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Statutory Theft

Steadily increasing Government expectations about the environmental outcomes required of owners of private land are eroding property rights and amount to theft by statute. Somewhat paradoxically, this is occurring at a time of increasing recognition that stronger property rights for a wide range of commercial and natural resources lead to better commercial and environmental outcomes.

The key to clarifying property rights for land and ensuring that the entire community equitably pays for public good environmental restrictions is to define an appropriate 'duty-of-care' for landholders. Regulations that impose additional restrictions in excess of this standard should trigger public funding. Unfortunately, Governments in Australia and overseas have been remarkably reluctant to define a duty-of-care for owners of land, no doubt seeking to avoid paying for community environmental demands.

The occasion was a November 2000 hearing of a Commonwealth Parliamentary Committee inquiring into the cost of public good conservation restrictions on private land. Appearing before the Committee was a representative of the NSW State Government, who was speaking to a submission prepared on behalf of a number of NSW State Government Department's that have an involvement in land management.

The Committee members were questioning the witness on the concept of the 'duty-of-care' a landholder should normally be expected to exercise in managing land. The significance of the question is that if landholders face regulations that go beyond this duty-of-care, then they are obviously being regulated to achieve a public benefit, at a private cost. The Committee asked the State Government representative to define 'duty-of-care'. The response (in part) was:

> There are different ways you can define it. … The big question is where it stops being your duty as a landholder, and where what you are doing becomes part of a benefit to the broader community. That will differ depending on what you are doing and what area of the State your are in.

To a later question on the same subject, the following response was provided:

> We do not use the term 'duty-of-care' in NSW legislation. It is difficult to articulate. We do not have a ready solution as to how you give that certainty, but at the same time, take account of the fact that you will get new information. Things change, and you have to be able to take action as things change.[1]

The response is important, as it highlights several significant issues in relation to landuse management policy. The first is that Governments have either deliberately or negligently failed to establish a mechanism to ensure that the rights of individual landholders are appropriately protected, and that where they are impacted on to achieve a public benefit, equitable cost-sharing measures are available.

Just as significantly, however, the response reveals that bureaucrats are imposing what is best described as a variable duty-of-care, depending on where land is in the State, and what information is available about that land.

Presumably this means that if a threatened species is discovered, or if an urban water supply area requires protection, then a higher 'duty-of-care' will be imposed on landholders in that area than would otherwise be the case – irrespective of whether or not the desired outcome is a public benefit.

The main beneficiary of this policy is Government and the general public, because by not defining a duty-of-care, Governments can impose ever-encroaching regulations over private land use to meet ever-increasing environmental demands, at no cost to the public purse.

This has a hidden cost in reduced productivity and efficiency of land resource use, and in sub-optimal and non-sustainable outcomes in relation to environmental objectives. In particular, current landuse policies provide a positive incentive for landholders to either hide or remove significant environmental characteristics of their land. A failure to do so simply exposes the landholder to the risk that the land will be locked up.

[1] House of Representatives Standing Committee on Environment and Heritage. Transcript of Public Hearing, Nov. 20, 2000.

The Legal Interpretation of 'Duty-of-Care'

The starting point in developing policies that overcome this inequity, and which at the same time potentially generate better environmental outcomes, is an examination of the approach that is currently taken in Australian law to the general 'duty-of-care' concept.

Courts most frequently consider duty-of-care in cases involving alleged negligence. Negligence is dealt with under common law, and arises where the action of a person results in harm to either another person, or to property owned by another person. A duty of care is a legal obligation to avoid causing such harm.[2]

Obviously, a broad interpretation of duty-of-care could result in clogged Courts, so over time the legal system has developed a number of limitations which restrict situations in which a duty-of-care breach will be found to have occurred. These are often summarised as:

- The need for the harm or injury caused to be reasonably foreseeable
- The need for 'proximity' between the person causing the harm, and the person suffering the harm
- Whether it is fair, just and reasonable to impose the standard of duty of care on the alleged perpetrator.[3]

Even these principles are subject to debate, as has been commented by Justice Gleeson of the High Court.[4] He highlighted that these concepts are more subject to pragmatic consideration than precise definition. This is especially so in situations where the harm being considered is not so much actual physical harm, but economic loss (for example, loss of business income as a result of a someone damaging power lines).

