ASSISTED THEFT

Compulsory land acquisition for private benefit in Australia and the US

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In May 2008, the High Court of Australia made a decision that went relatively unnoticed. The case was about a native title interest in the Northern Territory, which was compulsorily acquired by the Territory government. The land in question in *Griffiths v Minister for Lands, Planning and Environment*[1] was not to be utilised to build a road, school or hospital — it was acquired for the sole benefit of a farmer. After waiting two hundred years to gain the tools required for their customary system of tenure to be recognised by the colonial legal system in Australia, the Ngaliwurru and Nungali peoples of north-west Northern Territory found out just how easily their interest could be erased.

Yet Indigenous Australians with a native title interest are part of a larger group of Australians whose property interests are more vulnerable as a result of the *Griffiths* decision. The High Court has left the door ajar for compulsory acquisitions to take place where the beneficiary is not the public at large, but private individuals such as developers and entrepreneurs. This door was recently flung open by the Supreme Court of the United States, in the decision of *Kelo v City of New London*.[2] In that case Suzette Kelo aimed to save her property and the properties of eight other petitioners, including an elderly couple down the road, from condemnation by the City of New London, Connecticut. The properties were not condemned to make way for roads or schools, but were required for the construction of a pharmaceutical company, plus development of a conference centre, shopping strip and waterfront dining. This landmark decision has made such private-to-private acquisitions entirely constitutional in the US.

Unlike its Australian counterpart, the *Kelo* decision brought widespread public outrage, with an array of strange bedfellows. While conservatives decried the decay of private property rights, the political left pointed at the disproportionate effect of the decision on certain sectors of society. The beneficiaries in such cases are almost always the rich and powerful; the victims are usually marginalised — ethnic minorities, the poor, indigenous or elderly.

Developments since *Griffiths* and *Kelo* have been mixed, although arguably there is a legal and social tide moving away from these landmark decisions, particularly in the US. This article explores the backgrounds, decisions and post-decision developments of *Griffiths* and *Kelo*, arguing for the strengthening of the current pulling away from compulsory acquisition for private gain.

Ways of imagining land ownership

'A man's house is his castle', an adage from the 17th century, was evoked in the 1990s by Darryl Kerrigan in the film *The Castle*, when the Crown threatened to acquire his prized family home for the expansion of an airport. Darryl may not have been aware of this, but the 'castle model' is one way of characterising an interest in land. We might imagine a feudal master who reigns supreme over his dominion. The owner has absolute domain over the property as long as they 'stay within their borders' by refraining from acting illegally or significantly harming others.[3]

Yet there are other ways of characterising land ownership. The 'citizenship model' recognises that property is not an autonomous sphere, but there will always be conflicting social goals.[4] We need to recognise that property owners, like citizens, have obligations as well as rights. Owners do not live alone but within the community and as such should be subjected to obligations that are just and fair, as well as protected from unjust obligations.[5] While some proponents of a 'castle model' decry compulsory acquisition as presumptively invalid, the 'citizenship model' forces us to decide whether the acquisition is just and fair, in the context of the wider society.

The 'citizenship model' of property, also called 'property as social relations', is not so dissimilar from the way that many Indigenous people think about land. My friend Djarro, an Indigenous man, wrote:

> The Land is the Administrator of Individuality, Independence and Equality…The individual must not be given ownership of the Land. The Land must be given ownership of the individual.

'Ownership' is not about individuals reigning supreme over pockets of land; ownership is submission to the land itself and the wider community.

Compulsory land acquisition in Australia

However, for many Australians the dream is to own the castle. This is alive and well despite inflated property prices and economic uncertainty. For the second half of the 20th century, the aspiration was to have a detached home on a fenced quarter-acre block of suburban land, made possible by the post-WWII reconstruction and economic boom. Homeownership is not only a source of status in Australia,[6] but also perceived to be an important form of retirement security.[7] The Australian home represents far more than a place to live.

REFERENCES

1. (2008) ALJR 899; [2008] HCA (15 May 2008).

2. (2005) 545 US 469.

