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Wednesday, 10 December 2014

Planning law is not property: Sea level change in Queensland



The Torres Strait is already suffering sea level rises*

Queensland's Infrastructure Minister, [Jeff Seeney](#), has ordered a [local government authority](#) to remove from its regional plan any references to climate change induced sea level rise. The stated objective of this directive is 'to ensure residents' rights to build and develop their properties were maintained and not restricted by their local council'. The Minister confirmed that he had intervened to protect property rights.

I suggest that instead, the Minister has a confused understanding of appropriate government authority to regulate land use, thus undermining government's own legitimacy in this area. Additionally he has generated a dissonance between the real-world market practice of insurers and the ideological myth of property as dominion. In doing so he may be exposing the local authority (and state government) to liability in the future. All in the name of property.

Does his argument have foundation? Or does it simply reflect an ideological position?

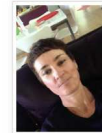
The nature of property

At law and contrary to its popular understanding, property is not a thing. It is generally regarded as a relationship between a person and a thing. Perhaps more particularly, it represents the capacity of a person to exercise control over the thing in their dealings with others, in a way that is protected by law. The type of control depends on what the law is prepared to enforce. Again, contrary to popular conception, this is not an absolute matter. There is no single 'true' definition of property. It is a concept contingent upon time, culture and ideology.

Until the abolition of slavery in the West, (some) human beings were property. That is now fundamentally objectionable. Similarly, women and children are no longer, and can no longer be, property in Western democracies. Our very conception of property in contemporary Australia is that whatever property is, it is *not* people. This is just one illustration of the changing nature of property, that it is not absolute.

Nor is property necessarily *ownership*. There are many types of property that are not co-extensive with how we understand 'ownership'. For example, a bank mortgage over land is a type of property. Yet for so long as the land owner is not in breach of the mortgage, the bank has no right to possession of the land, no right to exclude. The nature of its property interest is significantly less than ownership.

About Me





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Ownership, on the other hand, tends to connote a full 'bundle of rights'. This indicates that the 'owner' holds a number of different rights that are recognised by the law. Commonly in relation to (freehold) land, we understand these ownership rights to include the right to exclude others, and the right to use the land as we see fit. However the assertion of an overarching right of dominion over freehold land is misguided. This concept goes beyond what the law actually provides for as the substance of the meaning of 'land ownership'.

The boundaries of land ownership

In Queensland, as in other Australian states, most urban land is held as a freehold estate in fee simple. This is 'the greatest estate known to the law'. In other words, this type of property is the most expansive set of rights that will be enforced. The content of these rights and their extent is always dependent on the law of the day. Notably, the intervention of Minister Seeney notwithstanding, the content and extent of property in land has [diminished over time](#) in favour of the State.

Originally the land owner owned 'up to the heavens above and down to hell'. 'Land' included vegetation, water, minerals - except gold and silver - and all the airspace above it. In Australia many of these component parts have been removed from private ownership, to become vested in the State. Using Queensland as an example, the State owns the [water](#), [all minerals](#) and [greenhouse gas storage reservoirs](#). There are [limits on how vegetation can be dealt with](#) - and rules [requiring its destruction if it impedes a neighbour's view](#). All of these interests occur over the same parcel of land. And the State can potentially allocate them to different owners, creating conflicting property rights. Perhaps if the government were truly concerned about landowners' property rights, it would not allow coal seam gas exploration or mining on private land.

Additionally, the pressure of urban development long ago resulted in government regulation of land use. This is interesting to consider in contrast to the concept of property. Planning laws do not interfere with land title, the legal right to enforce 'ownership' of property. But they do constrain the purposes to which land can be put. They work alongside other regulations such as building standards to ensure considered and orderly development not just of individual parcels of land, but of entire communities.

Planning laws are generally considered necessary. Indeed they can enhance the value of land. For example, no residential neighbourhood would appreciate the construction of an abattoir in its midst. The reason the law does not permit such a mix of uses is to protect amenity and health.

Most planning regulation is accepted without question. It is not considered a burden on one's 'bundle of rights', nor an impingement on property interests. We understand that the extent of our property is a different question from that of regulating its use. Or at the very least, we understand that our rights do not amount to '[sole and despotism](#)'.

Therefore the application of limits to use is not a question of property, as asserted by Minister Seeney. The question of what limits to impose is a matter of expert opinion about appropriate land use. And this is a different question.

Sea level rise and land

All scientific indicators show that the Australian coast line is to expect sea level rises. The 'high end' estimate is a [1.1m rise by 2100](#). This is expected to affect South East Queensland and Sydney the most. The risk has been [acknowledged by the insurance industry](#), which will not, as a rule, cover coastal properties for risks associated with sea level rise. This reality reflects the dissonance in the Minister's intervention. He is permitting land owners' activities that are otherwise constrained in a commercial sense. Being uninsurable casts doubt on the value of the land as security also. How do these realities align with the Minister's view of 'property rights'?

As [has been pointed out](#), 'management of the coastal zone is the source of considerable conflict between local politics, ideology and private property rights.' In New South Wales, the original policy of '[planned retreat](#)' from areas of potential inundation has been withdrawn. The new framework is designed to make it easier for land owners to protect their land from sea level rise by preventative works involving sand bags.

There are two issues that arise from increasing sea levels. The first relates to 'greenfield' sites and what development might be approved there. Should councils restrict new

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development to limit inevitable losses from sea level rise? Or should land owners be free to use their land as they wish? In Queensland, Minister Seeney has seen fit to free owners from the constraint of sea level rise. But not, it should be pointed out, from the limitations in the remainder of the relevant regional plan. Owners do not, in fact, have complete dominion over their land

The second issue is a so-called legacy problem. This issue can be addressed in the short term by preventative works eg sandbagging of existing development within potentially inundated areas. This legacy problem raises questions of liability. Do property owners, exercising their dominion over land, also need to bear the cost of such infrastructure? Roche et al [identify a number](#) of questions about the challenges arising from this problem.

What is clear is that the Minister's intervention does not 'protect property rights'. There is no *right* to build and develop land other than any spelled out in the relevant planning legislation - this is not a property right, but a planning right. Therefore until Minister Seeney's intervention, land owners did not have a right to develop. He created a development right for them. Any right to build or develop is always framed by planning instruments which are based on sound principles of planning. In the case of sea-level change it is based on evidence-based scientific projections.

Removing the constraints on development now simply defers the imposition of the cost of sea level change. And what the Minister has failed to reckon into his position is the relationship between land owner, government and the wider community in bearing those costs as they arise.

Property as ideology

There is no basis on which to suggest that the Minister has protected property rights. Instead what he has implemented is an ideological position concerning the extent of a landowner's rights, assuming them to be more extensive than they really are. If he were truly protective of the fullest extent of property rights, he would not allow the creation of competing rights, such as mining rights, over land owned by others.

Alternatively the Minister's order reflects a stubborn denial of climate change related sea level rise. In this case, his position contradicts the fact and the desirability of regulation of land use and denies adequate infrastructure planning for the community. Ironically he denies it also for the landowners themselves: the very parties whose rights he purports to protect.

* image from 'Climate Change in the Torres Strait'

Posted by [Kate Galloway](#) at 18:07

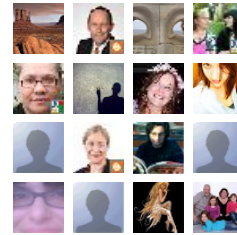
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