

# ***“There is nothing new under the sun”:***

*An essay on property rights from historical and current perspectives*

*Terry Hogan  
Director General  
Queensland Department of Natural Resources and Mines*

## **PURPOSE OF THIS PAPER**

Recent demands by rural industry for compensation for alleged loss of property rights have highlighted the need for the debate to be grounded in legal and historical fact. This paper clarifies rights and obligations and explains some common misunderstandings. It does not reflect Government policy – the Queensland Government has not yet to my knowledge considered the issue of property rights in the context of the current debate.

In the development of this paper, I thank Geoffrey Edwards of my Department who has put in many hours trawling through the texts and refining the core arguments.

The debate has risen to prominence during the past two decades of reform in Australia's administration of its natural resources. Those who hold property have sensed that their prerogatives have been limited by expanding environmental regulation at all levels of Government – local, state and federal. Looked at objectively, there is simply no doubt the regulatory environment is more complex than it was in the recent past, and is not likely to become less so in the foreseeable future. This reflects our greater scientific knowledge of the complex interrelationships between, on the one hand, natural resource elements and on the other hand, the political pressure on Governments to acknowledge the rights of all citizens for a say in the management of the environment, which under common law is a generic resource owned by everyone.

Consequently, individual property owners might feel deprived when Government 'interferes' with their use and enjoyment of property over which they thought they had exclusive rights. Some landholders claim that title carries the right to exploit the resource as they please, or at least they lament the passing of an era when it seemed that this was so.

Owners of non-rural land have always faced a very high level of regulation by all levels of Government through planning schemes and other forms of intervention. Notwithstanding the restraints imposed, non-rural landowners generally accept the need for a degree of control in the interests of the common good, and the protection of their individual rights from potentially harmful activities of their neighbours.

Rural landowners have been relatively free of regulatory control until recent years. The extension of regulation coincides with greater knowledge and sensitivity to those very long term environmental trends that if left untreated threaten the economic viability of the same lifestyle that property rights advocates wish to see preserved.

## THE LEGAL AND HISTORICAL BASIS OF PROPERTY

My central argument is that we do not treat any of the propositions put forward in this debate as absolutes, but as conditioned by particular historical times and social processes.

Its equally important that we recognise the central role of property security and the value that attaches to it for capital formation- the basis of the economic system under which we live.

What exactly is a ‘property right’? Property is not a thing in itself; rather, it is a legally recognised relationship with a thing, a socially-based institution given some basis in law. There is nothing intrinsically mystical about “owning” property, but it certainly is vested with a considerable amount of psychological weight and social meaning.

### How Property is Created and Developed

Property in modern Australia is complex and can trace its origins from several roots.

Most ancient are the *indigenous traditions*: based upon a sacred duty of custodianship of country—country has spiritual dimensions; property holders are not granted rights until they have demonstrated that they accept the obligations that go with those rights and are capable of exercising custodianship. The *Mabo* case showed that ‘native title’ survives today where it has not lapsed or been extinguished. It is now part of the law of the land. The indigenous approach has some similarities to the ancient Hebrew tradition which is also a part of Australia’s cultural heritage. Under Hebrew law, humans have only a life tenancy and are not to push the productivity of natural resources to their limit.

Australia has inherited *Anglo-Roman traditions*: based upon the rule of law—both statute law which creates secure rights to facilitate investment and economic activity; and common law which governs relationships between resource holders and society. In 1066 William the Conqueror assumed ownership of all land in England. True to this tradition Captain Cook in 1770 planted his flag and claimed the whole east coast of Australia for the King. The subsequent colonial governments assumed ownership of all land within their territories, and using their sovereign law-making powers, were able to take possession of other natural resources (such as minerals and the flow of water) and to dispose of any property they then owned.

Australia grafted on its own *nation-building traditions*: based upon equality of opportunity. The state originally holds all natural resources on behalf of the community and is its agent in allocating them fairly for private and public purposes, regulating their use and guaranteeing the security of titles.

No model of property which fails to respect all these traditions, can gain enduring public support.

Resources are then developed by several different processes:

1. The state makes resources available by *allocating* them to potential users, through conditional tenure mechanisms such as freeholding or leases and water allocations which allow occupation or possession. This process amounts to a transfer of ownership and its power derives from the state’s primary ownership. It would be instructive to take a detour through the impassioned debates which accompanied the squatting and closer settlement movements in 19<sup>th</sup> century Australia, as first the squatters and then the small holders tried to assert moral supremacy on the principles of “we were here first” or “we are more deserving”

or even “we demand the State take away the property rights of those others and give them to us”. Strikingly similar arguments are used in the current debate about property rights.

2. The Commonwealth, State or local government have always *regulated* the development and use of resources, through regulatory mechanisms such as planning schemes, trading rules and environmental licensing. This power derives from the state’s authority to legislate for what is perceived to be the common good.

