

LANDOWNERS' vs MINERS' PROPERTY INTERESTS

The unsustainability of property as dominion

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ince the 2010 release of the film *Gaslands* in the US, community opposition to coal seam gas ('CSG') mining activities has gained considerable momentum in Australia. The grounds of opposition rest on environmental concerns and associated risks to the health of those living nearby, as well as economic and social impacts through destruction of food-producing land and local communities. These issues are being taken to governments across Australia — particularly by the community-based lobby group, Lock the Gate Alliance Inc ('Lock the Gate'), but also by the Australian Greens. Farmers' groups have highlighted the threat to food production nationally, where exploration and mining occur in agriculturally viable areas.

Opposition to CSG activities has included calls for environmental safeguards, moratoria on CSG extraction processes pending further research on their impacts, and protection of food production. The Environmental Defender's Office (NSW) has written a comprehensive submission on how to address many of these issues — and others — within a framework of sustainability principles, but focussing on planning law and approvals.¹

In addition to these grounds, much opposition involves a vocal assertion of private property rights by freehold landowners against private property rights of miners to explore and extract.² This has resulted in an alliance between green (environmental) interests and farmers' groups, which together appeal for recognition and protection of freeholders' private property. Disputes between landowners and miners over access to private land for the purpose of exploiting CSG have thus highlighted the inadequacy of the Australian framework of property law, which centres on individual private rights, to cater for much deeper interests representing community and ecology.

As a landholding system founded in feudalism, and perfected in the individualism of Enlightenment thinking, the common law understanding of land and property more generally remains predicated on individualism and classical utilitarianism in a world that can no longer afford to operate on these assumptions. What the CSG issue highlights is the centrality of a competition between *private* interests, in what is more sensibly categorised as a *public* interest debate. In the private sphere, however, there appears to be no room for the deeper public concerns that underlie the present debate over CSG exploration and extraction.

This article highlights the inadequacies of considering interests in land (property) in terms of individualistic private interests, in light of the ecological issues facing society at large. It does so using the CSG debate as an example of the limitations inherent in our system of private land holding. It first provides a background to Australian law's understanding of the nature of private property and its attendant rights, then examines how this framework is unable to accommodate deeper community concerns such as food security and ecological sustainability. Finally, it assesses whether the issue to be addressed in the CSG debate is one of competing private property interests, or rather one of re-thinking the very nature of private property to reflect a more sustainable ecological framework.

The nature of property

In spite of fundamental shifts over time in our understanding of what might be property or who might own it, the underlying conception of what property is has not really changed over centuries. The traditional common law understanding of property in land is that all land was held in common by humanity, and that God gave man (sic) dominion over nature. In his *Commentaries*, Blackstone supports the concept of private property through the application of natural law principles found in the Bible. His approach justifies private ownership of land based on improvement of the land and occupation — recognising the benefit to the commonwealth of the outputs from the application of labour to land.³ In a similar vein, John Locke justified original ownership of property on the basis of application of human effort.⁴ By giving of oneself through labour, land would be transformed from that belonging to the commons to that belonging to the labourer. Each approach justifies a transfer of interests in a resource (land) from the commons to an individual.

Such an approach also represents the idea that land should always be put to its highest use — this highest use being intrinsically related to productivity in terms recognised by the market. The discourse of Blackstone and Locke represents 'highest use' in terms of individual (human) utility. It is this understanding of the nature of property that enabled Europeans to justify dispossession of traditional owners of Australian lands. Such an understanding conflated ownership or property in land with cultivation in the European way — the investment of labour putting land to its 'highest use'.

Having justified the idea of private property, the law describes and allows enforcement of the rights that accompany the idea, including the right of exclusion of others:

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing. ... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.⁵

Indeed Blackstone explains that the only way to part with ownership is to expressly disavow one's own title.⁶ This has been described as the 'castle model' of property, whereby the owner has an absolute right of veto over others accessing the land,⁷ and is the basis of

the private property argument being run by Lock the Gate.⁸

While parting with ownership — and its attendant right of dominion (or exclusive possession) — can be done by overt abandonment, more conventionally it is done by way of written agreement. This idea is reflected in the recently introduced Landholders' Right to Refuse (Coal Seam Gas) Bill 2011 (Cth). The aim of the Bill is to enshrine a right of landholders to refuse CSG mining activities by corporations on Australian food producing land where there is no prior written authorisation by the landholder. In proposing such a framework, the Bill, introduced by the Greens in the Senate,⁹ operates within the legal construct of private property — effectively giving priority to the landholder over the miner. This begs the question: how did the landholder's right to exclusion get to the point of requiring statutory enforcement?

