which are inherent in property. None of the approaches is sufficient alone. As I have pointed out above, many are related only to land and others suggest obligations to particular classes of people, or to the Crown. Further, it seems regressive to reach back to the feudal era in search of a legal doctrine appropriate for the 21st century, and all the more so when it is unnecessary to do so, in view of the ample material in support of a more general duty, of which the doctrines of trust and intergenerational equity are particular manifestations.

I have already referred above to the argument that private ownership constrained by social and environmental responsibility is not private property.[93] One might anticipate economic arguments along similar lines against enlivened recognition of the principle of general proprietary responsibility.[94] As Kimminich pointed out,[95] for Adam Smith the good of all was best served by unlimited free trade in private property and thus the highest object of private property is the achievement of the common good. Further, the compatibility of the liberal legal principle that property carries inherent obligations is attested by the operation of such a legal principle in practice in the capitalist economy of Germany.

VI BEYOND THE COMMON LAW WORLD — A CONCEPT OF PROPERTY WITH OBLIGATIONS IN PRACTICE

Comparative law has great value in any situation. Often through comparative law we see in a new light the most obvious things about our own legal system. German property law has special significance for Australia and most of the British Commonwealth because the development of the Torrens System of land title registration in Adelaide in the 1850s was originally inspired in a very large measure by the system operating in the 1840s in Hamburg.[96] Adoption of the German idea of

mental Affairs 621; Joseph Sax, 'The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review* 471.

91 *National Environmental Policy Act*, 42 USC s 4321 (1969).

92 *National Environmental Policy Act*, 42 USC s 4321 (1969); see also Brady, above n 90, fn 118.

93 Lucy and Mitchell, above n 79.

94 For a thorough-going encounter with the economic arguments, see M Oksanen, 'Environmental Ethics and Conceptions of Private Ownership' in D Dalmeyer and A Ike (eds), *Environmental Ethics and the Global Marketplace* (1998) (forthcoming).

95 Otto Kimminich, 'Artikel 14' in R Dolzer and K Vogel (eds), *Bonner Kommentar zum Grundgesetz* (at October 1995) 132, [153].

96 Stanley Robinson, *Transfer of Land in Victoria* (1979) 1–25.

registered title introduced a particular concept of property. It is arguable, for example, that the idea of the conclusive land title register abolished the feudal concept of seisin, under which the owner was the person with the best right to possession, and substituted the modern liberal 'bundle of rights' approach under which one of the rights of the owner is possession.[97] Also, in the absence of fraud, the registered legal owner holds his or her property free of all unregistered interests, whether aware of them or not,[98] apart from the paramount interests.[99] No estate or interest in land was to be created or to pass until registered in the land title register,[100] which is maintained for the wider social good — certainty in transactions concerning real estate and securities in it, for example. Implicit in these clear innovations is an idea of property subject to at least one wider obligation — the obligation to register estates and interests in land at the risk of losing them, and one can imagine no greater disincentive to breach the obligation. Interestingly, the idea of registered title developed in Hamburg hand-in-hand with land use planning for the purpose of limiting environmental interference.[101] The passages quoted from the writings of Hale[102] and Locke[103] show, nevertheless, that there were obligations to preserve the object of property before the introduction of the Torrens System and these were not necessarily restricted to land.

The German concept of property assumes obligation at a number of levels. Article 14 of the German federal *Grundgesetz* ('*Constitution*')[104] contains a civil rights guarantee of ownership, a statement that the content of property rights will be set out in legislation, a qualified power of compulsory acquisition, and a statement that ownership carries with it obligations:

> Article 14 (Ownership, Inheritance and Expropriation)
>
> 1 Ownership and inheritance will be guaranteed. Their meaning and limitations will be defined in legislation.
>
> 2 Ownership creates obligations. Its use shall at the same time serve the common good.
>
> 3 An expropriation is permissible only for the common good. It is to be permitted by legislation, or on the basis of legislation, which arranges the manner and measure of compensation. The compensation is to be determined by just weighing of the interests of the common good and of the private party.

97 To this end, the *Transfer of Land Act 1958* (Vic) s 41 deems registered title to be equivalent to seisin.

98 *Transfer of Land Act 1958* (Vic) s 43.

99 *Transfer of Land Act 1958* (Vic) s 42(2).

100 *Transfer of Land Act 1958* (Vic) s 40.

101 See, eg, Jörgen Bracker (ed), *Die Hanse: Lebenswirklichkeit und Mythos* (1989); Murray Raff, 'A History of Land Use Planning Legislation and Rights of Objection in Victoria' (1996) 22 *Monash University Law Review* 90.

102 Hale, *The Primitive Origination of Mankind*, above n 35.

103 Locke, above n 32.

104 *Grundgesetz für die Bundesrepublik Deutschland* of 23 May 1949, BGBl I, 1, the title of which was often translated as *Basic Law* during its transitory phase, but at least since Unification, the document is regarded as a *Constitution*.

> Litigation under law before the ordinary courts stands open for a party on account of the level of compensation.[105]

Article 14 is now unchangeable.[106] The western World War II allies, which energetically supported the foundation of the United Nations, participated in approving the *Constitution*.[107] The text of article 14 was also derived with regard to article 153 of the *Weimar Constitution* of 1919. Article 14 expresses natural law principles reaching back to the Enlightenment,[108] and an historical cultural limitation of the German liberal conception of property rights based on social obligation as found in Gierke[109] and Germany's long history of planning law.[110] The text of article 14 is thus not the source of the obligation but an expression of it.[111]

While no doubt available as an interpretive principle, there are difficulties in construing from article 14(2) a duty which is positively enforceable between private citizens, in contrast to its role as a constitutional limitation of private rights vis-à-vis the state.[112] The public law character of the obligation bolsters the confidence of some commentators from the private law realm to assert that as a matter of private law, the right to use property is prima facie unlimited. This is criticised by many. One might point out that article 14 assigns to the legislature the task of defining property in detail, and this is done in the German *Civil Code*. As a constitutional guarantee, article 14(2) prevents such legislation creating a concept of private property which carries no obligation. Environmental and planning law is seen as an expression of the obligation. Further, article 14(2) has been drawn upon by way of analogy in the development of private law doctrine,

105 Art 14 (Eigentum, Erbrecht und Enteignung).

> 1 Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.
>
> 2 Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit die-nen.
>
> 3 Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen. Wegen der Höhe der Entschädigung steht im Streitfalle der Rechtsweg vor den ordentlichen Gerichten offen.