3. The holder of the resource *manages* it to achieve personal goals, by works and maintenance.

Various public and private bodies then *advise* and assist the resource holder to adopt desirable management practices.

### **Constitutional Position**

Land and water were central to the development of the six colonies and it is not surprising that at federation in 1901, the administration of natural resources was unambiguously retained by the States. The Commonwealth was handed responsibility for only those functions specified in the Constitution. This included international treaties and defence, marine fisheries beyond territorial limits and copyright. Its role in legislating for indigenous matters was added by referendum in 1967 and this enabled the Commonwealth to legislate for native title.

Over time, the Commonwealth has dealt itself further into the financial game through its taxation powers (and into natural resource management mainly through the same route), its marine jurisdiction and its external affairs power to sign international treaties. But otherwise, accountability is clear: responsibility for natural resource management within State boundaries lies with the States. This is not to assert an absolutist States Rights argument, for there are many issues in natural resource management which demand national (or indeed international) attention. It is simply to emphasise that muddled accountability leads to inefficiency and an incapacity to resolve problems.

By Section 51(xxxi) of the national Constitution, the power of the Commonwealth to acquire property is limited to ‘acquisition’ on ‘just terms’. The Commonwealth has only the powers the Constitution assigns to it or the States cede. In any case, this provision does not bind the States and there is no comparable provision in the constitution of any State. The electors in all States in 1988 at referendum rejected a proposal to extend the just terms provision to the States.

### **Common Law Position**

Common law has its roots in late 12<sup>th</sup> century England. It survives where it has not been supplanted by express words in statute. Over time, statute law evolved to supplement and modify the common law. Governments pass new laws sometimes to simplify or clarify the law and/or the practice of it. In the context of the current debate statute law reduces the need for individuals to resort to civil litigation to preserve their property rights from nuisance by other citizens. Partly also, governments come under pressure to legislate when self-regulation is shown to be inadequate. In my experience environmental regulations are usually introduced to protect the rights of the community as a whole, not because governments or bureaucrats take delight in removing the rights of those whose activities are targeted. Even bureaucrats and government ministers own property.

Common law developed several principles, a few of which are explained below.

### ***Magna Carta and equality of all before the law***

Some resource holders and the more simplistic of the property rights advocates equate protection of the right to use the property as one wishes with general democratic freedom or the tradition of economic liberalism. This is a misunderstanding on several levels.

The Magna Carta (1215) which set England on its course of prosperity is hardly a beacon of democracy, but essentially it did subject the king himself to the rule of law. It was the end of arbitrary regal power and survives today in the supremacy of parliament to pass laws. In England, it was the equality of all before the law that allowed individual enterprise to flourish. There is strong evidence that the Industrial Revolution was spawned in England not because of technological progress but because England had most clearly established the rule of law in relation to human rights (personal security and liberty) and property rights. Security of tenure under the protection of the law, not absolute discretionary rights, made it worthwhile to innovate and to invest.

This is not an argument in support of the proposition that property rights must be absolute. ‘Freedom’ in this context did not mean freedom to do as one pleased but freedom to be treated the same as any other person or class of persons in the realm. The Magna Carta prohibited confiscation of property not absolutely but except in accordance with due process. (Art. 52 reads: “To any man whom we have deprived or dispossessed of lands, castles, liberties or rights, without the lawful judgment of his equals, we will at once restore these.”)

The Australian Constitution and the Commonwealth *Racial Discrimination Act 1975* are modern descendants of the Magna Carta. The *Racial Discrimination Act 1975* prevents differential treatment on the basis of race so protects native title from extinguishment except in accordance with the provisions of the Native Title Acts. Native title laws are somewhat unique in that they try to articulate the coexistence of different notions of attachment, or if you like, property rights, to the same title and to give security to those rights. Native title is in its own way confirmation that property in Australia is subject to the protection of the law and to natural justice.

### ***Quiet enjoyment***

Belief in the rights of the individual took root in England over the centuries and gradually a body of law built up entitling a person who was in legitimate occupation to quiet enjoyment of their property and to manage it without oppression or trespass from individuals who might do them a mischief.

### ***Nuisance: Protecting neighbours from damage***

Common law developed two-way protection. To protect a right to enjoy property it developed the parallel principle that a person may not exercise what would otherwise be their rights if their actions were likely to unreasonably diminish other property holders’ enjoyment of their property. Accordingly, an entitlement to property intrinsically carries an obligation not to do harm to others, even if on its face the title deed gives no hint of such a thing. This has been the case ever since Australia was first colonised—and for centuries before that. This means that many conflicts over environmental issues are conflicts between different kinds of property entitlements, not simply between property holders and remote governments or environmentalists. *This turns the conflict between environmental concerns and property holders on its head.* At common law, property holders must refrain from damaging the environment because the common law property rights of all others who have a legal stake in that environment could be compromised. Government regulation articulates this principle.

