

# The Rights of Persons and the Rights of Property

Eran Asoulin

## How property rights are embedded in Australian political history

Mirvac chief executive Susan Lloyd-Hurwitz, not one usually associated with sympathy for tenants on the rental market, said earlier this year that ‘renting in Australia is generally a very miserable customer experience...the whole industry is set up to serve the owner not the tenant’. Her observation is basically correct and the solution she offers is to change the current situation where small investors, supported by generous government tax concessions, provide effectively all of the country’s private rental housing. Lloyd-Hurwitz wants Mirvac, a property group currently managing over \$15 billion of assets, to become an apartment landlord that would own not one or several properties like small investors currently do but rather thousands of properties to rent out. This build-to-rent housing scheme would of course make the real estate—investment company a great deal of money. At the same time it would do very little to alleviate the current housing crisis. Such schemes are a nonstarter for people who want the security, stability and independence of home ownership.

Those of us who care about finding a real solution to the housing crisis would do well to consider how we got into this situation in the first place, and then consider how this might inform what we do next. The following then, traces some of the historical and philosophical roots of our understanding of property and their institutionalisation at various levels of government, especially in the Australian context. It does not purport to provide solutions, but it does show some of the vigorous debates of the past around property rights that have largely been forgotten.

The roots of the problem go back at least to the founding of the colonies in Australia and the way our democracy developed after Federation. In the same year that the First Fleet left Portsmouth, England, the Constitutional Convention took place in the newly formed United States.

As is well known, convicts were originally transported by Britain to the thirteen colonies in North America, but after the American War of Independence, which ended in 1783, the United States refused to accept any more. Britain decided to set up a new penal colony in New South Wales. As the First Fleet was sailing across the Atlantic towards Rio de Janeiro, the Americans were hard at work producing their constitution. Being a British colony, the way in which the American constitution was drafted, as well as the aims and aspirations it had for the newly created state, are, in significant respects, similar to what the founders of the next British colony, Australia, would come to envisage as the function of their state. Nowhere was this parallel clearer than in regard to the rights of persons and the rights of property.

During the debates at the American Constitutional Convention in 1787, James Madison (the so-called Father of the American Constitution and a major influence on the framers of the Australian Constitution) remarked that ‘In England, at this day if elections were open to all classes of people, the property of landed proprietors would be insecure. An agrarian law would soon take place’ that might begin to give land to the landless. Madison saw this as an injustice, and in order to prevent it the constitutional system had to be designed in such a way as to protect property rights. The landholders were by far the minority and at the time were the only ones who could vote, and they thus set the country’s policies to suit their own interests. This situation must be maintained, argued Madison, and so ‘our government ought to secure the permanent interests of the country against innovation’ to make sure that landholders would retain their influence on government. Madison helped design a constitution that set up checks and balances against the population at large by creating a system of government whose aim was ‘to protect the minority of the opulent against the majority’. This was done in several ways, the most

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egregious of which was to make sure that the Senate became an unelected body that would effectively wield a veto over whatever legislation the Lower House (whose members were elected) might decide on. The system created in Australia half a century later had similar aims, both at the state level and later, when Federation took place. The first parliamentary elections in the Australian colonies, for the New South Wales Legislative Council in 1843, restricted voting to men who owned freehold property worth more than £200 or who paid annual rent of at least £20, effectively restricting voting to wealthy white males, who were the only ones who possessed such large sums of money. And even when the franchise was extended to other groups of people to allow them to vote for the Lower House, the Senate either remained completely unelected (such as when the members were directly appointed by the governor) or retained a restricted franchise well into the twentieth century. For example, the South Australian Legislative Council was elected on a property-based franchise until 1973, and the New South Wales Legislative Council was appointed to various degrees until 1978.

Moving from the state level to the federal level, even though the first Australian federal parliament granted the franchise to men and women over twenty-one who were British subjects, and regardless of their wealth or whether they owned property, Federation was among other things a business arrangement designed to enhance the commercial interests of the wealthy within each state. This was recognised right away in the 1890s by the organised labour movement, which was critical of federation because it correctly saw that, in the words of the first professor of law at the Australian National University's College of Law, Geoffrey Sawyer, "To some extent, the whole structure of federalism in Australia protects property interests." The Labour Party at the time, which was excluded from the framing of the draft constitution, was highly critical of it and saw many of its features as undemocratic. Indeed, more than half of eligible voters did not support the adoption of the federal Constitution (either through refraining from voting or by voting against it in the referendum), and those who supported the Constitution had little influence over its content, which was drafted by conservative political leaders. The movements for real democratic reform in Australia in the nineteenth century had a different idea of what democracy should be like, and they were thus met with strong opposition from the wealthy minority at the time, the creation of powerful and unelected upper houses based on property franchises being only one of the forms this opposition took.