For an alternative translation of '*das Wohl der Allgemeinheit*', see text accompanying below n 132.

106 *Constitution* art 79(3).

107 On property and its development in the postwar German *Constitution*, see Wolfgang Däubler, 'Eigentum und Recht in der BRD' in Däubler and Sieling-Wendeling (eds), above n 20, 141. For a detailed history of art 14, see Alexander von Brünneck, *Die Eigentumsgarantie des Grundgesetzes* (1984) 21 [trans: *The Constitutional Guarantee of Ownership*].

108 *Housing Office Measures Case* (1952) 6 BGHZ 270, 278.

109 Gierke, above n 13.

110 Rudolph Dolzer, 'Property and Environment: The Social Obligation Inherent in Ownership' (Working Paper No 12, International Union for Conservation of Nature and Natural Resources, 1976) 34, 44. When the free Hanseatic trading city of Hamburg was laid out in the Middle Ages, for example, inconsistent land uses were spatially separated through the land title registration system, which was maintained in conjunction with a city plan: see, eg, Bracker (ed), above n 101

111 See, eg, *The Kreuzberg Monument Decision* (1882) 9 PrOVG 353, reproduced in (1985) 100 DVBl 219, which exhibits similar principles without the support of express statutory or constitutional text.

112 Kloepfer, above n 71, 52–3, 564.

such as the doctrine of neighbourly consideration.[113] The extension of the private law doctrine of good faith[114] into neighbourhood environmental relations also suggests a sense of obligation going much further than common law concepts of nuisance.[115] After considering these issues with respect to private law, Jauernig concluded '[t]hat the social obligation in ownership of land is extraordinarily strong remains without doubt.'[116]

With respect to the interpretation of article 14 of the German *Constitution*, two directions are most relevant for the purposes of this paper:

- environmental obligations of an owner; and
- constitutional guarantee against undue environmental interference from governmental projects.

A *Environmental Obligations of an Owner*

The most extensive development by the German courts of the obligations in article 14(2) of the *Constitution* has been in cases initiated by private property owners claiming that a government planning or environmental initiative amounted to an expropriation contrary to article 14(1) which must be compensated under article 14(3). The courts have held that when a citizen has an obligation to preserve or maintain an environmental quality of his or her property, article 14(2) can preclude a right to compensation for what would otherwise be an interference with private property initiated under a law made to express that obligation. Thus, compensation can be claimed only for governmental limitations which exceed the obligations which the owner already had. Whether the citizen was already under an obligation to act with respect to his or her property in the way later required by the legislation complained about depends upon the social and environmental context of the property.

The principle of *Situationsgebundenheit*, or 'environmental context',[117] is of particular interest in the application of article 14(2) in compulsory acquisition cases. In the view of the *Bundesverfassungsgericht* ('German Federal Constitutional Court'), the German *Constitution* conceives a citizen to be a person living within and dependent upon society and not as an egocentric individual. The constitutionally protected sphere of property in land cannot be determined by abstract reasoning. The owner's rights are malleable and must be determined through an integrated view of the setting and the environment in which the property is located. An owner has no inherent or underlying right to use property in a way

[113] See, eg, *Gable Wall Case* (1951) 18 BGH-LM (to § 903 German *Civil Code*) No 1 and *Ruin Rebuilding Case* (1953) 18 BGH-LM (to § 903 German *Civil Code*) No 2.

[114] German *Civil Code* § 242 ('*Treu und Glauben*'). For an overview of the doctrine with respect to contract, see Martin Vranken, *Fundamentals of European Civil Law and Impact of the European Community* (1997) 101.

[115] See, eg, *Garden Wall Cleaning Case* (1966) 19 *Neue Juristische Wochenschrift* 599.

[116] Otmar Jauernig, 'Zivilrechtlicher Schutz des Grundeigentums in der neueren Rechtsentwicklung' (1986) 41 *Juristenzeitung* 605, 613.

[117] Also translated as 'situational commitment': Dolzer, above n 110. 'Locational relativity' is another possibility. 'Obligation to a place' is a further possibility because, at least in the sense of a contract, *die Gebundenheit* connotes 'obligation'. However, discussion of the principle in cases and texts suggests 'environmental context'.

which would be socially disruptive in context. The court judges the sphere of protected property by considering what the reasonable thoughts would be of the rational or understanding but nevertheless economically minded citizen, when contemplating potential uses of the particular property in its social and environmental context in the absence of legal regulation.[118]

The obligation to the common good in article 14(2) was first held to include an environmental obligation in the leading decision of the *Bundesgerichtshof* ('German High Court in civil matters') in the *Cathedral of Beech Trees Case*.[119] The court held that the content of the environmental obligation depended in turn upon the environmental context of the relevant property. The plaintiff owned a farm where a centuries old grove of beech and oak trees stood, popularly known as the Cathedral of Beeches. The trees were first designated for protection in 1925, and thus the owner was prohibited from felling them by legislation. After 1945 the owner sought removal of the trees from the protected list without success. He then sought compensation, arguing that the preservation order amounted to an expropriation of property for which compensation had to be paid. The German High Court found that the natural features and landscape of the land imposed a social obligation on the owner to preserve the trees, even in the absence of legal regulation, as a reasonable and economically oriented owner of that land, with the common good in mind, would recognise. Therefore, the preservation order was not an expropriation of property — it merely concreted obligations already borne.