This feature affects the prospect of compensation profoundly. A regulation which seems to remove the ‘right’ of a resource holder to generate a problem for somebody else or for people generally could not create a liability for compensation *because under common law the*

*resource holder never had that right to create the problem* in the first place. Of course, it may be difficult to link cause with effect; and the timescales are very long, but the principle remains. Also, rural Australians are tolerant people and don't complain much about their neighbours' actions—only about the actions of governments! However, given the increasing recourse to litigation in Australian society, litigation between landholders on account of rising salinity, spread of weeds and other forms of off-site environmental deterioration is a clear prospect. Indeed it is already being mooted in my bailiwick where the managers of public lands – quite rightly - are being called to account for the spread of weeds and pests onto adjacent properties. Both common and statute law principles affirm that public land managers should be just as accountable as anybody else, and in this sense there is a reflective conceptual link to the mutual obligation principles following Magna Carta.

Also, the definition of 'environmental harm' has been changing as scientific knowledge about the functioning of natural systems improves. We have yet to face the full force of the debate about the causes, effects and remediation of greenhouse emissions and climate change, but I will hazard a guess our children and grandchildren certainly will.

In passing, I note there has been some debate recently about whether Governments should wait until there is absolute scientific certainty before moving to regulate behaviour in the area of natural resource management. If this were the case neither Governments nor citizens would ever do anything, because science by its very nature is always evolving and certainty is always beyond our grasp. The best we can do is to evoke the precautionary principle. In the vernacular, and reflecting our experience in repairing landscapes we have altered over the last couple of centuries, this might be expressed as "If there is reasonable doubt, don't". This is very different from "If in doubt, go ahead anyway and we can fix it up later" which no-one these days would advocate. The precautionary principle stands squarely in the common law tradition.

### **The History of Property in Water**

I now turn specifically to water allocation. Ancient English common law which gave the right over the water in the streams to the riparian landholders has progressively been replaced with statutory enactments vesting control of the water in the state and establishing licensing regimes to allow for continuing government control of what has been, and is still, regarded as a public resource. The statutory enactments have retained and codified part of the older common law right, in that holders of land have a statutory entitlement to take water for ordinary stock watering and domestic needs.

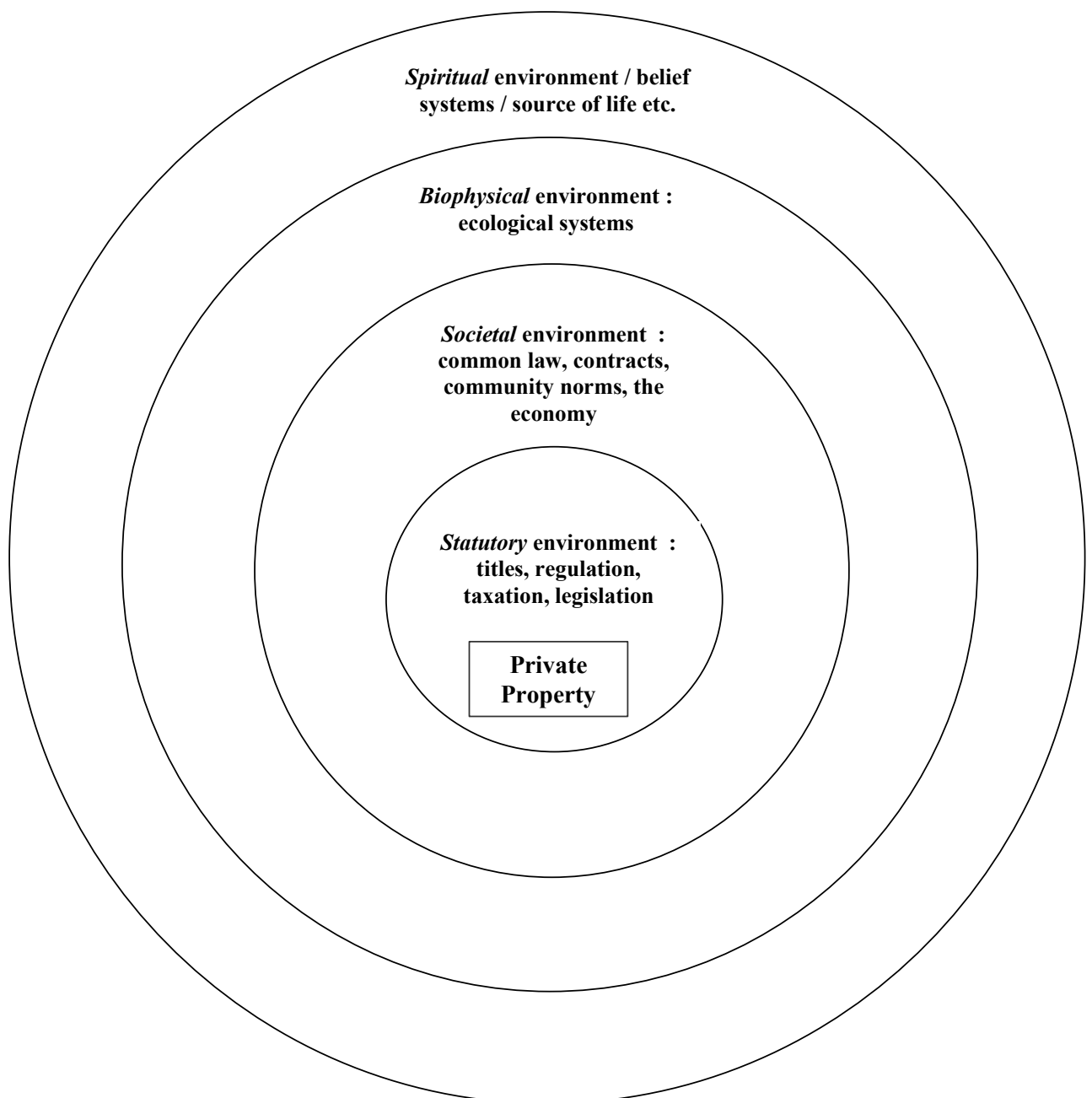
In Queensland the *Rights in Water and Water Conservation and Utilization Act 1910* vested control of water in watercourses and underground water in the State, essentially abolishing the common law riparian rights. It also retrospectively declared the bed and banks of all boundary watercourses to be the property of the Crown and prohibited the further granting of such land. This allowed the State to construct works for the benefit of rural industry.