3. For a summary of the 'castle' model, see Joseph William Singer, 'The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations' (2006) 30 *Harvard Environmental Law Review* 309.

4. Ibid.

5. Ibid.

6. Ian Winter, *The Radical Home Owner: Housing Tenure and Social Change* (1994).

7. Rob Ranzijn et al, 'Independence and Self-provision in Old Age: How Realistic are these Goals?' (2004) 23(3) *Australasian Journal on Ageing* 120.

Yet for some, this Great Australian Dream underpinned what for them was, and continues to be, the Great Australian Nightmare – dispossession of land held for generations and a denial of home, spirituality and livelihood. The colonial legal system that makes home ownership possible is responsible for the decimation of the traditional laws and customs that form the basis of Indigenous land tenure.

Despite the emphasis individuals and governments place on its importance, at law this Dream is surprisingly fragile. While the Torrens principle of indefeasibility of title protects property owners against third party interests, governments and authorities across the country can compulsorily acquire private property for a wide range of reasons. We often hear stories in the media of governments acquiring land to extend highways, build pipelines and construct similar public infrastructure.

Unlike the counterpart provisions in the Fifth Amendment of the US Constitution, there is no explicit requirement in the *Australian Constitution* or in any federal legislation that the land in question must be acquired for a 'public use'. Instead, the *Constitution* and federal legislation state that property may be acquired 'for any purpose in respect of which the Parliament has power to make laws'.[8] Similarly, there is no public use requirement in any state legislation. The exception is municipal authorities, which, when empowered to acquire land, are normally required to adhere to a specific purpose that is generally public, such as widening roads[9] or carrying out the purposes of particular legislation.[10]

A pure private-to-private acquisition occurs where private property is acquired for the use and benefit of somebody else. It can be differentiated from, for example, privatised infrastructure which is owned by a private individual or company (who may greatly profit from the venture) but is used by the public at large. Throughout this article, I use the term 'private property' to classify an array of private interests, including freehold and native title interests, notwithstanding that native title is often communally held.

Despite the lack of restriction under legislation, historically it seems that private-to-private acquisitions were almost unheard of. The few court decisions concerning these kinds of acquisition have tended to involve municipal governments, such as *Werribee Council v Kerr*,[11] which involved the acquisition of private land for the purported purpose of road widening, with the actual purpose being pipe installation for the benefit of an oil company. In that case, the High Court held that the acquisition was for an improper purpose, since it did not fit within the purposes allowed by the relevant legislation. Specifically, Higgins J stated that '[t]he Legislature did not give to municipal councils power to interfere with the private title of A for the private benefit of B'. Similarly, in *Prentice v Brisbane City Council*[12] the Supreme Court held that the Brisbane City Council's powers did not extend to the compulsory acquisition of private land for the purpose of carrying out a company's plans for development. Where private land has been acquired for the use of another private party, courts have either found this act invalid, or in some cases, validated the seizure not because they approved of private-to-private acquisitions, but because they found that the private use did not constitute a substantial or dominant purpose for the acquisition of the land.[13]

There are many ways of conceptualising land ownership, and each proponent may have a different take on the validity of private-to-private land acquisition. Through the lens of the 'citizenship model', I argue that government acquisition of land to vest in a private third party is an unjust obligation placed on the original interest holder. While acquisition for a public purpose, such as building roads or schools, may benefit the public at large, vesting the interest in an individual benefits, primarily, only that individual. Australian society has, up until recently, recognised this principle and restricted the compulsory acquisition of land to use by the public.

The case of Griffiths

Griffiths marks a departure from this norm. The Ngaliwurru and Nungali peoples had a long-standing connection with land that surrounded a town called Timber Creek, in north-west Northern Territory. Between 1981 and 1997, grazing licences over several lots of this land were held by a farmer called Lloyd Fogarty, together with his company. The two interests resided simultaneously and the Indigenous groups maintained their connection with the land. In 1997 Fogarty applied to the Minister to purchase a number of these lots. The application was received favourably and in 2000, upon receipt of similar requests for lots by other parties, several notices of proposed acquisition were published.

