Property Rights

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The story goes of Tarquinius, the last of the seven legendary Kings of Rome. When the pagan goddess Sibyl offered to sell Tarquinius the nine books containing all the world's wisdom for an exorbitant price, Tarquinius refused. The Sibyl then promptly burnt three of the books and offered the remaining six at the same price. Tarquinius again refused, and the Sibyl burnt another three books.

Rather than be left with no wisdom to guide him, Tarquinius finally paid the full price for the three remaining books.

Among the fundamental underpinnings of any stable, secure and democratic society is the right to own property.

In societies where systems for registering and establishing property ownership are complex and riddled with uncertainties, the foundation for the growth of private capital and investment is absent and communities suffer.

Property rights provide the foundation on which many other rights and privileges are exercised. The right to own property affords citizens a means whereby they can secure a permanent stake in their nation.

In most countries, the earliest rights to own property were established in the common law with land owners being required to prove their claim to ownership through a chain of evidence connected to Title Deeds (as they were known), that stretched back to the earliest grant of the land by the Crown or State to its first owner.

As one might expect, over long periods there will have been numerous occasions on which a property has changed hands. Sometimes ownership will have passed from generation to generation within the same family and at other times it will have passed to others who are part of the same community. A living record may have accompanied the written record, however, the means of validating ownership was fragile. In circumstances like these, the likelihood of Title Deeds being lost, stolen or damaged and ownership challenges arising is high, creating an environment of uncertainty for landowners and occupiers alike.

Where uncertainty over property ownership exists, development is stifled and transactions become much more difficult as buyers are very much beware.

In 1858, a new system of establishing title to land was introduced in Australia by Robert Torrens, a Member of the South Australian Legislative Council and a former Premier and this was passed into law in the Real Property Act. This system of establishing land title, widely known as Torrens Title, was based around the establishment of a central State register where all transfers were recorded along with all encumbrances and mortgages affecting the land.

While Torrens did not act alone in devising this form of land title registration, he was instrumental in securing its acceptance in South Australia and ultimately in the Australian colonies and many other parts of the world. The simplicity of his scheme saw him facing fierce opposition, mainly from lawyers who derived significant income from the work they undertook in navigating the complex and confusing land grant and title deed systems.

As in many other parts of life, not everyone is happy to have a problem resolved!

In developing nations, the Torrens Title approach gained favour as it provided a clear cut means of addressing two major issues associated with poverty, namely, the uncertainty surrounding land ownership and confusion around land transactions.

The right to own and control property is central to the development of nations. Where strong protections are afforded in the law for the right of citizens to own property there is a value that transcends the natural value of the property alone.

Peruvian economist Hernando de Soto, points to the important link between property ownership and nation building[1]:

> *"In advanced nations, formal property representation functions as the means to secure the interests of parties and to create accountability by providing all the information, references, rules, and enforcement mechanisms required to do so. Legal property gave the West the tools to produce surplus value over and above its physical assets. Whether anyone intended it or not, the legal property system became the staircase that took these nations from the 'universe of assets' in their natural state to the 'universe of capital' where assets can be viewed in their full productive potential."*

In nations like Australia, where the origins of our legal system reside in the English common law, the concept that a 'man's home is his castle' is not only deeply entrenched in law but also in the psyche of citizens. In his famous speech in the House of Lords in 1763, William Pitt, Earl of Chatham declared:

> *"The poorest man may in his cottage bid defiance to all the force of the Crown. His cottage may be frail; its roof may shake; the wind may blow*

> *through it; the storms may enter, the rain may enter—but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement."*

Compulsory Acquisition

While the rights of property owners in developed democracies are strongly established in the law, they do not afford absolute rights to owners over the use and enjoyment of property. Compulsory acquisition by the Crown or State of privately owned property has been a long established precedent, however, the purposes for which the acquisition may be made and the terms of such an acquisition are established both in the Constitution and in the law.

There is increasing angst in the population at large that property is being acquired by the State, and rights are being eroded, not so much because of a clearly defined public interest but more so because the interests of major corporations and government are being preferred over the rights of private land owners.

In Australia, the right of compulsory acquisition is established in Section 51 (xxxi) of the Australian Constitution which empowers the Commonwealth to make laws to acquire property 'on just terms' from any State or person for any purpose in respect of which the Parliament has the power to make laws.