That comment notwithstanding, the key element of these is the concept of 'proximity'. While there still seems to be some legal debate about exactly what the term means, it is clear that the meaning has extended beyond physical or geographical proximity. It has recently been interpreted as causal proximity, which is the degree to which an act or omission will directly affect a person by injuring them or their property. This definition appears to negate situations where a third party in an extended chain of events suffers harm.

The person who suffers harm, and who is seeking restitution from whomever caused it initiates most court proceedings involving this question. A classic example of this would be an upstream farmer carelessly cultivating steeply sloping land, causing erosion that silts up the dams and creeks of a downstream neighbour.

Parliaments have progressively moved to enshrine a standard duty-of-care in various pieces of legislation. For example, most legislation controlling pollution is based on a community-agreed standard duty of care, beyond which anyone releasing harmful substances into the environment is likely to incur a penalty.

It needs to be remembered, however, that a duty-of-care is two sided – not only does it protect the individuals and their property from harm, but it also protects individuals from vexatious litigation. As long as an individual complies with the duty-of-care standard, that person should not be subject to prosecution for causing harm. In effect, the duty protects the basic right of individuals to carry out their businesses or their lives, secure in the knowledge that they will not be continually subject to litigation and claims for damages.

The Economic Context of 'Duty of Care'

The concept of duty-of-care is also significant in an economic sense, in that most of the rights enjoyed by citizens in a modern economy are defined, and have their value established by the extent to which their enjoyment is limited by any duty-of-care.

As a simple example, the right to operate a take-away food business is limited by the need to ensure that any food sold complies with food safety regulations. Ideally, the standard of care required also coincides with the economic imperative to serve healthy food so customers come back. However, a sudden increase in accepted food safety standards, especially one that impacts on certain sectors of the industry more than others, will have a dramatic impact on the profitability of that enterprise.

Governments have progressively recognised over recent decades that harsh regulation to impose a changed duty-of-care can have significant undesirable economic consequences. Firstly, blunt regulation rarely achieves the desired outcome unless strict compliance measures are also imposed. Even regulations with strong compliance measures, such as lower road speed limits coupled with heavy fines, often do not achieve the desired community outcome.

Secondly, inappropriate regulations can have a significant distortionary effect on investment decisions made by individuals, and hence reduce national economic productivity. For example, unnecessarily high vehicle emission standards could significantly increase transport costs in Australia, and make regionally based export industries uncompetitive. This would drive investment away from regional Australia, even if such investment otherwise made sound economic sense.

Much of the deregulation that has occurred in the Australian economy over the past decade, some of this under the National Competition Policy (NCP), has occurred because Governments recognise that national wealth and productivity are higher when undesirable regulations are removed, and market forces allowed to operate freely.

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2 Butterworths (1997) Concise Australian Legal Dictionary.

3 Katter (1999) "Duty of Care in Australia" Law Book Company Information Services. Sydney.

4 HCoA (1999) Perre v Apand Pty Ltd HCA 36 of 1999

Unfortunately, environmental regulation has been excluded from such scrutiny, despite the fact that 'bad' environmental regulation has the potential to do considerable damage to individual businesses, and the economy as a whole.

Lessons from the USA

Landholders in the USA have experienced problems similar to those encountered in Australia concerning the definition of property rights, and appropriate limits to landholders' duty-of-care. A key difference in the US is that their Constitution incorporates a Bill of Rights, partly via the Fifth Amendment, which expresses clearly the rights of US citizens in relation to property.