On 11 May 2000, Alan Griffiths and William Gulwin on behalf of the Ngaliwurru and Nungali peoples filed a native title claim together with a notice of objection to the acquisition. The full Federal Court recognised the native title interest in November 2007. Accepting this determination, the High Court of Australia decided on the basis of the lawfulness of the compulsory land acquisition. A five to two majority (Kirby and Keifel JJ dissenting) held that the native title interest could be acquired by the Northern Territory government for the purposes of another private party.

The decision turned on the specific wording of the *Land Acquisition Act 1998* (NT) (LAA). Section 43(1) states:

> Subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever…

The majority chose to interpret this provision literally, holding that 'any purpose whatsoever' could include the purpose of acquiring land to give to another private individual. They pointed to the legislative history, which had involved the deletion of a 'public purpose' requirement, to show an intention of the legislature to empower a very wide taking power.[14] According to the majority, this alteration was a clear manifestation

8. *Australian Constitution* s 51(xxxi); *Lands Acquisition Act 1989* (Cth) ss 40(1) and 6.

9. See, eg, *CC Auto Port Pty Ltd v Minister for Works* (1965) 113 CLR 365, concerning the *Local Government Act 1960* (WA) and the *Municipality of Fremantle Act 1925* (WA).

10. See, eg, *Samrein Pty Ltd v Metropolitan Water Sewerage & Drainage Board* (1982) 56 ALJR 678; 41 ALR 467, concerning the *Metropolitan Water Sewerage and Drainage Act 1924* (NSW).

11. (1928) 42 CLR 1.

12. [1966] Qd R 394.

13. See, eg, *CC Auto Port Pty Ltd v Minister for Works* (1965) 113 CLR 365; *Samrein Pty Ltd v Metropolitan Water Sewerage & Drainage Board* (1982) 56 ALJR 678; *Estates Development Co Pty Ltd v Western Australia* (1952) 87 CLR 126.

14. At [23]–[34].

Legally, freehold title is as vulnerable under the Northern Territory legislation as native title. Yet, under the government policy, only native title was targeted — signalling the political vulnerability of Aboriginal title.

of Parliament's intention to remove any fetters on the Northern Territory's ability to compulsorily acquire land.[15]

Justice Kirby, in his dissenting judgment, refused to take the apparently clear wording of s 43(1) at face value. He relied on the established legal presumption that Parliament does not intend to overthrow fundamental principles or infringe rights without clear, express language.[16] In the case of s 43(1), Kirby J contends that there is an absence of manifest intention by the legislature to deprive people of individual and communal rights.[17] Justice Kirby points out that the acquisition of private land for public purposes is treated as exceptional by the law of Australia. How much more exceptional, then, is the acquisition of private land so as to advantage a different person's private interest?[18] Justice Kirby also points to the long and painful battle for Indigenous Australians for native title to show the need for particularly clear legislation enabling the revocation of such rights.[19]

In their literal reading of s 43, the majority miss an important chance to comment on the exceptional nature of private-to-private acquisition, refusing to see any common law limitations and deferring instead to the specific words of the legislature.

The case of *Kelo*

The US Supreme Court decision of *Kelo* relates to freehold land, as opposed to a native title interest. The difference, however, does not preclude a valuable comparison being made. Both are interests protected by their counterpart constitutional provisions. While the case law is not clear as to the exact nature of a native title interest,[20] the very broad interpretation of s 51(xxxi) of the *Australian Constitution* ensures that it is a form of property for the purposes of the compulsory acquisition power. The constitutional term 'property' has become practically a synonym for 'valuable legal right',[21] and no High Court judge has yet denied native title as a form of property for this section.[22]

Unlike the decision in *Griffiths*, *Kelo* tackled head-on the issue of compulsory acquisition for private use. The City of New London in Connecticut was economically depressed. In response, the City made plans for revitalisation and invited pharmaceutical company Pfizer Inc. to build a $300 million research facility in the vicinity. Local planners hoped that Pfizer would draw new business into the area, and created development plans that included a waterfront conference hotel, restaurants and shopping, a pedestrian 'riverwalk', a museum, office space and new residences. It was hoped that the developments would create jobs and generate tax revenue.