Disaggregation of 'land'

While private land remains held by the Crown under Australian state-based tenurial systems, what is held has become smaller and less significant. As a concomitant to an absolute right to exclude, the common law doctrine of *cuius est solum, eius est usque ad coelum et ad inferos* (whoever owns the soil is theirs up to heaven and down to hell) provides that the land owner had dominion over an estate that exceeded the mere surface of the soil and included minerals, subsurface, sky, water and vegetation.¹⁰ While obviously one cannot literally own 'up to heaven' or 'down to hell,' increasingly this doctrine has been further narrowed as interests in land have become unbundled.

Originally, the only reservation in a grant of land was the royal metals, gold and silver, which were reserved to the Crown.¹¹ That is to say, one would own the 'land' except for any gold or silver contained in it. In Australia, over time, various other minerals, metals and petroleum were reserved from land grants in favour of the Crown. This resulted in the creation of one subject of property rights — land — and a second subject of property rights — minerals and petroleum.¹² Land granted before statutes reserved these resources continues to include these rights. National media has recently identified this as a 'loophole' in land ownership, identifying it as a loss for the state in mining royalties.¹³ This in itself is telling of the extent to which the disaggregation of land has become normalised in our culture — that parcels granted before minerals were reserved constitute a 'loophole' to land law, and that the loss is one of state revenue. The question might be asked why separation of ownership of minerals, metal and petroleum might not be considered a loss to the land itself.

The common law also recognised riparian rights in favour of landowners — rights to water that flowed over or adjacent to land. This too has become 'unbundled', creating yet another subject of property rights. Queensland, for example, has legislation declaring 'all rights to the use, flow and control of all water ... are vested in the State.'¹⁴ Use of this water is granted to riparian owners via licences of some sort.¹⁵ Water rights are usually associated with the land adjacent to the waterway — though obviously rights in upstream owners may impact on downstream owners. The reality of the connection between ownership of water and land adjacent to it means that these rights differ from mineral rights that vest in another owner, over the same parcel of land.

Planning laws are obviously another restriction on the use of land and, therefore, the extent of enjoyment — however unlike minerals and water, these restrictions do not take the form of an unbundling of the constituent parts of land through creation of separate property interests.

What is interesting to note about the way in which the concept of 'land' (and consequently its 'ownership') has been narrowed, is that rather than supporting a community-based or public approach to these resources the State has used its reserved rights in these resources to create new markets based on the same individualist paradigm that universally underpins our understanding of what is property.

The consequence of unbundling of property rights in this context is the creation of another market for private property interests (CSG) that directly competes with an existing private property interest (freehold land ownership) — through a remaking of the legal constitution of 'land'. The conflict between landowners and miners now highlights the essential basis of our law: that land and its constituent parts are a 'legal object that can be bought, sold, exploited or destroyed to satisfy human preferences'.¹⁶ Burdon identifies the tension, stating that:

contrary to elementary ecological principles, the law's implicit message is that the physical world divides easily into component parts, with the water owned by 'A', the land by 'B', the surface mineral rights by 'C' and the airspace by 'D'.¹⁷

The clash over CSG in Australia represents the most recent manifestation of this progressive unbundling. The landowner loses control over access to resources under the ground and loses the right to exclude others from the land, through the granting of competing rights under legislation.¹⁸

Creation of rights to CSG

While CSG exploration is occurring nationally, Queensland and New South Wales are the primary locations of CSG in Australia at the moment.¹⁹ The Queensland legislative framework is used below as an example of how the competing property interests are established.

CSG in Queensland is defined as 'petroleum (in any state) occurring naturally in association with coal or oil shale, or in strata associated with coal or oil shale mining', and is reserved to the State under section 9 of the *Petroleum Act 1923* (Qld).

