



Australian Property Institute

Western Australia State Conference

"Dividends from the Boom"

The Hon Wayne Martin
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Hyatt Hotel

I would like to commence this afternoon by acknowledging the traditional owners of these lands, the Noongar people and by paying my respects to their Elders past and present.

It is a great honour and a privilege to have been asked to address the Western Australian Conference of the Australian Property Institute. The Institute was formed in 1926 and represents more than 8,000 members with expertise in property throughout Australia. Bodies like your Institute have many admirable advantages, but there are two to which I would draw particular attention.

The first is that the Institute provides a wonderful opportunity for practitioners to emerge from their own individual professional silos, and interact with other professionals who have a common interest in property. Members of the Institute are drawn from a wide variety of professional fields, and include valuers, professional property advisers, analysts, lawyers, bankers, fund managers, academics and accountants. Interaction between these various disciplines at both a formal and informal level is of enormous benefit to our community.

The second great advantage of your Institute is its focus upon the maintenance of the highest standards of professional practice, education, ethics and discipline. Your Institute's Code of Professional Practice, which incorporates a Code of Ethics and Rules of Conduct strongly promotes the public interest in the maintenance of the highest standards of professional practice in an area which is of the utmost importance to our community, namely, property ownership. And membership of your Institute enables members of the community to identify practitioners with whom they can deal, confident of their adherence to those standards of professional conduct.

Your conference is appropriately entitled "Dividends from the Boom", and I will return to that theme, and the effect which the extraordinary boom which this State has enjoyed has had upon a number of issues related to property and real estate later in this address. However, in order to set the scene for those remarks, I'd like to step back a little from the day to day, and spend a little time looking at the nature of property, and the historical development of the concept of property.

Property in Land and Other Things

At the outset it is appropriate to differentiate between land and the many other things, such as cars and boats, in which property can exist. Often the word "property" is used interchangeably with a reference to a piece of land or a chattel, or a right, such as a share in a company. But to lawyers at least, "property" is subtly different. Land is a part of the surface of the earth. But the property in that land is the right to do something or other with that land - usually to own it or occupy it to the exclusion of others. The point I am trying to make is that "property" is a right or bundle of rights relating to land or other things. The significance of that observation is that it begs and conveniently introduces the questions: "What is the nature of those rights and against whom can they be enforced?"

Home and Castle

The nature of the rights enjoyed by the owner of real estate is often conveyed by the pithy expression "a man's home is his castle". Many contemporary Australians might think that expression was coined by Darryl Kerrigan, the leading figure in the movie "*The Castle*". In fact, one of the more famous exponents of the expression was Sir Edward Coke, the famed English jurist who was variously the Speaker of the

House of Commons, Attorney General, Chief Justice of the King's Bench, and prisoner in the Tower of London.

In more gender sensitive times, we must eschew the masculine terminology of the feudal era. But if a person's home is their castle, against whom are the battlements and fortifications installed? As the plot of *The Castle* reveals, the most common marauder, the most common assailant upon the sanctity of property, is not the burglar or blackguard, but the State.

And it is a mistake to think that the many and different ways in which the State can today interfere with and, indeed, expropriate, rights of property is a recent consequence of the ubiquity of the State and its many organs and agencies. As long ago as 1761, James Otis Jr, used the line:

"A man's house is his castle; and whilst he is quiet, he is well guarded as a prince in his castle ..."

as part of a 5-hour address to the Chief Justice of Massachusetts, in support of an argument that the *Molasses Act* was invalid. The *Molasses Act* was an Act passed by the British Parliament imposing a tax on all non-British sugar imported into America. Its purpose was to give preference to sugar harvested in the British West Indies.

After referring to a man's house being his castle, Otis went on to assert that the Act:

"... would totally annihilate this privilege. Custom House officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court may inquire. Bare suspicion without oath is sufficient.

Every man prompted by revenge, ill humour, or wantonness to inspect the inside of his neighbour's house may get a writ of assistance. Others will ask it from self-defence; one arbitrary exertion will provoke another, until society be involved in tumult and in blood."