In 2000, these controls were extended to cover farm dams and overland flow in order to manage increasing pressures on the resource. Generally, stakeholders have acknowledged these extensions of the statutory regimes under the *Water Act 2000* as necessary to protect both existing entitlements and the community interest—and these changes occurred without compensation, it should be noted.

## UNDERSTANDING PROPERTY

Most of the resources and ecosystem services which underpin the continued productivity of land are not identified in the property title. These include the atmosphere, climate, connections with bush remnants, catchment conditions and groundwater. Property holders might think that they buy a complete suit but their title is better expressed as a thread in a larger cloth, most of which has a public interest dimension.

The following diagram displays the interdependence of economic, social and environmental considerations. It shows that *private* property regimes derive from the *common* property, which is owned by all citizens collectively and mostly is managed by the state on their behalf. It derives from the state's powers after 1788. It also reflects, as I have said, *indigenous* property which has a metaphysical origin not dependent on the state, and managed according to tradition or custom. The model is explanatory in a special way: *there are no externalities*. Every action affects everything else.



This model can show that any pollution arising from private property damages the residual commons, by trespass. It is not some over-bearing state regulation that creates the offence. This model reverses the usual complaint that private rights are inadequately defined: In fact, many of the private rights are spelt out in the statute and it is the rights of the commons, being residual, which are usually not formally defined and perhaps for this reason are widely overlooked.

The genesis of the current debate is an attempt to extend the articulation of private rights and to reduce the common, or public rights. This would reverse many centuries of statute and common law development, and would leave us in the position where the assertion of conflicting private rights of a very high order could only be resolved by endless litigation between adjoining land owners. In feudal times chieftains had recourse to horse and sword to assert their rights. In modern times we use lawyers, and I would hazard another guess this would lead in turn to demands by landholders for the passage of statute law in an attempt to fix the problem of these conflicting private rights. The wheel would turn full circle.

The diagram also shows that in Australia, with a few exceptions, markets do not exist outside the rule of law. A strong statutory framework created and managed by governments, coupled with common law, is needed in order that so-called 'free' commercial markets can work. The state is an invisible party to every contract, a guarantor that commercial and other transactions can take place in security. Markets also require regulation in order to bring externalities into prices. Markets adjust to the rules, once the rules are clear. Transparency is equally and perhaps more important than permanence.

## **RIGHTS ARE BALANCED BY OBLIGATIONS**

The history of the world shows that secure property rights have been an essential precondition of development, world-wide. Productivity increases when farmers, workers and capitalists can use property to secure the rewards of their labour and investment and match effort with reward. The absence of security in land ownership still plagues under-developed countries.

Yet this observation has been unjustifiably distorted by some property rights advocates to claim that any limits on their right to manage as they see fit is somehow an attack on free enterprise or a form of socialism. Much of the tension in the debate about property rights stems from misunderstandings about the extent of the *rights* enjoyed by property holders and the *responsibilities* they owe. An examination reveals two opposing points, that holders of titles in Australia already have extensive authority over their property but that their rights are extensively offset by responsibilities.

