[redacted]
Queensland, Australia
Tel. [redacted]
3 August 2012

The Secretary
SDII Committee
Parliament House
Brisbane

Dear Secretary

I write to make a submission to the work of the Committee.

My Credentials
First, my credentials for doing so. I have been closely involved in land tenure and tenure policy in official positions in two States and internationally (Papua New Guinea) for more than 40 years. From 1980-1986 I was a local government councillor and in 1983 was Shire President, in a region where land development was the pre-eminent political issue. From 1991 to 2006 (apart from short-term tours of duty) I was Director/Manager Land Planning in the Department of Lands/Natural Resources which included the role of policy adviser and land use adviser to State Land Administration. I was a member of the internal reference panel which advised the officer who drafted the *Land Act 1994*.

For five months in 2002 I was taken off-line to advise the Director-General on the nature of property rights and the validity of requests for compensation from agricultural landholders denied permission to clear trees. A summary of the report has been published and is attached to my submission as **Attcht 2**.

I pursued the subject of property rights in academic studies and it forms a chapter of my Ph.D. dissertation (2007).

Background – Attachment 1
As background to my submission, I wish to table **Attcht** 1, a paper entitled *Allocation, Regulation and Management of Natural Resources* which I drafted in my official capacity a decade or so ago. This was endorsed at the senior levels of the department and has been published. The references in that paper to legislation are dated, but the main underpinning theme, that the land tenure regime in Queensland has a strong public interest foundation, remains valid today.

Parliamentarians don't need me to remind them that the primary if not the sole role of government is to protect the public interest, through its monopoly on regulatory power and the economies of scale that allow it to deliver services that cannot be done efficiently by individuals. The community via representative government has entrusted to the parliamentarians and the permanent public service, a high responsibility for the natural resource inheritance of the State against the overweening ambition of potential developers and over-hasty alienation of its resources.

The public interest does not equate to the interest of the economy. There is a wide range of civic, social, individual and environmental values that are not achieved automatically by the market: the market is simply one mechanism amongst many. This is reflected in

the objects of the Land Act, section 4. Furthermore, while it is in the public interest to have a prosperous economy, this does not mean that is in the public interest for *individual* firms or *individual* landholders to benefit, especially if the economic, social and environmental costs of doing so are borne by the community.

Main Points

Differences in regulatory controls are narrowing
Over the past two decades of legislative reform, the differences in the statutory controls over the use of leasehold and freehold land have been narrowing. This is attested by the similarity in market price of leasehold and freehold, an observation made in evidence by Ms Liz Dann, and a statement with which I concur. Leasehold is not a significant impediment to the use and development of land. Canberra and Hong Kong are built upon a leasehold system.

However, this does not mean that the tenure controls are obsolete. First, Queensland does not have an adequate regulatory regime for development control; but more fundamentally, the two forms of State oversight of land use are very distinct and require separate regimes.

Tenure control is very different from regulatory development control. Generally speaking, one is aimed at determining the conditions under which a parcel of public property should be privatised; the other is adjusting the use potential of already private land at the margins. There is an "owner's consent" provision in the planning legislation to allow adequate cross-referencing.

In terms of ease of facilitating development, yes, leasehold does require additional site evaluation. This is a check that the public interest in the ownership of the land resource is protected – especially important for prime sites such as the coast and waterways; or localities where the development potential may be uncertain. The State as agent for the community should retain a voice in development in these areas. Please note, if an adjustment to tenure is required to allow a project to proceed, it means that the applicant does not have sufficient property rights to proceed – in other words, *the land is not the applicant's to develop*.

If this additional evaluation delays applicants, the delays are caused or worsened by under-resourcing in the lands offices. There are remedies for backlogs other than abandoning or short-cutting the procedures.

Taxpayers appoint the government to protect their interests
The community expresses its views about land developments only irregularly. While a developer applicant may have only one or a small number of projects on which to focus energy and attention, a local community has dozens or hundreds and cannot be expected to raise considerations of public interest reliably when conversions of tenure or development projects are proposed. The community pays for public servants and local government staff to perform this task on their behalf. It is vital that the Parliament grants to ministers and elected members the tools to enable this high responsibility to be discharged faithfully. I urge the Committee not to lessen the public interest protections in the legislation.

The land planning in the Land Act is minimalist
The land evaluation (planning) process in the *Land Act 1994* (section 16) is minimalist. The process for determining most appropriate land use was designed to be flexible, depending on the degree of intensity of the development.

One could not weaken this provision without dispensing with a pre-development or pre-freeholding evaluation of land use altogether – and that would not be tenable, as there is an obligation even under common law for ministers to inform themselves by prudent inquiry in advance of the merits of disposing of public land.

Delays in development approval do not require amendment to the Land Act
Complaints from the development industry or tourism industry at delays in assessment procedures, commonly called "red tape" or "green tape", do not arise from the provisions in the *Land Act 1994*, except in some complicated cases. Apart from the question of staff resources, they derive mainly from the complexity of the *Sustainable Planning Act 2009*. In my view, the Sustainable Planning Act is not fit to the purpose of protecting the public interest in land development, and cannot be made fit for the purpose by less than a complete rewrite. The complexity and process-heavy structure of the Sustainable Planning Act are a burden upon public servants, the development industry and the community alike.

Windfall profits should accrue to the community
One of the major purposes and benefits of the leasehold system is that it allows the State and the community to benefit from intensification of land use. In the town planning system, a change in land use usually results in a windfall for the developer applicant. This may be partly on account of the investment of initiative, capital and labour by applicants (for which profit is appropriate), but partly it is a gift from the State or local government because the development potential arises from the natural growth of the community.

A lessee however holds their lease for a specified purpose. If purpose is to change, the lease must be re-issued under competition to ensure the best market price for the State. There is no obvious reason why, say, a grazier holding a pastoral lease should be gifted an anti-competitive opportunity to value-add for, say, a tourism development. The market should be allowed to identify the best person or firm to develop a tourist resort.

Supplementary Submissions

I will write further to the Committee if I can obtain approval to present some additional department material that is not currently in the public domain.

Also, I would be pleased to have an opportunity to appear before the Committee to elaborate on the principles in my submission above and the attachments.

Yours faithfully

(*Signed*)

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DEPARTMENT OF NATURAL RESOURCES AND MINES
INTEGRATED RESOURCE MANAGEMENT OUTPUT

HANDBOOK OF
RESOURCE PLANNING GUIDELINES

GUIDELINE B2

ALLOCATION, REGULATION AND MANAGEMENT – THREE APPROACHES TO RESOURCE SUSTAINABILITY

Status: *Authorised paper – available for public release*

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Purpose of this Paper

This paper outlines a conceptual framework for understanding how land use in Queensland is administered.

The paper has been written for readers including international readers who would like an overview of the tools available in Queensland for managing natural resources, specifically land..

13 May 2002

Abstract

This paper establishes a conceptual framework for understanding how land use in Queensland is administered.

The Australian States' interest in land is derived from two distinct sources: the *sovereign* power, by which the State legislates; and the *proprietorial* power, by which the State acting as a 'landlord' conditionally disposes of its assets.

Historically, a resource such as land is made available for development when the owner (originally the State) *allocates* it to a potential user. A public authority then *regulates* the use of the resource; and the holder of the resource *manages* it to achieve personal goals. The various mechanisms by which these functions are performed are not interchangeable: each kind has its own intrinsic features which derive from its conceptual origin.

Land policies in Queensland have a number of features of national and theoretical interest. This paper discusses in particular the capacity of privately managed leasehold to achieve the public interest objective of sustainability, though there are occasional references to other States, resources other than land and other forms of tenure. It argues that the tenure-related mechanisms of allocation continue to be relevant, despite a contemporary lack of appreciation of them.

National Context

Explorer and public servant Lieutenant James Cook took possession of eastern Australia in 1770 in the name of King George III. From the establishment of a new colony in 1788, settlement proceeded on the assumption that the Crown held all the land and would allocate it according to law and policy. During the nineteenth century land policy evolved in several loci as the one colony became six, they gained responsible government and in 1901 federated. Land policy in the other five Australian States and the territories is similar to that in Queensland.

Queensland's land law and policies have a number of features of national and theoretical interest. This paper focuses on the essential nature of the mechanisms available to achieve the public interest objective of sustainability on privately managed land. The ex-convicts and settlers who took up land held bitter memories of the subservience of landless peasants to their landlords in England and Ireland. Eventually land law in their new homeland came to be flavoured with an objective of social justice, an intention which has persisted to the present day and is now supplemented by an objective of environmental sustainability.

Significance and Purpose

Land law and policy in Queensland is under reform on several fronts. Relentlessly declining terms of trade mean that a pastoral holding which was once a viable family farm may now be scarcely a front paddock, so many enterprises (mostly leasehold) are being restructured. For environmental reasons, the State Government in the mid-1990s tightened restrictions on the clearing of natural vegetation on leasehold land (c.250,000 ha cleared annually), restrictions which derived from the State's ownership of the vegetation. These were supplemented in 1999 with restrictions on clearing of freehold land, these restrictions deriving from the State's regulatory powers. Public controversy over clearing and native title has affected the confidence which graziers have traditionally held in leasehold tenure. For various reasons there has been increasing general suspicion of governments and this has strengthened popular advocacy for voluntary mechanisms to achieve sustainable management. On the other hand, the pressure from informed opinion for stronger regulation is also growing, in the light of incontrovertible evidence of the seriousness of land degradation. Separately, local governments are introducing a range of measures such as property agreements and rate concessions to encourage conservation on private land, a trend given momentum by heightened environmental pressure from urban electors. Finally, the legislation and policy relating to natural resources is inevitably caught up in the modern wide-ranging program of public sector reform.

An understanding of the conceptual origins of controls over the use of natural resources is necessary for three main reasons. First, it allows practitioners and stakeholders to make sense of the plethora of different mechanisms available. This knowledge is necessary if case officers are to choose the most suitable mechanisms and is also an essential prerequisite of effective reform. Second, planning by different public

authorities can be better integrated and more tightly focused if the instruments available to implement them are better understood. Third, moves to coordinate between mechanisms by 'reducing overlap' can be doomed if they try to yoke together fundamentally distinct instruments.

Pioneering work by Binning, Cripps and Young (such as Cripps et al. 1999) in explaining the non-tenure mechanisms available to local governments and their communities to conserve natural resources is stimulating the creation of new instruments for management. Comparable accounts exploring the contemporary usefulness of tenure instruments are scarce, apart from the definitive Else-Mitchell (1973, 1976) and the original work of Holmes (1994, 1996) focused on pastoralism. Another notable exception is that Canberra, the national capital, still operates on a leasehold system and is able to achieve an orderly conversion of rural land to residential and commercial as the city expands. Otherwise, land tenure nowadays is widely regarded as a relic of the settlement era and is little understood except by staff of the departments administering it.

Conceptual Background

A Classification of Mechanisms

Historically, a resource is made available for development – which is an increase in the intensity of use – according to this sequence:

- the owner of the resource (originally the State, now subject to native title) *allocates* it to a potential user, by *proprietorial* or *tenure-related* mechanisms such as leasehold or freehold or statutory covenants, which *authorise occupation of the resource*;
- a State department, local government or other public authority *regulates* the *use* of the resource by its holders, through *regulatory* mechanisms such as planning schemes and by-laws;
- the holder of the resource *manages* it to *achieve personal goals*, by voluntary *management* mechanisms, such as property management planning or landcare.

These terms are not unambiguous. For example, the term *tenure* strictly refers to legal 'interests' which convey secure *possession*, such as leases. In this paper the term is used broadly, to also include occupations such as road licences and reserves which convey rights to *use* and not to possess. The term *regulation* is often used more broadly than here, to describe any action by governments.

The term *management* is particularly fluid. In addition to the primary sense of *custodial management* by the holder of a resource as intended above, the roles of *facilitating development* and *advice* commonly undertaken by government to assist other landholders to manage better also fall within the description of 'management' tools.

Sources of Confusion

There are several reasons why the fundamental distinctions between the classes of mechanism are often not understood:

- *the sequence is not always obvious*. For example, a person who buys a freehold property on the commercial market is usually not aware of the historical original grant of the land;
- *some controls are not easily categorised*. For example, the State can exercise the (regulatory) power to regain proprietorship, through voluntary or compulsory acquisition. The State controls the (regulatory) Torrens system of registration of land, by which it guarantees the validity of freehold titles. These controls might at first appear to be tenure ones. For another example, statutory covenants which are registered on title are considered to affect the tenure of the land and modify the allocation, but unregistered agreements are management mechanisms;
- *regulatory controls may*, through feedback, *affect proprietorship*. For example, a State reserve may be zoned by the local government in the planning scheme as open space and this inhibits the State from selling it for a tourist resort;
- *proprietorial mechanisms may be conditional*: for example, an industry might be given permission to divert water (proprietorial) provided it meets defined standards for its effluent (regulatory);

- there is an *overlap in the considerations* which are investigated when applying each mechanism. Planners must assess similar attributes and evaluate similar environmental, economic and social trends.

Despite these complexities, the distinctions remain; and the procedures for applying the various mechanisms unavoidably travel down different routes within government.

Origin of Powers

In the Australian federation, the responsibility for land administration, natural resource management and statutory ('town') planning lies with the States. Statutory planning is largely devolved to local governments which are creatures of the States. The Commonwealth has a jurisdiction in the territories and under the Constitution's external treaties power in fields such as world heritage. The States' interest in land is derived from two distinct sources. The more basic is the *sovereign* power, by which the State exercises authority to legislate on behalf of its people. The second is the *proprietorial* power, by which the State acting as a 'landlord' allocates its resources according to law to those who can use them.

The power of lessees to manage their property derives generally from the legislation governing leases and specifically from the terms of the lease. The power of owners of freehold land to manage their property derives from common law. They have every right to manage, except those removed by regulation and common law obligations.

Tenure-related mechanisms are direct and simple. The form and conditions of tenure specify at the outset the rights of the landholder and *withhold* those which remain with the State. Regulatory controls then moderate the landholder's rights by *withdrawing* those which would otherwise be associated with the respective form of tenure (Holmes 1996). It is more contentious to *withdraw* rights than to *withhold* them. This is a case for retaining tenure powers where re-assignment of a resource in some different way at a future time could achieve a substantial public policy outcome.

Put somewhat loosely, leasehold enables the State to set *positive* obligations by specifying which forms of development and use are permissible or even mandatory; whereas regulatory controls may set *negative* obligations by specifying what the landowner is not permitted to do. Another loose generality is that the tenure-related controls tend to be focused on the intrinsic condition and operation of the landholding, whereas regulatory controls may be more tightly limited to concern about externalities, that is, with negative outcomes on neighbouring holdings or the community.

Who is the Custodian?

Who is or should be responsible for ensuring that properties are managed sustainably, for translating the national policy on 'ecologically sustainable development' into personal, property-specific terms? This can amount to asking which is the most appropriate mechanism to apply. The conceptual basis outlined above indicates that responsibilities are shared. The authority *allocating* a resource is responsible for doing so only under conditions which achieve sustainability; the *regulatory* powers of a range of public authorities can be progressively amended to embed sustainability objectives; and the landholder is responsible for sustainable custodianship or *management*. Even in this last apparently simple statement, however, are philosophical and semantic traps. Governments are ultimately responsible for the welfare of the community and thus cannot escape a vicarious responsibility for the condition of all lands in their State.

Appeal Rights Flow From Origins

The civil courts have traditionally had the role of protecting individuals' rights against arbitrary or unjust exercise of official power. This role was strengthened by the *Judicial Review Act 1991* which provides a general right of appeal on the grounds of want of 'procedural fairness' or natural justice in the *process* by which administrative decisions are made by the State and local governments.

As to the substantive *merits* of decisions, most regulatory controls provide for appeals to a court of law or expert tribunal, because of their potential to reduce or *withdraw* existing rights to develop property. However, allocation is different: tenure is a privilege not a right and applicants have only a right to apply, not a right to the resource. In Queensland, decisions of the Minister to *withhold* State land, minerals or forest

products are not subject to appeal on their merits. To grant an appeal by an unsuccessful applicant would amount to forcibly removing ownership of the natural resource from the State. Of course, appeals are available if the State proposes later to *withdraw* an existing tenure.

Tenure-related Mechanisms

The State may choose to release a resource in part only, for example when a lease is issued for defined purposes. Even freehold land is not conveyed absolutely: in all States the Crown retains the rights to minerals and petroleum (and fauna) on freehold, even though most other resources (including vegetation) now pass to the purchaser. Early grants reserved indigenous timber for building ships and bridges and it is technically possible for the State even to reserve the right to receive rent (Else-Mitchell 1973:40). In Queensland, the right to land for a road may be 'reserved' to the State and all freehold deeds of grant issued since 1992 have reserved the right to quarry materials. Freehold land granted under the *Aboriginal Land Act* and the *Torres Strait Islander Land Act* cannot be sold by the owners. From this perspective, freehold and leasehold differ in degree rather than in kind.

The main forms of tenure available in Queensland (173,660,000 ha) approximately in order of decreasing State interest and increasing private interest are: unallocated State land, national parks and conservation parks, State forests, roads, State reserves, deeds of grant in trust, licences, permits to occupy, profits à prendre, term leases, perpetual leases, Aboriginal and Torres Strait Islander land and freehold. Native title, although strictly a collection of rights rather than a form of tenure, will be specifically mentioned because of its national and international interest. Statutory covenants can be placed (voluntarily) on freehold or leasehold land after allocation and upon registration on title modify the proprietorial rights.