In Queensland, permits to explore for and extract CSG are issued under the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) ('Act'). The main purpose of the Act is to set up a 'safe, efficient and viable petroleum and fuel gas industry'. In this sense, the Act is clearly enabling 'petroleum activities' — rather than primarily managing land or interests in land, or resources in a much broader sense. It seeks, however, to manage these activities 'in a way that has regard to the need for ecologically sustainable development for the benefit of all Queenslanders'.²⁰ In the same section, the Act's purposes include appropriate compensation to landowners,²¹ and facilitation of constructive consultation with those affected by authorised activities.²²

The Act's purpose is not to protect the interests of other property holders — but rather to confirm that their interests are compensable. Radin suggests that 'fungible property' is that which can be readily converted into money value, and distinguishes it from 'personal property'.²³ Opposition to CSG extraction operations by landowners suggests that this property is not fungible: that what is at stake is something more than a compensable financial interest. It is a relationship with the thing (the land) that matters in these

claims to property. This is not recognised by the legislation — and indeed on present conceptualisations of property that underpin our law, they would not be.

Chapter 3 of the Act provides specifically for rights to exploit CSG — and its stated objectives revolve around resolving any conflict between a CSG tenure and other petroleum or mining tenures under this Act or others.²⁴ In other words, the focus of the legislation is on securing private property rights associated with mining — making no provision for the protection of other private property rights except in terms of compensation. The relationship between miner and landholder is to be managed under the *Land Access Code*.²⁵

Again, the *Land Access Code* presupposes the private property rights of the miner and the landholder — except to the extent that it also inevitably supports the right of the later interest-holder (the miner) to access the land of the earlier interest-holder.

The Queensland Government is committed to balancing the interests of the agricultural and resource sectors to address issues related to land access for resource exploration and development. Good relationships between these groups, assisted by adequate consultation and negotiation, will improve transparency, equity and cooperation across the sectors involved and creates a more level playing field for all.²⁶

Predictably, human preferences themselves will differ in the use and exercise of rights in the same land. The logical conclusion to be drawn from this conceptualisation of property is that the private property interests thus created will inevitably compete with each other.

Ironically, the exercise by miners of CSG rights is in direct contrast to the mining industry's widely publicised untruthful objections to native title following the *Mabo* and *Wik* decisions.²⁷ Aggressive national campaigns were run at the time, warning freehold landowners of the threat that native title posed to the maintenance and exercise of private property rights.²⁸ Native title, that most fragile of all property rights, was never contemplated as being in competition with freehold title in spite of the miners' claims.²⁹ In contrast, CSG rights directly and explicitly collide with what has traditionally been known as the 'highest and most extensive interest that a man (sic) can have' [in land].³⁰

The argument in favour of CSG operations and miners' rights seems to be economic: there is a wealth of riches available for the state (the 'greater good') to arise from the CSG enterprise.³¹ Therefore, in Blackstone's framework of justifying private property,³² the CSG mining interests are preferred because of the net benefit to the commonwealth through the exertions of labour.

The arguments advanced by farmers and environmentalists exist in a framework other than economics. To the extent that these arguments are based on private property, they presuppose a 'focus on connection between persons and things, [emphasising] a person's need for a stable context to constitute and express themselves as persons.'³³ These arguments are also public interest arguments about the utility of food production, land quality and wider environmental protection. Not only is there a private property competition where one party argues personal connection and the other an economic interest, but there is also a competition for the public good (or public goods) of the environment and its resources as valuable on their own terms.

What is of interest here in terms of the CSG debate is the inevitable meeting up of different and incompatible property rights over compartmentalised parts of what is really an indivisible whole. Within our present conceptualisation of what 'property' means, and the justification for private property, there can only be one winner in this competition. Assuming that a form of private property and a market mechanism remains a justifiable foundation for our economic system, the CSG conflict illustrates that this exists within a much wider context, warranting an urgent re-think of the philosophical foundation of private property itself.

Re-thinking property

Where globalisation of problems — climate change, environmental degradation, human rights, sustainability, energy production — results in the need for national or global *public* responses, contemporary solutions often (though not always) utilise *private* property interests and free market mechanisms.

This may seem logical in one sense. Creating a market-based mechanism to put a price on carbon emissions, for example, is intended to cause people to be more responsible in their carbon production to avoid paying that price. Similarly, those paying for water entitlements may find more efficient ways to use this precious resource.