### **Property Rights: The Meaning of 'Security of Tenure'**

The National Farmers' Federation (NFF) has identified four characteristics of a property right:

- *universality*, whatever that means. If it means that all resources must be administered in an identical way and forever, it is historical and legal nonsense. If it means property holders wherever they live must be treated more or less equally, as per Magna Carta, it is fine. I will retitle it as the *right to use and modify the resource* to conduct economic activity without doing damage to the underlying fabric, and will accept it as a feature of a property right;
- *exclusivity*, which presumably means that the holder enjoys possession, the right to physical control and the right to exclude trespassers;
- *transferability*, which means that a holder can sell or gift the title to others;

- *enforceability*, which goes without saying whenever government issues a legal title. I will retitle it as *protection from withdrawal during its term*, and accept it as a feature of a property right.

If this list is taken as a list of absolutes, it is not very helpful on its own. A crucial feature is missing: *responsibility* including *obligation*. Every holder of a resource carries obligations to their neighbours, their heirs and the community in return for the right to occupy that resource. These points deserve explanation.

However, before explaining the *responsibilities*, I would mention that the above list is incomplete. *In addition to* the features of a property right listed by the NFF, in Australia, most titles over most resources (except short-term licences to use) already enjoy the following features:

- *durability*: the right to occupation for a period as long as is necessary to achieve personal goals or to recoup investment;
- *consultation*: the right to a voice in decision-making about the property or the regime in which it is grounded;
- *clear definition*: the right to an unambiguous record in a publicly accessible, reliable, up-to-date, transparent register which defines who holds the entitlement, under what terms and conditions and against what boundaries.

Public institutions such as our Torrens title registry have been so successful in creating the conditions for free market exchanges that those institutions have been taken for granted. Wolfgang Kasper said as much last August at a symposium on *Property Rights and the Rural Environment* in Canberra: *‘The global economy functions only because we have institutions that we trust.’* I would agree, with the added observation that the behaviour of certain high profile institutions and individuals in Australia and overseas in recent times puts the “trust me” argument on somewhat shaky ground. There are myriads of precedents for this kind of behaviour from time immemorial, and have usually led to demands for Government to step in using regulation or force to stop the rot. Unfettered economic freedom is not a panacea. Under the protection of regulation, governments and citizens in Australia generally honour their contracts and titles mean what they say they mean.

These seven characteristics can be summarised by the useful shorthand term ‘security of tenure’. No instrument satisfies all those criteria absolutely, because titles have been issued for different purposes over many decades. For this reason the term ‘property entitlement’ is a more accurate term than ‘property right’.

### **Property Responsibilities: The Meaning of ‘Stewardship’**

As well as *rights*, title holders also carry *responsibilities*—to their neighbours, the wider community and the environment. How burdensome are these? A ‘pure property obligation’ should display the following features:

- if one wishes, one could pay *spiritual reverence*: or homage to the Dreamtime, or God (however described), or Gaia (life force). This metaphysical obligation does not normally get a mention in documents prepared by secular governments, but influences the way that many stakeholders approach the issues;
- respect for *indigenous heritage*: to acknowledge the traditional inhabitants and to respect their culture and their continuing connection with their country, despite settlement;
- submission to the *rule of law*: to respect parliament’s prerogative to pass legislation, to abide by the statute and common law, to cooperate with those administering justice, to frustrate criminal activities, to declare and register all relevant interests in the title;

- *consultation*: to consult frankly about development and use of one's resources;
- *environmental responsibility*: to live within the capacity of the ecological systems by minimising disruption of ecosystem services, conserving biodiversity, retaining wilderness, suppressing pests, preventing detrimental off-site effects and abiding by the precautionary principle; also includes an obligation not to diminish the rights of future holders;
- *civic responsibility*: to avoid nuisance (interfering with the rights of others), to appropriate no more than a fair share of the resource, to allow non-owners to acquire entitlements on fair terms, to avoid privatising public goods, to act ethically in all dealings, to respect the core Australian values and community norms; to respect the knowledge and values of others; to respect the right of the community and its representatives to change their mind;
- *economic responsibility*: the obligation to use economic resources productively but thriftily; to avoid wasting the infrastructure installed by previous generations, to avoid wasting economic opportunities; to refrain from erecting monopolies and other obstacles to an honest market or holding others to ransom; to act ethically in all commercial dealings, to position future holders of the resource for ongoing profitability; to harvest only the produce, not the natural capital.

These characteristics can be summarised by the useful shorthand term 'stewardship'. A *steward* is an agent or manager of property on behalf of its owner. So 'stewardship' means caring for property held in trust for the benefit of future generations. This should apply to occupiers over all tenures in all resources. Acceptance of some of these stewardship responsibilities is inherent in accepting the resource.

I assume no-one in this audience will object to the principle outlined above. Some however, on both the left and right of this debate, will have different views on what it might mean in practice.