After negotiations with private landholders failed, the City initiated condemnation proceedings. Suzette Kelo was the lead petitioner for a writ of certiorari to the Supreme Court of Connecticut and aimed to save her property and the properties of eight other petitioners from condemnation. There was no allegation that any of the properties in question were blighted or in poor condition — they simply stood in the way of the redevelopment project. *Kelo* now stands for the proposition that property may be taken from one private owner to another private owner, for the purpose of 'economic development'.

The power of eminent domain (a term equivalent to 'compulsory acquisition') is curbed by two caveats, set out in the 'Takings Clause' of the Fifth Amendment — one being the payment of fair compensation, and the other being the requirement that the acquired land be put to a public use.[23] We see clear recognition that land should never be taken from one individual for the exclusive benefit of another individual: instead, if land is regretfully taken, it must be for communal purposes.[24]

The *Kelo* petitioners claimed that appropriation of their properties would be a violation of the Constitutional 'public use' restriction. However, following Supreme Court precedent,[25] the Court chose to define 'public use' quite broadly, and read it as 'public purpose'.[26] The new interpretation of the Takings Clause now simply requires that where property was transferred from one private owner to another, it have a public *purpose*. There is no need for the public to actually *use* the land. It was held in *Kelo* that the public purpose could be increased tax revenues and increased employment.[27]

Kelo is not a stand-alone case, but represents the highest authority in the US of a principle that has been edging its way into the courts for almost thirty years. In the 1981 5-2 decision of *Poletown Neighbourhood Council v City of Detroit*,[28] the Supreme Court of Michigan authorised the expropriation of the elderly Polish-American population of a Detroit suburb in order to clear a site for a new assembly plant for General Motors Corporation. After that, private-to-private acquisitions were authorised in courts across the US. It became common practice for local government agencies to advertise that, in return for a fee, they would exercise their eminent domain powers to provide developers with land that they could not

15. At [29].

16. For general principle see *Potter v Minahan* (1908) 7 CLR 277 at 304; *Baker v Campbell* (1983) 153 CLR 52, 96–7, 116–17, 123. Presumption also applies to the alienation of personal property rights — see *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Cmrs* (1927) 38 CLR 547; *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677, 683.

17. At [105].

18. At [119].

19. At [105].

20. Native title has been seen at different times as an interest that equates to ownership or something similar (*Mabo v Queensland [No 2]* (1992) 175 CLR 1; *Yanner v Eaton* (1999) 201 CLR 351) or else a fact specific accumulation of rights (*Western Australia v Ward* (2002) 191 ALR 1; *Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538). Some judges prefer to identify native title as a *sui generis* set of interests (eg *Mabo [No 2]* (1992) 175 CLR 1, 89 (Deane and Gaudron JJ) and 133 (Dawson J).

21. *Minister for the Army v Dalziel* (1944) 68 CLR 261, 290 (Starke J); *Commonwealth v Mewett* (1997) 191 CLR 471, 535 (Gummow and Kirby JJ).

22. Sean Brennan, 'Native Title and the "Acquisition of Property" under the *Australian Constitution*' (2004) 28 *Melbourne University Law Review* 28.

23. Section 1 of the Fourteenth Amendment ensures that the Takings Clause applies to States and municipalities.

24. Kevin Grey, 'There's No Place Like Home!' (2007) 11(1) *Journal of South Pacific Law* 73, 74.

25. *Hawaii Housing Authority v Midkiff* 467 US 229 (1984).

26. At 479–480.

27. At 483–484.

28. 304 NW 2d 455, 410 Mich 616 (1981).

obtain through the market.[29] *Kelo* simply represents the highest authority and most controversial point in a history of private-to-private acquisition.

Developments since *Kelo* and *Griffiths*

Yet *Kelo* is not a legal terminus. The controversial decision saw a strong public reaction, igniting the passions of forces from almost every ideological stripe. While libertarians and property advocates lamented the end of private property, the political left decried the disproportionate impact the decision would have on the poor and marginalised. The majority opinion inspired fervent dissents from O'Connor and Thomas JJ, naming the decision 'far-reaching' and 'dangerous'. Such was the negative reaction that in the months after the decision, more than 70 eminent domain reform bills were being debated in state legislatures across the US, with the purpose of reducing the impact of the decision.[30]

While the tide in America may be partially receding on private-to-private acquisitions since *Kelo*, in Australia, where the issue has not found a prominent place on the public agenda, there is no clear trend away from compulsory acquisition for private gain.