One member of the audience during Otis' impassioned plea was John Adams, who was later to become an author of the Declaration of Independence and the second President of the United States. He later stated:

"Then and there, the child Independence was born."

So, in the view of Adams, who was rather well placed to proffer a view on such things, threatened interference with property rights, gave rise to a movement which resulted in the independence of the country which is now the most powerful country in the world.

As an aside, although Otis obviously had a fan in Adams, he wasn't universally popular. Some years later, following a scathing attack on the Custom Commissioners of Boston, one of them confronted him in a

Boston coffee house. They came to blows, in the course of which Otis received a head injury that left him somewhat mentally deranged. In a dramatic end for a dramatic man, some years later, on 23 May 1783, he was struck and killed by a bolt of lightning.

Returning to my theme, the importance of protecting rights in property was also prominent in the thoughts of those who founded Western Australia. One of the most significant communiqués in the development of the constitutional history of our State was a letter from Lord Goderich of the Colonial Office in Downing Street, London to Governor Stirling of 28 April 1831. Some measure of the way in which the pace of communication has altered in modern times is provided by the fact that the letter, of April 1831, responded to Stirling's letters of 20 and 30 January, and 18 October 1830. The constitutional significance of the communiqué was that it enclosed an Act passed by the British Parliament, and an order of the King in Council which created a Legislative Council and an Executive Council for the fledgling colony. Because of the limited personnel available to serve on such bodies in the fledgling colony, Goderich recognised that the composition of each body would be identical, but insisted that they be kept separate, and minuted separately, because of the different functions being performed by the legislative body as compared to the executive body.

The letter also directed Stirling to implement a system for the registration of land title, and for the registration of transfers of land. Goderich observed:

"In a settlement of which the wealth and resources must, to a great extent, consist in agriculture, whatever tends to relieve the proprietors of the soil from uncertainty, respecting their titles, or from embarrassment in the conveyance of their property must eminently conduce to the general welfare."

Although these days we would probably add the words "and mining and resource development" after the word "agriculture", but the sentiment remains valid almost 200 years later.

I trust you will permit a lawyer to digress briefly to mention that Goderich also directed Stirling:

"Amongst the earliest objects of the attention of the Council will be the institution of Courts of Justice, exercising jurisdiction in all cases, civil and criminal, arising within the settlements. This is a power to the exercise of which they are specially called by Parliament, and to which effect must be given with the least possible delays.

In imposing this task upon yourself and other gentlemen not regularly educated to the practice of the law, as a profession, His Majesty's government may at first sight seem to be making a very unreasonable demand. To regulate whatever relates to the administration of justice, of course, presupposes so exact and comprehensive an acquaintance with the whole business of jurisprudence, as is possessed by a comparatively small number even of those who have made the law their peculiar study. ...

It is almost needless to say that the administration of the law both civil and criminal in England is encumbered with a multitude of forms, and attended by a degree of expense which have recently attracted the anxious deliberation of Parliament, and of His Majesty's government. If the same system were transferred to an infant colony, it would of course be subversive of the very end it was designed to promote. Whatever may be the advantages, real or imaginary, of the complex judicial processes, which prevail in the courts in Westminster Hall, it will be at once admitted that in Western Australia, justice should be administered with the utmost possible degree of simplicity and economy."

As to which I say "hear, hear". Almost 200 years ago, Goderich was right on the money. It is still of vital importance that in Western Australia, justice should be administered with the utmost possible degree of simplicity and economy. Unfortunately, after Goderich's time, the multitude of forms, attended by expense, were exported to the infant colony, and were subversive of the very end of achieving justice. We are still trying to recover from that subversion today.

