

Launch of the Asia-Pacific Centre for Complex Real Property Rights

University of Technology, Sydney

29 April 2009

A Discussion on Property Rights

**The Hon Justice Peter McClellan
Chief Judge at Common Law
Supreme Court of New South Wales**

The modern concept of individual property rights developed in England, with the closing of the commons. Once land could be privately owned it could be more effectively used. During the late eighteenth and early nineteenth century the British people dispersed to other lands taking their understanding of property rights to the new frontiers.

In Australia, what we now understand as a capitalist ideal was superimposed on the communal property regime of the Australian Aborigines. The concept of improvement of wasted land informed the doctrine of *Terra Nullius*. Title was conditional upon land being used in a ‘recognised’ fashion.¹ The fluid concept of land ownership held by many aboriginal groups was translated by the legal world to mean that Aborigines had a feeling of obligation to the land but not the ownership of it.²

Many of the early white settlers also had a dynamic relationship with the land. They had little interest in owning it. The squatters derived their wealth from

¹ Moloney, Pat “Colonisation, civilisation and Cultivation: Early Victorian’s Theories of Property Rights and Sovereignty” in *Land and Freedom: Law, Property rights and the British Diaspora*, at 24.

² Gove Land Rights Case (1971 Federal Law report 17 at 270)

their herds of cattle or mobs of sheep that could be managed without the need to acquire property rights in the land which maintained them.

The law is an intellectual construct which the citizens of a community accept as defining their rights and obligations. The individual components of the construct may be illusive. The High Court recently discussed the concept of property rights in *Telstra Corporation Limited v The Commonwealth* [2008] HCA 7. This discussion followed the decision in *Yanner v Eaton* [1999] HCA 53 at 17-19 where the Court said:

The word "property" is often used to refer to something that belongs to another. But ... "property" does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of "property" may be elusive. Usually it is treated as a "bundle of rights". But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said, that "the ultimate fact about property is that it does not really exist: it is mere illusion".

The difficulty in defining property rights does not diminish their importance. Security of tenure is necessary for the effective functioning of a sophisticated society's economy. The lack of enforceable property rights, especially for farmers, has had disastrous consequences in Zimbabwe. The government's seizures of farmlands resulted in "a pullout of foreign investment, defaults on farm bank loans, and a massive decline in agricultural production."³ Many farms could no longer function because they lost their source of water. Irrigation pipes, which were no longer owned by anyone, were dug up for scrap metal in a free-for-all leaving many farms dry. Ironically some of the metal from the pipes was

³ Richardson, Craig J. "How the Loss of Property Rights Caused Zimbabwe's Collapse" Cato Institute Economic Development Bulletin No. 4, November 14 2005, at 2.

melted down to make coffin handles, “one of the few growth industries left in the country.”⁴

In recent years, China has taken steps to secure private property rights. The reforms protect individual rights to the same level as that afforded to collective and state property rights.⁵ The Chinese government said that the legislation was to protect the “lawful property accumulated through hard work.”⁶

As society becomes more sophisticated, new “things” become important for both economic stability and development. Property rights must be defined in relation to these new “things”. Rights to human tissue both inside and outside human bodies pose difficulties for both communities and individuals at many levels. Rights to water and rights with respect to carbon pose difficult contemporary problems. And even when a right has been identified and defined valuing that right raises a different mix of problems.

Water rights have been legislated for over a century in NSW, beginning with the Water Rights Act 1896. Trading in water rights is not a recent invention, having been used unofficially since 1940.⁷ The first formal trading scheme in NSW commenced in the mid 1980s when the Water Act was amended to allow the transfer of water entitlements. This was intended to make the system more efficient, and perhaps it did, but it did not diminish the total demand for water. Previous over allocation problems could not be addressed simply by creating tradeable rights.

⁴ Id.

⁵ Allens Arthur Robinson. “Focus: China – Property Rights Law – June 2007” www.aar.com.au/pubs/asia/foch8jun07.htm (last accessed 18 March 2009)

⁶ Beck, Lindsay and Guo Shipeng “China Property Law Bolsters Private Rights” www.reuters.com/article/worldNews/idUSSP36543620070308 (last accessed 6 March 2009)

⁷ A Pye, “Water Trading Along the Murray: A South Australian Perspective” (2006) 23 Environmental and Planning Law Journal 131 at 132.

It is a difficult task to determine the elements which are comprised in a right to water and its value given all of the “externalities” that must be considered. Bell sounds a word of caution. “The great danger with relying on a market which is created by economic rationalists is the extent to which the important social and environmental aspects are ignored by the market simply because the market does not have a mechanism to value them.”⁸ Although the market may be able to allocate a price for water, the price may not take into account the damage occasioned to the biosphere, and may not accommodate the essential human right of access to clean water. As the Murray Darling Basin continues to dry these issues come into greater relief.

Carbon rights and the re-trading of those rights present a significant challenge if we are to bring them within the intellectual construct of effective law. A national emissions trading scheme appears inevitable. The challenge is to develop a structure for it that works.

The European Union Emissions Trading Scheme is currently the world’s largest carbon market.⁹ In contrast to the present system in NSW, which has adopted a baseline and credit model, Europe has a cap-and-trade system. Emission allowances are created, and firms which pollute less than their allotted amounts can sell the remaining permits to those who wish to pollute more than their allotted amounts.¹⁰ The first phase of the scheme ended in 2007. It provided the EU with experience in emissions trading, to discover the appropriate market prices for carbon and to uncover design problems. The main problem quickly

⁸ Bell, F. “Why Water is a Unique Type of Property – An Analysis of Various Property Rights in Water Across Australia” Third Australasian Natural Resources Law and Policy Conference, Adelaide, March 2001 at 14.

⁹ Wilder, Martijn and Monique Miller. “Carbon Trading Markets: Legal Considerations” *Climate Law in Australia* editors Tim Boyhady and Peter Christoff, Federation Press, 2007 at 73.

¹⁰ Christoff, Peter. “Can the invisible hand adjust the thermostat? Carbon emissions trading and Australia” *Climate Law in Australia* editors Tim Boyhady and Peter Christoff, Federation Press, 2007 at 91.

became evident. The baseline levels were over estimated. Once it became clear that there was a lower level of emissions than expected, which in itself is positive, the price of carbon credits dropped significantly.¹¹

The issues involved in an effective trading scheme will continue to emerge. The need to create a bundle of tradeable rights which are enforceable provides a challenge to scientists, sociologists, valuers and lawyers. It is a challenge which we as a community must embrace.

The University is to be congratulated for creating the Asia-Pacific Centre for Complex Real Property Rights. In particular professors Spike Boydell deserve all of our thanks for his initiative in creating a centre for the study of these issues which are fundamental to the social and economic foundations of contemporary society. Through John Sheehan, who I know will have a significant involvement in the project, I have recently had the opportunity of discussion with Spike Boydell. The university has chosen wisely in asking Spike to join with others to develop the Centre.

Many of you will know of the game Second Life which, for reasons I do not understand, has led millions of people to create virtual lives which they conduct in a virtual world. Notwithstanding the world's economic downturn the game prospers and some players continue to make real profits. The success of the game proves that provided the rules meet community objectives and are accepted by individuals as fair and effective, enforceable property rights can be created.

I wish the Centre every success in its future endeavours.

¹¹ Smith, Stewart. "Greenhouse Gas Emission trading" NSW Parliamentary Library Research Service Briefing Paper No 2/07 at 11.