Sixty-six percent of Queensland is leased, so the leasehold system – applied to facilitate rural development and closer settlement in the pioneering era, and as recently as the Brigalow Scheme 1962-74 – is now available to facilitate other public policy objectives such as sustainability. In States such as Victoria where most land is freehold, greater reliance must be placed on regulatory mechanisms, unless the State retrieves ownership through purchase and then re-issues leasehold or conditional freehold.

Native Title

In June 1992, the High Court ruled in the *Mabo* decision that Australia's common law recognised a form of native title to the land. The common law provided that governments could extinguish native title by valid exercise of their sovereign power: by legislation, granting a tenure (such as private freehold) or using the land in a manner which is inconsistent with the continued existence of native title. Further, in 1996, the High Court in *Wik* held that pastoral leases did not necessarily extinguish and may co-exist with native title. However, if there were any inconsistency, the native title rights and interests must yield to that extent to the pastoralists' rights.

The Commonwealth and Queensland Governments responded to Mabo and Wik by passing legislation in 1993 and 1998. A more secure tenure cannot be issued without clarifying native title status.

Sustainable Management Through Leasehold Tenure

The main obligations upon lessees to manage sustainably are set out in Queensland's *Land Act 1994*:

- a duty of care for the land is upon all lessees. This condition was inserted by the Act into all leases retrospectively without compensation;
- lessees must keep noxious plants under control;
- lessees require a permit to destroy 'trees' (defined broadly). Applicants may be required to submit a 'tree management plan';
- lessees must give the Minister information, such as a report upon the condition of the land, when asked;
- the Minister may approve an application by a lessee that a lease be used for additional purposes. So 'nature conservation' or similar could be added to the purpose of a lease issued for grazing;
- the Minister may conduct a review of leases issued under the 1994 Act every 15 years. As a result of the review, a condition about protection and sustainability can be changed *with or without* the lessee's agreement (but this decision may be appealable);

- the Minister may issue a *remedial action notice* to protect land at risk of serious degradation, or if the duty of care is being breached, or if the land is being used beyond its capability.

Lessees are entitled to peaceable occupation for the term of their leases provided that they pay the rent and observe the purpose and conditions. In the absence of the lessee's agreement, conditions cannot be changed except as indicated above. But as leases are a contract between two parties, special conditions can by agreement be inserted at the time of issue or subsequently. For example, a condition could specify that riverbanks be fenced from grazing, or that the lessee adhere to detailed provisions spelt out in a defined property management plan. Few leases include such sustainability conditions. Indeed many current pastoral leases were written early this century in the settlement era and explicitly require tree clearing and other forms of development.

Inclusion of sustainability conditions beyond the general statutory duty of care would mostly require property-specific negotiations. Generally, lessees will oppose limitations on management practices, because the protection of their independence is an article of faith among landholders. However, many lessees lack only the funds or technical knowledge about how to manage sustainably, not the willingness to do it. Further, rural industry is on notice to minimise degradation voluntarily or it runs the risk of more severe regulation. Third, new sustainability conditions could be a trade-off for some other benefit, such as a more secure form of tenure, or (as in South Australia) a roll-over for a new term. Indeed, the main obstacle to updating leases in this way may be not reluctance of landholders but practicalities such as stamp duty and lease administration fees (on a lessee's side) and an absence of experienced land officers (on the government's side).

Regulatory Mechanisms

Regulatory mechanisms place restrictions upon the method by which the resource is developed. Examples include:

- statutory planning schemes. In most Australian states these are the primary mechanism for development control;
- declaration of catchments or flood plains within which certain kinds of development are prohibited;
- pest management orders or entry notices;
- vegetation management controls on freehold land (the *Vegetation Management Act 1999*);
- restrictions on clearing vegetation or damaging the physical form within a watercourse;
- local laws (formerly called 'by-laws'), under the *Local Government Act 1993*; including vegetation protection orders (VPOs) to protect valuable and significant vegetation. The power to write local laws for development-control purposes like this was removed by the *Integrated Planning Act 1997* but pre-existing VPOs remain in force;
- property taxation (rates, land tax);
- restrictions on disturbing marine plants (e.g. sea-grasses, mangroves and salt couch) under the *Fisheries Act 1994*, by the Queensland Fisheries Service.

Unlike the tenure powers, these mechanisms are not really suitable for arranging a direct preventative positive obligation such as fencing. Some regulatory tools such as the first two depend upon a prior district-wide planning process and imposition of a spatially explicit plan under which applications are evaluated. Most such as the first two are applied when a change of land use is contemplated; in other words, the landholder applies for a permit. Others such as the third are applied to current management practices. Also, most operate by setting a threshold below which a permit is not needed.

The Queensland Statutory Planning System

Statutory planning under the *Integrated Planning Act 1997* is the primary mechanism for development control in Queensland. A range of explanatory materials about the system, introduced in March 1998, is available so this account will be brief.

The objective of statutory planning is to achieve ESD. This is to be achieved by co-ordinating and integrating local, State and regional dimensions; and by managing both the process by which development takes place and the effects of development. The system is administered by local governments. The primary

mechanism for achieving these outcomes is the planning scheme. The scheme has two parts: the plan and the development assessment process.

The plan outlines the preferred future direction for land uses in the local government area. It does this by setting out the outcomes that will be sought through the development assessment process and mapping out the future distribution of land uses.

The engine of the scheme is the development assessment process which comprises the rules that guide how the environmental effects of development will be assessed and, where appropriate (and where possible) mitigated. It is proposed that the primary mechanism for doing this will be through codes which encapsulate those decision rules which apply to the assessment of the environmental effects of development. These codes can be specific to a particular development; or they can apply to a range of developments or to areas in which development may take place. Two important features of codes are first, that they are performance-based, meaning that assessment is based on the extent to which the proposal meets the requirements of the code; and second they are meant to integrate the large-scale objectives of the plan as set out in the desirable environmental outcomes. Also forming part of the development assessment process is an impact assessment process that addresses development where the environmental effects cannot be accurately predicted.

Some features of the statutory planning system include:

- existing lawful management practices can continue without a permit: the planning controls are triggered only when an applicant wishes to change land use or reconfigure (e.g. subdivide) an allotment;
- council can adopt an infrastructure charges code which levies developer contributions at the time of subdivision for funds to purchase land for local community purposes – such as public park. This power could be used to retrieve a strip of land along (say) a river;
- council can adopt planning scheme policies and codes for each of a number of industries or activities (such as gravel extraction, timber harvesting, vegetation clearing), to set out standards which applications much satisfy in order to justify approval.

The system has a significant unrealised potential to achieve the objectives of community-based natural resource management, but this requires an investment of time and energy by community groups as well as by the authorities.

Management Mechanisms

The proprietorial and regulatory controls together lay down a broad framework within which the landholder is free to manage the resource; that is, to use and develop it. At that stage government is involved mainly by way of information and advice. Four common mechanisms are:

- the *property management plan*, a personal, documentary tool which captures the landholder's intentions. The term embraces four main components: *land management*, *enterprise* (stock/crop) *management*, *financial management* and *personal goals*. The term is most commonly associated with rural private land but it can apply to properties of all kinds, including public land (where it may be called a master plan, a facilities plan, a recreation plan or a capital works plan). The Queensland program to promote property management planning is called Future*profit*;
- ESD, organic or environmental *accreditation*, such as by an environmental management system, observance of ISO 14000, the proposed Australian Land Management System or similar. While voluntary, these can potentially be linked to satisfaction of regulatory requirements or concessions on rates, rents or taxes;
- the *landcare* movement, which has grown from nothing in 1986 to an Australia-wide network of some 4300 local groups spreading knowledge of sustainable practices and marrying nature conservation, farming and science. Originally focused on agricultural lands, it may also embrace urban lands, and has spawned programs such as *coastcare*, *bushcare* and *backyard conservation*;
- *voluntary management agreements*, between a public authority and a landholder to specify mutually desirable protective practices. These (unlike *statutory covenants*) do not run with the land and are based on contract law;

- *Land for Wildlife*, a voluntary and free registration of interest in conserving nature on one's property. Participants join a network of like-minded landholders, receive a quarterly informative newsletter and can attend field days such as those run by *NatureSearch*;
- *market* mechanisms, such as *insurance*, although to be workable some of these require such a strong statutory framework that they are more truthfully described as regulatory mechanisms.

Duty of Care

The common law duty of care requires that every person take all reasonable and practicable steps to avoid causing foreseeable harm to another person's land or their use or enjoyment of that land. Duty of care is well established in common law, particularly in cases of injury to persons or property, but is not so well established for remedying harm to the environment.

State legislation (*Environmental Protection Act 1994*) extends the common law responsibility into a regulatory requirement upon everyone in Queensland, to exercise a general duty of care to prevent harm to the environment. To show that an environmental duty of care has been met, an individual must be able to show 'due diligence', that they have assessed potential risks to the environment from their activities and then have taken reasonable and practicable measures to avoid, or at least, to minimise those risks. As well, there is a statutory duty of care upon all State lessees.

Adherence to a separate statutory or voluntary code of management practice could be taken as *prima facie* evidence of compliance with these responsibilities. A number of industries are developing voluntary 'codes of practice' to guide their members in management of their properties. For example, Queensland has adopted a code of practice for agriculture.

Different Aspects of Management

In some other publications, notably Guidelines G100A and J1, 'management' is usefully separated into three distinct aspects: *custodial management*, by the person or body in lawful occupation of the resource; *development facilitation* on others' land, including the provision of infrastructure by public authorities; and *advice* including capacity building.

Is Tenure Irrelevant?

Co-operative or Coercive?

Contrary to first impressions, the tenure-based controls such as leasing or the writing of statutory covenants are not coercive but are more-or-less voluntary, in the sense that the terms and conditions are accepted voluntarily when the instrument is offered. Their nature is *contractual*. By contrast, the regulatory mechanisms are introduced in their broad form without landholders' consent, although specific applications can be negotiated. They are *coercive.* Most management mechanisms are of course by definition *voluntary*.

It is sometimes argued that in the 1990s the 'free-market' outlook could lead governments to dispense with tenure controls, to allow conversion of leasehold to freehold, and to rely on regulatory planning schemes to achieve the necessary control of land use. However, the leasehold system with its *voluntary* acceptance of *individually tailored contracts* spelling out *direct* and *transparent* mutual obligations in a landlord-tenant relationship may be more closely aligned in its essence to the free-market approach than a system of *government regulation* imposed by *third party* authorities regardless of tenure. Commercial property is widely held under leasehold from private landlords and is understood in this light.

The Difference Between Freehold and Leasehold

Subject to any land over which native title has been established, the State is the paramount title holder of all land in Queensland including that which it alienates, whether by grant or other means. Put another way, land is the 'eminent domain' of the State. This principle is evidenced when land is 'resumed' by the State and vested in an authority or when land reverts to the State upon the death of a freehold owner leaving no traceable heir or

successor or next-of-kin. Thus the various forms of tenure in which land rights may be granted or allocated by the State reflect only the extent to which those rights are granted or allocated.

It follows that, from the *perspective of sovereignty*, and notwithstanding perceptions in the landholding community, freehold and leasehold differ in degree rather than in kind. The State in issuing freehold tenure can and usually does reserve certain rights (specifically to minerals, petroleum and quarry materials) to itself and these do not pass to the freehold owner. In issuing a lease, the State in effect reserves a greater range of rights to itself but, subject to native title, the lessee is entitled to peaceable occupation for the term of the lease.

Viewed from the *perspective of land use*, however, there is a clear distinction between the two types of tenure. After land is freeholded, the State has no proprietorial involvement in the use of the land whereas the holder of a State lease may use it only for the purposes for which it has been leased. Even a perpetual lease, while offering indefinite security, is still issued for a given purpose or a limited range of purposes.

Justification for Leasehold

The leasehold system of land tenure was adopted to achieve this by allowing land settlement to proceed in an orderly way with suitable conditions of use being set. Is this still relevant?

As community expectations about resource management have become more complex, governments have used their sovereign powers of *regulation* to amend the rights and obligations attached to private property, regardless of the form of tenure. And voluntary *management* mechanisms which also apply to all tenures are increasing in number and versatility. The difference between the corpus of provisions applying to freehold and that applying to leasehold is therefore narrowing. But neither this convergence nor the fact that leasehold and freehold simply represent different positions on a continuum of possessory rights equate to a conclusion that tenure is irrelevant.

The justification for leasehold has not rested on any notion that the State is a 'better manager' than private landholders, for a lessee is unquestionably the manager. Rather the justification rests on the capacity of leasehold to serve public policy objectives which cannot be satisfied through market forces. The public interest dimension and accountability to a public landlord make leasehold arrangements over State land different from the primarily economic relationship between a private landlord and tenant over freehold land.

The leasehold system has five main features which distinguish it from freehold in their normal forms and which underpin its contemporary relevance in the sustainability era:

Financial Incentive

The State receives rent for land and royalties for water, minerals, timber and gravel. The level of rent can be set to achieve policy objectives. For example, in Queensland's pastoral districts it has been historically low to encourage settlement and compensate for disadvantage. Even now it is only 0.8% of unimproved capital value.

Facilitating Development

In the early days of settlement, leasehold facilitated private occupation of land at low capital cost for defined purposes, while allowing the State the flexibility to allocate the land to other uses at some future time. This was particularly important in the early pioneering days, to encourage land settlement or development of infrastructure. There are localities in Queensland where patterns of land occupation have not yet matured and there are still opportunities for the State to direct development in this way.

Through leasing, land can be made available for, say, tourist developments without the need for up-front capital costs of purchasing land. Land may be returned to the State for re-allocation should the original purpose become redundant. Further, by allowing sites to be retrieved for re-allocation if projects do not proceed, the leasehold system ensures that prime developmental sites are not locked up in inadequately financed or poorly planned projects.

Influencing Land Use

Lessees have certain defined responsibilities. The State determines the form and intensity of use so retains control over income-earning activities not specified and can exclude inappropriate uses. Even a perpetual lease, while offering indefinite security, is issued for a limited range of purposes. Leasehold is a direct, convenient method of development control. Of course, upon application by the lessee, the purpose can be changed (provided that it does not allow an inappropriate intensification of land use) or added (provided that it is ancillary to the head purpose). So 'ecotourism' or similar could be added to the purpose of a lease issued for grazing.

The leasehold system can act as a brake upon the subdivision of holdings to unviable sizes. Land can be retrieved from term leases at expiry, without compensation for land value, for public purposes such as national parks and schools. Further, the boundaries of many pastoral leases were set in the last century, some in the squatting era. The State in partnership with lessees can reconfigure leases at expiry or conversion, or restructure with neighbouring leases, in line with economic viability and modern principles of catchment management derived from regional resource planning, resulting in more sensible and 'sustainable' boundaries.

Noting that using land for residential purposes, unlike other purposes, represents a form of "final consumption" by households (Else-Mitchell 1973: 49), there is a solid argument in favour of moving to freehold with its simpler registration and transfer procedures where land is to be used for residential purposes.

Constraining Speculation

Lessees are entitled to sell their leases and to benefit from any improvements they make (although improvements revert to the lessor at expiry). However, they do not have a right to subdivide or change purpose and are not entitled to reap unearned 'windfall' profits arising from district-wide intensification of land use. Else-Mitchell (1973:14-16) explained that the value of land comprises two components, *use value* reflecting the benefit of using it; and *development value*, reflecting the benefit from holding it in expectation of realising a different purpose. While land remains under lease, the development value associated both with planning decisions and with the growth of the community accrues to the community via the State as lessor, not unearned to the lessee. Increments of value can in principle be appropriated through regular adjustment to rents (Else-Mitchell 1973:38).

Environmental Policy

Although the evidence as to whether rural leasehold properties are less or more degraded than comparable freehold properties is largely anecdotal and non-conclusive, leasehold offers the potential in future to apply the State's technical knowledge in a coherent policy framework on a case-by-case basis. The Government is able to use conditions of tenure to achieve specific policy objectives, such as by controlling the clearing of vegetation.

Applying Various Mechanisms

A person seeking to develop land requires permission under *all* relevant statutes. The absence of a single one may be fatal to the proposal. A lease, for example, may allow a certain business to be conducted; but this will be negated if the planning scheme prohibits that business.

Most tenure-related and regulatory controls operate by setting a threshold below which a permit is not needed. For example, approval is not needed under a planning scheme to continue current or long-standing legal uses.

A landholder may voluntarily undertake a *less intensive* use than is permissible under law, such as to conserve some natural feature, and can enter into a covenant with another party to secure this practice. However, none of the available management mechanisms allow a landholder to undertake a *more intensive* use than is legally permissible, or to contract out of obligations to comply with relevant Commonwealth, State or local legislation, such as fire protection notices or planning schemes.

Conclusions

Although the suite of mechanisms is not and may never be complete, clearly there are existing powers which are not utilised. The greatest obstacle to sustainable management is not a lack of legislative power but a lack of sustained application of existing powers.

A wide range of mechanisms is available to either enforce or encourage sustainable land management practices. Some are tenure-specific, some are tenure-blind. Sustainable management requires the application of all three classes of mechanism.

The rights to develop land are not inherent to the soil but are conferred by society. The prerogative of society in the public interest to set conditions on development should not be disputed. When considering which mechanisms to use, the issue is whether to use a direct tenure-related method of exercising that prerogative (if it is still available), or the indirect method of moderating previously granted rights.