If I may be permitted to continue my digression, although Goderich instructed Stirling to create courts, he was told not to employ lawyers as Judges. He wrote, in a passage which ends with a reference to the importance of the recognition of proprietary rights:

"To provide for the Constitution of the Courts it will be scarcely a more difficult office than to select proper persons on whom the duty of presiding in them must be devolved. At no remote period it will of course be necessary to appoint one professional lawyer at least as Judge. For the present, it may not be necessary to incur that expense. The transactions of life in a colony so recently settled,

must be exceedingly simple, and I see no reason to doubt that, for some short period at least, justice may be satisfactorily administered by the same body of gentlemen whom you appear to have nominated as Magistrates, or by such of their number as are most distinguished by probity, general education, and aptitude for business. From amongst persons of this description, you will select, at your own discretion, such as you may deem best qualified to act as Judges. That occasional errors will be committed, must of course be anticipated, and for those mistakes which result from an unavoidable ignorance of the positive Rules of Law, you will make every allowance. But with a firm purpose to administer Justice impartially, and with a patient attention to the merits of every controverted question brought under their cognisance, I entertain no doubt, that Judges, so chosen, will promote the general interests of society, and protect the rights of individuals until the arrival of that time when in Western Australia, as in more advanced countries, the administration of the law shall occupy the entire time and attention of persons devoted exclusively to that profession. In any event the more alarming violation of the public peace, and all palpable encroachments on private property, will be effectually repressed, and an object of the first importance in Society will thus be secured to a very great extent, even tho' in an imperfect manner."

Consistently with these early recognitions of the importance of proprietary rights, more recently, a number of international instruments have recognised the significance of those rights. Article 17 of the Universal Declaration of Human Rights provides that everyone has the right to own property alone as well as in association with others, and that no-one shall be arbitrarily deprived of that property. Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination provides that the parties to that Convention:

"Undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(d)(v) the right to own property alone as well as in association with others."

Australia has given effect to that obligation by s 10 of the *Racial Discrimination Act*. In a recent case, *Bella Bropho* argued that the closure of the Swan Valley Reserve interfered with rights of property enjoyed by Aboriginal people in contravention of that section. Two months ago, the Full Court of the Federal Court rejected that argument (*Bropho v State of Western Australia* [2008] FCA FC 100). The Court held that the findings of two inquiries to the effect that sexual and other forms of violence were pervasive at the reserve justified interference with any proprietary rights which the inhabitants of that reserve might have had. The Court observed:

"... although the right to own property alone or in association with others is a customary rule of international law, the right to own property, like all rights, is not absolute in nature. As was observed in a report by Luis Valencia Rodriguez...

'It is generally recognised that a State has a right to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contribution or penalties. It is important that those regulatory powers of the State should not result in seizure of property without compensation and in 'arbitrary' or 'illegal' seizure'.

It has long been recognised in human rights jurisprudence that all rights in a democratic society must be balanced against other

competing rights and values, and the precise content of the relevant right or freedom must accommodate legitimate laws of, and rights recognised by, the society in which the human right is said to arise."

In relation to the rights said to have been conferred under the law of Western Australia upon the Aboriginal occupants of the reserve, the court said:

"... the right to occupy and manage the land conferred by statute was subject to the contingency that the right would be removed or modified if its removal or modification was necessary to protect vulnerable members of the community enjoying the right of occupation and management. We accept that it will always be a question of degree in determining the extent to which the content of a universal human right is modified or limited by legitimate laws and rights recognised in Australia."

So, the extent to which the ramparts and fortifications of your castle will be effective in defending you from intervention by the State will depend upon value judgments made by courts as to where the public interest lies. One can't help thinking that the moat around the castle might have dried up, or, at least, that the drawbridge has been lowered.

Of course, in reality, the moat and the ramparts, and even the occasional pot of boiling oil will never be completely effective to protect the castle keep from a State intent upon entry. There are many and varied ways in which the State can broach the castle boundaries and, indeed, acquire the castle. They include the resumption and acquisition of land, the

sterilisation of land use through zoning changes and planning controls, the inhibitions upon land use imposed on the grounds of environmental protection, and more recently, the confiscation of a wide variety of property that was directly, or even indirectly, used in the course of the commission of an offence, or the acquisition of which you cannot explain under the *Criminal Property Confiscation Act*. So, if there is today any truth in the proposition that our homes are our castles, it must be said that, as castles, they are not terribly well protected from intervention by the State. And the fact that the successful defence of our castle might depend upon value judgments made by courts as to where the public interest lies may not instil the greatest confidence or security.