So the full franchise at the federal level did not affect men of property, and the federal government from 1901 onwards traditionally has had little involvement and no constitutional responsibility in such areas as urban land-use planning (except for developing Canberra) and in the provision of public housing. The system that was set up after Federation meant that the local governments provided roads, drains, parks and zone planning controls according to the legislation enacted by their state government. State

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governments, for their part, performed planning and construction of major infrastructure projects and enacted regional planning controls such as those relating to building size, location, type and use. A 2010 federal government report (*Of the Plan: Commonwealth City Planning Systems*) remarks that 'State and territory governments lay down strategic planning frameworks, and local governments implement planning policies that ideally reflect local aspirations'. Given the extent to which legislative councils were elected on a property-based franchise even into the 1970s, these local aspirations included mostly the interests of wealthy property owners.

Looking back, then, we see local government in Australia as largely the domain of property owners who would, unsurprisingly, only vote for and support candidates who supported their interests. Voting was linked to paying rates and as a result property owners would have a vote in each local government in which they owned property. This system died a slow death, for it wasn't until 1976 that South Australia and Tasmania introduced full adult franchise for local government, and it wasn't until 1984 that Western Australia did so. Even so, the system of property votes where landowners (individuals, corporations or business groups) are given non-residential voting rights still flourishes today. A case in point is the 2016 City of Sydney council elections, where the Liberal state government not only made it compulsory for businesses to vote (it was previously voluntary and most businesses did not bother to vote) but also granted each business two votes. This blatant attempt to hand the power of the council to the preferred candidate of the business community backfired, however, and Sydney lord mayor Clover Moore won an unprecedented fourth term in office, her independent team increasing its majority of councillors in the city chamber.

In their 2011 discussion paper 'Equality and Australian Democracy', Marian Sawyer and Peter Brent from the Australian National University noted that

One might assume that by now property votes would be a thing of the past, safely consigned to the rubbish-bin of history, along with the exclusion of women, Indigenous Australians and the poverty-stricken from the franchise. This is indeed assumed by most people, but in fact property votes are still flourishing everywhere in local government in Australia except in Queensland and the Northern Territory.

Property votes derive from a particular view of the function of local government; they continue a view that has been strongly entrenched in Australia that 'construes local

government as primarily a provider of services to property and as primarily funded by rates on property'. And again, chief among the protectors of property have been the state legislative councils, each of which was traditionally an appointed body and 'a bastion of property owners'.

The consequence, then, is that our current economic, political and legal systems favour and in many cases actively promote the interests of those who own property, and of course the more property one owns the more influence one has. A working-class family who owns their home has much less influence on government than a mining or real estate—investment company. Such influence often results in conflict when governments attempt to put in place environmental and natural-resources regulation, or when they attempt to deal with the housing crisis and the escalating price of buying or renting a home. Indeed, since the 1990s government regulation of land use has seen a strong backlash from the mining, farming and property-development industries. Landowner groups such as Property Rights Australia argue that there is a right to property and that it is a natural right. A case in point is to be found in the work of conservative thinktank the Institute of Public Affairs (IPA): it is one of the wealthiest thinktanks in the country and has a strong influence on the Liberal Party. IPA director John Roskam said in a 2010 press release that 'State and Federal environmental regulations are undermining property rights across Australia' and that 'billions of dollars of property...has been appropriated' by state and federal environmental laws, including such laws as the *Native Vegetation Act 2003* (NSW) and the *Threatened Species Conservation Act 1995* (NSW). Roskam argues that it 'is a fundamental principle that property owners should be compensated when they are stopped from using their land as they choose'. It is worth thinking about what this means, and what implications it has for society at large.

Property rights of the kind Roskam asserts are a very peculiar kind of right, one that is very different from human rights, such as the right to free speech. As Noam Chomsky has often noted, there are no rights of property, only rights to property. There is a sense in which I have a right to my bicycle, but the bicycle itself has no rights. Another peculiarity is that my right to free speech does not infringe on your right to free speech, but if I have a right to property then it interferes with your right to have that property. An investor's 'right' to leave an apartment in the Sydney CBD vacant for tax purposes clearly interferes with the right of thousands of people who are seeking a home to own or rent. So

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humans have rights, but it makes little sense to talk about property having rights. This is an important distinction—one between possessions and private property. The view of property as a natural right might seem innocuous, for people rightly want protection from any external entity interfering with their home or possessions. But such protection from having your personal possessions tampered with was not the main aim of the lawyers, merchants and other wealthy men who set up the economic and political system we now live under. Rather, the protection of property rights, seen as a major function of government at all levels, means the protection of the property and financial interests of a minority. The government guards the rights of persons generally, but it provides special and additional guardianship of the rights of a specific and tiny section of society, namely wealthy property owners.