The German High Court recalled that a sovereign interference in ownership rights is to be characterised as an expropriation when it contravenes the constitutional guarantee of equality,[120] by requiring of an individual or a group an unreasonable sacrifice in the interests of the commonality. On the other hand, a limitation of ownership is acceptable when, without contravening the guarantee of equality, it expresses inherent and social limitations of the property which stem from the general nature of its existence. The natural features of property which make it worthy of preservation are an example of such inherent limitations. Legislation, or administrative action requiring preservation is not an interference with the owner's power of disposition, but instead a concrete expression of the social obligation which burdens the property in view of its situation.

> The limit lies at the point where the conservation merits of the property would appear in the concrete situation to the owner, as a rational economically thinking person, when acquiring it as an economic asset with economic intentions or pursuing such intentions in relation to it.[121]

The court concluded that preservation of the trees lay within the inherent situation of the property. The limitation of the plaintiff's use of the land was one of which the

[118] Ibid 22–3, 51.

[119] *Buchendomurteil* [1957] DVBI 856 ('*Cathedral of Beech Trees Case*'); Dolzer, above n 110, 50–1; Kloepfer, above n 71, 564–5.

[120] *Constitution* art 3.

[121] *Cathedral of Beech Trees Case* [1957] DVBI 856, 861–2.

rational and reasonable owner with consideration to the particular situation would be mindful.[122]

The test of the reasonable economically minded person was confirmed, and to an extent expanded, with respect to both nature conservation and ground water management in the *Gravel Extraction Case*.[123] The owner of land on which a gravel deposit was situated was refused permission to develop it further for two reasons. First, extraction had interfered with groundwater management — a lake had already formed on the land. There was evidence that other gravel pits in the area also had such groundwater problems. Second, the area to be developed was a small forest which was the habitat of various animals. The forest was seen as vital for the future regeneration of the area. The German High Court decided that compensation was not required when development permission was refused. With respect to the forest alone:

> [A] rational and reasonable owner, who had not lost sight of the common good, would abstain from gravel extraction. He would not close his mind to the knowledge that the completely paramount interest of landscape protection requires retention of the remaining forest and compels him to refrain from the otherwise economically rational exploitation of the gravel deposit which lies in his private interests.[124]

Dolzer concluded, and this is supported by a consideration of the statement of the powers of ownership in § 903 of the German *Civil Code*, that the core indicia of property in German law are the power to transact with the thing and the power to exclude others from it, but there is no right of unlimited use.[125] Legal limitations of property use are inherent in the conception and essence of ownership itself,[126] and therefore, even as a matter of law, when one stands for the status quo of existing property rights one also stands for the obligations stemming from the social and environmental location of the property. The law therefore reflects the real social and environmental relationships to property expressed in the traditional poles of debate about the conservation or the development of land when it is fulfilling a conservative social role. That is, the preservation of property and the status quo carries with it preservation of its environmental qualities.

Some cases concerning the environmental obligation in article 14(2) extend the owner's social obligation to refrain from antisocial uses of property so far as to require performance of positive acts to maintain and preserve the property which a reasonable owner would perform in the absence of legal regulation. These include planting greenery, cultivation and restoring land after mining.[127]

[122] Ibid 862.

[123] *Gravel Extraction Case* (1984) 14 *Agrarrecht* 281. The approach of the German High Court in civil matters has been considered far more conservative than that followed by the German Federal Constitutional Court in its famous *Naßauskiesungs Decision* (1981) 58 BVerfGE 300, 344; Kloepfer, above n 71, 638 For the purpose of this paper, this later decision of the German High Court represents a sufficient, if conservative, reconciliation of the views.

[124] (1984) 14 *Agrarrecht* 281, 282.

[125] Dolzer, above n 110, 57

[126] Peter Bassenge et al, *Palandts Bürgerliches Gesetzbuch* (56th ed, 1997) 1096–8.

[127] Dolzer, above n 110, 37–8, 51–4.

The problem of historically valuable building forms was explored in the *Kölner Hinterhaus Case*.[128] The plaintiffs owned land in the Old City of Cologne where a cluster of three old buildings had stood. The front and middle sections were extensively damaged during World War II. The rear section, the *Hinterhaus*, was virtually destroyed, requiring a demolition order in view of possible collapse. The front section was restored and the middle section partly rebuilt. Permission was, however, refused for reconstruction of the rear section as it would have contravened building regulations. The plaintiffs claimed that this refusal amounted to an expropriation. The German High Court noted that since the 19th century, when the *Hinterhaus* was built, building regulations concerning such tenements had changed. The court added that they had changed with good reason — accommodation in an old *Hinterhaus* was not very healthy, with limited light and fresh air.[129] A reasonable owner with an economic outlook and a view to wider society would not rebuild the *Hinterhaus* even in the absence of legal regulation. While historical value is an aspect of the nature of a thing, to which regard must be given, and environmental context does not necessarily imply strict adherence to contemporary building standards, the social obligations surrounding property do change over time. In this case, the social perspective of the reasonable owner had changed more or less to accord with contemporary building regulations, and refusal of permission to reconstruct the *Hinterhaus* was not an expropriation. Both an order to demolish an intact *Hinterhaus*, and an application to rebuild one in a way which did not infringe contemporary standards, would be treated differently.[130]

One might therefore observe that the case did not disrespect the historical value of old buildings. The old building was no longer there. That was the reality of the situation of the land in question. The question was whether the land owner was to be prevented from building the same thing again and, if so, whether compensation had to be paid. Rather than abandoning historical values, the court edged the conservative outlook of the land owners closer to a more progressive view that tenants (we might reasonably suspect) cannot be expected to live in a museum of the worst features of urban life of past centuries, at least once it is gone.

The German constitutional approach might well appear innovative, far-sighted, and sophisticated to one educated in the common law property tradition. However, the eminent text writer, Kloepfer, seems to express some frustration at restrictions on the range of legal actions which might be initiated on the basis of article 14(2) to citizen–state relationships, and with the narrowness of the social and environmental qualification of the concept of property.[131] While Kloepfer refers to no cases militating against the possibility, he is clearly concerned that *das Wohl der*

128 (1967) 48 BGHZ 193.