Dividends from the Boom

I would argue there is a corresponding and correlative obligation upon the State to utilise its property and resources, and more specifically to address the theme of your conference its "Dividends from the Boom", in the public interest. It is, I think, an interesting and perhaps paradoxical consequence of the sustained economic boom in this State that in metropolitan Perth, there are at least two significant shortages. The first is for pens in the river in which to place the large motorised launches that have become the toys of the affluent; the second is for accommodation which is affordable by the less well off members of our community. In

fact, the soaring prices of real estate, and rental accommodation, have been a source of significant hardship to some, amid a time of great prosperity for others. Surely it must be the responsibility of government to use the resources which flow from a sustained boom of this kind, to mitigate its adverse effects upon those who simply can't afford to pay the prices which result from frenetic economic activity.

Sometimes its said that Governments shouldn't discriminate in favour of one group in society over another. The law has been grappling with issues of discrimination for hundreds of years now. We know that treating things and people that are different as if they are the same is just as unfair and unjust as treating differently, things and people that are the same.

In the week of the homeless, it is also worth repeating Anatole France's famous observation:

"The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."

The point he was making of course, is that the law is not equal, because the rich don't want to sleep under bridges, or beg, or steal bread.

And fairness and equity is not the only obligation which a boom imposes upon government. As I think is well recognised, a government taking the benefit of a booming economy has an obligation to provide infrastructure which will be beyond the reach of governments in less prosperous times in the future. If we do not seize the opportunity now to provide roads, trains, harbours, schools, hospitals, universities, theatres, museums and even football stadiums, we will have squandered a god-given opportunity to provide for future generations. And they would not thank us for that. And the opportunity must be grasped with vision. To borrow again from Anatole France:

"To accomplish great things we must not only act but also dream, not only plan, but also believe."

And when the fruits of this bounteous harvest are being allocated, it should be remembered from whence they came. The bounty is not won in metropolitan Perth, but in the regions. The services and infrastructure available in the regions of our great State still fall well behind that of metropolitan Perth. Now is the time to address that imbalance, and to consciously allocate a greater proportion of our resources to regional Western Australia. Resources should not be allocated by reference to voting power, but by reference to need, and to considerations of fairness and equity.

Astute listeners will have noticed that when I was listing potential infrastructure projects a few minutes ago, I made no reference to courts. That is because I want to selfishly finish with a plea for a number of projects in which I have a very strong interest. Given what I have just said about regional Western Australia, I should first draw attention to the plight of many of our regional courthouses which are, quite frankly, simply inadequate. New or substantially refurbished buildings are urgently needed in Kalgoorlie, Kununurra, Karratha, Broome and Carnarvon. These are the places from which our wealth is being derived - we must give some of it back. We are very grateful for the significant commitment already made by government to a new/refurbished courthouse in Kalgoorlie.

Closer to home, there has been a desperate need for an extension to the Supreme Court building in Perth for almost 20 years now. Over that period we have been compelled to do an increasingly large amount of our business in an ordinary office building which was not designed for judicial business. We are the only Supreme Court in the country which has been compelled to operate in this way. It is expensive and inefficient.

Following the gold rush of the 1890s, our forefathers committed a very substantial part of the resources of the State to construct a Supreme Court

building which symbolised the importance of the rule of law to our community. That symbol endures today, but is manifestly inadequate to discharge our current caseload. It is time that the leaders of our community acknowledged the obligation recognised by their forefathers, and set aside a much smaller portion of our State's resources to build an appropriate extension to that symbol on a site and to a standard which is consistent with the importance of law and order in our community. Propitiously, the foreshore redevelopment project, which I think will add an exciting new dimension to our city, provides a wonderful opportunity for a court extension to be built in harmony with the surrounding environment, both natural and built. I would hope that today's leaders will follow the example of Sir John Forrest, and commit a very modest portion of the Dividend of the Boom to the construction of an enduring symbol of the importance of law and order to our community.