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A Tale of Two Titles

Until recent years, few people gave much thought to the rights associated with title to land – either farmland or an urban block. This has now changed, with State Government land management legislation and regulations having an increasing impact on the rights landholders previously assumed they held. What has become apparent is that the constitutional provision that prevents the Commonwealth from acquiring property on other than 'just-terms' means little when it comes to the State removing a property right.

The concept of fair compensation for an individual whose property rights are removed to achieve a public good is heavily dependent on political circumstances. All owners of title are legally equal, but politics makes some titleholders more equal than others.

Land Title Rights in a Marginal Electorate

In 1921, Mascot was chosen as the site for an airport to service the fledgling aviation industry. Situated as it was on 600 hectares of flat land on the shores of Botany Bay, about 8 kilometres from the city of Sydney, it seemed like an ideal location for an airport.

Progressively, however, suburban development consumed the areas of available vacant space surrounding the airport site, and at the same time the burgeoning aviation industry required ever larger facilities. Just 25 years after the airport had been established, the first investigation was carried out of possible alternative sites for an international airport.

By 1964, the NSW Government and the Department of Civil Aviation had commissioned a report into alternative sites for a second Sydney airport.[1] By 1999, despite a further fifty reports, there is still no clear decision made about the location of a second Sydney airport.

As part of the seemingly endless wrangling over the airport, a proposal was developed in the late 1980's to build a third runway on the current Mascot site. This proposal resulted in a storm of protests, and calls for compensation for those owning residences nearby that would be affected by the increased aircraft noise. In response, John Howard said "..I've always regarded the issue as being grossly exaggerated in terms of the impact on the local residents. There are a limited number of people who are severely affected by aircraft noise. The great bulk of them are only mildly affected and in any event bought their houses knowing full well they were under flight paths."[2]

The opposition to the third runway grew increasingly vocal, but despite this, in November 1991 approval was given to the Federal Airports Corporation to proceed with construction. This runway was opened in November 1994, at which time the transport Minister announced a $183 million/10 year compensation program for those property owners who would be affected by aircraft noise as a result of changed flight paths. The program was designed to voluntarily acquire some properties worst affected by the increased noise, and to insulate and air condition a large number of others that would suffer some impact.

The legislation enabling this program was the Aircraft Noise Levy Act (1995), and the Aircraft Noise Levy Collection Act (1995). These Bills passed through both Houses of federal parliament on the 8th and 9th of June, 1995. The legislation imposed a levy on all aircraft using the airport, which the airlines were to recoup from their passengers, and the money was to be used to pay for the property acquisition and insulation program.

The parliamentary debate was somewhat truncated, but a number of speakers mentioned the principle of 'beneficiary pays' as justification for the legislation. For example, Senator Foreshaw stated "The bill establishes the important principle that as airlines and their passengers are the major beneficiaries of an airport's operations, they should in turn be required to meet the costs of reducing the more severe impacts on the affected communities in the vicinity."

Nowhere during the debate was the question of any legal principal underlying the provision of compensation discussed.

[1] Williams, P. (1998) Second Sydney Airport – A Chronology. Parliament of Australia Library.

[2] Mike Carlton show, March 21, 1989. As quoted in Senate Hansard, 9/6/95

Perhaps it was considered that as the areas in question were marginal Government-held seats, it was blindingly obvious why compensation was being paid, irrespective of whether there was any legal principal involved!

The Sydney Airport Noise Amelioration Program is still in operation at present. As at September 1999, 145 houses had been voluntarily acquired, and funds had been provided to Marrickville Council to convert the area into a park.[3] In addition, 2,780 of the eligible 3,570 residences had been insulated, as had 55 schools and other institutions. Work is underway on an additional 41 institutions, plus the remaining houses. Thus far the program has cost $280 million.

Land Title Rights in Non-marginal Rural Seats

Prior to 1995, if farmers in NSW purchased freehold land, they were encouraged to develop enterprises on that land. Often, these enterprises involved the removal of vegetation and the cultivation of the soil. The right to develop and improve an area of land was considered an intrinsic aspect of freehold land ownership, in much the same way that enjoyment of peace and quiet is considered a right for an urban landholder.

Governments provided significant incentives to encourage land development, including tax concessions, favourable depreciation scales, and superphosphate bounties. The development potential of a particular area of land was an important aspect to consider in arriving at a valuation for that land. The only constraints on the development potential of freehold land were those such as the risk of soil erosion or development causing damage to another property.

In recent years, legislation and regulations have removed some significant rights landholders previously had on freehold land. The most relevant examples in NSW are the Native Vegetation Conservation Act, and a range of planning controls established under the Environmental Planning and Assessment Act, and World Heritage and Threatened Species legislation.