What are referred to as the takings and due process clauses state "No person shall … be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."[5] The historical origin of this is Chapter 39 of the Magna Carta, signed by King John in 1215. It prevented the King from taking property belonging to others, except as punishment, or when fair compensation was paid.

Much of the debate in the US about this issue has involved the question of what is referred to as 'partial takings' – which is the taking of some property rights by regulation for the benefit of the public, without necessarily acquiring title to the property. Up until the 1980's, the US Supreme Court had adopted the same approach as the Australian High Court has in cases such as the Tasmanian Dams Case where it was ruled that regulations that remove some property rights, but do not involve Government acquiring title to property, do not trigger any constitutional rights (under S 51(xxxi) – the 'just-terms clause') to compensation for the landholder.[6] This is despite recognition by some High Court judges that this allows Governments to effectively acquire a persons' property without paying compensation.

A series of US Supreme Court decisions throughout the 1980s has altered this interpretation somewhat in the USA, irrespective of whether or not Government acquires title to land. The result has been a series of rules the Court uses to decide whether a regulation amounts to a taking of property. These are referred to as the Agins Rules.[7] In that judgement, the Court stated that for a property regulation to be constitutional, it must:

- have as its purpose a 'legitimate state interest'
- it must substantially advance this interest
- it must not deny the owner "economically viable use of his land."

The third rule has subsequently been explained to contain two tests, which can apply to part or all of a property. First, the regulation must not make it commercially impractical to develop the property, and second, there must be no undue interference with the owner's investment-backed expectations.[8] In addition, in some of these situations the burden of proof now rests with the Government to prove property has not been taken, rather than with the property-owner as in the past.

These decisions have strengthened property rights in the USA, and placed limits on the extent to which Governments can regulate landuse, without paying compensation. However, the issue is by no means resolved, and most of the key decisions in the US Supreme Court have been decided on a narrow majority. In addition, it is generally conceded that progressing this issue through the justice system is a slow, expensive and inexact pathway – essentially a 'back-end' process that only occurs after the damage is done.[9]

The alternative 'front-end' approach is one where legislation is enacted that requires lawmakers to assess the potential impact of their legislation on property rights, before new laws or regulations are enacted. This is similar to the approach that has been taken in Australia's native title legislation (the future acts provisions) under which Governments are prevented from carrying out 'acts' that may have an impact on the enjoyment of any potential native title rights without first negotiating compensation.

In this situation, the onus rests with the Government to prove the proposed 'regulation' will not damage the rights of the title-holder, which stands in stark contrast to the approach taken for other property owners.

There are at least six pieces of legislation of this type progressing through the US Congress and Senate, and the election of President Bush is likely to speed these up.

Towards an Australian 'Duty-of-Care' for Land

The starting point in defining a duty-of-care for landholders in Australia must be the broader legal principles surrounding this concept that have already been spelt out by the Courts. It is fortunate that these coincide fairly neatly with economic principles that dictate that the removal of unnecessary regulation and the 'beneficiary pays' principle is the best way to maximise productive use of resources within an economy.

Few would disagree with the ancient common law maxim – "Sic utere too at alienum non laedas" – one should use his own property so as not to injure others. Australian Courts have refined this by requiring that any injury or harm caused must have been reasonably foreseeable, there must be reasonable proximity between cause and effect, and there is an overall test of fairness, justice and reasonability about the duty-of-care.