129 Ibid 197. The German High Court also referred to provisions of the *Bundesbaugesetzbuch* ('Federal Buildings Code') requiring maintenance of healthy living and working environments: at 198.

130 Ibid 197–8

131 Professor Dr Michael Kloepfer was formerly a judge of the *Oberverwaltungsgericht* ('Superior Administrative Appeals Court') for Rheinland-Pfalz and is now a Professor for Public Law at the Humboldt University in Berlin. Most recently he was deputy chairperson of the federal German government project to codify environmental law.

Allgemeinheit, or the common good, should not be interpreted in an anthropocentric manner, but rather should extend to the benefit of other species and their habitats.[132]

1 *Contrasting United States 'Takings Law'*

The *Fifth Amendment of the United States Constitution* also provides a constitutional protection against property being taken without just compensation. The US courts have applied this constitutional protection to governmental actions which affect the economic value of property, where there has been no governmental acquisition of an estate or interest in land for example, in the numerous takings cases.[133] Environmental obligation for the common good is not yet a significant consideration in these cases. Generally, the value of the land left to the owner after the alleged taking has been the main consideration. In *Penn Central Transport Co v City of New York*[134] the majority (Brennan, Stewart, White, Marshall, Blackmun and Powell JJ) held that the designation of a railway station as historically valuable did not amount to a taking. When the railway terminal was designated a landmark by the Landmarks Preservation Commission, the plaintiff did not seek judicial review of the designation. Rather, designs were prepared for a project to construct a 55-storey tower on stilts in the air above the station land and were submitted to the Commission for approval. One such design was described as 'an aesthetic joke'.[135] The point that no reasonable owner with an economic outlook and a view to the common good[136] would build such a structure above a building of historical value, and therefore no power of the owner with respect to the property, in its environmental and social context, was being denied through public protection of it, was not considered by the court.

The court considered that the plaintiff was still able to use the railway station as it had always done. Denial of the use of air space above the land was dealt with through a number of approaches. Height restrictions are a taking if they make the land wholly useless. Aircraft overflight[137] was a taking because it seriously interfered with surface use, not because it took airspace.

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.[138]

In this case, the plaintiff still had the airspace and could probably use it if an acceptable proposal were developed, and the plaintiff had the benefit of tradeable development rights. In arriving at this decision, the majority discussed the

132 Kloepfer, above n 71, 566.
133 See generally Michael Metzger, 'Private Property and Environmental Sanity' (1976) 5 *Ecology Law Quarterly* 793; McElfish, above n 90.
134 438 US 104 (1978).
135 Ibid 117–18.
136 See generally, above n 129, and accompanying text.
137 See, eg, *United States v Causby*, 328 US 256 (1946).
138 *Penn Central Transport Co v City of New York*, 438 US 104, 130–1 (1978).

impossibility of developing a single formula for calculating when justice and fairness require compensation for economic injury caused by governmental action, with the result that much depends on the facts of the case:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, *the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.*[139]

The issue of investment-backed expectations was illuminated in the nature conservation case of *Southview Associates Ltd v Bongartz*.[140] In 1982, the plaintiff purchased 88 acres of land from a timber company with a view to developing a 78 lot residential development near the ski resort of Stratton Mountain in Vermont. The land was part of the habitat of the white-tailed deer and permission for the proposed development was refused. The US Court of Appeals (Oakes CJ, McLaughlin and Lay JJ) held that the relevant environmental legislation did not take property from the plaintiff. The plaintiff remained in possession, retaining substantial control which could be exercised through a wide range of land uses apart from the residential proposal, and the right to sell the land was not worthless: 'Indeed, the deer activity displaces only a few sticks in the bundle of rights that constitute ownership.'[141]

The court saw some irony in the plaintiff's viewpoint that the deer were intruding on its land, but did not draw this into juristic consideration.[142] Further, the plaintiff's case was not ripe because only one development application had been made and refused. There was no obstacle to the plaintiff making another proposal for use of the land. The Court of Appeals also considered the plaintiff's expectations:

> [T]o the extent Southview's reasonable investment-backed expectations have been affected by the Board's actions, Southview could not have reasonably expected that its plans would have been permitted to proceed willy-nilly. Rigorous Act 250 review seems the norm, not the exception. The fact that Southview must now modify the configuration of its subdivision proposal if it wishes to obtain Act 250 approval *does not, in my view, unduly interfere with its reasonable investment-backed expectations.*[143]

The significance of the property owner's expectations is uncertain. In *Penn Central Transport Co v City of New York*, they were relevant considerations. In *Southview Associates Ltd v Bongartz* the existence of expectations and their reasonableness[144] seem to be treated as centrally important issues. It does seem arguable that the US courts are edging toward an analysis in which the objective views and expectations of a reasonable and socially minded person are to be considered, and thus implicitly that there are social and environmental obligations

[139] Ibid 124 (emphasis added).
[140] 980 F2d 84 (1992).
[141] Ibid 195.
[142] Ibid 95, fn 5.
[143] Ibid 107 (emphasis added).
[144] See also *Gil v Inland Wetlands and Watercourses Agency*, 593 A2d 1368, 1373–4 (1991).

in the use of property which may be rendered into positive law without infringing a constitutional guarantee of property.

This is countered to some extent by the subjective nature of expectations dealt with in *Maine Land Use Regulation Commission v White*[145] and *Claridge v New Hampshire Wetlands Board.*[146] It is not clear why the existence of subjective expectations held by the property owner should make any difference in answering the question of whether there has been an expropriation of property or not. People acquire objects every day under misapprehensions about their intrinsic qualities and thus with misplaced expectations about what they might do with them but this does not alter their value. Certainly, weighing objective reasonable expectations might be a convenient way to ascertain cultural and environmental obligations attached to a particular area, and thus what should be done regardless of legal regulation and the availability of compensation, but the US courts do not yet appear to have reached this point.