The facts in *Griffiths* do not represent an isolated case. Between 1998 and 2001 around 82 notices were passed by the Northern Territory government to compulsorily acquire native title land. For many of these notices, the intended purpose for the land was private.[31] Legally, freehold title is as vulnerable under the Northern Territory legislation as native title. Yet, under the government policy, only native title was targeted — signalling the political vulnerability of Aboriginal title.

Native title is also vulnerable to extinguishment, which will occur, among other ways, when the Crown vests a freehold interest to a third party.[32] There is no High Court authority as to whether an extinguishment may satisfy the definition of an 'acquisition' under s 51(xxxi), although there is *obiter* to the contrary.[33] Sean Brennan, however, argues that it is a form of acquisition for the purpose of this section, and native title should thus be protected by s 51(xxxi) in the way that other property rights are.[34] Regardless of the scope of s 51(xxxi), extinguishment of native title where land is vested in a private third party is a blatant form of private-to-private transferral of property.

Aboriginal land granted under land rights legislation is also vulnerable to compulsory acquisition for private gain. 'Deeds of grant in trust', or DOGIT, is a system of community level land trusts, established in Queensland in 1984. In mid-2008, the Queensland Parliament passed legislation[35] that permitted the routine acquisition of DOGIT land to be used for a public purpose unrelated to the delivery of community services. While the legislation explicitly stated that the purpose was to be public, there was concern amongst Indigenous and land rights advocates that the land would in effect be used to benefit commercial third parties. At the time the legislation was debated, the Chinese Government was undertaking a process to assess the feasibility of a mine at Aurukun, to be run by the Chinese mining company Chalco. Indigenous leader Noel Pearson argued that the legislation would enable acquisition of Aboriginal land for the creation of a port which would *technically* be for a public purpose, but would actually benefit Chalco.[36] The Aboriginal community — the less powerful party in a commercial deal involving government on the side of big players — would lose out.

Yet it is not only Aboriginal land that is affected by private-to-private acquisition. Since *Griffiths*, freehold title has been compulsorily acquired for the benefit of a commercial third party. The Parramatta City Council recently sought to acquire and transfer three private properties to private company Grocon, to make way for a $1.4 billion Civic Place redevelopment. The matter was brought before the Land and Environment Court in 2007 by two of the concerned property owners. The Court found in favour of the property owners.[37] Soon after the decision, Frank Sartor, then Minister for Planning in New South Wales, attempted to override the decision by proposing legislative changes that would enable him to acquire land to transfer to another private owner, for the purposes of urban renewal and land releases. These plans were shelved in May 2008 due to public outcry, which condemned the explicit legalisation of private-to-private transfers. However, the next month the Land and Environment Court decision was overturned by the New South Wales Court of Appeal, in *Parramatta City Council v R & R Fazzolari Pty Ltd*.[38]

The case turned on whether the relevant legislation[39] allowed for the compulsory acquisition of the respondents' land in order to vest that interest in a private company. The NSW Court of Appeal held that it did. Interestingly, the decision seemed to condemn pure private-to-private acquisition. Justice Tobias, with whom the other judges agreed, seemed to approve of the dissenting judgments in *Griffiths*, but argued that the present case could be distinguished on the facts. While in *Griffiths* the transfer was for the private benefit of Fogarty, in *Parramatta* the dominant purpose was not to enhance the private interests of Grocon, but to enhance the interests of the wider community through redevelopment and rejuvenation of a public space[40] — in other words, it was not a pure private-to-private acquisition. It was held that this purpose adhered to purposes contained in the legislation, and the acquisition was a valid exercise of power.