While the concern over the use of laws created under this power has attracted little attention in Australia to date, it is likely that the issue will gain more attention in the future as the scope of acquisitions widens and the impact of planning regulation, heritage listing, native vegetation protection, rising sea levels due to 'climate change' etc leads to increasingly restricted use of private property.

What constitutes "just terms" in the Constitution is a matter of conjecture as it is not prescribed in legislation and is left for courts to ultimately determine. However, in taking action under these provisions the Commonwealth must establish that it will derive some benefit from the property acquired and not merely seek to extinguish the ownership rights of the previous owner[2].

What has been established though, is that the term 'property', at least as far as it relates to action taken by the Commonwealth, has a wider meaning than simply freehold land. It also includes the statutory right of an owner to use his or her land. At the State level, land acquisition Acts establish authority for States to compulsorily acquire private property for public purposes and 'Assets Confiscation Acts' have opened the way for the seizure of assets gained or financed from the proceeds of crime.

The indefeasibility or absolute security of title that most Australians take for granted is nowhere near as sacrosanct as we might have believed.

While it is reasonable to expect that in the broader public good it will at times be necessary for the State to acquire the private property of citizens, it is critical that the threshold for such takings is high. The right of citizens to own, use and enjoy private property is a fundamental right that must only be over-ridden in circumstances where the case for a public good is overwhelming and the terms of compensation are just.

Erosion of Property Rights through Planning Regulation

Over the past two decades we have seen explosive growth in planning and building regulation which has resulted in significant constraints being placed on the owners of property in connection with their use and enjoyment of their private property.

Where, in the past, owners could reasonably expect the limitations, caveats and encumbrances connected with land to be recorded on the Certificate of Title under the Torrens Title system, today an overarching set of planning and building guidelines established by local Councils and State governments now severely restricts the way in which a property can be used.

In almost all cases where the planning guidelines impact the use and value of the land, they do so without any form of compensation to the owners of the land.

For example, with the intention of maintaining large trees within an urban environment, many State governments enacted legislation against the removal of trees of a particular

size, declaring them to be “significant trees”. The protection of these trees on privately owned land was enacted purportedly to create a benefit for the whole community, notwithstanding the fact that the inability to remove such a tree meant that the private property owner was now restricted in their use of the land and the land was devalued as a consequence.

In cases like these, the private property owner bears a three-fold burden in that they carry the loss in value resulting from restricted use of the land, they shoulder the loss of any potential profits from the development or subdivision of the land and they are denied just compensation for the losses incurred.

Regrettably, this ‘Planning Plague’ as I call it, has spread much further than was ever thought possible. Micro-regulation now permeates the processes necessary to build even the most modest building. Take, for example, the following excerpt from a letter from the local regulatory authority to a builder in respect of a dwelling application:

> *“Please provide a letter from the owners of the new dwelling stating that they understand that no heating or cooling devices are allowed to be installed in the dwelling for the life of the dwelling.”*

And this one,

> *“The internal planning and orientation of the dwelling does not suit a desirable sustainability outcome as there is little connection between the living areas and the northern courtyard ……There is insufficient room in the open courtyard area for a BBQ or pool … the roof pitch must be 22.5 degrees and not 21 degrees as proposed … Letterbox materials are to compliment the dwelling…... Two of your selected palm trees are to be confirmed if acceptable …... The downpipes are to match the external wall colour …... The backyard seating is to be a minimum of 200mm-600mm from the boundary…..”*

Clearly, the local regulatory authority considers it knows best what internal layout best suits the family lifestyle of our customer. They hold concerns for the aesthetic qualities

of the letter box and they know best what to plant in the garden; contrasting downpipes obviously don't appeal to their sense of taste and, finally, they want to tell our customer how close to the boundary fence they can put their garden seat. As for the heating and cooling example, it beggars belief.

While examples like these highlight the absurd dictates of interventionist planners, they also point to a much more serious problem. That authorities believe they have both a right and a responsibility to govern such small issues in our lives is just plain frightening. This brings to mind the observations of German philosopher Ludwig von Mises in his seminal work 'Human Action:'

> *'The planner is a potential dictator who wants to deprive all other people of the power to plan and act according to their own plans. He aims at one thing only : the exclusive absolute pre-eminence of his own plan.'*