Rather, the use of subjective expectations seems almost to raise a doctrine of notice in the interpretation of a constitutional guarantee — that one is bound by ecological features of the land of which one had notice at the time of purchase, or perhaps constructively, of which one should have had notice. This view would seem to conceive the environmental vulnerability, or other social purpose which legislation seeks to protect, as a latent form of property itself — as an equitable interest to which the purchaser might or might not become subject according to rules which have very little to do with the legitimacy of the claim of the relevant ecosystem to protection.

Environmental obligations stem from property ownership, regardless of whether one was aware of them at the time of purchase. The ramifications of purchasing land without extensive information about it should be solved through an action in misrepresentation against the vendor, or through establishment of reliable cadastral and geographic information systems, and not through constitutional litigation which could result in invalidity of the relevant environment protection measure and consequent environmental damage, simply because a purchaser did not acquaint him or herself with the relevant environmental value of what was being purchased. This disproportionate result is avoided by recognition of the social and environmental responsibilities which pervade property.

2 *Contrasting Compulsory Acquisition in Australia*

In the case of *Newcrest Mining (WA) Ltd v Commonwealth*[147] the High Court of Australia extended the law with respect to compulsory acquisition within s 51(xxxi) of the *Australian Constitution.*[148] Of particular interest is the judgment of Kirby J, in which his Honour aligns the protective elements of s 51(xxxi) with 'protections against arbitrary and uncompensated deprivation of property [which] may be found

[145] 531 A2d 710 (1987).

[146] 485 A2d 287 (1984).

[147] (1997) 147 ALR 42 ('*Newcrest Mining*').

[148] *Australian Constitution* s 51(xxxi) gives the Commonwealth power to make laws with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has powers to make laws'.

in the constitutions of most civilised countries.'[149] The case concerned mining leases which had been granted prior to 1978 over Crown land in the area of Coronation Hill in the Northern Territory. The area had long been considered for inclusion in the Kakadu World Heritage area, which was first initiated by the Fraser Liberal Government in 1979 in recognition of its international environmental value. The plaintiff acquired the mining leases in 1987 from BHP Minerals Ltd. Until 1991, the plaintiff company was in fact named BHP Gold Mines Ltd.

By proclamations in 1989 and 1991, the relevant Crown land was added to Kakadu National Park. The *National Parks and Wildlife Act 1975* (Cth) had already been amended in 1987 to provide that there would be no operations for the recovery of minerals in Kakadu National Park, and further that there was no liability to pay compensation for that reason. The plaintiff contended that the effective termination of its right to mine was an acquisition of property by the Commonwealth which entitled it to compensation on just terms. The majority (Gaudron, Toohey, Gummow and Kirby JJ) accepted this contention with respect to mining leases which were valid at the time of their 'acquisition'. The different ruling of the minority judges (Brennan CJ, Dawson and McHugh JJ) followed from their finding that the power to make laws for the government of a territory[150] is not subject to s 51(xxxi) in view of earlier High Court authority which they declined to overrule.[151] Toohey J also declined to overrule earlier authority, but found that the acquisition of property followed from laws which could be characterised within the legislative powers in s 51[152] which were thus subject to s 51(xxxi), regardless of characterisation under s 122.

That the mining leases were property was not disputed. That suppression of their use amounted to acquisition by the Commonwealth was in contention. This point has inspired Sperling[153] to express very pertinent concerns about the limitation of the use of the mining leases being conceived as an acquisition in contrast to the High Court's approach in *Commonwealth v Tasmania*.[154] The issue is that public regulation of private land use for the purposes of environmental protection might now be construed as full or part sterilisation of the relevant private interest in the land, and in turn, be characterised as an acquisition of property requiring compensation. If this is to be the consequence of *Newcrest Mining*,[155] Sperling argues, quite rightly, a concept of public interest must be introduced to the equation. As I have sought to elucidate, an environmental constraint has lain within the western concept of property since at least the time of Hale and Locke and this should apply a fortiori to the Crown's ultimate or radical title to land, which in any

149 *Newcrest Mining* (1997) 147 ALR 42, 149.

150 *Australian Constitution* s 122.

151 *Teori Tau v Commonwealth* (1969) 119 CLR 564.

152 Specifically, the external affairs power in s 51(xxix) as a means of implementing the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

153 Karla Sperling, 'Going Down the Takings Path: Private Property Rights and Public Interest in Land Use Decision-Making' (1997) 14 *Environmental and Planning Law Journal* 427.

154 (1983) 158 CLR 1 ('*Tasmanian Dams Case*').

155 *Newcrest Mining* (1997) 147 ALR 42, 154.

case could remain burdened by native title and the environmental constraints of applicable indigenous law and customs in relevant cases. Indeed, in this connection, the decision carries the advantage of confirming, if it were necessary, that as a matter of constitutional law the sterilisation or extinguishment of native title is an acquisition of a proprietary interest[156] requiring compensation. Nevertheless, *Newcrest Mining* need not be read as departing from the *Tasmanian Dams Case*[157] and this was not contemplated by the High Court with the depth which one would expect for such a momentous conclusion. When the Commonwealth terminated mining operations at Coronation Hill it effectively acquired the unexpired term of the mining leases, thus enlarging its reversionary interest. This acquisition occupied the attention of the court far more than the possibility of land use control,[158] and there was no similar factor in the *Tasmanian Dams Case*.

It remains a pertinent question how the High Court might have decided the issues in *Newcrest Mining*[159] had the correct legal position regarding the environmental obligations inherent in property, here a mining lease, been placed before it. In this respect it is interesting to consider principles applicable to the expropriation of mining interests under article 14 of the German *Constitution* in view of the obligations implicit in the ownership of them. This in turn requires consideration of the environmental context of the land in question. In 1991, the Cabinet of the Commonwealth government decided on the basis of a report of the Resource Assessment Commission ('RAC')[160] to prevent mining in the Kakadu Conservation Zone, including Coronation Hill, largely in view of the spiritual and cultural importance of Coronation Hill to the Jawoyn people.[161] The report nevertheless concluded that the prospective impacts beyond the planned mining site included loss of the opportunity to preserve the entire catchment area of a tropical river at least for the life of the mine, and could challenge the ecological integrity of the Kakadu National Park with which the area is biophysically linked, and affect future possibilities for listing the area as world heritage.[162] The area is also the habitat of endangered and vulnerable species.[163] The mine site itself was to occupy 13 square kilometres and it was proposed that the ore be extracted by the open cut method, employing cyanide leaching.[164] Levels of radiation were also anticipated because of the presence of uranium. The RAC suggested methods of mitigating the ecological

156 *Western Australia v Commonwealth* (1995) 183 CLR 201.