It is hoped that a better understanding of the range of mechanisms available may encourage relevant departments, community leaders and landholders to apply the tools at their disposal with confidence, and to work to complete the suite of tools where there are identifiable gaps.

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For further information see the Handbook of Resource Planning Guidelines, published on the Department's website*:* *http://nrm.dnr.qld.gov.au/land/planning/pdf/guide/b2alreg.pdf*

End of Guideline B2

Minor edits on 6 August 2002 to reflect NR&M website alterations.

DEPARTMENT OF NATURAL RESOURCES AND MINES

HANDBOOK OF
RESOURCE PLANNING GUIDELINES

GUIDELINE B7

RIGHTS AND RESPONSIBILITIES IN PROPERTY:
"THERE IS NOTHING NEW UNDER THE SUN"

Status: *Authorised for public release*

Keywords: *Property, compensation, rights, duty of care, stewardship, responsibilities*

Authorised by:

(*Signed*)

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Issued by:

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Purpose of this Paper

This Guideline has been written to explain the nature of what is loosely called 'property rights' in natural resources. It aims to clarify 'duty of care' and 'stewardship' and evaluates the question of compensation for diminished entitlements.

The paper has been written for members of the public, staff of the Department of Natural Resources and Mines and other public authorities. It is not Government policy but an essay from historical and current perspectives intended to be an analytical contribution to the contemporary debate about the nature of property. The paper presents the text of a speech by the Director-General to the forum "Property Rights in Paradise" held in Cairns on 8 April 2003.

12 June 2003

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.

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 19th 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.

4. 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 12th 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.

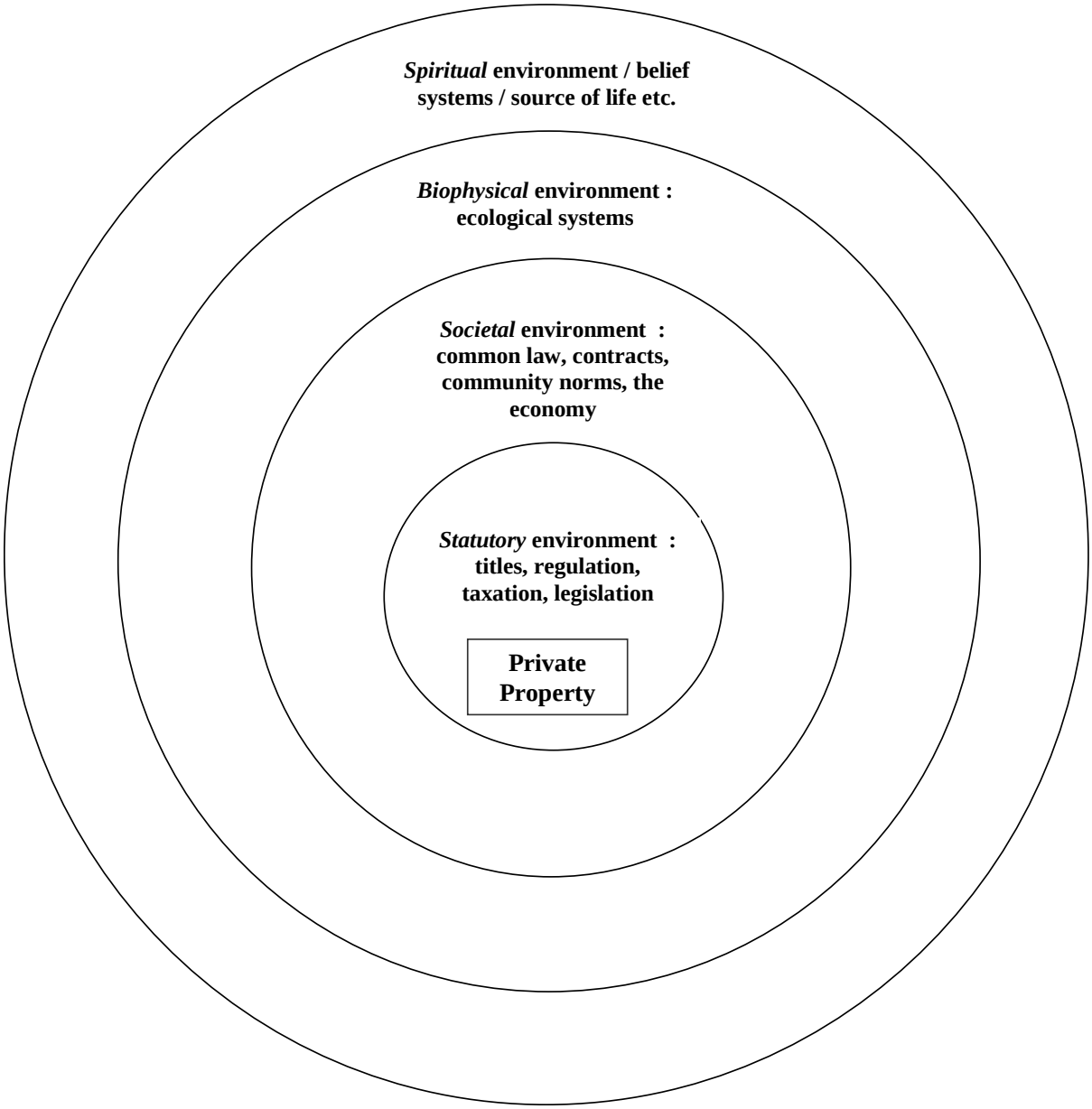
In 2000, these controls were extended to cover farm dams and overland flow in order to manage increasing pressures on the resource. Generally, stakeholders have acknowledged these extensions of the statutory regimes under the *Water Act 2000* as necessary to protect both existing entitlements and the 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 spelled 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 pre-condition 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 these *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.

Under the protection of regulation, governments and citizens in Australia generally honour their contracts and titles mean what they say they mean. 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.

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, while 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 1*999.

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 gives 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.

End of Guideline B7

PROPERTY

An Analysis of Rights and Obligations in Property

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PART D: THREE MODELS OF PROPERTY

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PART A: INTRODUCTION

EXECUTIVE SUMMARY

The preferred model for considering property is called the *stewardship* model, as follows:

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 to resource holders. Entitlement holders then have the prerogative to manage the resource to achieve their personal goals, but are under a duty of care to the community to manage sustainably.

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 upon the holder of the resource after the entitlement has been granted.

For each of the elements there are many stakeholders. Some will have a proprietary legal interest, evidenced in writing; 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. All these stakeholders have a duty of care in their dealings over it.

People consider property through 'lenses', or perspectives. The 'market lens', for example, identifies those sticks in the bundle of resources that are ripe for commodification and explains how to create tradable entitlements. These entitlements should be as secure as necessary to enable the specific market to achieve the purposes for which it was constructed. This conception correctly views the market as a tool suitable for applying in defined circumstances, rather than some form of universal solution to which social and environmental considerations are external exceptions.

The nature of the reciprocal obligations that communities and title holders owe to each other changes with time and location, notably with the economic fortunes of resource-based industries, with the level of scientific understanding about the condition of the resource and causes of damage, 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 with enduring certainty. Attempts to secure the rights of some stakeholders often mean that the rights of others will be diminished. However, these stewardship responsibilities can and should be made less confusing, through defining duty of care for each locality.

Given this understanding of mutual responsibility, talk of 'compensation' for so-called lost rights does not make sense, quite apart from the lack of legal justification. Rather, communities and governments should aid entitlement holders in their journey towards sustainability.

Indigenous traditions have much to teach non-indigenous property systems about stewardship. A dialogue should be launched to build these rich traditions into a contemporary model.

The absolutist property right does not exist. The term 'property right' at best is a loose generic term which describes the range of mechanisms by which people hold legal entitlements to occupy resources.

What is a 'property right'? Subject to native title, it is an entitlement to occupy or take a resource according to the terms and conditions of an instrument issued by the State; and subject to regulation, contract, common law and community norms. Any individual entitlement is being redefined continually by these mechanisms.

With the adoption of this model, it can be seen that the quest for a definitive and permanent definition of relative rights and obligations is futile because each of the main ingredients in the statutory and non-statutory scene is a variable.

PURPOSE OF THIS PAPER

This paper outlines a conceptual framework by which property can be understood and debated. The paper dissects rights and obligations and identifies some common 'lenses' and three alternative models by which the issue is approached. It evaluates the question of compensation for lost entitlements and suggests a process for reconciling the inherent tensions within property. The examples used focus on Queensland but the model could be adapted to other States.

Contemporary debates about the prohibitions on clearing native vegetation or management of freshwater resources triggered by a growing awareness of stress in river systems, have highlighted the lack of shared understanding of the conceptual nature of property and the need for a considered response to demands by users for compensation for lost 'rights' or entitlements.

DEFINITIONS

This entire paper is about defining ambiguous concepts, but it will be helpful at the outset to define a few terms so that the discussion may make sense:

- *custodian*: a guardian of their own property. In this paper, the term is confined to, alternatively, Indigenous people occupying their traditional lands; or the state, occupying and managing common property over which it has assumed ownership. Custodians have the obligations of stewardship just as do occupiers with less fundamental tenures;
- *duty of care*: a mandatory (legal) obligation, with flexible dimensions, not to harm the resource or the interests of others;
- *entitlement*: an authority to own, occupy, take or possess a resource; and *title*: a document that conveys or gives evidence of an entitlement; and *permit*: evidence of regulatory permission;
- *occupier*: used here as a generic term for the holder of title to a resource, rather than in its more narrow legal sense which differentiates an 'occupier' from an 'owner';
- *property*: a generic term referring to a relationship with a natural resource;
- *property right*: is widely used as a loose generic description to cover titles of all kinds but the term *property entitlement* is preferred, because this helps avoids confusion with simple regulatory expectations or permission to use;
- *proprietorial* or *proprietary*: depending on context, either a generic term referring broadly to access to, occupation of or possession of a resource, or more narrowly just legal and tradable possession as distinct from non-assignable use;
- *resource* or *natural resource*: land, water, the right to access water, vegetation, minerals, carbon, fish, radio spectrum and the other gifts of nature;
- *state*: the general term for the supreme civil authority in a modern society; and *State*: one of the States or Territories of Australia. States replaced the former colonies on 1 January 1901 and in Queensland's official usage the 'State' replaced the 'Crown' during the 1990s;
- *statutory*: actions depending upon specific legislative powers. This embraces most of the proprietorial and regulatory mechanisms;
- *steward*: an agent or manager of property on behalf of its owner. 'Stewardship' means caring for property held in trust for the benefit of the community or future generations. This applies to all occupiers of property of all tenures in all resources.

PART B: THE NATURE OF PROPERTY

THE LEGAL BASIS OF PROPERTY

Property rights have 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 constrained by expanding environmental regulation and have demanded greater recognition of their 'rights'.

What exactly is a 'property right'? The courts have explained that 'property' does not refer to a thing; rather, it may be viewed as a socially-based institution given some basis in law, a legally recognised relationship with a thing.[1] Legal cases have suggested that the substance of a proprietary interest lies in the advantages which can be derived from the property, the capacity to capture a stream of benefits and to prevent interference by others.

However, this explanation by itself does not lay to rest the confusion and sense of loss that resource holders feel when the state 'interferes' with their use and enjoyment of property they thought they owned. Some resource holders 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. Property rights are more clearly understood for some natural resources than for others. The rights inherent in land ownership in fee simple are better understood, for example, than the regulatory fetters on those rights or the social obligations. This paper explores these issues. In so doing, it travels beyond interpretation of what the law now states, to where the law and policy might advance.

'Property' can be either real property or personal property. Land and the fixtures on it are real property; most other natural resources are personal property. A forest, for example, is considered to be real property until it is cut down and converted to logs, when it becomes personal property. Entitlements to use property—real or personal—include both legal interests (examples: leases or tradable water rights) or personal licences to use (examples: permits to occupy land or water licences). Loosely, a legal interest is assignable (tradable) while a personal licence is not.

The Cultural Origins of Property in Australia

Modern Australia has inherited its administration of property from four rich sources:

- *Indigenous* traditions: based upon a sacred duty of custodianship of country—country has spiritual dimensions; rights follow acceptance of obligations;
- *Judaeo-Christian traditions*: based upon a sacred duty of custodianship (Jewish) and obligations to others (Jewish and Christian)—humans have a life tenancy; humans are made in God's image so every person is entitled in a share of the earth's bounty and is a part owner; humans are not to push the productivity of natural resources to their limit;
- *Anglo-Roman* traditions: based upon the rule of law—Roman law via England, English common law, constitutional and statute law—legally secure rights facilitate investment and economic activity; obligations encrust rights;
- *nation-building* traditions: based upon equality of opportunity[2]—the State originally holds all natural resources on behalf of the community and is the community's agent in allocating them equitably for private and public purposes, regulating their use and guaranteeing the security of their titles; rights are subject to moderation by the community.

[1] *Yanner v Eaton* (1999) 201 CLR 351.

[2] It is acknowledged that this equality was not extended to all inhabitants.

No model of property which fails to respect all *these traditions can gain widespread and enduring public support*. In the new millennium the active reform agendas in natural resource management offer an opportunity to meld these traditions. This will critically require action by the States.

How Property is Created and Developed

The urge to control space, the 'territorial imperative',[3] is deeply inherent in animal behaviour. For many species, territory aids sustainable production of food and nesting materials, helps to ensure fair distribution of resources among the population and is a prerequisite for the formation of households and reproduction. It has both individual and social functions. Similar functions apply, more or less, to humans.

Given *territory's* ancient origin, one could draw the conclusion that *property* was created by individuals and pre-dated governments. Such a conclusion misreads biology, history and economics. Humans are not solitary animals but social ones. Anciently, individuals' claims to territory were embedded in their relationships with their communities and subject to the rules of the traditional elders. In the village (though there is a wide range of forms), every person was allowed sustenance; no one starved; and the mark of high status was not the acreage controlled so much as the extent of the obligations which a person could discharge to the community. In large modern states, government is the successor to the village elders in fulfilling the functions of distribution and discipline but wealthy individuals can disconnect themselves from civic responsibilities.[4]

In conceptual terms, property in the Western system can originate:

- by *creation* of something valuable out of nothing (examples: artisanship can create a sculpture, statute can create intellectual property out of ideas or strata titles out of air);
- by *capture* and possession of something considered unowned (example: prior to discovery of native title, statute captured access to water);
- by legitimate *transfer* from the previous owner (example: marketplace purchases such as tradable rights); or
- by illegitimate forcible *seizure*: (example: land upon conquest).

In 1066 William the Conqueror assumed ownership of all land in England by 'royal prerogative'. At colonisation, the six colonial governments inherited the English law and assumed ownership of the real property in the natural resources within their territories. Then using their sovereign law-making powers, they were able by statute to take possession of other natural resources (such as the flow of water) not classed as real property and to dispose of any property they then owned.

After the States assumed control, they made resources available for development according to this sequence:

Statutory processes

- the State *allocates* the resource to a potential user, by *proprietorial* mechanisms such as State leases or quasi-proprietorial[5] mechanisms such as licences and water allocations. They are contractual in nature and permit access, occupation or possession. They are always conditional. This power derives from the State's

[3] Ardrey, Robert. 1966. *The Territorial Imperative: A Personal Inquiry into the Animal Origins of Property and Nations*. New York: Atheneum.
[4] Small, G. Ric. 1997. 'A Cross Cultural Analysis of Customary and Western Land Tenure'. *The Valuer and Land Economist*. p.618-25.
[5] See Fisher, Douglas. 2000. *Water Law*. Sydney: LBC Information Services. p.102. This right is not a true possessory right, as explained, but nor is it regulatory.

presumed original ownership or quasi-ownership, now subject to native title to a variable extent;[6]

- a State department or a local government *regulates* the *development and use* of the resource, through *regulatory* mechanisms such as planning schemes, trading rules and environmental licensing. They are coercive in nature when invoked. This power derives from the State's authority to legislate on behalf of its people;

Non-statutory processes

- the holder of the resource *manages* it to achieve personal goals, by voluntary *custodial* mechanisms, such as works and maintenance. This power derives from the title or from common law after title is granted;
- public authorities and other bodies *facilitate development* on others' property by *development* mechanisms, such as joint ventures to build dams and construct infrastructure. This power derives from their statutory role or from contract law;
- public authorities, peak bodies, scientists and community groups *assist* the resource holder to adopt desirable practices, by voluntary *advisory* mechanisms such as extension or stewardship incentives. No specific powers are needed to authorise this activity.

All processes of allocation and regulation are, desirably and usually, preceded by some form of policy formulation or geographic planning, partly to ensure that the process is applied effectively in the public interest; partly to overcome the weaknesses of the incremental method of dealing with applications case by case; and partly to ensure fairness and equity in the subsequent distribution of benefits. These policy and planning steps can themselves be statutory or non-statutory.

In summary, so long as they do not exceed the proprietorial or quasi-proprietorial rights they enjoy as holders of the resource, entitlement holders are at liberty to use and manage, within the framework of the imposed regulatory restrictions and any contractual obligations they take on.

The above terms of course are capable of several meanings. 'Allocation' here means transfer of ownership and does not mean quite the same thing as in the phrase 'allocation of scarce resources' used in economics to include financial as well as physical resources. 'Regulation' is often loosely applied to any statutory activity by governments. The term 'management' is particularly fluid and can be used to cover collectively all five activities (as in the term 'natural resource management') or just the final three arrow points. Some mechanisms cross the boundaries. For example, observance of a voluntary industry code of practice can help a landholder to demonstrate that some regulatory obligation has been satisfied.