5 Siegan (1997) "Property and Freedom". Transaction Publishers, USA.

6 High Court of Australia (1983)Tasmanian Dams Case . 158

7 Agins vs City of Tiburon (1980) US Supreme Court.

8 Siegan (1997) op. cit.

9 Meltz (1995) The Property Rights Issue. Con. Res. Service report 95-200

These tests have been developed for situations where harm is already alleged to have occurred, but as has been pointed out previously, the duty-of-care concept protects both sides of the argument and these principles are just as applicable in a situation where Government imposes a regulation that restricts a landholder. In such a situation, a landholder would be eligible for compensation for any economic loss unless Government could prove that harm to another person or property would otherwise have occurred. Australian Courts have already clarified that in situations where the aim is to prevent harm occurring in the future (quia timet proceedings) the burden of proof rests with those seeking to have the restriction applied.[10]

It may be claimed that landuse regulations that aim to protect biodiversity or moderate greenhouse emissions are justifiable on the basis that in their absence, harm will occur to the environment that is the property of the entire community. This argument has also been tested in Australian Courts, which have found that a reduction in scenic amenity or damage to biodiversity do not constitute a nuisance.[11] On this basis, the same ruling would be likely to apply in relation to regulations concerning greenhouse emissions and threatened species.

Threatened species regulations would also fail this test on the basis of reasonableness and fairness. It is inconceivable that a Court would agree to impose an economic cost on one individual, to achieve a benefit (the preservation of a species) that is desired and enjoyed by the entire community. The same would apply to restrictions imposed to prevent dryland salinity. The lack of proximity between cause and effect, and the obvious lack of justice and fairness in regulating one person to benefit the entire community, means that these regulations would not pass the duty-of-care tests.

Some may argue that this would prevent Governments achieving environmental objectives. But far from reducing Government's ability to manage for environmental outcomes, this approach would actually enhance it, as it would require Government's to specifically define community environmental objectives, and where these are in excess of the duty-of-care, purchase these outcomes from private landholders. This would make it beneficial for landholders to identify and preserve desirable environmental characteristics of their property, rather than the current approach that encourages them to hide or destroy them. The end result would be better, not worse, as far as environmental outcomes are concerned.

Based on the US experience, the best way to implement this is via a 'front-end' regulatory assessment process, rather than have it develop in a slow and piecemeal fashion via legal decisions. A complication under Australian law is that while the just-terms clause of the Constitution binds the Commonwealth, it is the States that have responsibility for land management.

This means that legal precedent will only be created by challenging regulatory actions of the Commonwealth, (which admittedly are now more likely given the enactment of the Commonwealth Environmental Protection and Biodiversity Conservation Act).

The Commonwealth has already set a precedent for the regulatory assessment approach in the implementation of National Competition Policy (NCP), where revenue is only transferred to the States conditional on State legislation complying with NCP requirements. This model is also increasingly being used in areas such as food safety and road transport, where it is desirable to have a single national standard apply.

For environmental regulation on private land, the Commonwealth could require that any future access to taxation revenue for these programs would be conditional on the relevant State having subject its environmental legislation to a property rights impact review. This review would identify and remove regulations that unfairly impose a public good burden on owners of private land, without appropriate compensatory arrangements. The process would also necessitate the establishment of a public good impact tribunal, with the role of assessing the compensation required where private land was affected by new or existing environmental regulations.

The fact that a similar Commonwealth/State legislation/ revenue model already exists (the NCP agreements), and that a similar regulatory assessment model already exists for the impact of Government decisions on land title (The Commonwealth Native Title legislation) means that the solution is neither novel, nor untested. All that is required in States such as NSW is recognition by bureaucrats and politicians that current landuse regulations extend well beyond a reasonable duty of care, are inequitable and unfair, but most significantly, are poor models in terms of achieving desired environmental objectives.

As they currently operate, these regulations simply amount to a theft of property rights, under the guise of statutory regulations. Those responsible for their enactment and implementation are clearly in breach of the duty-of-care imposed on Governments, which requires that they treat all citizens with equity and fairness.

COMMENTS CONTAINED IN THIS DOCUMENT ARE BASED ON INFORMATION AVAILABLE AT TIME OF PUBLICATION.

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[10] Kent v Johnson (1973) 21 FLR 177, as cited by Farrier in "The Environmental Law Handbook. Redfern Legal Centre, 2nd Ed. 1995

[11] Kent v Johnson. op cit