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Unbundling Interests in Land

It used to be that 'a man's house is his castle' and indeed this aphorism is reflected in the common law doctrine of *cuius est solum, eius est usque ad coelum et ad inferos* or he who owns the soil is theirs up to heaven and down to hell. Increasingly however this doctrine has been narrowed as interests in land have become unbundled.

I draw a distinction here between the recognition that one cannot literally own 'up to heaven' or 'down to hell' and what is considered to constitute 'land'.

Originally the only reservation in a grant of land was the royal metals, gold and silver, which were reserved to the Crown. That is to say, one would own the 'land' except for any gold/silver contained in it. In Australia, various other minerals and metals were extracted from land over time - not by mining, but through legislative reservation of minerals for the Crown. This resulted in creation of one subject of property rights - land - and a second subject of property rights - minerals.

Likewise, the common law recognised riparian rights - rights to water that flowed over or adjacent to land. So water was considered to be part of the land. This too has become 'unbundled', creating yet another subject of property rights.

The contemporary clash over coal seam gas in Australia represents another dimension of this progressive unbundling whereby the landowner loses control over access to resources under the ground and according to some landowners, also lose control over permissions to access land: they 'don't have a choice' in giving permission for the gas wells.

The result, as reported in The Weekend Australian there is an alliance between environmentalists and farmers both of whom reject coal seam gas as an interference in the farmers' control over farmlands.

The consequence of unbundling of property rights in this context is the creation of another market for private property interests (coal seam gas) that ostensibly directly competes with an existing private property interest (land ownership). While there may not be anything inherently wrong with a private property interest or market (depending on your ideological persuasion of course) what does need to be considered here is the foundation that justifies the making of laws that allow this direct competition.

If private property interests are to be elevated above all else (a libertarian view of property) then there seems to be an inherent conflict between the pre-existing (private) property rights of the landowner and the subsequent interests of the coal seam gas rights holders. Perhaps such competition is regarded as putting resources to their highest use (see eg Adam Smith and comparative advantage). In this case, the law's granting of permission to extract coal seam gas will presumably be based on a public interest argument - that this land is put to more productive use by coal seam gas extraction than from farming. Coal seam gas extraction seeks to meet global demand for energy production - a pressing public need.

The arguments by farmers and environmentalists challenge this. These arguments seem to be based not just on protection of pre-existing private property, but are likewise public

ABOUT ME



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I lecture in land law at James Cook University and I write and think about the nature of

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interest arguments about the utility of food production, land quality and wider environmental protection. On this basis, not only is there a private property competition, there is also a competition for public goods.

It is my observation that these private/public issues are becoming increasingly prevalent, particularly in the context of the unbundling of property rights in land. Where globalisation of problems - climate change, environmental degradation, human rights, sustainability, energy production - result in the need for national *public* responses, it is interesting to note the solutions proposed often, though not always, utilise private property interests and free market mechanisms.

Posted by Kate Galloway at 11:36



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