Particularly confusing is the fact that conditions of use can be set by either allocation or regulatory restrictions. For example, an industry might be given permission to divert water (quasi-proprietorial) provided it meets defined quality standards for its effluent (regulatory). An irrigator may not be able to take up their water allocation because the local government has zoned the locality for 'landscape protection' and is refusing permits. The absence of any one necessary permit can be fatal to a development. The two classes of statutory permission are conceptually distinct: one sets out the conditions under which the state is prepared to privatise one of its assets, the other controls use.

Despite these ambiguities, this classification is explanatory in three main ways: it differentiates the range of mechanisms on the basis of their inherent legal

[6] Section 17 of the *Native Title (Queensland) Act 1993* confirms for Queensland the State's existing ownership of State-owned resources, but this does not necessarily extinguish native title. As the Yanner case showed for fauna, ownership can be ambiguous. Parallel wording in s.212 of the *Native Title Act 1993* (Cth) enables a State to confirm any existing ownership by the Crown of natural resources or any existing right to use, control and regulate the flow of water, but this expressly does not extinguish native title.

characteristics and origins; it explains resource-holder prerogatives; and it differentiates the mechanisms that resource holders can apply by themselves from those that need governmental action.

The classification in effect defines the five main classes of mechanisms or *tools* available to stakeholders to manage natural resources. In recent debates over reform in natural resources, it has been a common practice instead to simply differentiate *market mechanisms* from *command-and-control mechanisms*, with water trading characterised as a market mechanism. This dichotomy sheds little light on the core issues lying at the heart of the debate over property rights, especially the extent of proprietorship and compensation. It is better to regard the 'market' as a method of delivering mechanisms rather than a class of mechanisms in its own right. Markets can be constructed for mechanisms in several of the above categories: for example, entitlements to water (with or without land) can be transferred from the state via auction; rights to a joint venture development could be tendered; competitive bids could be called for advisory stewardship payments.

Also, with a few exceptions, 'command-and-control' does not accurately describe the non-coercive processes by which entitlements and permits are issued. Crown land leases were historically allocated by ballot – nowadays mostly by auction or tender; water allocations are mostly auctioned or negotiated one-on-one; and regulatory permits, while they rest ultimately on the state's coercive powers, are mostly issued by applications negotiated one-on-one within a framework set by a planning process which includes public consultation and embodies the community's aspirations.

The parallel distinction between 'markets' and 'government intervention' is also simplistic, because in the industrialised countries, with a few exceptions, markets do not exist outside the rule of law. A strong statutory framework created and managed by governments, not title holders, 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. Reports like *Creating Markets for Ecosystem Services*[7] become tangled because the market lens they apply is inadequate to understand the inherent nature of the tools they describe. One economist has suggested that the theory of market economics has overlooked the indispensability of these essential pre-conditions because it arose in democratic societies which were already governed under the rule of law and in which rights were secure.[8] The public institutions have been so successful in creating the conditions for economic progress that those institutions have been taken for granted.[9]

This objection to characterising markets as autonomous is not merely a semantic nicety. If command-and-control mechanisms are portrayed as unpopular, coercive and stifling of initiative; and if markets are portrayed as simple, democratic and self-managing, as is often the way the distinction is described, stakeholders will be misled about the extent of preparation needed to get a sound trading scheme up and running and they will also unwittingly exaggerate the benefits that trading can achieve. Trading in a new field such as water requires extensive government-sponsored policy, spatial planning and rule-making so that the bounds of the market can be set. Markets also require regulation to bring externalities into prices. Markets accommodate regulation, once the bounds are set.

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[7] Murtough, G., Aretino, B. and Matysek, A. 2002. *Creating Markets for Ecosystem Services*. Productivity Commission Staff Research Paper, AusInfo, Canberra.

[8] Mancur Olson quoted in Bethell, Tom. 1998. *The Noblest Triumph: Property and Prosperity Through the Ages*. New York: St. Martin's Press. p.26.

[9] Hernando de Soto, quoted in Bethell *op. cit.* p.200. Also Kasper, Wolfgang. 20 Aug. 2002. 'The global economy functions only because we have institutions that we trust.' Symposium on 'Property Rights and the Rural Environment'. Australian Agricultural and Resource Economics Society. Canberra.

Open access, common, state and private regimes

The classification above helps explain some labels used in economics to describe property systems:

- *open access* property regimes: where no person seems to exercise ownership (such as the atmosphere, the oceans, certain marine fisheries or freshwaters before the States claimed them);
- *common* property regimes: where management is exercised collectively—this can be under an Indigenous regime, under assignment from the state (such as trusteeship of public reserves), or under a joint arrangement following an allocation from the state (such as by a co-operative which holds a tradable right or an irrigation district);
- *state* property regimes: where the state retains management (such as by low-security permits to occupy State land or water licences);
- *private* or *individual* property regimes: where an individual or corporation manages the resource (such as by high-security leasehold, freehold or tradable water rights).

Economics teaches that open access regimes tend to be over-exploited, because no-one is accountable for their condition. So, as over-use or abuse become a problem, governments tend to convert open access regimes to one of the three controlled regimes. To supply a motive (self-interest) for users to husband the resource, economics usually favours converting open access resources into individual property rights. However, other motives are also operative and the other two categories are also workable.

Common property regimes have been the main form of managing natural resources, throughout history. Common property is not necessarily badly managed: the feudal commons had been grazed sustainably for hundreds of years, despite Garrett Hardin's mistaken description of commons in his famous 1968 essay 'The Tragedy of the Commons' as open access regimes.[10] [11] Enclosure (privatisation) of the commons led to an increase in production per acre but at the expense of sustainability.

The four categories overlap and indeed are only abstract points on a continuum. For example, an allotment held (say) by an individual under lease could be portrayed as an individual tenure, or as a state tenure with the state utilising the lessee as agent to achieve its public policy (resource use) objectives. Further, the distinction between the state and common categories can look hazy: for example, local governments have a legislative mandate deriving from the state but can act as local collectives; and the state itself can be considered as the embodiment or the agent of the community.

Poorly managed state property can look like an open access regime, which can perhaps be described as a result of failure of the state to assume or exercise its prerogatives of ownership rather than a special kind of property regime. The fact that the state may have under-resourced the management of its property in recent budgets is not necessarily an argument against having it manage property. The state is capable of managing very well when it resources itself well. Increasing the state's capacity to manage may be a simpler and cheaper remedy than commodifying. There are remedies for declining state capacity other than the self-fulfilling one of reducing it further.

[10] Cox, Susan Jane Buck. 1985. 'No Tragedy on the Commons.' *Environmental Ethics* vol. 7:49-61.

[11] Bollier, David. 2002. *Silent Theft: The Private Plunder of our Common Wealth*. New York: Routledge. p.19 etc.

Post-Mabo, the state may not have unchallenged right to resources such as water over which it has not previously assumed or taken ownership.[12] It is likely that there may nowadays be transitional regimes where the state is unable to assume ownership without the risk of compromising native title, but native title procedures have not yet yielded a determination of native title over the resource.

Noting the above discussion, and the insights that *Mabo* brought to our understanding of property, it is questionable whether there is such as thing as open access property. The following is a better classification of property systems:

- *Indigenous* property regimes, which belong to the traditional owners, have a metaphysical origin not deriving from the state, and are managed according to tradition or custom;
- *common* property regimes or *commons*, which are owned by all citizens collectively, in Australia deriving from the state's powers post-1788 and mostly being managed by the state on behalf of the community;
- *private* property regimes, which derive from the commons but are now managed individually. Freehold, leasehold and tradeable water rights are examples.

This model is superior to those models which portray pollution and other off-site degradation as external to their arena of analysis. It shows that any pollution arising from private property damages the residual commons, by trespass.[13] One does not need to rely on some over-bearing state regulation to create the offence. Further, the presumption that no one owns so-called 'open access' resources therefore no one else's property rights are affected by off-site degradation is exposed as a fiction. Private property derives from public property. Public property rights are the foundation of an economically developed society.[14] This model reverses the usual plaint that private rights are inadequately defined: in fact, the rights of the commons being residual are the ones that are usually not adequately and formally defined and perhaps for this reason are widely overlooked.[15]

More profoundly, this classification opens up a new way of regarding Indigenous interest in property: the Indigenous regime is a form of commons, pre-dating the commons which Europeans assumed at settlement. (This is not necessarily arguing that Indigenous people now have rights over resources not consciously claimed by the state, only that they once did).

This model of property turns demands for compensation on 'just terms' on its head. If the community were to receive a fitting royalty or rent on 'just terms' whenever its commons were privatised, annexed or degraded, rather than to regard them as open access resources available for free, the power of market forces might be turned to aiding sustainability of the as-yet uncommodified resources rather than aiding waste. This model also simplifies the debate over intellectual property in biological resources: it belongs to the owners of the commons.[16]

On another theme, the current trend towards catchment planning and landcare could be viewed in part as a move to reinstate some of the features of a common property regime, to ameliorate the over-development and degradation associated with

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[12] If native title rights and interests are determined to exist over an area of water, the State will recognise those rights and interests subject to the Native Title Acts and (in Queensland) the *Water Act 2000*. Subdivision H allows the State to deal with water subject to providing procedural rights to native title holders—for areas that have had an approved determination that native title exists, and for areas pending determination. Compensation will be an issue where native title rights and interests are lost or impaired—but a determination is required to confirm that they existed in the first place.

[13] Judge, Rebecca. 2002. *op.cit.*

[14] Rankin, Keith. 24 June 1998. 'Act's View of Property Rights; Fundament or Quicksand?' www.ak.planet.gen.nz/~keithr/rf98_PropertyRights.html

[15] Australian Conservation Foundation. July 2002. *Rights and Responsibilities in Land & Water Management*. ACF Discussion Paper. Melbourne.

[16] Rankin, Keith. 20 Mar. 2001. 'Public Property Rights'. www.scoop.co.nz/stories/HL0103/S00152.htm

inadequately supervised individual property rights. There are even moves towards community-based regulation: statutory powers for regional planning groups.

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 radio spectrum, 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 into natural resource management mainly through its financial clout, its marine jurisdiction and its external affairs power to sign international treaties. But otherwise, accountability is clear: responsibility for implementation of the (national) policy of ecologically sustainable development within State boundaries lies with the States.

Section 51(xxxi)

By Section 51(xxxi) of the national Constitution, the power of the Commonwealth to acquire 'property' is limited to 'acquisition' on 'just terms'. Unlike the US Constitution's Fifth Amendment, this clause was probably intended to grant to the Commonwealth the power actually to acquire property as much as to protect citizens from a potentially overbearing state. 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 1988 at referendum rejected a proposal to extend the just terms provision to the States.[17]

Laws that merely prohibit or control a particular use of property generally do not constitute an 'acquisition' under the Constitution. In the Franklin Dam case, the first case interpreting this aspect of s.51(xxxi), the Court held that unless the Commonwealth acquires some property, there is no 'acquisition' under the Constitution, even if its regulation effectively terminates the intended use of the property.[18] However, the High Court in 1997 determined[19] that the Newcrest company was protected by the just terms provision when a batch of mining leases had effectively been sterilised by regulation.

The Federal Court in 1993 drawing upon other precedents determined that fishing rights—the right to take what would otherwise be public property—are a property interest, and the act of decreasing the catch via regulation amounted to an 'acquisition' under the Constitution. This in effect would be a withdrawal of a previous allocation to take tangible property.

Common Law Position

The English common law can be traced back to the late 12th century with the evolution of jurisdiction by Henry II's royal courts over feudal tenures, though its roots lay in the village communes which pre-dated even the introduction of feudalism. Belief in the rights of the individual took root and gradually a corpus of law built up entitling a person who was in legitimate occupation to quiet enjoyment of their property and to manage it without oppression.

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[17] O'Connor, Barry. 20 Sep. 2002. 'Review of Property Valuation Cases'. Australian Property Law Conference. Brisbane.

[18] Sperling, Karla. 1997. 'Going Down the Takings Path: Private Property Rights and Public Interest in Land Use Decision-making' *Environmental and Planning Law Journal* p.427-36.

[19] *Newcrest Mining (WA) Ltd v Commonwealth and the Director of National Parks and Wildlife*. 14 Aug. 1997.

Over time, the statute law evolved to supplement and modify the common law, to define private property rights more precisely. This reduced the need to resort to civil litigation based upon nuisance or other torts to preserve the value of property from spillover effects. The common law survives where it is not supplanted by express words in statute. Common law developed several principles that Australia inherits, explained as follows.

Magna Carta and equality of all before the law

Many resource holders equate protection of their right to use their property with democratic freedom. This is a misunderstanding on several levels.

The Magna Carta (1215) which set England on its course of enterprise and prosperity essentially subjected the king himself to the rule of law. It was the end of arbitrary 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. 'Freedom' in this context meant not freedom to do as one pleased but freedom to be treated the same as any other person in the realm. The Magna Carta prohibited confiscation of property not absolutely but except in accordance with due process.[20]

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. To pastoralists fearful of the security of their titles, the story of native title is, rather, confirmation that property in Australia is subject to the protection of the law and to natural justice.

The United Nations Universal Declaration of Human Rights (1948), while not having statutory force, could be used by the courts as a guide to international best practice. It adopts a dual-sided approach to property. Article 17 states:

"1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be *arbitrarily* deprived of his property." (Emphasis added).

The Crown holds 'original' title

Except for Indigenous titles, all titles, even freehold, are held from the Crown (the state). This is reflected by the term 'resumption to the Crown' used, accurately, to describe compulsory acquisition of real property. At common law there is no obligation upon the state to compensate for restoring its ownership although all Australian States have passed statutes to provide this.

Nuisance: Protecting neighbours[21] from damage

The concept of 'quiet enjoyment' is sensitive to physical intrusion or pollution, or what today we would call environmental damage, by activities on neighbouring properties.

So 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 foreseeable 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 specific others, even if on its face the title deed gives no hint of such a thing. This has been the case ever since Australia

[20] 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." Quoted in Sperling. *op.cit.* p.435.
[21] A neighbour is any person who one can foresee might be injured by one's actions. Need not be a property holder.

was first colonised—and for centuries before that. This means that many conflicts over environmental damage can be portrayed as conflicts between different groups of resource holders, not simply between resource holders and remote governments or environmentalists. *This turns the conflict between environmentalists and farmers on its head*. At common law, farmers and graziers refrain from damaging the environment not because the impersonal 'environment' is suffering, but because the property rights of all others who have a legal stake in that environment could be compromised. This is so, even though in Australia, the definition of those who have a legal stake or 'standing', is much narrower than the definition of those who are 'stakeholders' in the broadest sense of the term, which includes all members of society. It also differs between the States.[22] The narrow scope of standing makes it difficult for citizens to litigate on the basis of public interest.

A person with an entitlement may not be able to fulfil all the activities that that entitlement permits, if in so doing the adverse effects spill over onto neighbours. This phenomenon affects the prospect of compensation profoundly. There is no presumption at common law that a new economically productive use can be established, if it interferes with existing uses, especially those that have merged into the landscape. For example, people do not have a right to return contaminated water to the environment.[23] A regulation which seems to remove the 'right' of a resource holder to generate a nuisance could not create a liability for compensation *because under common law the resource holder never had that right* in the first place. Of course, it may be difficult to link cause with effect, to show 'causal proximity';[24] and the burden on proof lies on the claimant; but the principle remains.

Given the well-attested rise in litigiousness of Australian society, future litigation on account of rising salinity, spread of weeds and other forms of off-site environmental deterioration can be expected.

Two other difficulties are that the definition of 'neighbours' is contextual and the definition of 'harm' has been changing as knowledge about the functioning of ecosystems improves and as awareness of the inter-connectedness of natural and socio-economic systems grows. Though they can be clarified at a time and place, property rights can never be fixed at common law.

No protection for public interest or the environment

Ever since its origins, common law has focused on protecting the rights of individuals. The obligations under common law are imposed upon occupiers rather than being inherent in the physical property itself. This has left two arenas with suboptimal protection. The first is the public interest (the stake that the wider community has in ensuring that property was used prudently). Provided that the tort of nuisance is not committed, a title holder is free at common law to develop the property as they see fit, even to render it useless.[25]

In other words, there is a common law presumption that land can be used for the benefit of the proprietor. This thinking allows a legitimate existing use which does not conform to a new regulatory restriction to continue, unless expressly prohibited. Conversely, at common law there is no right to compensation for regulatory restrictions.

The second arena is an obligation of care towards the natural environment such as ecosystem services and resource condition internal to the boundaries. Common law arose in an era when all waste was bio-degradable and the notion that the

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[22] Comino, Maria. June 1996. "Who Can Sue? A Review of the Law of Standing". *Impact: Newsletter on Public Interest Environmental Law*. No. 42.
[23] Cullen, Peter. June 2002. 'Sort Out Water Property Rights'. *Australian Landcare*. p.14-5.
[24] NSW Farmers. 2002. *Property Rights and Farming in Australia*.
[25] O'Rourke, John. Oct. 2002. *pers. comm.* Also Sperling. *op. cit.*

environment could be damaged on a global scale was unimaginable.[26] Generally the environment can be protected by common law only indirectly through liability for impacts on other persons and their property. By contrast, a statutory duty of care may be created with a much broader scope.