157 *Tasmanian Dams Case* (1983) 158 CLR 1.

158 *Newcrest Mining* (1997) 147 ALR 42, 48 (Brennan CJ), 81 (McHugh J), 129 (Gummow, Gaudron and Toohey JJ).

159 Ibid.

160 RAC (Cth), *Kakadu Conservation Zone Inquiry Final Report*, Parl Paper No 110 (1991) vol 1 ('*Kakadu Conservation Zone Inquiry* vol 1').

161 Brian Galligan and Georgina Lynch, 'Integrating Conservation and Development: Australia's Resource Assessment Commission and the Testing Case of Coronation Hill' (1992) 9 *Environmental and Planning Law Journal* 181, 190–2.

162 *Kakadu Conservation Zone Inquiry* vol 1, above n 160, 123.

163 RAC (Cth), *Kakadu Conservation Zone Inquiry Final Report*, Parl Paper No 111 (1991) vol 2, 15–21.

164 Ibid 95–9

impact of mining if it were to go ahead.[165] These suggestions were directed to the protection of the surrounding area. Even if they were adopted, impact on the site itself would still be profound at least for the duration of the mining operation.

The environmental context of the mining leases would thus be a very weighty consideration bearing on the intentions of a rational and reasonable owner, who had not lost sight of the common good. If the interest in the land held by Newcrest Mining (WA) Ltd had been full ownership, one would expect the same outcome as that reached by the German High Court in the *Gravel Extraction Case* discussed above.[166] That is, the owner would not be entitled to compensation if directed not to mine, because mining would exceed the uses which such an owner would consider appropriate for the land in its environmental context. The cultural importance of the land is also an inherent feature which the objective owner would respect.[167] The owner could pursue a range of other uses.

However, with respect to an interest in land granted for such a specific purpose as the extraction of an identified resource, the German courts have acknowledged a paradox in concluding that the proprietor of such an interest could be prevented from pursuing the sole specific purpose and not regarding this as an expropriation.[168] In the case of potential uses which have not yet been pursued, if there is some further public permission to be obtained, in the form of an exemption from a general prohibition of the activity,[169] then there is no expropriation in preventing the use by some other means. If, however, obtaining a simple approval is all that must be done before the proposed use could be commenced,[170] then preventing pursuit of the purpose can be an expropriation.

Directing the manner of the exercise of the sole specific purpose does not give rise to compensation. However, in assessing the level of public direction, the German courts have drawn upon the principle against interferences with the use of the property which amount to expropriation[171] because they prohibit or considerably limit the relevant use. With these principles in mind, it seems unlikely that the prohibition of mining on land over which a mining lease is held, even for good environmental reasons, would escape characterisation by the German courts as expropriation of private property.

However, the issue does not end with characterisation of the public law restriction on land use as being of such severity that it amounts to expropriation. The common good is also brought into consideration when calculating the amount of

165 Ibid 63–8.

166 (1984) 14 *Agrarrecht* 281.

167 *Kölner Hinterhaus Case* (1967) 48 BGHZ 193, discussed at above n 128. A connected point is that if Newcrest Mining (WA) Ltd was aware of sufficient facts underlying the presence of native title when it acquired the interest, *good faith* (see above n 114) could require subjection of the mining interest to the native title. In this respect, the *good faith* doctrine resembles the English doctrine of notice.

168 Kimminich, above n 95, 41–2, [43].

169 A clear example of this would be amendment of a planning scheme which otherwise prohibits the proposed use.

170 An example of this might be the final certification of fire fighting appliances installed in a building in accordance with an approved plan.

171 '*Der enteignungsgleiche Eingriff*'.

compensation which must be paid, and hence the social and environmental obligations of the property owner are also relevant here. Von Brünneck has noted a difference of view between the German Federal Constitutional Court and the German High Court concerning the relevance of market value in determining the measure of compensation on 'just terms'.[172] However, even the German High Court case which he cites confirms that the inherent limitations and the social and environmental context of what has been expropriated are vital determinants of its value.[173] The object of compensation is not to place the property owners in the position which they might otherwise have enjoyed, as with the calculation of damages, and so conjectural future development and profits are irrelevant. The point is to determine, on one hand, where the limitations and obligations inherent in the property end and, on the other hand, to determine where an uncalled for individual sacrifice is being required. With respect to a mining project which has not commenced, this is particularly difficult in view of the great risks necessarily involved in the industry. In contrast to the US position, a consideration of 'investment-backed expectations'[174] does not displace the actual limitations of the property in its social and environmental context.

These limitations would not be calculated by reference to effects on neighbouring land alone because there is no right in property to pose risks to neighbouring land. If the environmental and cultural constraints of the relevant site itself could not be respected in the course of mining it, then this should determine the value of the right expropriated. In other words, if the environmental value of the site itself would require a method of mining which in the circumstances could not be pursued for economic reasons, then the value of the right expropriated is the market value of such a site. No doubt there are many ore bodies in Australia which cannot be mined economically because of their inherent qualities, such as low density of the ore body. The environmental and cultural qualities of the site are also inherent qualities. To require a higher level of compensation upon expropriation of the right[175] would be to require the public to underwrite the risks which the proprietors of such rights take when they acquire them, and thus to compensate such proprietors for their own inadequate pre-acquisition environmental assessments.

B *The Constitutional Guarantee against Undue Environmental Interference from Governmental Projects*

A further implication of characterising as expropriation the limits upon, or interferences with private land use which flow from governmental action is the recognition of environmental interferences which emanate from public projects as a

[172] Von Brünneck, above n 107, 199–200, *Constitution* art 14(3).