Numerous examples are available of farmers who have areas of their land in a relatively undeveloped state. With the implementation of SEPP-46 in 1995, and its successor the Native Vegetation Conservation Act, those whose land fell within the definition of native vegetation –(more than 50% of groundcover consisting of native species and present for more than ten years) - lost significant rights that existed at the time they purchased that land.

They cannot now proceed to cultivate that area or remove any more than limited amounts of timber without first submitting a development application to the NSW Government. Preparation of an application for development involves commissioning consultants to carry out investigations into a range of technical issues. While the costs of these vary depending on the scale of the proposal, costs in excess of $30,000 are not uncommon.

Particular problems exist for those landholders whose development application triggers an investigation of the presence of threatened species in the area. Reports from farmers suggest there is no great consistency in the way such assessments are made, and in some cases it seems the presence of potential habitat for a threatened species can trigger as many restrictions as the actual presence of the species. Significant additional application costs are faced by landholders where threatened species are an issue.

In the event that development is refused or restricted, there is no requirement for the Government to pay any compensation to landholders. This applies, irrespective of whether or not the reason for refusal or restriction is clearly a public-good issue such as the preservation of a threatened species or habitat, or the retention of biodiversity. Plenty of examples exist of farm businesses which are estimated to be at least $50,000 per annum worse off as a result of these restrictions, with this cost borne wholly by the landholder for presumed community benefit.

Perhaps the most striking example of landholders being restricted to achieve a public good outcome occurred in the case of those involved in the Willandra World Heritage area. Literally overnight their land management practises were restricted, and many were stopped from cropping their land, despite the fact that the areas in question had been cropped for many years. It took seventeen tortuous and agonising years before these landholders were paid any compensation for their land.

The Cost Impact on Rural Landholders

Some would argue that public-good restrictions placed on rural landholders have not resulted in any real cost, and therefore the question of compensation does not arise, irrespective of the legal position. There is mounting evidence that this is not correct.

Public-good conservation measures, such as biodiversity, threatened species and native vegetation conservation, are now having a real impact on land values, as well as farm income.

In recent reports property-valuers Herron Todd White have repeatedly commented on the impact of environmental legislation on rural land values.[4] In September 1999 they reported that “As more traditional grazing properties diversify from grazing to dryland cultivation, the Native Vegetation Act is beginning to have an impact.” In October 1999, they reported “The Native Vegetation Act has reduced the production potential of underdeveloped properties, increased the cost of clearing and extended the timeframe of such development.” They continued “.. it appears unbalanced that a significant part of the cost (of environment legislation) is worn by the landholder without adequate consideration of compensation, or provision of an alternative option to improve and maintain productivity.”

[3] Airports Planning Branch. Dep’t of Transport and Regional Services. Briefing note, Sept 13th, 1999.

[4] Herron Todd White. The Rural Review. Various issues, 1999

In November 1999 they reported "Values for grazing properties that cannot diversify (due to the Native Vegetation Act) are stagnating and in some cases continue to fall."

Numerous individual landholders also cite examples where land on which environmental restrictions are imposed is now of little or no value, and landholders face a real dilemma about their futures.

In these situations, unlike the property-owners living in proximity to Sydney airport, the removal of rights has not resulted in any compensatory measures. Landholders who have invested their life savings and their life labour in their property face the prospect of their "superannuation " being substantially diminished, and have few alternative options.

Defining Rights Under Titles

At first glance, a homeowner at Marrickville affected by aircraft noise, and a landholder in western NSW who can't diversify because of the presence of a threatened species of animal have little in common.

The underlying issue for both, however, is the question of what rights a person obtains upon acquisition of title to land. Following logically on from that is the associated question about whether a landholder is eligible for compensation if a subsequent decision by Government results in some of those property rights being affected or removed.

There is a general assumption that an important aspect of a healthy economy is security of title to property, and that Governments cannot arbitrarily remove that title without fair compensation. Many believe this principle is enshrined in the Australian Constitution. Section 51(xxxi) of the Constitution states that the Commonwealth has powers to acquire property on just-terms from any State or person, for any purpose in respect of which the Parliament has powers to make laws.

This provision of the Constitution is reinforced by both Commonwealth (Lands Acquisition Act 1989) and similar legislation in every State and the Northern Territory.

This principle has operated in situations where the actual title to property is acquired by the Government for a public purpose. For example, Governments have purchased houses and land to construct freeways or railways. While invariably there will be arguments about the amount of compensation due in these situations, there is no question that the removal of someone's title to property generates a requirement for just-terms compensation.