Theft and breach of contract

There are common law criminal remedies against 'theft' of property. 'Theft' means unauthorised taking of someone else's property with intention to exercise ownership. This logic supports the argument that there should be no appeals against the minister's refusal to grant a new allocation – of land or water or other resource.

PERCEPTIONS OF PROPERTY

Arguments about individual and collective rights are not new. The modern debate about property will be richer if the debaters are aware of how previous thinkers have understood the questions and the reasoning they have used. Also, stakeholders will be better able to reach some kind of resolution if they understand the arguments that their philosophical opponents use.

The Views of the Philosophers[27]

Modern Western conceptions of the nature of property can be traced to two English philosophers John Locke and Jeremy Bentham. Locke (1690), arguing against the oppression implicit in the doctrine of the divine right of kings, proposed instead that men had been created as sovereign individuals with inherent, God-given rights to life, liberty and property. Individuals, however, needed to band together to protect their rights and freedoms from depredations by the minority of others who were dishonest or violent. So they created governments and invested them with powers to act on the collective behalf.

This philosophy gave birth to some profoundly influential currents of thought. First, the notion of individual sovereignty gave rise to modern liberalism, a celebration of the rights of the individual and a legitimisation of the ambition which in turn facilitated economic expansion. Both property and modern economics share these roots. Second, it conceptualised government as a creation of the people, not as a disconnected abstraction or a remote and alien external force. It positioned government as an instrument to protect the property (and other) interests of individuals, not as a threat to them. Third, it visualised property as an original, root entity, comparable with individual life and liberty as a basic right in the state of nature. Locke's model was adopted in 1789 in the French revolutionary *Declaration of the Rights of Man and the Citizen*.

Bentham in 1791 famously derided as "nonsense upon stilts" the Lockean notion that people enjoyed 'natural rights' including property independently of the state. He argued that the only rights people possessed were those that the state chose to enforce. Property was the creation of the state.

A careful reading of Locke (*e.g.* as explained by Judge[28]) reveals that he did not think that property arose in a vacuum. Property derived from God and the 'state of nature' was a commons, held by all under God for the common benefit. Modern scholars who have dropped God from their own conceptual framework tend to forget that s/he was not absent from Locke's. Given that the modern state has assumed responsibility for

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[26] Raff, M. 1997. 'Environmental Obligations and the Western Liberal Property Concept.' Paper delivered to Environmental Justice conference. Melbourne.

[27] This section acknowledges in particular Mercuro, Nicholas and Samuels, Warren, eds. 1999. *The Fundamental Interrelationships Between Government and Property*. Connecticut: JAI Press.

[28] Judge, Rebecca. Aug. 2002. 'Restoring the Commons: Toward a New Interpretation of Locke's Theory of Property'. *Land Economics* vol. 78(3): 331-8.

the commons, the contemporary successor to Locke's source of rights is not the atomistic individual, but the state.

Nevertheless, history has not been kind to Locke's notion that *property* is a pre-existing right independently of civil law and the consensus today is that he was mistaken. Private property is a late invention in human history. Individual ownership arose only in late Greek and late Roman times.[29] Also, the establishment of limited liability corporations showed that rights could originate through human agency. Although James Madison, a drafter of the US Constitution, personally was convinced that private property rights were a guarantee of civil liberties, the founding fathers decided to omit reference to 'property' as one of the inalienable rights of man endowed by the Creator (leaving 'life, liberty and the pursuit of happiness') on the grounds that property was legitimately alienable by the state.

The Lockean notion of pre-existence of rights implied that withdrawal of them should be compensated unless the regulation is to abate a common law nuisance. This is countered by the Benthamite explanation that the state has the power to legislate for the health, safety and welfare of the citizens in the public interest. These two themes survive today in the debate over the relative weight to be given to individual rights and to community well-being in property.

Lenses

People approach issues through various *lenses*, which are the product of their genes, their upbringing and life experience, their education and the roles they fill in their community. Indeed, one could argue that there are as many lenses as there are stakeholders involved. However, they can be grouped into a few main disciplinary outlooks. Each of these has its own jargon and inbuilt assumptions about the world—a world view—which means that discourse between them is often difficult. All lenses are partly valid, but each is only partial. People do not confine their attitudes to any single lens, but adopt parts of several as circumstances seem to require.

Five common lenses in particular tend to colour public debates over natural resources:

- the *Indigenous* lens: Indigenous people maintain a spiritual connection to the land, of which they see themselves as the custodians. The land over which one is custodian is largely determined at birth. It is difficult to resolve the status of native title in the Western system of land tenure because native title pre-dated the establishment of the Australian States. Property in the Western system derives its legitimacy from the existence of the state. To bring the native title regime entirely under state legislation is, then, to confine it a way that is contrary to its own internal principles. But without doing so, it cannot easily be reconciled legally with the other institutions of property under statute law;[30]

- the *rural landholders'* lens: Rural landholders hold several deep convictions—respect for *common sense*; the desire to protect their self-reliance or *independence*, pride in their contribution to Australia's *prosperity*; and pride in their own *stewardship*. Nowadays none of these values seems to be appreciated by society. Common sense—the intuitive wisdom they have inherited or gathered from experience—is overwhelmed by the complexity of debates about natural resource management; independence is counteracted by isolation from modern networks of information and support as vigour leaches to the coast; the prospect of prosperity is fading because they see no model of national economic policy that makes sense; and their definition of stewardship is disputed by city folk and conservationists.

[29] Small, G. Ric. *Op. cit.*

[30] The Indigenous view of ownership is not the same thing as native title. Native title is dependent upon the common law for recognition.

The language of farmers, around their kitchen tables, speaks of caring for the land, of their hopes that their children will inherit a prosperous and well-managed property. They themselves have inherited an attachment to their resource along with a pioneering spirit, deriving from Australia's nation-building era. They want to fulfil their obligations to the environment and the community, if they can discover what they are, and they resent being blamed for previous wrong policies or over-allocation of resources by governments who were supposed to be acting in the community interest;[31] [32] [33]

- the *ecological* lens: Scientific evidence is emerging that the basic ecosystems on which life depends are becoming stressed on a global scale. *All the relevant indicators of natural resource condition are trending downwards*. If the damage being caused to climate, soils, waters and biodiversity is at only the modest end of current responsible predictions, Western society must confront major changes to its resource-based production systems, its economic policies and its institutions. Just as rural landholders resent being cast as environmental vandals, so environmentalists who toll this bell resent begin portrayed through the market lens as self-interested rent-seekers[34] or as hippies and extremists;

- the *Judaeo-Christian* lenses:[35] Christianity, the dominant religious faith, inherits the pre-Western Law of the ancient Hebrews, an 'indigenous' law, written into the Old Testament and accepted into Christianity as part of the revelation of God to humans. This lens (or pair of lenses) is not now prominent in public debate and cannot be advocated by a secular, multicultural government, but it remains a foundation of modern Western law and has deeply influenced Australian attitudes about property.

  The Creation story includes a divine exhortation to "Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." (Genesis 1:28). This 'dominion' was not absolute authority, even less a mandate to waste and despoil, but an all-encompassing responsibility of stewardship, as logically follows from the revelation that the living things were created by God and as the extensive property-related commands in the following books of the Law make plain.

  Private property was protected in two out of the Ten Commandments (Exodus 20:15,17) but the Hebrews had simply a life tenancy: "Land must not be sold in perpetuity, for the land belongs to me, and to me you are only strangers and guests." (Leviticus 25:23). There are also commands not to push the productivity of the natural resources to their limit: "For six years you shall sow your field, for six years you shall prune your vine and gather its produce. But in the seventh year the land is to have its rest, a sabbath for Jehovah." (Lev. 25:3,4).

  To this ethic of stewardship was grafted a strong ethic of social justice, set out in the earliest Hebrew scriptures. Humans were made in God's image so each

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[31] Woodside, Dedee. 2002. 'Balancing the Right to Access Water with the Obligation to Care for the "Commons"'. Paper presented to the Futurescape conference. Nature Conservation Council of NSW. Sydney.

[32] See also Peterson, Tarla Rai and Horton, Cristi Choat. 1995. 'Rooted in the Soil: How Understanding the Perspectives of Landowners Can Enhance the Management of Environmental Disputes'. *The Quarterly Journal of Speech*. 81(2): 139-66.

[33] Stasi, Aaron. 2002. *Ascertaining Community Perspectives*. Unpublished paper, Department of Natural Resources and Mines. Brisbane.

[34] Goesch, Tim and Hanna, Nathan. June 2002. 'Efficient Use of Water'. *Australian Commodities* vol. 9(2): 381.

[35] This section acknowledges Singer, Joseph. 2000. *The Edges of the Field*. Boston: Beacon; Small *op. cit.* and Raff *op cit.* Quotations are from various translations of the Hebrew and Greek scriptures.

individual is sacred (Gen. 1:26,27). For this reason every person was entitled in a share of the earth's bounty. Indeed, the poor are part owners of the land: "When you gather the harvest in your country, you are not to harvest to the very edge of your field, and you are not to gather the gleanings of the harvest. You are to leave them for the poor and the stranger." (Lev. 25:22). An owner is not entitled to monopolise a resource to the extent of denying a fair share to others to sustain their husbandry. Jesus later reinforced the Jewish Law, as recorded in the Christian gospels. He clearly respected the right to own property (Matthew 15:19; 18:23-35; 24:47) but also infused it with obligations to share its benefits (Luke 16:19-26);

- the *market* lens: This lens argues that if the relative rights and obligations inherent in property are accurately specified, markets can ensure that individuals will enjoy the benefits and incur the costs of their actions. Environmental problems arise when property rights in environmental goods are poorly defined and externalities have not been brought into the marketplace. By harnessing the power of individual motivation, the market will achieve results that are concurrently optimal for society as a whole.[36]

The problem with some lenses is that they encourage a focus on only one aspect of property: for example, economic efficiency, or individual rights, or self-determination, as the case may be. For example, markets normally parcel out resources according to capacity to pay (that is, existing wealth), but this is discordant with the Indigenous, Judaeo-Christian and nation-building traditions because it takes no account of need or fair play and so arguably sits uncomfortably with mainstream Australian public values. In fact all dimensions must be accommodated if property is to be managed adequately. 'Ecologically sustainable development' is a lens which encourages a multi-dimensional approach.

The majority of the resources and ecosystem services which sustain the continued productivity of individual properties are not in the market place. These include connectivity with biological refugia, catchment conditions, the atmosphere, climate and groundwater. Resource holders might think that they buy a complete unit but their title is not even a stick in a bundle: rather a thread in a large cloth.

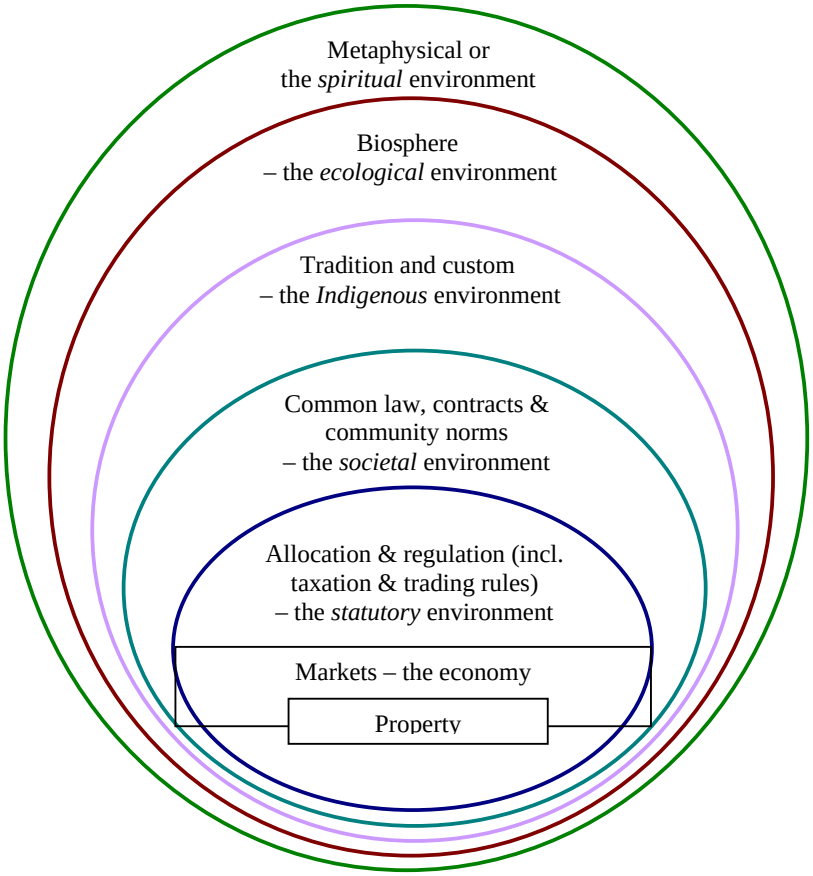
[36] Aretino, Barbara *et al.* 2001. *Cost Sharing for Biodiversity Conservation: A Conceptual Framework*. Productivity Commission Staff Research Paper. Canberra: AusInfo. p.12.

Interdependence

The following diagram displays the interdependence of the economic, societal and environmental spheres. It shows the market as being a creature of the statutory framework which in turn is a social construct. Some elements of property are traded in the marketplace but many are not.

The model hints at a way of aligning Indigenous and Western concepts of property. Both systems have a similar outer circle then share the same second circle. Both systems have a body of community law—in this diagram the Western one is shown as succeeding the Indigenous one, which has not disappeared, on resources of all tenures.

The model is powerfully explanatory in another way: *there are no externalities.* This reflects reality.



PART C: RIGHTS AND OBLIGATIONS DISSECTED AND RECONCILED

Property carries *rights* and *obligations*. Much of the tension in the debate about property rights stems from misunderstandings about the extent of these rights and obligations. Misunderstanding is fostered because only some of them are explained in any publicly articulated form. To explain them, first this paper will list them. The lists reveal two opposing points, that holders of titles can have authority over their property but that their rights are extensively offset by obligations.

IDENTIFYING RIGHTS AND OBLIGATIONS

Pure Property Rights: The Meaning of 'Security of Tenure'

Academic writings and common law cases about property suggest that, in order to perform the functions outlined later, a pure private property right will display the following features. Different experts label, group or subdivide them variously. The compilation covers personal property such as chattels as well as real property. When states create property titles, they crystallise various combinations of these attributes:

- *possession*: the right of the holder to physical control over the matter of the resource. In this list, for simplicity, possession is taken to include *access*, the right to enter the property or take it into custody; the right to consume or destroy its *capital*; and *exclusion*, the right to exclude trespassers and other non-invitees. This right is encapsulated in some form of official title specifying the terms of occupation. The state will stand beside the title holder and protect their entitlement against theft or intrusion;

- *use*: the right of the holder to use, manage and modify the resource to fulfil personal goals including to conduct economic activity and receive income. This is taken to include *usufruct*: the right to harvest the fruits of the resource without damaging its substance;

- *durability*: the right of the holder to occupation for a period as long as is necessary to achieve personal goals or to recoup investment;

- *consultation*: the right of the holder to a voice in decision-making about the property or the regime in which it is grounded;

- *clear definition*: the right of the holder to an unambiguous record in a publicly accessible, reliable, up-to-date, transparent register which enjoys public confidence and defines who holds the entitlement, under what terms and conditions and against what boundaries. The sum of the separate entitlements is not to exceed the total resource available;

- *protection from withdrawal*: the right of the holder to immunity from dispossession by the state during its term. It is accepted that sometimes unilateral withdrawal may be permissible, but only for an over-riding public purpose (not simply for re-issue to a competitor);

- *transferability*: the right of the holder to transfer the entitlement to another holder either absolutely or conditionally, in whole or part, including for a period, and including by bequest or gift. The administrative procedures to allow this are simple, quick and non-discriminatory.

These seven characteristics can be summarised by the useful shorthand term 'security of tenure'. 'Security' is an elastic, multi-dimensional concept.

Other commonly used terms

In 1994 COAG listed the desirable features of entitlements (in water) as *ownership*, here embraced within 'possession'; *volume*, here embraced within 'clear definition' in the narrow administrative sense of defining the boundaries; *reliability*, here embraced within 'protection from withdrawal'; and *transferability*, here included by that name. Title holders often demand, in addition, a clear specification of use conditions and obligations, to deliver more 'certainty'. However, only some of these can be specified within the entitlement, as they in part derive from independent regulatory restrictions (such as trading rules) and the common law.

Other suggested characteristics of property appear in the literature, but many accounts are confusing or confused. For example, *being in demand* or *valuable*, but these are pre-conditions of a successful market rather than components of the property right; *universality*, but this seems to embrace several different elements; *divisibility*, but this embraces two different concepts—sharing, which is a special case of transferability, and subdivision, which amounts to alteration of the terms of the allocation so could be self-contradictory; *verifiability*, here called clear definition; *flexibility*, but this seems more like a feature of adaptive community-based planning than a right; *low sovereign risk*, but this embraces two different concepts—protection from withdrawal (for those features internal to the allocation) and protection from other changes in the regulatory environment, which by definition are not part of the property right itself; *alienation*, but this is better termed transferability as the title holder can transfer only what they already hold; *mortgageability*, perhaps covered by the final three features but otherwise a matter for policy by the lender; and *enforceability*, but this simply means that it is specified by statute or contract, for when the state passes a law or enters into a contract it implicitly establishes its obligation to enforce that instrument. *Permanence* is often mentioned but this is not necessary for either confident possession or a successful market: entire irrigation districts have been built on the basis of one- or two-year licences.