[173] *Frankfurt Underground Railway Case* (1971) 57 BGHZ 359. This approach was followed by the *Bundesverwaltungsgericht* ('German Administrative Court') in the *Munich Airport Case* (1991) 87 BVerwGE 332.

[174] *Southview Associates Ltd v Bongartz*, 980 F2d 84, 107 (1992).

[175] There might be private law remedies in relevant circumstances against the vendor or grantor of a such a right, for example, where environmental qualities of the right were expressly warranted.

form of expropriation. As noted, this is a feature of US takings law[176] and it also follows from the guarantee of private property in article 14(1) of the German *Constitution*.[177] In view of the social obligations implicit in property, which are to be determined in context, there is a level of interference generated by public initiatives which a private property owner must tolerate for the common good. However, when interference with the usual use of the property reaches the expropriation threshold, compensation must be paid. There is yet a further level of interference with the property, or an integral part of it,[178] at which the property cannot be used in a relevant sense, and then it must be acquired.

The *Munich Airport Case*[179] is a recent illustration of the application of these principles with respect to noise intrusion. The environmental assessment of plans to construct a second airport at Munich led to the designation of a noise intrusion area where noise was expected to reach 55 dB(A) in the inner living areas of buildings with closed windows.[180] In this area, noise management measures, such as soundproofed windows, were to be installed with the object of keeping noise intrusion below 55 dB(A). One ground of appeal by citizens and municipalities was that the assessment agency had erroneously omitted affected land from the designated area. The court concluded that it was within the discretion of the agency to designate areas within which it would be presumed that noise would reach unreasonable levels and provide attenuation measures.[181] This could not however exclude the right of a private property owner outside the area to seek compensation, which could be provided in the form of noise attenuation measures, where unreasonable intrusion is actually experienced, or to require complete acquisition where the intrusion is so unbearable that meaningful usual use of the land could not be made.

Naturally, in the complex situation of aircraft noise, a vast range of factors are involved, such as the time of day and pre-existing conditions in the area,[182] and the mixture of active solutions, through air traffic control and restriction of aircraft types for example, and passive solutions, such as the installation of sound proofing, which might be adopted. Perhaps in view of this complexity, the court declined to specify decibel levels for the expropriation threshold, although it noted the levels

176 *United States v Causby*, 328 US 256 (1946).

177 See generally above n 171 and accompanying text.

178 A home and its garden are considered integrated in a social and familial sense: *Highway Construction Case* (1981) 61 BVerwGE 295, 300–1.

179 (1991) 87 BVerwGE 332

180 The *Planfeststellung* procedure was conducted by an independent agency with authority to arrive at an actual decision. This procedure was subject to ordinary avenues of appeal to the administrative courts, however the agency retained an area of discretion, generally limited to the weighing of facts and planning policy, with which the German Administrative Court would not involve itself. This case reached the German Administrative Court from the Munich Administrative and Higher Administrative Courts. The environmental assessment was conducted within the provisions specifically applicable to civil aviation projects set out in the *Luftverkehrsgesetz* ('Civil Aviation Legislation').

181 *Munich Airport Case* (1991) 87 BVerwGE 332, 360–1.

182 In contrast to 19th century English decisions concerning the law of nuisance (cf *Munro v Southern Dairies Ltd* [1955] VLR 332 with respect to noise), the pre-existing conditions of an area did not justify additional interference which took the total interference over reasonable limits: *Munich Airport Case* (1991) 87 BVerwGE 332, 358.

considered tolerable in other cases.[183] Rather, it reasoned from basic principles applicable to private ownership and found that the levels set by the environmental assessment agency, in consideration of expert evidence of the effects of noise disturbance, were generally consistent with them. Underlying this reasoning was the constitutional purpose of protecting private property in a modern democratic republic,[184] which had been identified by the German Federal Constitutional Court in the *Hamburg Dyke Case*:

> Ownership is an elementary basic right which stands in a close connection with the guarantee of personal freedom. It has the task, within the total structure of the fundamental rights, to secure for the bearer of the fundamental rights a realm of freedom in the field of property rights and thus facilitate a self-responsible form of life. The guarantee of property as a legal institution serves the security of this basic right. The fundamental right of the individual presupposes the legal institution of 'property'; it would not be effectively guaranteed if the legislator could establish something in the place of private property which no longer deserved the title 'property'.[185]

The application of this fundamental perspective to environmental rights in one's residence led to the conclusion that when ascertaining relevant noise toleration levels it was correct to take into account human health needs such as sound sleep, occasionally with the window open. This requires regard to the noise level at which one is awakened by the autonomic reaction of the human nervous system (55 dB(A)),[186] and that at which communication is interfered with (65 dB(A)).[187]

Naturally, it remains within the power of German legislators to set more stringent standards. An example of this is to be found in the *Traffic Noise Protection Regulation*,[188] pursuant to which the construction or significant alteration of public streets, railways and tramways is to be executed in such a way that specified minimum levels of noise interference will be achieved. In residential areas, the levels are 59 dB(A) during the day and 49 dB(A) at night.[189]

VII CONCLUSION — THE RIGHT TO *BENEFICIAL USE AND ENJOYMENT* MEANS WHAT IT SAYS

As our century draws to a close, the destructive potential of some of our industrial technologies defies calculation within the pay-out and sell-out options of conventional economics, leaving great uninsured exposures at risk,[190] the value of securities over potentially affected property in doubt and the ex post facto solution of litigating for compensation a straw in the wind. It is questionable that economic

[183] *Munich Airport Case* (1991) 87 BVerwGE 332, 382–3.
[184] Ibid 380.
[185] (1968) 22 BVerfGE 367, 389.
[186] *Munich Airport Case* (1991) 87 BVerwGE 332, 388.
[187] Ibid 386.
[188] *Verkehrslärmschutzverordnung 1990* (Germany) vol 1, 1036.
[189] *Verkehrslärmschutzverordnung 1990* (Germany) vol 1, 1036, § 2(1)(2).
[190] David Collard, 'Catastrophic Risk: Or the Economics of Being Scared' in David Collard, David Pearce and David Ulph (eds), *Economics, Growth and Sustainable Environments* (1988) 67–8, 71

forces alone can achieve rational scientific investigative scrutiny, or even safe spatial location of such industrial processes when the major stakeholders themselves cannot translate the risks into costs and benefits.[191] Nuisance and escape cases, in a paradigm generally formulated in more sober moments by judges generally intoxicated by the industrial revolution, do establish a social obligation to neighbouring interests, including property, but do not usually assist with regard to degradation within boundaries. Hence a *quia timêt* action to restrain potential intrusion continues to be subjected to the mistaken presumption that one may do what one likes with what one owns unless the threat is dangerously imminent.