The judicial and legislative events around the Parramatta City Council Civic Place redevelopment are interesting because in the end, there was a movement *away* from pure private-to-private acquisition. Frank Sartor's proposed legislation was politically unviable, and the New South Wales Court of Appeal, in *obiter*, did not support the kind of acquisition that occurred in *Griffiths*. Perhaps the events show that despite the decision in *Griffiths*, which turned on strict deference to the legislature, there is an undercurrent present in the Australian legal system and Australia community condemning private-to-private land acquisitions. On the other hand, as shown by changes to the DOGIT system,

29. Kevin Grey, above n 24. The court authorised this abuse of power in *Southwestern Illinois Development Authority v National City Environmental, LLC* 768 NE 2d 1 (Ill, 2002).

30. Carla T Main, 'How Eminent Domain Ran Amok' (2005) 133 *Policy Review* 3.

31. ABC Radio, 'Land Appropriation in the NT', *National Law Report*, 20 May 2008, <abc.net.au/rn/lawreport/stories/2008/2247140.htm> at 25 February 2009.

32. *Fejo v Northern Territory of Australia* (1998) 195 CLR 96; *Native Title Act 1993* (Cth) ss 15 and 229.

33. *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 613 (Gummow J).

34. Brennan, above n 22.

35. *Aboriginal and Torres Strait Islander Land Amendment Act 2008* (Qld).

36. ABC Radio, 'Qld Government in Land Grab: Pearson', 13 May 2008, <abc.net.au/am/content/2008/s2242940.htm> at 25 February 2009.

37. *Mac's Pty Ltd v Minister Administering Local Government Act 1993* (2007) 155 LGERA 362.

38. [2008] NSWCA 132.

39. *Local Government Act 1993* (NSW) ss 186(1) and 188(1).

40. At [167]–[173].

41. At 505.

The case of Griffiths *adds fodder to the argument for the introduction of a Charter of Human Rights.*

as well as the decision in *Griffiths*, this social and legal thread is weak, and unless intentionally strengthened in the near future, will be rendered meaningless.

Conclusion: who loses out from private-to-private land acquisition?

The effects of private-to-private land acquisitions are not indiscriminate. The burden generally falls on the poor and less powerful: the elderly Polish community in *Poletown*, the old couples and families in *Kelo*, the Indigenous people with fragile native title rights in *Griffiths* or with statutory land rights on DOGIT land. The beneficiaries are generally the rich and powerful: General Motors, Pfizer Inc, Fogarty, overseas mining companies. Through a 'citizenship model' of land ownership, we see the rights of interest holders infringed not to benefit the wider society, but to increase the wealth of developers and entrepreneurs.

Of the *Kelo* decision, dissenting Justice O'Conner said:

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.[41]

Rather than protecting the interests of the less powerful, the courts in both cases are allowing governments to act as assistant to those who wish to use others' land for their own profit. Yet *Kelo* and *Griffiths* are not legal end-points. In the US, we see public outrage and states legislating to undermine the influence of *Kelo* on eminent domain. In Australia, we have seen that the New South Wales Court of Appeal has not supported the majority decision in *Griffiths*, and has recognised a caveat on private-to-private acquisition within the common law of Australia. However, these social and legal currents are weak, and stand in the face of federal legal authority to the contrary. In Australia, the issue of private-to-private compulsory acquisition is barely on the public agenda. The issue needs to be placed on the public agenda, and at its next possible chance the High Court must make a clear stance as to whether compulsory acquisition for private use is part of the common law in Australia, rather than deferring to the words of the legislature and ruling only on the application of a specific piece of legislation.

The case of *Griffiths* adds fodder to the argument for the introduction of a Charter of Human Rights. While the petitioners in *Kelo* were failed by the way the majority interpreted the Fifth Amendment, they at least had a strong constitutional right to appeal to directly. The same cannot be said for the appellants in *Griffiths*. A Charter should protect basic human rights and include a clause protecting property rights, particularly Indigenous native title and land rights.

Indigenous Australians, whose property rights remain fragile despite the long battle for recognition, are but the most vulnerable of a large group of Australians who could have their property taken for the use of somebody wealthier and more powerful. Either through legislation or clear direction from the court, such acquisitions should be unlawful in Australia.

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