Where the issue is considerably less clear is when the title to a property is not taken away, but some aspects of the enjoyment of rights normally associated with that title are either impaired or removed. In these situations, the actual title is not acquired by the Government.

The properties located within close proximity to Sydney airport are a case in point. Presumably, the logic is that when the owners acquired their properties, they also acquired a right to enjoy living in the house on that property in peace and quiet.

Increasing air traffic and changed flight paths impinged on some of those rights and apparently generated a requirement for redress. However, the point raised in the earlier quote of John Howard is very relevant. If a title is purchased in close proximity to an airport or freeway, presumably at a lower cost, the case for compensation for reduced enjoyment of rights under that title seems weak.

Pondering this question leads logically to the question of exactly what "rights" are acquired when a person acquires a title to land. Under common law these rights were quite extensive, and restricted only to the extent that exercising those rights should not result in damage to the property of another person.

However, legislation and regulations have progressively limited these rights, especially planning and environmental legislation.

The Legal Position on Just-terms

There has, not surprisingly, been quite a number of legal cases where the question of the meaning of Section 51(xxxi) of the Constitution has been tested.

Perhaps the most noteworthy was the Tasmanian Dams Case.[5] In that case, the Commonwealth enacted legislation to prevent the Tasmanian Government damming the Franklin River, and one of the grounds for Tasmania challenging the Commonwealth was that it's restrictions on the use to which the Tasmanian Government could put the Franklin River and nearby land amounted to an acquisition of title, and triggered s.51(xxxi) compensation provisions.

In the Court case to determine this question, Justice Mason (with the concurrence of two other Judges) ruled that "to bring the constitutional provision (s.51 (xxxi)) into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be."

The only dissenting Judge was Justice Deane, who considered that the restrictions imposed by the Commonwealth could be substantial enough to amount to the acquisition of property, and should therefore be compensatable.

In a more recent case, Justice Kirby stated that the terms of s.51(xxxi) were "intended to recognise the principle of the immunity of private and provincial property from interference by the Federal authority, except on fair and equitable terms."[6]

5 High Court of Australia. The Tasmanian Dams Case. (1983) 158 CLR 1.

6 Newcrest Mining vs The Commonwealth (1997) 190 CLR 513

He cited a variety of international legal precedents protecting the rights of property owners, including the Universal Declaration of Human Rights, The Magna Carta, The French Declaration of the Rights of Man and of the Citizen, and the Indian, Malaysian and Japanese constitutions. Also cited was the Fifth Amendment of The United States Constitution which states that "no person shall be … deprived of … property, without due processes of law; nor shall private property be taken for public use, without just compensation."

Despite Justice Kirby's ruling, the conclusion from these and other related court cases is that, whilst there is no unanimity, the High Court has so far held that unless the Commonwealth (or the State) actually becomes a titleholder by acquiring a title from an individual, the just-terms provision of the constitution do not apply.

Taken literally, this means that a Government in Australia may simply enact laws to remove all the rights of a titleholder, however as long as the actual title to the land is not removed, no compensation is due.

This interpretation means that property-owners under Sydney flight paths have no legal right to any compensation for loss of enjoyment of their rights, if flight paths are altered. It also means that native titleholders or claimants have no right to compensation for any action by Government that does not amount to full extinguishment of that native title.

In both these situations, irrespective of this strict legal interpretation, Governments have enacted legislation (The Airport Noise Act and the Native Title Act) which ensure restitution is made where the rights of title holders are removed.

Rural landholders whose rights have been removed for public good purposes have not received the same treatment.

Equity and Fairness.

The most galling aspect of this issue for rural landholders is the inequity inherent in the treatment of the rights of different titleholders in Australia

If the property title you own lies in an urban electorate that also happens to be marginal, there is an automatic assumption of rights to compensation if some of the rights you previously enjoyed under that title are removed. This is irrespective of whether or not the title was purchased in full awareness of the potential blight on some of those rights.

This expectation is built on the notion of equity and fairness, and the principle of "beneficiary pays", and has been implemented by Governments, irrespective of the current legal interpretation of the relevant section of the Australian Constitution.

In a rural setting in a non-marginal electorate, the reality is quite different. Restrictions on landuse that effectively remove substantial rights from farmers for public-good purposes are routinely imposed by Governments, with no regard to the cost to individual landholders, and no consideration of compensation.

Article 52 of the Magna Carta, written in 1215, recognised the importance of secure title to property, and the dangers in the arbitrary removal by Government of a person's rights. Eight hundred years later, the Australian legal system still does not incorporate that principle.

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