### ***Practical expression of the responsibilities***

Many of the above responsibilities are well known, others are not. Here are some examples of limits on resource holders' rights:

The *allocation itself* is not absolute. Examples of limits are reservations from title such as minerals (applies even for freehold land); easements, mortgages, native title. The local government can dispossess a landholder if rates remain unpaid for as little as three years.

Then *regulation* has been superimposed. Examples are the obligations to control noxious weeds or pay rates; statutory duty of care; estate law; statutory planning; anti-discrimination law which outlaws improper criteria when dealing with other parties; landlord and tenancy laws. The holder of a title does not have an absolute right to let, sell, bequeath or bar entry to their property to whomever they please.

There are *common law* limits. Examples are limits on creating pollution such as salinity or mine tailings dam runoff.

Some limits are entered voluntarily by the entitlement holder through *civil contract*. Examples include crop liens and Indigenous Land Use Agreements although these have statutory force once registered.

Some limits are simply *community norms* or expectations. Examples are peer pressure, custom, good conscience.

Additional limits are imposed by *biophysical change*. Examples are climatic change, natural disasters, ecosystem decline.

## Duty of Care

Farmers and peak bodies are requesting compensation for responsibilities they take on in the public interest beyond their defined duty of care. There are two sources of uncertainty here: what is the duty of care and is it reasonable to compensate for actions which exceed it?

The legal, mandatory duty of care arises from two identifiable sources:

- *common law duty of care*: requires that each person takes all reasonable and practicable steps to avoid causing foreseeable harm to another person's property or their use or enjoyment of it;
- *statutory duty of care*: legislation can give the common law duty statutory force or extend it in new directions. In Queensland there are two duties of care by that name: a statutory general duty on all Queenslanders not to cause environmental harm (s.319, *Environmental Protection Act 1994*) and another on occupiers of State land (s.199, *Land Act 1994*). The duty of care also requires observance of all relevant regulatory restrictions, of which there are many.

As one scans the state, regional, catchment, district and locality scales to focus on the property scale, the duty of care develops increasing meaning and precision. The task of preparing a property resource management plan helps to clarify just what the duty of care really means on a specific property and helps to overcome the unavoidable generality of industry codes of practice and official guidelines. It can help to rationalise the multitude of signals generated by regional plans, legislation and policy by all levels of government, data about resource condition and trend, industry standards and local community expectations.

If a property plan is certified by the state then a regulatory permit could be issued in accordance with that plan. The permit would become the basis of a statutory right to manage within the bounds of that duty. An example is that 'land and water management plans' are now required if a water entitlement is purchased for irrigation purposes.

Clarifying the duty of care is a continual process, never reaching a final conclusion but yielding temporary conclusions which serve the purpose at the time, be it the issue of an entitlement to take a resource, or a regulatory permit, or the preparation of an environmental management system. Defining the duty of care is a journey, not a destination: a process, not an event.

It is best to confine the term 'duty of care' to the legal 'duty' and not to draw the broader voluntary standards of stewardship into the definition. Of course, over time, there is a tendency for voluntary standards to migrate into explicit statutory duties as voluntary take-up drags behind expectations—in other words, as self-regulation falls short of expectations.

Explained in this way, the argument as to whether resource holders should be compensated for managing beyond their 'duty of care' partly solves itself. We don't pay people to abide by the law (although the prospect of start-up payments when new regulatory restrictions are first introduced is a separate issue, debated later). Further, we don't pay people to act as good citizens by taking up stewardship responsibilities beyond the legal duty, as by definition they are voluntary. Of course, governments may quite legitimately pay *incentives*, to encourage producers to move to this condition of stewardship, or may pay for specific ecosystem products such as carbon, but that is not *compensation* for lost *rights*.

As always, it is instructive to look for historical antecedents to this debate, on the old adage “there is nothing new under the sun”. The squatting boom of the 1830’s and 1840’s across most of southern Australia was brought to an end by the various Land Acts of the 1860s and up to the Soldier Settlement schemes of living memory. These stripped the old squatter kings of their vast – indeed, almost feudal – holdings in the interests of smaller more productive farming enterprises. When I was a boy growing up in western New South Wales there were still some descendants of the squatter oligarchs who mourned the loss of their empires – or their “property rights” if you like. However they did their mourning in private as there wasn’t much sympathy for them from the new class of smaller productive farmers. Looking back there is some irony in some of the conditions imposed on closer settlement – for example, the requirement to clear native vegetation – and that irony is not lost on me as the administrator of the Queensland *Vegetation Management Act 1999*.

## **CONTRASTING NOTIONS ABOUT PROPERTY**

Two contrasting concepts of property are presented.

### **The ‘Ownership’ Model**

The ownership model views the prerogatives of the holder of a resource in absolute terms and hankers after the ‘pure private property right’. By this concept, the owner has or should have the right to decide how the resource is used, who is permitted to use it, how and when it is transferred to another owner. Some assertive landholders see regulation as an infringement of civil liberties and a threat to democratic freedoms. The ownership view is widely held but is shackled by significant misconceptions.