How pure must a property right be?

The term 'pure (private) property right' can be retained to describe a theoretical entitlement which is absolute in all these seven attributes. However, no instrument satisfies all those criteria absolutely. Indeed, each attribute displays a continuum, and there is no precise threshold 'above' which an instrument can be deemed to be a property right and 'below' which it fails some kind of test. A given entitlement is not invalidated simply because not all of these attributes are satisfied *in toto*. The specific provisions of the legislation under which it is granted and the specific terms in the small print on its reverse side give a clue as to how closely an entitlement approaches a 'pure property right', though as shall be seen, other factors then intrude.

Reliance on the nomenclature of 'pure property right' is risky as it may convey some utterly mistaken impressions: that the nearer a particular entitlement approaches that concept, the better it is; that only instruments which approach it can be traded; and that governments should progressively restructure their resource entitlements to align with this ideal. Different resources lend themselves to more or less emphasis on different characteristics; some of the characteristics are more conducive to marketability than others; and markets are not the only method of dealing in property. States are able to issue not only various forms of secure property right, but also insecure permits and contracts that neither satisfy nor aim to satisfy these criteria.

Also, different characteristics rise in importance depending on the purpose for which the entitlement is being written. It may not matter if a particular entitlement lacks a particular characteristic of a pure property right. For example, a lessee may agree to allow access to others for cultural purposes under an Indigenous Land Use Agreement or may agree to be subject to tighter state control over management practices in return for a longer lease.

What features are necessary for 'bankability', to underpin development?

History and the experience of world development show that secure property rights have been an essential pre-condition of development, world-wide. The absence of security in land ownership plagues under-developed countries and impedes the prospect of productive investment. There is strong evidence that the Industrial Revolution was spawned in England not because of technological progress in itself 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 property made it worthwhile to innovate and to invest. Transferability lifted property holders out of feudal subservience. By contrast, in continental Europe and Ireland, landlords and tenants alike were vulnerable to capricious or malicious confiscation of property by soldiers or the king.

The same principle applies to this day. In analysing economic progress around the world, there is a strong correlation between stages of development and the security of property. Productivity increases markedly when farmers, workers and capitalists can use property to secure the rewards of their labour and investment and match effort with reward.[37]

This is not an argument that property rights must be absolute. It is possible to pick out the features from the above list which, viewed through the lens of a banker, are most critical for securing loans and so underpinning economic activity. The most important for 'bankability' are the final three: *clear definition*, *protection from withdrawal* and *transferability*. In other words, the state registers entitlements reliably and administers them without arbitrary change. This is not predicted by many scholars of property, who place possession as the primary criterion. But possession may not even be chronologically first, as a resource must be defined before it can be offered for allocation. The true mark of property is not that one occupies it but that others recognise the claim.[38]

What features are necessary for operation of a market?

The list of pre-conditions for a successful market are not the same as the features of a pure property right or a bankable property right, although all three concepts are philosophically related. The pre-conditions are well established in the economics literature. Confining the analysis to natural resources, in summary the pre-conditions include:

- a serviceably *secure property entitlement*, in other words, a tradable commodity that as far as practicable displays the characteristics of bankability outlined immediately above;
- *information* on condition, price, volumes for sale, volumes required by buyers, etc—both scientific information about the resource and market information, publicly and equitably accessible so that buyers and sellers compete on equal terms and so that formulae to enable them to apportion risk equitably can be devised;
- *low transaction costs*, to allow responsiveness to market signals. This includes *smooth transitional arrangements*, to minimise starting friction;
- *demand*, or a workable number of receptive and competitive buyers and suppliers exercising well-matched power;
- *trust*, with rigorous *accounting* and *audit* procedures to maintain market integrity and confidence.

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[37] Bethell, Tom. 1998. *The Noblest Triumph: Property and Prosperity Through the Ages*. New York: St. Martin's Press.

[38] Mercuro and Samuels *op. cit.* p.211.

Competitive markets for goods and services work as well as they do because the underlying rules about ownership are clear. A person entering a shop does not need to bargain about who is entitled to sell the produce: it is there free of prior obligations, ready for exchange.

Landholders and irrigators prefer that the instruments traded be as secure and transparent as possible, as the market will work most efficiently if the buyers and sellers have confidence in the product that they are transacting. Otherwise investment may flow to enterprises that are less productive but more secure. However, markets can and do trade the most insubstantial evidence of promises, relying on trust and fair play while factoring in the relative risk that the instrument might evaporate. For this reason, a trading regime can operate more-or-less successfully even if the entitlements are short-term and heavily conditional. Transparency is more important than security. Of course, prices reached for less secure instruments or in informal markets may be lower, but that does not invalidate the trades. Markets adjust to the rules, once the rules are clear.

In particular, a right does not have to be permanent. Few resources apart from land are really permanent. Indeed, the majority (>90%) of trades in the irrigation industry in the eastern States to date have been temporary trades, refuting the argument that a right must be permanent to be meaningful. Durability is not one of the most critical factors that financiers use in assessing credit-worthiness of a property-development project. Lenders evaluate applications on their merits and look in particular for personal credit-worthiness, strong business planning and capacity of the enterprise to generate cash-flow. Even the city skyscrapers have an economic life of only 25 years or so, leased perhaps for just 5 + 5 years.

What features are necessary for 'certainty'?

As stated, the desire by farmers for absolute security of tenure is non-achievable. But there are sources of uncertainty and resentment other than insecurity in their title. Resource holders often feel that the entire system lacks *certainty* or to use Young's word, *dependability*.[39] This, more than pressure from bankers, is the source of demands for increased security. Certainty is a multi-faceted concept, with many ingredients resembling those necessary for a market, but with different emphases:

- a serviceably *secure property entitlement*, as explained;
- *information* on how the plethora of strategies, plans and studies affects *their* property and what the government and the community expects of them as to a duty of care;
- *low transaction costs*, especially understanding of the processes being followed in reform and opportunities to participate meaningfully, perhaps to restructure the entitlement;
- *simplicity and predictability*—especially in regulatory restrictions imposed outside the title regime by third parties such as the Commonwealth and local government;
- *durability of the system*[40] and confidence that governments will remain committed to the system as a whole and not withdraw or de-fund or privatise it when it is half-complete, or perhaps reassign its staff so that corporate memory of the reforms is lost;

[39] Young, Mike. 8 July 2002. pers. comm. The generosity of Professor Young and Mr Jim McColl in granting an interview is acknowledged.
[40] Young, Mike. 8 July 2002. pers. comm.

- *trust*—in the leaders of their industry, their communities and their governments. This includes *frankness*: lack of frankness is deeply resented. Trust starts with a perception that regulator and regulated are moving progressively and in good faith as partners towards a goal of sustainable management that both recognise is in their joint interests.

Importantly, a title holder could have a secure title but no certainty, because all of the other five ingredients may be perceived as missing. Conversely, if there is certainty in the other ingredients, then a degree of insecurity of the title can be tolerated.

Incidentally, the modern trend towards performance-based regulation has had the effect of reducing certainty for resource holders. Complexity of regulations tends to increase under performance-based approaches. Prescription has the advantage that applicants can ascertain what is their development potential from a schedule, as distinct from an environmental impact assessment. Performance-based approaches require heavy investment in information-gathering and forward planning.

Pure Property Obligations: The Meaning of 'Stewardship'

The analysis above has focused on the *rights* that title holders enjoy or would like to enjoy, to maximise their private interest. But title holders also carry *obligations*—to their neighbours, the wider community and the environment. How burdensome are these?

The literature and experience suggest that a pure property obligation will display the following features. Different authors label, group or subdivide them variously. When states create property titles and regulations, they crystallise various combinations of these attributes in various degrees of strength. However, whereas property *rights* in the Western system largely originate from the Crown's ownership and sovereignty (nowadays given effect through statute), many of the property *obligations* have a deeper origin, deriving from our human-ness and membership of society. They are poorly defined so are poorly understood.

The obligations identified in the literature and from experience are:

- *spiritual reverence*: the obligation to pay homage to the Dreamtime, or the Creator, or Gaia (life force). This metaphysical obligation does not normally appear in the institutional arrangements for property but influences the way that many stakeholders approach the issues. This view opens the possibility of a nexus with the Indigenous approach to country;

- respect for *Indigenous heritage*: the obligation to honour the traditional inhabitants and to respect their culture and their continuing connection with their country, despite settlement;

- submission to the *rule of law*: the obligation 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. This attribute includes *human rights*: the obligation to respect human life and liberty, refraining from discrimination;

- *consultation*: the obligation to consult frankly about development and use of one's resources, necessary to engender long-term confidence by the community in development approvals;

- *environmental responsibility*: the obligation 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; the obligation not to diminish the rights of future holders;[41]

- *civic responsibility*: the obligation 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, especially potential synergies with others in the district; to refrain from erecting monopolistic 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 treat employees, buyers and suppliers as share-holders and shareholders as part-owners; to harvest only the produce, not the natural capital.

These characteristics can be summarised by the useful shorthand term 'stewardship', though stewardship is an elastic concept. A given entitlement is not invalidated simply because not all of these attributes are satisfied *in toto*. No instrument satisfies all those criteria in totality.

Once the first three obligations are accepted, the task of determining stewardship obligations in practice will often boil down to defining the final three responsibilities more precisely. The problem is that every one of the three responsibilities is contextual (depends on circumstances) and so is difficult to pin down. However, no individual can change any of the obligations dramatically. People cannot contract out of their fundamental rights or obligations at common law or under statute. Nor can they opt out of communities or breach community norms with impunity for very long.

The final obligation deserves special mention. Even if we could isolate economic production from social and environmental objectives, we would still not insist that entitlements adhere to the pure, individualistic property right. That individuals can make a profit is not enough to achieve economic optimality for a community. There are economic externalities as well as non-economic ones.

The language of ethics and social responsibility tends to go missing in debates about property in natural resources, as if the controversies were simply battles between economic production and the environment.[42] In fact, ownership of property is dependent on acceptance by non-owners of that ownership and this requires reciprocal acceptance of responsibilities to society. It could even be argued that acceptance of some of these stewardship obligations is inherent when accepting the resource. Lyndon B Johnson and Stewart Udall wrote: "Despite our fee titles and claims of ownership, we are all brief tenants on this planet. By choice, or by default, we will carve out a land legacy for our heirs."[43] We have an ethical obligation to leave a legacy for which our heirs will be grateful.[44]

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[41] Raff *op. cit.*
[42] Lawlor, Peter. 18 Sep. 2002. *Hansard* p.3692,3. Queensland Parliament.
[43] Udall, Stewart. 1988. *The Quiet Crisis and the Next Generation.*
[44] Gleeson, Tony and Kirstie Piper. 2002. *Institutional Reform in Australia: Defining and Allocating Property Rights.* Unpublished paper commissioned by the Department of Natural Resources and Mines. Brisbane.

Resource Holders are Sovereign Yet Rights are Constrained

Resource holders are 'sovereign'

On one hand, the list of features of pure rights can be used to show just how secure most instruments bestowing rights in land and water in Australia really are and this certainly applies to the emerging tradable entitlements in water. Government registries are largely competent and corruption-free. Governments honour their contracts. Mostly, occupiers are left to peaceable enjoyment.

The concept of *resource holder's sovereignty* highlights this serviceability. The concept is easiest to understand in relation to land. Once resource holders are granted occupation, they have wide authority or a *prerogative* to manage their properties and to decide whether or not to develop them. Subject to native title and the more fundamental sovereignty of the state, they are entitled to peaceable enjoyment and can eject trespassers. This authority to manage has its roots in common law and originated as a protection for landholders against capricious or unjust exercise of force by mediaeval rulers.

It means that resource holders generally cannot be forced to carry out works (such as planting trees) against their wishes unless it is a condition of their entitlement or of a regulatory permit to change use. So, tangible incentives may be necessary to persuade resource holders of the merits of such works. Also, improvement works cannot be implemented *en masse*: they must be negotiated one by one; no single spokesperson can bind every resource holder; they are all independent proprietors. Conversely, if resource holders agree with a proposed project, they bring their own sovereign powers to support it. It is, ultimately, resource holders who decide whether to utilise their resource, whether to undertake works and whether to participate in joint schemes such as landcare projects.

Rights are extensively constrained

On the other hand, titles to natural resources are extensively constrained. The constraints demonstrate that no instrument in any Australian State, not even freehold in land, satisfies the seven criteria for a pure property right in their entirety. The absolutist assertion that 'my home is my castle' simply does not reflect reality. As explained above, not even the States enjoy absolute ownership over Australia's water resources. For this reason the term 'property entitlement' is a more accurate term than 'property right'.

Whatever rights a title deed says it conveys are circumscribed by obligations, which may be explicit or implied. They can be expressed in either positive terms (the holder is obligated to undertake certain activities) or negative (the holder is obligated not to undertake certain activities). The obligations can take any of several forms, some associated with the entitlement, some constraints on personal behaviour:

- by *proprietorial* mechanisms, the terms and conditions of the instrument granting the *allocation* and its authorising legislation. Examples: native title; reservations from title such as minerals (applies in all States even for freehold land); easements, mortgages, caveats; pre-COAG water licences; adverse possession;
- by *regulation*, superimposed by statute. Examples: obligation to control noxious weeds or pay taxes (positive); obligation to refrain from destroying mangroves or to abide by trading rules (negative); statutory duty of care; trade practices law; family law; estate law; statutory planning (planning schemes can even give the local government right of first-refusal to purchase); anti-discrimination law which outlaws improper criteria when dealing with other parties such as when their properties are open for public business—such as shopping centres or bed & breakfasts; landlord and tenancy laws; resource operating plans requiring statutory consent for water trades; customs law which declares some goods not to be property at all;

- by *common law*; preventing a resource holder or anyone else from causing foreseeable harm to invitees, licensees or others' property. Examples: constraining pollution such as noise or salinity;
- by *civil contract*, usually entered voluntarily by the entitlement holder. Examples: crop liens and Indigenous Land Use Agreements although these have statutory force once registered;
- by *community norms*, or expectations. Examples: peer pressure, custom, good conscience, emerging scientific discoveries or government policy and international treaties which may not have been expressed into common law or statute;
- by *biophysical change*. Examples: climatic change, natural disasters, ecosystem decline.

In short, 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. Nor even to remain in occupation: for example, local governments can dispossess an owner if rates remain unpaid for as short a period as three years.

This classification of constraints aids understanding of the circumstances in which compensation might be payable and also of how to improve security. As each method is a source of risk, the list helps to explain how to assign risk. It also helps to understand the options available to bring externalities into the marketplace.

IDENTIFYING PUBLIC AND PRIVATE INTEREST

Functions of Property

Property serves many functions in a modern society, some essentially public and some private:

- it allocates natural resources to desired uses, a *resource allocation* function;
- it conveys prerogatives to its holder, a *power* function;
- it enables people to satisfy basic needs for survival, a *welfare* function.
- it allows the holder to use it for *utilitarian* functions. These can include both the generation of products or services for exchange and use for non-market purposes such as residence;
- it grants its holder protection from arbitrary oppression by the state: a *protection* function. It can protect the less powerful in society (if they can become owners). Property guarantees liberties as it allows holders to contract with others from a position of equality;
- it assigns wealth and clarifies who holds what rights: a *distribution* function. It assigns responsibility for development and maintenance of the resource.[45] Property crystallises patterns of distribution of wealth, preventing erosion of same or acting as a register of accumulation;
- it accords social standing, a *status* function;
- it is an orderly base for just and adjustable taxation: an *accounting* function, rendering transparency in apportioning liability and benefits among society;
- it allows a person to exclude others and so conveys a *privacy* function over the controlled space. It allows a person dignity and opportunity for self-expression;
- it supports self-identification: a *fulfilment* function, particularly where a person has a deep emotional tie through historical or cultural association.

Critically, these functions do not all flow from the existence of property itself but pre-eminently from the rule of law which defines and creates it.

[45] Siebert, Elizabeth, Mike Young and Doug Young. June. 2000. *Draft Guidelines for Managing Externalities*. High Level Steering Group on Water.

Public and Private Interests in Natural Resources[46]

Interests in privately managed resources can be seen as comprising both the holder's private interest and the public interest. Differentiation between these two dates back to Aristotle or earlier but it is easier to explain the distinction in theory than to define it in practice.

The National Farmers' Federation has advocated that any proposals for new regulation be subject to a 'public benefit test' and that compensation be paid for any 'shift in equity'. The difficulty lies in defining the meaning of the terms and advantage goes to those who devise the rules. If the test commences from a single-minded presumption like that of National Competition Policy—anti-competitive conduct is against the public interest—it will fail to cope adequately with the complexity of rights and obligations in natural resource systems.

The *private interest* lies primarily in the capacity of the property to provide an income or to service the holder's non-income (domestic, recreational, other) needs. Income results from the sale of its produce, the use of its natural amenities and from capital gain on sale. Societies via their governments can allocate property to private holders when they want to harness the power of private initiative. The private interest is aided by obtaining secure entitlements, though obligations enrich those entitlements, help to protect the resource and help to retain the support of the community.

The *public interest* lies primarily in satisfying community-minded obligations, though it is also in the public interest to ensure that individual enterprise flourishes. The public interest lies in issuing entitlements that are sufficiently secure to support economic activity, and in helping to ensure that the holders fulfil their obligations. By fulfilling their duty of care, holders help to safeguard the public interest.