It is important to stress that this was noticed at the time by the working-class movement and others, and the pressure by popular activism for reform was a major reason for the creation of the unelected legislative councils that would guard against an 'excess of democracy'. During the 1857 debate over the manhood suffrage bill, William Haines, the first premier of Victoria, feared that the removal of the property vote would result in a 'naked democracy' in Victoria—presumably a democracy not clothed in the interests of the wealthy minority who owned and controlled the colony. His argument was accepted by his colleagues and it took almost forty years after that for Victoria to abolish plural voting, where property owners could vote in every electorate in which they owned property. A look at the newspapers of the time reveals a lively debate about property rights. For example, a fascinating letter of 3 December 1857 to the editor of *The Empire* (a Sydney newspaper then owned and edited by Henry Parkes) beautifully explains the problem with property rights and their undermining of the rights of people. The author of the letter, John Cramp, discusses a quote from Pierre-Joseph Proudhon's famous 1840 tract *What Is Property?* The quote, often translated in English as 'property is theft' or 'property is robbery', has often been misunderstood, but Cramp correctly explains it as follows: the system of property rights that operated in colonial New South Wales was 'attempting to make private property of

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The Tiny Room

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the land’ and thus ‘lays the foundation for challenges, and justifies future revolutions, social disruption and anarchy’, for it is ‘confounding the very nature of property’. That system of private ownership of the land, under which system we still live, was for Cramp merely a form of theft. He makes a clear distinction between possessions and property: ‘Whatever man has made or can make belongs to man as an individual, may be exchanged, sold, or given away, and is essentially private property’. On the other hand, ‘That which man never made, belongs not to man as an individual but in the aggregate to the nation. This is the clearest deduction from reason’. Public lands, including those used for farming and mining and on which people may build their homes, belong to the public. ‘Those who advocate the sale of the public lands’, continues Cramp,

do not stop to consider that they would perpetrate a robbery on succeeding generations, who will be born and come to maturity with as good a right in the soil as we of this generation. Even if the Legislative Assembly were representative of the people, this generation does not possess and cannot delegate the right to sell the lands, and it is better so. What the people want is to occupy, not to possess the land.

This insight into the nature of property rights is far from unique in the newspapers and periodicals of the poor and working-class at the time, and since. Whenever the *Sydney Morning Herald* discussed Proudhon in the 1850s, he was referred to as ‘the deadly enemy of family and property’, one that would ‘denounce us as a public robber’. *The Melbourne Daily News* described Proudhon in 1849 as ‘the blasphemous of his God, and the misleader of his countrymen, the firebrand, the man who is called the first logician of France, and who aims at nothing less than the destruction of property, which if obtained would make fertile France a howling desert’. Such contempt for people who call for a fair distribution of land and wealth is entirely predictable, for the alternative view of property rights that Cramp articulated challenges the wealthy minority’s stranglehold on land and the profits they reap from their control of it.

Finding a real solution to the housing crisis, then, requires much more than Mirvac’s build-to-rent housing scheme proposes, for that leaves the root of the problem untouched. When we see that our economic and political system was designed in the interests of wealthy property owners we realise, as a member of the Victorian parliament feared in 1857, that ‘when property ceased to be represented,

it would cease to be respected’. A merchant by trade, D. S. Campbell understood that the only safeguard against an equal distribution of wealth and land reform in favour of the poor is the creation of laws and institutions to make sure that the opulent minority remain in control. And he was not alone in his thinking, as we saw above. John Cramp’s letter echoes the calls of the general population and the working-class from the beginning of the Industrial Revolution until today. The earth and its resources are the common inheritance of all and thus should not be monopolised by the few. And more importantly in regard to the housing crisis, those who own property are by the very nature of the interaction and the structure of our society exploiting those who do not own property. Examples are legion: an investor’s purchase of a property in which they do not wish to live deprives others of the security, stability and independence of owning their own home. This property right of the investor is derived from the very principle of our government and its institutions, and shows it to conflict with the rights of persons. A solution to the housing crisis thus goes hand in hand with the struggle for a more just and decent society, an essential feature of which puts the rights of persons above the rights of property. **a**

## The Tiny Room

The pool tech checks the rooftop pool,  
the cigarette smoke spools into the Los Angeles skyline.  
The model in the shoulderless dress  
meshes her long eyelashes.

The open purse on the striped couch  
bares its gold teeth and I want to leave,  
but when the phone buzzes in her hand  
I want to take its place.

No one listens to the new guy in shorts  
and a pullover when he talks,  
the waiter brushes my shoulder.  
The umbrellas’ and gulls’ rounded shades  
hover over the deck.

The sketch pad is out of place,  
the drawing pencil mirrors the dusk.  
I don’t know about tomorrow.

But I see myself in the library  
walking toward the original passage,  
letter as final as the last person who read it  
making the point, pages lit or not.

John Gosslee