#### ***Legislation protects as well as prohibits***

First, it misunderstands how critical governmental activity is to the protection of the freedoms and rights that owners cherish. Indeed, it is legislation that defines property, that preserves the entitlements and specifies the obligations. Legislation constrains the expectations that others might have had. Without government, there is no property and no market to suffer intervention.

An official permit has two faces. One face places a ceiling on the intensity of the development which can be undertaken: ‘Thus far may you go and no further’. But those who complain about the constraints of red tape on their freedoms tend to forget the other face: ‘Thus far you may go.’ The permit authorises the activity and protects it from objections, as well as placing limits on it.

#### ***Others have shares in the property***

Persons other than the entitlement holder have rights in the property. In fact, the primary occupier is one member of a web of people with stakes in the property. Some of these stakes are legal ‘interests’ (statutory or contractual); some are stakes at common law; others are less tangible. Indeed, the entire community has a stake in ensuring that natural resources are well managed.

The pure “ownership above all” model is ethically deficient as well as being legally misleading. By portraying resource-holders as autonomous owners, it invites them to regard community obligations as an obstacle to entrepreneurial ambition, a tiresome barnacle on the backside of their business instead of a duty they owe to the community of which they are also a part. A model allowing owners to exercise power without obligation is disconnected from Australian values and from Australian history. Our history celebrates both the virtues of free enterprise and wealth creation as well as community responsibility and social value. It is

alien to the notion of reciprocal obligations that underpinned indigenous society for millennia before that. It forgets that property is more than a legal contract, it is also a social construct. A right is a condition held against one or more other individuals. Strengthening the position of some usually weakens the position of others.

### **The ‘Stewardship Model**

The *stewardship* model, by contrast, draws the mutual obligations held between the resource holder and society *within* the boundary of the property right rather than deeming them to be *external* to the title. By this model, title holders accept their implicit and explicit legal obligations as stewards as a necessary condition of accepting title, not as something superimposed upon an otherwise autonomous right.

The model also casts environmental regulation into its proper perspective. Instead of being an infringement on private rights, it is an attempt by society to ensure that the obligations it desires are met. The stake that the resource holder has in the ecosystem services may be less than the stake the community holds.

Note that the obligations are genuinely mutual: just as a title holder has an obligation to care for the natural assets, so society should make available to the title holder the tools necessary to facilitate this stewardship and wealth creation. The tools include, as well as a secure title, information about the natural assets and how to manage them. Governments have a clear obligation here, although it is always dependent on the funds that society through its elected parliaments supplies for this purpose.

The stewardship model, arguably, would make sense to a large majority of landholders. Even those who make political statements demanding absolute security of tenure and compensation for lost rights, acknowledge *and are proud of* their role as stewards and their desire to pass property in good condition to their heirs.

### **COMPENSATION**

In Queensland, peak rural industry bodies have been demanding a clear Government position on the compensation arrangements to apply where it is proposed that current entitlements change. Compensation has been requested on two separate grounds:

- for fulfilling *positive* community service obligations beyond an accepted duty of care. This notion is discussed elsewhere in this paper;
- for *negative* loss of legal rights when governments reduce allocations or tighten regulations.

### **Compensation for Non-renewal or Withdrawal of Allocation**

No lease or licence can provide for automatic renewal. It is a fundamental principle of law that it is beyond power to pre-commit an administrative or Ministerial decision-maker by fettering their discretion to weigh up the issues on their merits according to due process at the time the decision is to be made. In short, a decision not to renew or re-issue on the same terms does not amount to withdrawal of a statutory or contractual obligation (unless perhaps the government made prior undertakings). The rights of a lessee expire on the date of expiry of the lease, regardless of how strongly the holder may have held hopes or expectations of renewal. That is as true of a rural leaseholder as it is of a retail leaseholder in a shopping centre or a tenant in a block of flats.

Does withdrawal of an allocation give a legitimate basis for compensation? Clearly there must be some circumstances in which it does. As shown above, there is no constitutional obligation on the States to compensate for voluntary or compulsory acquisition of land. Yet all Australian States have legislated to bind themselves to pay up when this happens.

There is also a principle in law that one-sided withdrawal of a contract during its term can attract damages or compensation, unless a condition of its issue provided otherwise. It could be argued that withdrawal by the state of a previous specific allocation or regulatory permit amounts to a breach of contract. However, the will of the Parliament is paramount and the specific legislation may allow no such interpretation. The permit exists only by statute and this may take it out of the sphere of the common law governing contracts.

### **Compensation for Regulatory Restrictions**

Cases when governments pay compensation for a regulatory restriction on development of a resource are rare. There is no provision in the Commonwealth's *Environmental Protection and Biodiversity Conservation Act 1999* for compensation of this kind. Worldwide, few governments have well developed policies for compensating for regulation, reflecting the inherent complexity of the issue. There can be no general obligation for governments to compensate for regulation as distinct from dispossession. A few reasons are mentioned here.