Alternatively, restricting private rights may result in a community resource that receives protection for the betterment of society or for its own sake. For example, vegetation protection orders seem a logical response to clear-felling land where that results in erosion, soil degradation, landslips, habitat destruction and general loss of amenity. On the other hand, such limitations on the private use of land are often contradicted by other planning approvals allowing use that could not be justified within an ecological framework. In any case, such restrictions are not categorised as 'property' rights per se but rather fall within environmental law.

While environmental law has had success in raising consciousness of the need for sustainability, many argue that economic concerns continue to prevail in the face of 'solutions' such as narrow environmental management programs.³⁴ Burdon argues that environmental laws are 'defensive in nature'.³⁵ Presupposing the right of the individual owner to engage in the incidents of property, and within our traditional property-as-dominion framework, environmental laws do not elevate the environment or its ecology as a legally recognised entity or object of property in their own right. To this extent, these laws serve humans but not the environment.³⁶

Earth jurisprudence offers an alternative foundation for thinking about human relationships with the environment, including, it is submitted, the idea of property underpinning our relationship with land. If, instead of assuming a dominion and control approach over land and its constituent resources, the law were to take a more holistic and relational approach to the idea of 'private property', conflicts such as those occurring between CSG miners and landholders would not arise.

In the first place, perceiving land as an ecological system would avoid its compartmentalisation in terms of different resources — minerals, water, trees, animals. As a legal concept, 'ownership' of 'land' would be considered in terms of a unified whole. Use of the land would, therefore, operate without competition for various resources embodied within it.

Second, the relationship of the 'owner' and the land would require reconsideration. Rather than a relationship of 'dominion' as conceived by early common law jurists, the relationship would elevate the land from object to subject thus becoming characterised by stewardship of land — as an ecosystem — in its own right. Under such principles, destruction of, or harm to, this ecosystem would *not* be an incident of ownership. In contrast, contemporary understandings of the incidents of full ownership of an estate in fee simple include the right to lay to waste — to destroy. In terms of CSG, this implicitly applies to miners (even though under the present

system they do not own the 'land'), thus potentially limiting or prohibiting such activity. It would also apply to farmers and other freehold owners — indeed all those who hold an interest (property) in land. Industrial systems of farming and poor land management would come under scrutiny as falling outside the boundaries of one's 'property' in the land. Rethinking property and its bounds in this way contrasts with the imposition of an array of 'environmental' laws onto that of property.

Both these foundation principles lead to a third supporting idea: that of community or the communion of humans with each other and with the environment. This takes the idea of an ecosystem exclusive of humans and transforms it into one that includes humans and their own relationship to each other. The groundswell of community engagement generated by CSG is illustrative of the power of connection of people to each other and people to land and their environment. Hillman, for example, advocates a link between participation and environmental sustainability — a clear connection linking social and environmental justice.³⁷ That CSG has become a touchstone for widespread community opposition and action, perhaps, illustrates that at a grassroots local level, people are calling for a re-evaluation of the meaning of human interaction with the environment.

Conclusion

While pressure needs to be maintained over the reform and effective enactment of laws to protect the environment, so too do we need to reconsider the law's approach to concepts that underpin our relationship with the environment — not as a legally constructed resource, but rather as a holistic, networked, global ecosystem.

The CSG conflict between private property interests of 'land'-owners and miners reveals the inadequacy of property law to conceptualise what is at stake, other than in terms of pure economic interests.

There is a way to go in re-thinking the terms of granting CSG mining interests. The terms need to be cast according to true sustainability rather than in terms of developing a petroleum industry. So long as the focus is on environmental management, CSG interests would exist in a system that is superimposed on an outdated justification for, and expression of, private property interests. Instead, what is called for is a re-thinking of the very foundation of property so that it encompasses concepts of connection of ecological systems, of communities and people with the environment.

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Update

On 1 May 2012, the NSW Legislative Council General Purpose Standing Committee No 5 released its report into CSG. The Committee made 35 recommendations, many of which were concerned with distribution of economic benefits of mining and management of environmental impacts. While a template agreement was recommended to support agreement-making between landholders and miners, the majority of recommendations can be considered to affirm the existing conceptualisation of land and mining interests. That the final recommendation is to suspend issue of production licences until implementation of a comprehensive framework for regulating the CSG industry does not indicate a shift in thinking about the fundamental issues of underlying property interests.

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