Attempts to find a limitation on absolute rights of property use in the doctrines of tenures and estates,[192] that an under-tenant in the feudal hierarchy owed an overlord an obligation to preserve the land, inevitably reach the historical limitation that feudal society had no conception of risks on this scale. Only exceptional cases were recorded in medieval times, and the obligation to preserve the fertility of land was so completely ordinary that no cases on the point would have been recorded even if some relevant degradation had been technically possible in a world where waste was, almost without exception, biodegradable.

The positivistic obsession with the 'absence of cases' limiting what one might do with what one owns, regardless of social and environmental strictures, therefore underscores the limitations of a common law method which is essentially backward looking. It does not establish an English golden age from which such strictures were absent. When we look instead to the views of eminent jurists[193] and political philosophers[194] of the early modern era we find that there was no such assumption. Only Blackstone seems possibly to have held a contrary view, and like his account of terra nullius, this view has been vulnerable to cleavage from its context.[195] When Blackstone's fundamentalism, or at least oversight, and perhaps even irony, in derivation of a natural law foundation of despotic dominion is corrected, the common law world has little jurisprudential justification for according a minor role to social and environmental obligations implicit in ownership of a resource.

The presumption in statutory interpretation in favour of maintaining freedom of property should not be applied in ways that reduce the effectiveness of environmental legislation. In legal conception, the ownership of something is the right to beneficial use and enjoyment of an estate or interest in the relevant property, and the power to assign that right and to exclude others from it. With respect to the ownership of animals, in *Backhouse v Judd* Napier J found an implicit obligation to care.[196] With respect to land in registered land title systems, the systems' concept of property plainly carries within it an obligation to register one's estate or interest.

191 Ibid 68.
192 See generally McElfish, above n 90.
193 See generally Hale, *The Primitive Origination of Mankind*, above n 35.
194 See generally Locke, above n 32.
195 *Mabo v Queensland [No 2]* (1992) 175 CLR 1. In view of Blackstone's respect for the American Indians and his acknowledgment of *property* in a shaded area under a tree, it is doubtful that he would have approved of the Privy Council decision in *Re Southern Rhodesia* [1919] AC 211, 233–4.
196 [1925] SASR 16.

Similarly, an environmental responsibility should be presumed positively, even in the absence of positive legal regulation, as an aspect of property itself and at the deepest jurisprudential level.

This obligation has been accepted by German courts without any apparent detraction from Germany's status as a so-called locomotive capitalist economy, or the value of its currency relative to the value of the currencies of nations which do not accept the obligation. Indeed, the contrary is the case. Economic theory generally takes property rights as given, and so far as it erects a theory of property, property is seen as a function of the need to internalise potential externalities which emerge with greater technical and commercial potentials.[197] The technologically magnified human powers of destruction are a concomitant of the technologically magnified human powers of production, and the cost of the rational scientific scrutiny of them must be internalised through a conception of property which accords with a prudent status quo as a matter of basic juristic perspective. There is very little in the way of high authority in support of an unlimited power in private property to destroy what one owns. Blackstone's idea of despotic dominion, if it is indeed to be taken seriously, was out of step with his own mentors regarding other major aspects of his writing — Sir Matthew Hale and John Locke.

Recognition of the wider obligations implicit in the owner's right to make beneficial use and enjoyment of the object of ownership would go a long way, in juristic endeavours at least, to restoring to the conservative pole of social deliberations in the field of planning and environmental law that pole's traditional concern that evidence of tangible benefits offered by the new and unknown be set off against a sober assessment of what would be lost of the old and known. It follows from this view that no impingement is made upon any freedom of action which is thought to pre-exist by the institutionalisation of public processes which require careful evaluation of the possible harm of new proposals, foresight in the allocation of resources, and consideration of alternatives. On the contrary, these evaluative processes are an expression of the social and individual obligations which lie within the very essence of property. What is appropriate beneficial use and enjoyment of property should be answered with full regard to the social and environmental location of the object of ownership itself, without judicial presupposition of a basic right to do anything with it. Such presuppositions are not data and should not compete with data. Accurate and dispassionate information about the affected environment and proposed uses of it is clearly required. Legislation establishing environmental impact assessment techniques is a rational expression of, and framework for the inquiry which is demanded by the social obligations inherent in the social privilege of owning property. This reasoning must apply a fortiori to public projects and public property, and especially public land. Without acceptance of the obligations lying embedded in property, when applying the presumption in favour of freedom of property, it is doubtful that environmental reform legislation can achieve its intended goals. This is a very weighty consideration at any time, but especially when that legislation implements solutions

[197] Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 *American Economic Review* 347.

to international concerns about environmental degradation expressed in international agreements and commitments.

It might be that we cannot consider Australia's frontier era[198] to have passed until conservatism accepts its role in preserving the status quo, and the courts, when playing their conventionally conservative social role, accept that any reasonable property owner should not change an environment until satisfied by prudent environmental inquiry that the real benefits of change outweigh what will be lost.

[198] On Australia's frontier society, see Michael Williams, 'Ecology, Imperialism and Deforestation' in Tom Griffiths and Libby Robin (eds), *Ecology and Empire: Environmental History of Settler Societies* (1997) 169, 173–5.