There is not much difference between these two positions. The private interest emphasises the *rights*, the public interest emphasises the *obligations*, but each is incomplete without the other. To reconcile the two perspectives, resource holders and communities are encouraged to debate the issues, endorse plans at various scales as the documentary expressions of the understandings reached, then use them to define a duty of care for each locality and property. The stakeholders give effect to these conclusions by applying a range of tools including markets. Both resource holders and the community have stakes in ensuring that natural resources are managed sustainably.

Rights and Obligations of Stakeholders

The analysis to date has focused on the rights and obligations of *resource holders*. If natural resource management is to be a partnership, as all parties claim, it is desirable also to spell out the rights and obligations of *governments* and the community. That is sufficiently complex to warrant another paper, although some suggestions appear in the Recommendations. Suffice here to mention that a measure of *certainty* is crucial, requiring support to entitlement holders to work out their own solutions on their journey towards sustainability.

Duty of Care

Farmers and peak bodies are requesting compensation for obligations 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 stronger a duty of care may be, the weaker the case for compensating for imposing new regulatory restrictions.

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[46] Some text in this section is adapted from Skitch, R.F. 2000. *Encouraging Conservation Through Valuation*. Department of Natural Resources. Brisbane.

The 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. State legislation can give this responsibility statutory force or extend it in new directions. In Queensland, there is a statutory general duty of care 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*). An individual may be required to show 'due diligence' that a duty of care has been met. Due diligence is demonstrated when individuals show that they have assessed potential risks from their activities and have taken reasonable measures to avoid or, at least, to minimise those risks.

Codes of practice that set out desirable practices at a State-wide or industry-wide scale have been developed by some rural industry associations. While useful they can never entirely satisfy the resource holder who wants to know what to do, because of their level of generality. These codes indicate that compliance with a written property management plan supported by periodic self-audits of operations and by notes and records would be an adequate demonstration of due diligence. Some rural landholders have argued in favour of a clear, statutory definition of duty of care, linked to an enhanced set of rights. These could be expressed in a property plan certified by the state then a regulatory permit or permits could be issued in accordance with that plan. The task of preparing a property management plan helps to clarify just what the duty of care really means. The intention is that the permit could become the basis of a statutory right to manage within the bounds of that duty. Loosely, this could be described as a partial 'right to farm'.

There can, however, be no such thing as a complete 'right to farm'. In principle, it would embrace four separate elements, all problematic:

- an exemption from new *regulations*;
- an exemption from a requirement to obtain *new permits* under existing regulations;
- an *immunity* from prosecution for causing harm to the environment, invitees or neighbours; perhaps so long as defined criteria are met;
- an unambiguous definition of *duty of care*, so that any more onerous obligations imposed by the state would attract liability for compensation.

As to neutering *new regulations*, it is a principle of our parliamentary system that the discretion of parliament cannot be fettered so it is beyond power to set up a statutory fence that purports to guarantee immunity from any future regulatory restrictions that a future parliament may wish to introduce. The most secure instrument possible is simply a title or permit for a defined purpose for a defined period, but it will always be subject to future regulation.

As to avoiding *new permits*, this is possible to a certain extent, as regulatory permits do authorise the named activities to proceed during the term of the permits. However, a permit cannot exceed the bounds of the legislation under which it is written. Also, no administrative action can simply invalidate any regulation that the parliament has determined is to apply. Also, as explained later under 'Compensation for Regulatory Restrictions', permits are commonly issued for specific developments upon application; they are not open-ended. Expressed in practical terms, the current system which requires numerous different regulatory permits cannot deliver a right to farm because each permit is administered separately and certainty in one could be subverted by changes in another. It would be necessary to pass new natural resource management legislation establishing a one-stop-shop permit, but the administrative impediments would be formidable.

As to an *immunity* from litigation, this would be denying either the rights of neighbours to peaceable enjoyment of their own property (that is, it would compromise

their own property rights) or would negate the wishes of the parliament in passing environmental regulation. Legislation of this kind is fraught with objections on the grounds of ethics and equity.

As to freezing the *duty of care*, any attempt to codify the duty at a point in time could hamstring the flexibility that both resource holders and communities need to interpret the meaning of sustainability for their localities. Also, no interpretation valid at a point in time can suspend the evolution of the common and statute law. Community perception of rights and obligations has changed significantly over time and there is no reason to suppose that the process has come to an end.

Defining the duty of care

The analysis above leads to two opposing preliminary findings:

- the duty of care cannot be frozen, it evolves continually, varying in time and space;
- the duty of care should be defined more clearly, to give title holders greater certainty.

These two findings can be reconciled by proposing that resources holders and their communities regard clarifying the duty of care as 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. The duty can be defined for a particular purpose at a particular time for a particular property. A minimum threshold can be defined more confidently than an upper threshold. Defining the duty of care is a journey, not a destination.

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. Throughout this must be a community-focused process, although at the property scale ultimately it is the resource holder who is responsible for preparing the document expressing the duty. (This harks back to the concept of *district standard*, an accepted standard of best farming practice which evolved over the years and was adopted by field valuers of the former Land Administration Commission in assessing whether a lease was well managed and not, for example, over-cleared).

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

- *common law duty of care*: including an obligation not to cause off-site nuisance, but confined to a duty to individuals, not the environment;[47]
- *statutory duty of care*: in Queensland, there are two called by that name (for occupiers of State lands and the general environmental duty), as well as numerous other regulatory restrictions. The duty of care requires observance of all statutory restrictions.

To illuminate what these duties mean, or to sketch out even higher aspirations, governments, industry and community groups produce a range of advisory materials including codes of practice, environmental management systems, public policies, guidelines, web pages, kits and explanatory leaflets. They have a greater or lower degree of official weight or acceptance by industry. They can be made subject of a contractual obligation or can be recognised by the statute. Industry standards help producers act as responsible members of their industry and are often more onerous than the statutory duties. All these statements nowadays are usually grounded in the principles of ecologically sustainable management, as first outlined in the 1992

[47], [47] Bates, Gerry. 2001. *A Duty of Care for the Protection of Biodiversity on Land*. Consultancy Report to the Productivity Commission. AusInfo. Canberra.

endorsed National Strategy for Ecologically Sustainable Development but evolving progressively.

The courts have had centuries of experience in ruling on what duty of care means, especially for personal property, but their approach is highly case-specific. They rely heavily on the statute law and previous court rulings, but will take note of accepted statements of best practice, the more so if they have been promulgated by official bodies. There is a clear obligation upon industry and governments to clarify what the duties of care mean, if only because the judiciary will tend to rule that there has been no breach of duty if a defendant cannot refer to any authoritative explanation.[48] Fair play demands no less.

The passage of a statute does not of itself make the statutory duty clear, because any State-wide or even local government-wide regulation will refer to some form of code, guideline or process in order to clarify the details.

It is best to confine the term 'duty of care' to the legal 'duty' and not to draw the broader voluntary standards 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.

Dissected in this way, the argument as to whether resource holders should be compensated for managing beyond their 'duty of care' solves itself. There can be no question of compensation for fulfilling the common law duty of care, or for compliance with the statutory duty of care. (The prospect of start-up compensation when new regulatory restrictions are first introduced is a separate issue, debated later). Further, no prospect of taxpayer-funded compensation can arise for compliance with industry-accredited schemes or statements of stewardship obligations, as they are advisory or even aspirational,. Of course, governments may quite legitimately choose to pay *incentives* or *inducements* to encourage producers to move to this condition of stewardship, or may pay for specific ecosystem products, but that is not *compensation* for lost rights or fulfilling stewardship obligations.

Recent studies have demonstrated that the economic value of ecosystem services (such as air purification, carbon sequestration, water filtration, maintenance of biodiversity) on farms may outweigh the value of agricultural production by a large margin, perhaps a factor of 10:1 or more.[49] It then becomes a moot point as to whether farmers should be paid to protect these services or they should pay the community for disrupting them when they produce agricultural products in place of ecological ones. Quite complex balance sheets could be drawn up and farmers cannot assume that they would be the beneficiaries. If farmers are to pay, the prices they receive for their produce would need to be loaded above the present. Given that prices for commodities are capped by corrupted international markets, it is certain that in most industries the cost equivalent of this disruption is not being returned to producers. This means that there is almost certainly an economic deficit which in effect the whole community bears because the ecological health which has been lost has not been made up by foreign income, even assuming that a monetary return can be an adequate substitute.[50] The absence of profitability is feeding back into the capacity of resource holders to care for their natural resource.

These ecosystem services tend to be overlooked until they break down. A mechanism to continuously re-define duty of care taking account of ecosystem services should be established. A property plan can encapsulate the duty. It can help to rationalise the

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[49] Balmford, Andrew *et al.* 9 Aug. 2002. 'Economic Reasons for Conserving Wild Nature'. *Science* 297 p.950. This world research found that the economic benefits of conserving wilderness exceeded costs by a factor of at least 100:1.

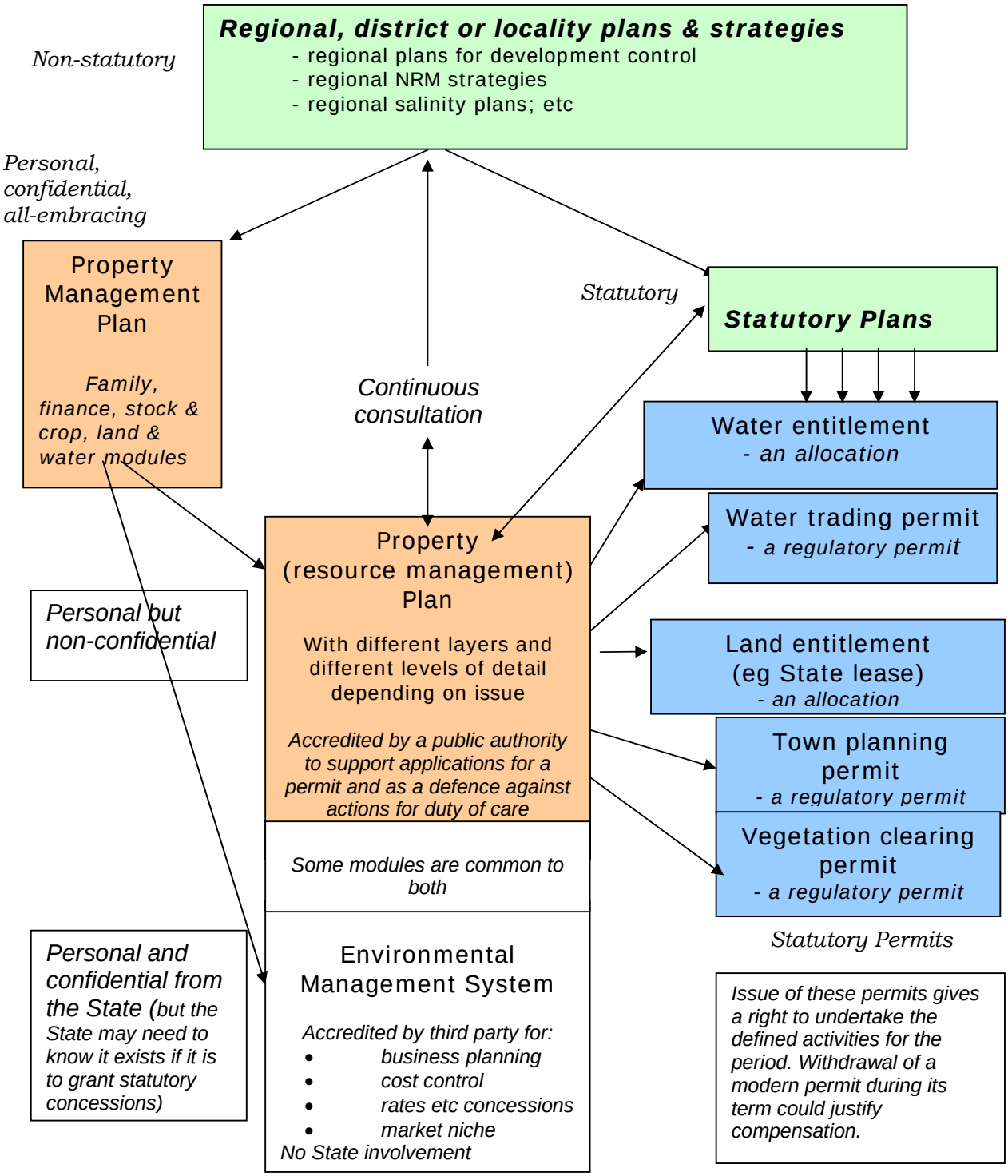
[50] Vivian, David. 1998. *Markets and the Rural Crisis: Implications for Sustainable Land Management*. Unpublished paper, Department of Natural Resources and Mines. Brisbane.

plethora 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. The broader-scale signals set a context in which to define the duty of care for each property. A great deal of the scientific information and the policy framework is documented at a regional or catchment scale but the statutory controls, both for resource allocation and regulation, are largely administered at the property scale. No wonder that resource holders yearn for 'certainty'!

Of course, not all differences of opinion and financial pain can be smoothed away; there is not always a 'win-win' solution; there can be genuine conflicts between production and protection; but misunderstandings can be greatly reduced and that would be progress. The process of translation is complex and partly subjective, even for professional experts, so most resource holders need assistance. This requires an investment of time and funds.

This property (resource management) plan or similar document dealing with natural resource management matters (not personal business or family matters) can be the basis of issuing statutory approvals, as shown in the accompanying diagram. Policy, taxation, incentives and other economic and regulatory measures should be adjusted progressively to encourage the exercise of this duty.

Permits Give Security



PART D: THREE MODELS OF PROPERTY

A model is a simulation, a generalisation which explains the functioning of a system: in the case of property, an enviro-socio-economic system. It is more than just a theoretical abstraction, because it tries to show how the real world behaves.

As an aid to analysis, three alternative models explaining the relative rights and responsibilities in property are suggested: the *ownership* model, the *bundle of rights* model and the *stewardship* model.[51] The paper argues that the ownership and bundle models are misleading and that only the stewardship model explains how the competing pressures can be accommodated.

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. 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. The owner is entitled to enjoy undivided the fruits of that labour and investment, subject only to an obligation not to cause a common law nuisance to neighbours (though the depth of this obligation is commonly under-estimated). This model is perhaps summed up in the old English but still popular adage 'For a man's house is his castle'.[52]

The ownership conception was given weight by a famous definition of property by jurist Blackstone: "…that sole and despotic dominion that one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." [53] This dictum was unsubstantiated and out of line with all reliable authorities of the time. Elsewhere,[54] Blackstone asserted that one of the "absolute rights inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land". This assertion is only partly rescued by the very powerful qualification at the end.

Farmers and graziers who take the ownership approach see new regulatory restrictions in terms of freedom. It is unfair that the government can cap or reduce the economic potential of their properties in a way that the average suburban homeowner does not ever have to contemplate (though among other flaws this analogy confuses residence with place of business). Some assertive landholders see regulation as an infringement of civil liberties and a threat to democratic freedoms.

The ownership view has pervaded Western society, as belief in the supremacy of the individual has gained potency since feudal days. It is however shackled by significant misconceptions.

Legislation protects as well as prevents

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 market to suffer intervention. The notion that the state should be limited from intruding into private decisions is logically circular, as it is only the state which decides what should remain 'private'.[55]

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[51] The three-way typology is borrowed from Singer, Joseph. 2000. *Entitlement: The Paradoxes of Property*. Yale University Press, New Haven. Professor Singer's generosity in granting an interview on 8 April 2002 is acknowledged.

[52] Coke, Edward. 1628. 'Commentary Upon Littleton.' *Institutes*. III: 73.

[53] Blackstone, William. 1765-69. *Commentaries on the Laws of England*. Book II.

[54] *Ibid*. II.I.2

[55] Mercuro and Samuels *op. cit.*

Statutory permits give certainty to those who are faced with either common law risks or some other open-ended limitation on their flexibility to manage. 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 rail against the constraints of governmental red tape on their freedoms forget the other face: 'Thus far you may go.' The permit authorises as well as restricts. (But this authorisation is not absolute, as explained elsewhere). There is the dual role: government is both a curb upon private power and a source of private power.

The argument that legislation protects rather than removes property rights is particularly easy to comprehend in urban areas where, in the absence of regulatory town planning, every landholder is potentially threatened by ugly development of the property next door. In the rural districts, where the neighbour may be miles away, the interdependence of every landholder is often not appreciated—although salinity, climate change and pollution of rivers is changing perceptions. Certainly many irrigators are coming to understand that a statutory regime that limits their take but increases confidence in that take can be a very good deal indeed. It is a fallacy that an increase in regulatory constraints must necessarily reduce the value of the asset being protected.

Others have shares in the property

Another misunderstanding inherent in this model is in the lack of recognition that persons other than the entitlement holder have rights in the property. In fact, the primary occupier is simply 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, some are more intangible. Indeed, the entire community has a stake in ensuring that the natural resources within its territory are well managed.

Although pervasive, the ownership model is ethically sub-optimal as well as being legally misleading. By portraying resource-holders as autonomous owners, we invite them to regard community obligations as an obstacle to entrepreneurial ambition, a tiresome barnacle on wealth-creation instead of a duty they owe to the other members of the community of which they are also a part. A model allowing owners to exercise power without obligation is disconnected from Australian values. It is impoverished in the social trust that has been deeply embedded in the Australian psyche ever since the children of the first convicts shouldered joint responsibility for building a new nation. It is alien to the notion of reciprocal obligations that underpinned Indigenous society for millennia before that.