Another example. A few years ago I bought a block of land on a very busy main road in one of Australia's capital cities. I submitted plans to the local shire council to build 12 semi-detached home units on the land and, as the zoning allowed for such a development I didn't expect any problems. That was of course until I came up against the Council Town Planner who said he'd recommend the development be approved *"subject to the provision of noise attenuation devices"* across the front of the property – noise attenuation is a fancy name for sound proofing. I tried to point out that there were thousands of kilometres of main roads across the country with many hundreds of thousands of dwellings and it seemed to work in most places without "sound attenuation." In any event I told him that the project was actually geared towards older people, many of whom actually prefer the noise of traffic and pedestrians – they said they felt safer there than in some quiet back street or cul-de-sac. But he was having none of it – he wanted his noise attenuation devices (personally, I think he just liked the phrase). Naturally I tried the commercial arguments on him that people who didn't like noise wouldn't buy them and that the market would sort it out. For reasons known only to Town Planners, but obscure to common sense, he rejected all my pleas and I installed the noise attenuation devices. No sooner had I finished the job however than the Royal Society for the Deaf bought all the units - every single one of them. I showed the Town Planner the contract and he couldn't even see the funny side of it.

It's not just that excessive regulations add cost, confusion and difficulty for ordinary people who are simply trying to exercise their rights as land owners, it's that there is no respect for the rights of property owners to use, develop and enjoy their property in perfectly reasonable ways.

National, State and Local government planning and building controls now infiltrate our lives to the point where, without compensation, they devalue our property by restricting its potential uses and in so doing trample over the property rights of ordinary citizens. This should not be. If Federal, State or Local governments wish to either acquire a person's property or limit a person's right to develop or enjoy a property, then they should be required to fully compensate that person for his or her loss.

Native Title

In 1992, after ten years of litigation, the Mabo case led to the most significant property law change in two centuries when the High Court of Australia decided that the common law of Australia recognised a form of native title to land.

In its judgement, the Court rejected the proposition that at the time of European settlement Australia was "terra nullius", ie a land belonging to no one (that this has subsequently been found not to have been the basis of colonisation at all is another matter). The Court asserted that the pre-existing rights of Aboriginal and Torres Strait Islander people to land survived colonisation and that those rights remain where they have maintained their connection with the land and/or waters and where title has not been 'extinguished' by legislation or any action of a government which discontinued the exercise of native title rights.

In response to the decision of the High Court, the Native Title Act came into being in 1994 and this legislation incorporated into the common law, native title rights established in the Mabo Case.

The 1994 Native Title Act underwent significant amendment in 1998 following the Wik Peoples v Queensland (1996) case in which the High Court reaffirmed the concept of

native title and stated that it also may co-exist with other forms of title, which in the Wik case involved pastoral leases bestowed by the Crown. The Wik finding also determined that where there is no inconsistency between the rights and interests of native title holders and those of pastoral lease holders, the two sets of rights may co-exist and that where the rights are inconsistent, the native title rights are subordinate to those of the pastoral lease holder.

Then came the 2006 judgement of Justice Murray Wilcox of the Federal Court who decided that Western Australia's Noongan Aborigines had retained sufficient cultural connection to the land that they were able to claim Native Title rights over parts of metropolitan Perth.

As it now stands, the Native Title Act recognises native title rights and sets down some basic principles in relation to native title in Australia including that native title cannot be extinguished other than through the Native Title Act. The Act also makes provision for Indigenous Land Use Agreements (ILUAs) to be made between native title parties and other interest holders and legislates for a range of other matters, including the establishment of a National Aboriginal and Torres Strait Islander Land Fund.

While recognition of the existence of native title by the High Court provided for indigenous people new rights in connection with their traditional lands it has been very much a two edged sword.

The rights conferred by virtue of native title are insufficient to, in a refrain of the words of Hernando de Soto, "*produce surplus value over and above its physical assets … from the 'universe of assets' in their natural state to the 'universe of capital' where assets can be viewed in their full productive potential."* Native Title rights do not confer the right to sell, lease, develop or offer the land as security. The fragile nature of such a right therefore has no capacity to assist in securing a future for indigenous people. It has been the cruellest of hoaxes. Like the 'oil curse' of the third world, billions of dollars worth of assets never translate into improved living standards for the people.

There is no future in property regimes such as Native Title. Australia's Torrens Title System is the best property regime in the world. I need say no more.

[1] Hernando de Soto, The Mystery of Capital, IMF Finance & Development Magazine, March 2001

[2] Mutual Pools & Staff Pty Ltd vs Commissioner of Taxation (1992), 173 CLR 450