



ANU LAW STUDENTS' SOCIETY

LAWS2215 Environmental Law 2nd Semester 2000

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Question 1(b)(i)

80/100

How ought policymakers reconcile private property rights with statutory protection of the public interest.

Traditionally, the view of private property rights has been one of ownership, for example 'my house, my car, my land etc'. This is best stated by Blackstone (1858) who refers to private property as occurring in 'total exclusion of all other individuals in the universe'.

However, more recently changes to the way we view property rights have occurred. Firstly, private property rights have been increasingly conceptualised as being about access, not possession. Thus, property rights are seen as 'bundles of rights' attached to the land, not so much as ownership and full dominion over the land itself.

Further, there has been a statutory erosion of private property rights in the public interest. This has occurred in traditional ownership areas such as pollution, water control etc and can include such areas as planning too.

In terms of environmental protection, many such issues deal directly with the conflict between traditional private property rights and environmental issues. Irrigation is a classic demonstration, where legislators must find a balance between allowing traditional riparian rights for landholders and still allowing water use for irrigation on larger scales.

But the issue really is whether the government ought to be allowed to impinge on private property rights in the public interest.

There are already several existing measures by which the government impinges on private property rights.

Firstly, acquisitions are a clear example, where the land is actually taken away. There are four accepted methods by which acquisition is done, with both State and Federal governments required to provide 'just compensation' for the acquisition. The Commonwealth has this requirement embedded in s51xxxii of the Constitution and while the Federal Court has ruled no such requirement exists in the state constitutions, the rule is applied by statute (eg the Land Acquisition (Just Terms Compensation) Act NSW (1991)).

However, while acquisitions are clearly a severe measure, planning decisions can also greatly effect private property rights.

The traditional view in Australia has been to refuse compensation as a result of perceived adverse planning decisions. However, this rule has varied recently.

In the USA, the case of Lucas vs South Carolina before the Supreme Court was decided in favour of Lucas, whose plans to build two houses on a lot was made impossible by a planning decision requiring the moving of the building line back 20 m. Lucas was awarded \$1.5 million in damages.

While Australia shows no moves to this extreme, recent cases have shown a tendency to acknowledge the effect of planning decisions on private property rights.

The classic case here is Newcrest Mining, involving the purchase of mineral leases in the Northern Territory, and subsequent action by the Commonwealth to extend Kakadu to cover the area of the lease, effectively extinguishing it. Newcrest argued that s51xxxii of the Constitution prevented acquisition of property without compensation, and the High Court accepted this, regarding the Commonwealth legislation that extended the park as effectively 'sterilising' the rights purchased by Newcrest. Thus, the Commonwealth was liable to pay compensation for this removal of private property rights.

Another important case in this area is the Tasmanian Dams case, involving the proposed damming of the Franklin River in Tasmania. The Commonwealth passed legislation to restrict building in world heritage areas, but the High Court saw that the Commonwealth had not acquired the land, because the statute only restricted some activities on the land and its use.

These two cases can be distinguished in that in Newcrest all the rights were extinguished, whereas in Tasmania Dams only certain uses were prevented.

So, where do we stand in the law currently? The general rule is that a right has to be totally extinguished to be an acquisition (and therefore requiring compensation on just terms). However, this rule is likely to have the effect of preventing or deterring the Commonwealth from creating environmental protection statutes as they must now pay compensation if they erode private property rights by acquisitions.

A better alternative can be found in encouraging the balance between private property rights and the public interest. By applying the precautionary principle and ESD, both the Commonwealth and state legislators, and private property owners can gain the greatest benefit. By using ESD,

the property owner gains the greatest amount of acceptable development that the land can safely carry, and the public interest is served by ensuring sustainability. Furthermore, such advances as these seen voluntarily in ecotourism (a booming market) and with such products as ‘dolphin-safe’ tuna, companies can achieve great benefits from a balance between environmental issues and business concerns.

Statutory regimes will always be required to protect the environment in the public interest. The framers of the constitution recognised that the commonwealth would be required to protect the public by acquiring land, but balanced this with the protection of private property rights by requiring it be done on just terms. Thus, a balance between public and private interest can be reached by allowing environmental issues to be part of planning decisions, but also in requiring that if such decisions impinge on the substantial uses of that land then just compensation [*who pays compensation?*] be available. Furthermore, this allows the balance of both the public and private interest in environmental concerns.

[Comprehensive and well argued, well expressed and clear throughout]

Question 1(b)(ii)

70/100

In environmental regulation, the Common Law (CL) and statute occur side by side, with the CL providing for actions and remedies not allowed under statutory regimes. However, there are many inadequacies in the CL, and the way it deals with environmental issues.

Originally, the principle of Rylands v Fletcher was applied (ie that a person who brings dangerous things onto land has a strict liability for damage arising). However, this was overruled in Burnie Port Arthur v General Jones, where Rylands rule was rejected and instead ordinary rules of tort applied.

Thus, in environmental damage cases, there are three main options in CL. Firstly, negligence, which requires assessment of duty of care, breach, and damage (both causally connected and reasonably foreseeable). This has many flaws in terms of environmental protection. Negligence requires that the burden of proof be on the plaintiff, causing problems in proving not only that there was a duty owed, but that the resulting damage was causally related. This provides a significant obstacle to environmental protection cases.

Secondly, trespass is another area in tort used for environmental matters, but it requires a direct, intentional and unauthorised interference with property. Thus, unintentional accidents that are not wilful are not actionable under trespass. The other issues that acts as an obstacle to environmental litigation here, is that it must be a direct action, not consequential. In Reynolds v Clarke (UK), the court ruled that a rainspout that directed onto another house that rotted it was not direct enough to be trespass, and in Mann v Saulnier the court found that to throw stones was trespass, but to allow stones to fall from a chimney onto other land was not.

In a landmark case, Southport v Esso, the court found that the release of 4000 tonnes of oil that was carried to shore in an estuary by the tide was not trespass, as it was only consequential.

[A bit too descriptive without relating the material to inadequacies, which is what the question asks you about.]

Nuisance is the third major area under tort that allows for environmental litigation. Its main barrier to such cases however, is that it is usually seen as a private action between two neighbours (in a broad sense) and so cannot extend to greater issues easily. There are also issues as to the extent the character of the neighbourhood ought to be taken into account in such cases.

The Remedies under CL are particularly poor with regards to environmental litigation. Firstly, precedent provides for a tendency to focus on the dispute at hand, between the two parties, not to focus on broader issues, upon which environmental cases are usually based. Secondly, decisions are directed towards individual rights and individual disputes rather than broader management issues. Decisions also apply only directly to the parties involved, and are extended in limited and exacting circumstances. Decisions are also not prescriptive (they do not lay down specific rules, but instead apply general principles which are flexible and uncertain). Further the focus is remedial, not on deterrents.

The Remedies also provide problems in application, how does one convince a boat operator to not dump oil, but to wait for an injunction). Or, to attempt to fully compensate the land and environment done to it by an oil spill, purely by compensation.

The CL is an expensive, time-consuming way to manage environmental protection. The measures under tort are insufficient, and the remedies are often not very useful. The CL has great structural inadequacies in terms of environmental protection, and so we must look to alternatives to ensure that the protection of our environment is not lost to a poor legal structure such as the Common Law.

[Again, comprehensive but at times you don't relate the material to the question. The better answers integrated the points that you make in the concluding paragraphs with their discussion of the principles of common law.]