It is against common sense to argue that the regulatory environment must be frozen in time. In the long term, resource holders mostly benefit by regulatory restrictions. In particular, restrictions which reduce semi-irreversible defects such as salinity will in the long term improve security of the existing property rights and confidence in the industry. This suggests that compensation when property values are depressed by regulation would make sense only if resource holders pay betterment whenever regulation (or some other discretionary action by government such as installation of infrastructure) causes valuations to rise. Betterment levies are rarely imposed (except indirectly through capital gains tax and general rates). Without betterment, demands for compensation are demands for one-way traffic from the public purse. Similarly, no-one is seriously suggesting that landholders as a class or individually should pay compensation to all other citizens because they or their parents or grandparents did things – with the enthusiastic backing of Governments – that we are now trying to undo through expensive programs such as the National Action Plan for Salinity and Water Quality or the Natural Heritage Trust.

To adopt a general obligation to pay those who suffer when a regulation is enacted would see governments exhaust themselves in identifying winners and losers affected by every regulation and exhaust their budgets in compensatory payments. Our society has not been structured along such mercenary lines. Police don't go out onto the roads with wads of public money to pay leadfoots not to drive fast. Compensation is not paid to motorists when road rules change to their apparent detriment, or to businesses for changes in workplace safety rules. People hold a stronger sense of civic responsibility than that.

### **CONCLUSIONS**

Property at a site consists of a bundle of entitlements to occupy a natural resource, often separated for administrative convenience into land, water, vegetation and various other elements. Subject to native title, the State has the role of issuing the primary titles over these elements. Title holders then have the prerogative to manage within the terms and conditions, but have a legal responsibility not to breach the common law and statutory duties of care. They are also subject to other restrictions imposed by regulation, contract, common law and community norms. Any individual entitlement is being redefined continually by these mechanisms. The common law obligation is more powerful than most commentators

appreciate. The absolutist property right does not exist, and never has except perhaps in repressive feudal systems. Without being too triumphalist, the history of feudal systems (including its contemporary manifestations) is not a happy or successful one.

For each element there are many stakeholders. Some will have a proprietary legal interest; many more will be directly and tangibly affected; many more again, arguably all Australians, will have an intangible stake in how that property is managed.

Every entitlement in the bundle is a social construct, a complex mixture of rights and obligations, with the obligations being inherent in the property itself and not simply nuisances imposed after the entitlement has been granted. The term 'property right' at best is a loose shorthand term.

Given this understanding of mutual responsibility, talk of 'compensation' for so-called lost rights does not make sense, except where legislation has provided for the granting of a compensatable right. There is no constitutional, legal or ethical requirement for governments to pay compensation for non-renewal of entitlements or for declining to issue fresh ones. On the contrary, there is an ethical obligation for them *not* to use taxpayers' funds to pay compensation for not issuing rights that the holder doesn't have.

But we need to temper this in recognising that a wide range of legislation does allow for compensation in defined circumstances. In a contractual sense, the *Water Act 2000* does attempt to give security of entitlement to the holder of an allocation during the term of a plan and compensation may be payable if that security is reduced by an act of Government.

Where allocations are reduced or tighter regulatory controls are introduced following a transparent process of planning or public policy conducted in the public interest, the property rights redefined after the process is complete are likely to be more secure and to provide greater confidence for investment. Compensation for introducing this kind of statutory protection of "rights" would also be problematic.

A better approach than talking of 'rights' is that communities and governments should aid entitlement holders in their journey towards sustainability, to translate the notions of stewardship and sustainability into practical terms. The nature of the shared obligations that communities and title holders owe to each other changes with time and location, notably with the economic fortunes of the industries, with the level of scientific understanding about the condition of the resource, with trends in public policy, with changes in statute and common law and with changes in community norms. It is not possible to pin down these obligations tightly or to present them as other than snapshots in time. However, these responsibilities can be made less confusing, through defining a duty of care for each locality and property.

Governments are responsible for regulating or easing the transition to sustainability, for all resources, using the range of tools available across all tenures. Nothing in this paper argues against payment of structural adjustment or incentives to facilitate this process, so long as they are for public benefit and are set by an equitable formula.

In summary, a right in property means whatever the law of the land says it means. It is continually evolving, in parliaments and the courts. And when I say evolving, I mean going forwards, not backwards to some mythical past. It is embedded in a complex and also continually evolving web of obligations shared with many stakeholders. The language of *rights* is misleading and confrontational and does not reflect adequately the rich traditions which Australia has inherited in property administration. The language of *stewardship* is better.

Terry Hogan  
Director-General  
Department of Natural Resources and Mines  
Brisbane, Queensland  
8 April 2003