

Who'd be a traditional landowner?

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I wouldn't be a Northern Territory traditional landowner for quids.

This is not just because of the much-publicised drawbacks of remote 'community' life – it's also because I'd probably lose as much as I'd gain from the Commonwealth's 'Northern Territory Emergency Response'. However, I guess I'd be accustomed to taking one step forward and another unpredictable one back – it's the rhythm of life in indigenous affairs.

As a Canberra resident, I enjoy a high level of government service delivery. I also own land - admittedly not freehold, but title which I regard as secure. I don't expect government to deprive me of it any time soon, and I particularly don't expect this to happen so that someone else can live in my house. Nor do I expect to be asked to surrender my property as a precondition for receiving other government services like policing.

But under the 'Emergency' Bills introduced this week, in order to receive services which begin to approach those which I enjoy, NT traditional Aboriginal owners will lose control of their land for five years, and not on the usual terms.

Normally, when the Commonwealth takes property rights like the 'Emergency' five-year compulsory leases, it does so under the *Land Acquisition Act*, which applies Australia-wide and requires due process and 'just terms' compensation. The Hawke government was even prepared to extend this courtesy to Mr John Clunies-Ross in its efforts to exclude him from the Cocos Island territory, where (according to the United Nations) he lived in a 'feudal' relationship with the rest of the population.

The 'Emergency' Bills do require either rent or compensation or both, but they attempt to limit these payments in at least five other ways. Limited compensation was not what the government promised traditional owners – or the Australian public.

First, although rent (as determined by the Commonwealth Valuer-General) *can* be paid for these leases, this will only happen if the Commonwealth Minister allows it. Unless this clause is amended to make the payment of rent compulsory, it is likely to go unpaid.

Secondly, the Bills displace the general statutory guarantee in the *Northern Territory Self Government Act* of 'just terms' compensation for acquisition of property. I couldn't imagine this guarantee (which has an ACT equivalent) being displaced if the property belonged to a resident of my suburb or the Darwin equivalent.

Thirdly, the Bills attempt to direct courts to reduce compensation if housing or other improvements on the land have been publicly funded. Imagine the uproar if governments took such an approach to compulsory acquisition of homes which had been subsidised by the first home buyers' scheme or negative gearing!

Fourthly, the Bills provide 'a reasonable amount of compensation' *if the Constitution requires 'just terms'*. Even if these two terms mean the same thing, the Commonwealth appears to be gambling on compensation for this particular acquisition *not* being constitutionally required. This is like putting up a sign saying 'If you want the money, you'll have to take us to the High Court', which is not what you'd expect in an 'Emergency'. The Commonwealth appears to be betting on being able to overturn or distinguish a narrow 1997 High Court decision that gave Newcrest Mining 'just terms' compensation under the *Constitution* when land over which it held mining tenements was included in Stage 3 of Kakadu National Park. Some of the majority judges' reasoning in this case depends on them treating the national parks legislation as operating nationally, whereas the 'Emergency Response' will be limited to the NT, where historically (before *Newcrest*) compensation was not constitutionally guaranteed.

Fifthly, the 'Emergency Response' Bills contain several provisions which confer on government housing authorities rights which may avoid the technical constitutional definition of 'acquisition of property' which triggers 'just terms'. For example, they allow these authorities to *occupy* and *manage* publicly-funded housing on Aboriginal land – apparently indefinitely. These rights will only be conferred if traditional owners agree, but who will be able to resist a good housing package? If the Commonwealth wants to occupy land long-term, it should offer the landowners rent – as it does for government offices in Canberra. A public housing authority wouldn't expect to be able to build dozens, perhaps hundreds, of houses on my land for free, just because it provided me with one of them.

When it comes to governments depriving NT traditional landowners of rights which the rest of us take for granted, there have been two other worrying recent trends.

One was associated with amendment of the Commonwealth's *Aboriginal Land Rights (Northern Territory) Act* last year to allow voluntary head-leases of settlements on Aboriginal land to government authorities. There's nothing wrong with this idea – except that the Commonwealth raided the Aboriginals Benefit Account (ABA) to pay for it. This Account - created to offset the effects of comparatively large mining projects on Aboriginal people after Aboriginal reserves were opened to mining in the 1950s - receives 'mining royalty equivalent monies' which are then paid to traditional owners or used to run land councils on their behalf. So raiding the ABA to pay rent on settlement leases meant that the landlords, not the tenants, were paying the rent – not something you'd expect when there's so much talk about bringing these 'communities' into the 'real economy'.

There is a risk that the Commonwealth will be tempted to resort to this source of funds again, to pay the compensation for, or the rent on, its compulsory 'Emergency' five-year

leases. While such anomalous arrangements might be defensible in the context of voluntary arrangements, they cannot be defended where forced on traditional owners. It might be argued that ‘mining royalty equivalent monies’ are themselves anomalous, because other Australians do not receive them. But similarly large mining projects are not normally visited on other Australians for simple political reasons. It’s not like there are no mineral deposits under Australian cities. If the ABA is to be sequestered, it should be for genuinely beneficial purposes – not just so that money can be moved around in indigenous affairs.

Finally, on the day that Mr Howard and Mr Brough announced their NT ‘Emergency Plan’, the High Court decided to grant special leave to appeal in a case which illustrates well how some people’s property is more equal than others’. That case concerns native title rather than the special freehold available under the *Land Rights Act*, although the appellants in the case hold both. They come from Timber Creek, where they have voluntarily leased their land rights land to a non-Aboriginal neighbour. But when their native title claim to other land in which the neighbour was also interested appeared likely to succeed, the NT government decided that voluntary arrangements weren’t good enough any more, and set out to acquire the land compulsorily in order to re-grant it to the neighbour.

Although it is not well-known, the advent of native title transformed compulsory acquisition laws across Australia. Once, these laws were vehicles to facilitate road-building and other government works – some were even called *Public Works Acts*. But post-*Mabo*, most allow not only the nightmare depicted in the movie ‘The Castle’ – acquisition of private land so that a private operator can deliver a public service – but also acquisition of private land so that it can be granted to another private holder for *private* purposes.

Native title is commonly acquired in this way, but nobody seems to have told non-Aboriginal Australians that our property has become similarly vulnerable, at least legally. Perhaps we don’t need to know. Even when the same laws apply to remote Aborigines as to those of us who live in ‘Infront’ Australia, they can’t possibly make the same demands on us. There are many other important rights besides property at stake in the NT right now, but other Australians simply would not tolerate the routine sacrifices of property rights required of Aborigines, even where (unlike in the Timber Creek case) those sacrifices benefit the wider ‘community’.

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