The 'Bundle of Rights' Model

In the early decades of the twentieth century, the 'legal realist' school of thought originating in the United States developed the notion that property consisted not of unitary and exclusive ownership by single landholders but a bundle of distinct rights. In Australia, the debate over native title has given intellectual support to this model, as it has become clear, especially after *Wik*, that native title rights and interests may co-exist with those of the post-settlement title-holders; and further, that among the Indigenous people themselves, different individuals or clans held a range of entitlements over different resources on a single parcel of country.

Economics tends to endorse this model as it legitimises the parcelling of a resource into a range of components—horizontally, between resources such as land, water or carbon; or vertically between allocations and use rights, such as pollution discharges, salinity credits or construction of works—each of which can be *commodified*, that is, specified as an entitlement which can be traded. If an externality like pollution or erosion rises to prominence, a property right can be created to unleash market forces to compete the problem away or at least to impart to title holders a greater capacity to

manage the risk and complexity.[56] Transaction costs and complexity can increase, however, in creating multiple markets, each requiring intensive information, planning and regulation and requiring a well-designed, well-funded statutory framework and governmental capacity. The regulatory regimes for trading in land are sophisticated and have evolved over many centuries; well-bounded markets in resources which have no tradition of trading cannot arise spontaneously. Also, once tradable rights are created, it may be necessary (depending on how the rights are structured) to compensate holders if they are later removed or modified. It is easier to create and hand out rights than it is to withdraw them.

From an ecological perspective, the portrayal of natural resources such as land, water, vegetation as sticks in a bundle is sub-optimal because *ecosystems* are holistic and operate as an interconnected, inter-dependent unity. However, the complexity of administering the different resources in a modern state (especially given historical arrangements) is too great to entirely dispense with separate regimes for separate elements. The language of 'entitlements' rather than 'rights' partly overcomes this problem as it portrays the title as a means to an end (sustainability) rather than a self-contained entity. Also, reductionism can be ameliorated by coordinating mechanisms such as multi-disciplinary catchment planning.

To illustrate: a legally recognised stake in a farm may be held by: the State as allocator; a mortgagor/financier; unsecured creditors with valid contracts or crop liens; a sub-lessee; a native title holder; and a share-farmer. And in addition to these 'business' associates, there may be a range of family associates: an uncle who owns a third of one of the paddocks; a spouse who may claim a half share should the couple divorce; a trust set up to fund the children's education; and a personal loan from dad accompanied by advice on how to spend it. Each of these sticks represents a component of property and can be transacted semi-separately from the other sticks. In this respect the bundle of rights model avoids one of the deficiencies of the ownership model identified above: i.e. it does not feed the notion of exclusivist possession.

A right is a condition held against one or more other individuals. Strengthening the position of some usually weakens the position of others. This hints at the consequences of strengthening the rights of the holders of property: these rights would be held against the landlord (for lessees), neighbours, affected resource holders downstream or the community as a whole (though all parties may benefit). The process of commodification privatises what would otherwise be part of the commons, held collectively. It tends to assume that pecuniary self-interest is the most effective motive and tends to ignore the prospect of liberating other motives by removing the impediments to them.

The bundle of rights model correctly captures the fragmented nature of a property right but still does not fully capture the relationship between the holders of sticks in the bundle and those external stakeholders whose interests are not recognised legally. In this respect, it perpetuates one of the main defects of the ownership model: its separatist assumption that property is held separately from society, that property can be disconnected from its social matrix and that the other numerous holders of intangible stakes can be ignored. It forgets that property is more than a legal contract, it is also a social construct.

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 to be stewards of the resource as a necessary

[56] Young, Mike and Jim McColl, 2002. *Robust Separation*. Adelaide: CSIRO.

condition of accepting title, not as something superimposed upon an otherwise largely autonomous relationship.

This model portrays the title holder not as king of the castle but as *steward*. The fact that a person may have paid substantial sums of money for that entitlement does not give them the right to do with it as they please, for they can still be held to account by the community for their stewardship. It simply gives them priority to enjoy the property over other people who have not paid according to the relevant rules of transfer.

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.

The stewardship model does not argue for less security or greater vulnerability to compulsory withdrawal. Of itself, it does not require any new restrictive legislation. Simply, it leads to a more clear-sighted understanding of reality—of the multiple dimensions which now exist to property.

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. The tools include, as well as a serviceably secure title, information about the natural assets and especially information about how to adapt to changes in the property regime. The notion that the community has a stake in the management of a resource but no responsibility for supporting the managers is hollow. 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 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. This is the model preferred in this paper.

PART E: 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;
- for *negative* loss of legal rights when governments reduce allocations or tighten restrictions.

The first ground is discussed elsewhere in this paper, the second here. The presence or absence of compensatable legal rights will be examined first. Then several pragmatic questions which would influence the way any such rights could be treated are explored.

THE LEGAL BASIS OF COMPENSATION FOR LOST 'RIGHTS'

The public debate over property rights in about 1999-2002 centred on requests that the States pay compensation for reductions in property value when tree-clearing permits are refused or water is denied; or if previous entitlements to take water are reduced or removed. Claims for compensation amount to claims for loss when the right to use the entitlement has been limited. Two of the six forms of limit are dealt with in detail:

- by mechanisms of *allocation*—see under heading below;
- by *regulation*—see under heading below;
- by *common law*—this can give rise to damages for an aggrieved party, not for the offender;
- by *civil contract*—this cannot give rise to compensation from the state, because the state is not one of the named parties. However, the near-universality of remedies for damages when a civil contract breaks down give a clue as to how to approach contracts with the state;
- by *community norms*—this cannot give rise to compensation from the state;
- by *biophysical change*—this means that there are sound scientific reasons for not entrenching private entitlements through compensating to remove them.

Compensation for Loss of Allocation

Two classes of failure to allocate can be identified.

Compensation for non-issue or non-renewal

No 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 licence holder expire on the date of expiry of the licence. This is so, regardless of how strongly the entitlement holder may have held hopes or expectations of continuation or renewal.

Compensation for withdrawal

In what circumstances does withdrawal of an allocation gives a legitimate basis for compensation? Clearly there must be some. As shown above, there is no constitutional or common law obligation on the States to compensate for voluntary or compulsory acquisition of *land*. Yet worldwide, states governed by the rule-of-law have legislated to bind themselves to pay up when this happens. Indeed, in Queensland the *Legislative Standards Act 1992* includes a 'fundamental legislative principle' that property can be acquired only on just terms,[57] though this does not bind the parliament. What are the distinguishing features and do they apply to rights to access *water*? As one considers forms of property less tangible than real estate and forms of restriction less complete than dispossession, the situation becomes less clear. No single criterion seems absolute but it is suggested that there are two key distinguishing tests of a compensatable claim.

First, the *extent of the legal interest*. The acquisition of land can be seen as a transfer of a proprietary interest. A tangible thing of value has transferred from the previous title holder,[58] real property has been occupied, ownership has transferred, the current holder has been removed from occupation. In these circumstances, the state as acquirer is morally obliged to pay, just as it would if it confiscated physical goods. The

[57] O'Connor. *op. cit.*
[58] High Court in *Kelly v. Kelly* (1990) 92 ALR 74.

distinction between a proprietary interest and a regulatory permit or personal licence which simply permits or prohibits an activity becomes clear.

Second, the *nature of the action*. Acquisition of a title to freehold or leasehold land amounts to resumption of the state's ownership during its term. In other words, the state has withdrawn a contract, a previous deed of grant which had a perpetual term. In general, if the state reneges on a deal, it considers itself obliged to make amends. The law of contract and tort binds the state. A commitment of the state must be honoured. For this reason, if the state withdraws an entitlement in a manner inconsistent with an approved statutory plan, there is a *prima facie* argument in favour of compensation.

These points lead to a conclusion that *prima facie* there is case for compensation if the state takes back a person's real property while they are in legal possession or withdraws a water entitlement during its term.[59]

However, the case is moderated by some other considerations. Some circumstances lead governments to decline to pay compensation. Notably, the *public interest*. Although acquisition of real property is nearly always compensated, there are cases when it is not. For example, the beds of watercourses in Queensland and other States have been resumed without payment in the overriding public interest. If a single resource holder finds their land title targeted for withdrawal while others in the catchment are unaffected, the action is compensatable. If the entire catchment or especially, the entire State is subject to the new rule then it is easier to concur that the pain is being shared and the action is in the public interest.

Compensation for Regulatory Restrictions

Cases when governments pay compensation for a regulatory restriction on development of a resource are rare. Notable examples are injurious affection for downzoning under town planning schemes (payable in Queensland in restricted circumstances but generally not in other States); limited compensation for declaring certain protected areas over private land under s.67 of Queensland's *Nature Conservation Act 1992*; the provision in s.86 of Queensland's *Coastal Protection and Management Act 1995*; and the compensation scheme under the vegetation clearing controls in South Australia. (However, the latter was arguably more an incentive for taking out a heritage agreement than true compensation for introduction of the regulatory restriction. It was abandoned after costs exceeded the estimates by a multiple of more than three). None provides a clear precedent for compensation for changes in regulation. There is no provision in the Commonwealth's *Environmental Protection and Biodiversity Conservation Act 1999* for compensation of this kind.[60]

Worldwide, few governments have well developed policies for compensating for regulation, reflecting the inherent complexity of the issue.[61] There are several reasons why there can be no general obligation for governments to compensate for regulation as distinct from dispossession.

First, *public interest*. It is against common sense to argue that the regulatory environment must be frozen in time. Plans and regulations which were previously quite splendid for their era can become outgrown as a industry or district develops or as previously unrecognised environmental dysfunctions press themselves into

[59] Many State leases in Queensland include a condition allowing the State to resume the land during the lease's term without compensation. This does not contradict the above argument as it remains a condition of issue of the lease.
[60] Beattie, Peter. 31 Oct. 2002. Ministerial Statement. Queensland *Hansard* p.4310.
[61] Schwindt 1992, quoted in Tisdell, Clem and Steve Harrison. June 1999. 'Compensation for Taking of Natural Resource Interests: Principles and Practices in Recent Queensland Cases'. *Australian Journal of Environmental Management* vol. 6:99-108.

consciousness. Cumulative effects may have only recently crossed a threshold of social or ecosystem tolerance.

There is no common law tradition for making payments to people in a community for regulations introduced to safeguard that community's well-being. This argument becomes weaker if the set of title holders who are directly constrained by the regulations is remote from the benefiting community, but that amounts to a claim for structural adjustment rather than compensation.

In the long term, and assuming that there is a reasonably coherent strategy or plan in place, 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 provokes the observation 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),[62] despite its theoretical attractions, partly because of complexity—the difficulty in devising a fair formula—and partly because of hostility by property holders. Without betterment, demands for compensation are demands for one-way traffic from the public purse.

That a use has been legal for decades or a century and may have enjoyed active encouragement or even subsidy by governments in an earlier era does not detract from the above argument and does not make it a 'right'.

Second, *exercise of discretion*. This reason requires some explanation. Usually a new regulatory regime is established first by passing an Act of parliament or subordinate legislation. This provides that permits are required for the regulated activity and these are issued by a decision-maker acting under powers delegated by the Minister or the local government. Some form of policy-making or spatial planning is launched to set out policies, rules or criteria to guide the issue of discretionary permits.

In these cases, it is unclear when the compensation claimed by advocates is supposed to kick in: at the time that the regulatory scheme is approved, or only later, at the time that a discretionary permit is denied. It can hardly be the first, because a scheme by itself usually does not create or deny rights, but only establishes a decision-making framework for the stakeholders. The relevant authority usually is allowed a bounded discretion when applying the plan or rules and until its judgement is cemented in specific decisions on specific applications, an applicant will not know how large is the effect on development potential.

But it can hardly be the second option either, because if an authority is obliged to compensate whenever it exercises its discretion not to issue a permit (or to issue one for a less intensive project), then the process of issuing a permit becomes a nonsense. So long as a permit is required, the regulator must obviously have a discretion to refuse and the applicant has no *right* to approval. So there will always be some doubt in advance as to whether a permit will be issued to approve the development just as the applicant wishes.

To assess claims for compensation for reductions in property value it is necessary to assess development potential and to do this it is necessary to clarify precisely what can and cannot be approved, usually through testing the rules by lodging an

[62] Day, P.D. 2002. *Incentives and Disincentives: The Potential of Property Taxes to Reinforce Public Policy Objectives*. Unpublished report for the Department of Natural Resources and Mines. Brisbane. There is provision in Western Australia's planning legislation for payment for 'enrichment' but it has not been activated.

application. Often alternative enterprises will be possible or variations might squeeze through the hoops.

Third, *taxpayers should not fund private benefit*. A general policy of compensating for refusing applications might simply encourage applicants to lodge frivolous or speculative applications, with the aim of talking up the alleged grievance when they are refused. Common-sense planning and regulation would head for the courts. If calculated on a 'before vs. after' basis, compensation would become a one-way street: taxpayers become guarantors of property-holders' private financial interests.

When regulation becomes sterilisation

The case for compensation becomes stronger if the regulation prevents all reasonable use of the resource. For example, if an authority desires to leave land as open space, and to deny the private holder *all* beneficial economic or other use, it is customary to purchase or resume it outright rather than simply downzone it. However, a regulation must be severe to amount to sterilisation. Refusal to issue a permit for one use or even the highest economically profitable use does not necessarily mean that all beneficial uses have been denied.

Incidentally, just as applicants do not deserve compensation for not receiving rights they don't already hold, applicants as a rule should not be entitled to appeal against a refusal to issue a new permit—only against withdrawal of an existing one.

PART F: CONCLUSIONS

The 'property rights' complex of issues touches important practical questions such as how the use of natural resources should be taxed, how to share the risk brought about by reform and how to translate emerging scientific knowledge into practical advice at the property scale. It also touches important philosophical questions such as the role of the state in a modern society, the desirable balance between individual initiative and collective responsibility and the depth of obligation owed to future generations.

The theoretical and practical spheres depend on each other. The theory behind property and the insights that thinkers over the centuries have applied needs to be infused with a solid practical understanding of the nature of the problems, the views of those whose livelihoods and interests are affected, causes and effects and possible remedies. To debate the options available there needs to be a common language. At present this is lacking, in both spheres.

Findings

1. Post-1770 conceptions of property in Australia have lacked a metaphysical dimension to stewardship, an understanding of the spiritual connection between people and country. Contemporary law and practice in property should be adjusted to learn from and incorporate some of the Indigenous traditions in this regard.

2. No production system that exceeds the sustainable carrying capacity of its ecological systems can survive. Governments are responsible for regulating or easing the transition to sustainability, for all resources, using the range of tools available across all tenures. This is their duty; and resource holders expect no less. Nothing in this paper argues against payment of incentives to facilitate this process, so long as they are for public benefit and are set by an equitable formula.

3. 'Security' of a property right consists of a number of attributes that are of varying significance for investment certainty. Rights are defined by the statute

that creates them and obligations are inherent in the rights. Resource security is ultimately a gift from the community to achieve a community objective, rather than a resource holder's right; that is, the question is one of inter-generational equity and flexibility.

4. 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. Indeed, there is an ethical obligation for them *not* to pay compensation for declining to issue rights that the holder doesn't have.

5. Where allocations are reduced or tighter regulatory controls are introduced pursuant to some process of planning or public policy motivated by public interest considerations, 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 not be legitimate.

6. All title holders have a legal responsibility not to breach the common law and statutory duties of care. The common law obligation (which states that no property holder has the right to generate foreseeable harm to others' property) is more powerful than most commentators appreciate. However, a resource holder can manage to a standard of sustainability beyond the legal duty into an ethic of stewardship. Most title holders are conscious that they are stewards but require support to translate the notion into practical terms. All classes of stakeholder have under-invested in the dialogue necessary to reconcile the tensions between broad concepts and local practicality, and between private and public interests in property.

7. The absolutist 'ownership' model of property rights is misleading and does not portray the correct balance between rights and obligations in natural resources. It is inconsistent with Indigenous concepts of custodianship for country; it is inconsistent with common law; it is inconsistent with primary producers' strongly held self-identity as stewards of the land they occupy; and it is inconsistent with modern insights about the interconnectedness of ecological and socio-economic systems.

8. It is in the public interest to ensure that resource-based industries are prosperous. This does not equate to guaranteeing the profitability of every title holder nor to compensating for personal hardship, although if hardship becomes a general phenomenon, there may be a case for an adjustment package. Nothing in this paper argues against payment of structural adjustment to achieve public interest objectives where the burden of accommodating external forces or remedying previous policy mistakes is greater than resource holders can fairly be expected to bear.

9. Trust is in short supply in many fields of natural resource management. No reforms can endure in the absence of trust or confidence in the dependability of the systems being introduced. This is arguably one of the most significant of all the problems facing governments in reform. Trust is aided by increasing certainty, of which security of title is only one aspect.

Closing Remarks

Property is a social construct. The state can create new forms of property and can invest the holders with powers and rights. Officially, a right in property means whatever the law of the land says it means and that is continually evolving, in parliaments and the courts. In addition, it is embedded in a complex and also continually evolving web of obligations shared with many stakeholders. In summary, the language of *rights* is confrontational and does not reflect adequately the four rich traditions which Australia has inherited in property administration. The language of *stewardship* is better. An instrument issued over a stick in the bundle that constitutes property simply *entitles* individuals to occupy their stick conditionally as stewards for the time being, according to the terms of the instrument and by favour of the community which has an enduring stake in—and responsibility for—its condition.

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