

Features

**Bill of rights will help the hoi polloi, not just the haughty torty**

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A modern charter lets parliaments remove rights -- but transparently, not by stealth

THE support of many delegates at the 2020 summit for a bill or charter of rights will undoubtedly be seen by John Hatzistergos as confirmation of his view that only ``professional lobbyists and law school elites'' are interested in such reforms and not ``ordinary citizens''.

Hatzistergos, the NSW Attorney-General, sounded eerily like his former federal counterpart Philip Ruddock recently when he rejected calls for a national charter, or even a state-based version like those in Victoria and the Australian Capital Territory. He insisted the best protection of rights was our system of parliamentary responsible government.

He did not misrepresent history when he stated that this was also the view of the framers of the Commonwealth Constitution when they chose not to emulate the US Bill of Rights. But the attorney did not acknowledge that parliamentary accountability is not what it was in the 19th century.

Its limited capacity to check the power of modern government has become all too plain -- with NSW no exception.

If dramatic proof was needed that ``ordinary citizens'' might actually have something to gain from a charter protecting their rights from an over-mighty government, then the attorney-general's own Labor colleague, Frank Sartor, the NSW Minister for Planning, provided it not long after Hatzistergos made his remarks.

Under Sartor's proposed new laws, which came to light last week, the right of property ownership may soon be significantly curtailed in NSW.

Governments have long possessed the power to compulsorily acquire land for public purposes -- the construction of new roads, airstrips or defence bases being good examples. Those whose property is taken are entitled to payment of compensation. This is guaranteed when the federal government compulsorily acquires property since it is a requirement of the Commonwealth Constitution that it pay ``just terms''. Although a similar guarantee was included in the original draft of the 1855 NSW Constitution, it was dropped before enactment and there has never been an equivalent to the Commonwealth requirement to pay ``just terms'' in the state constitution.

Although the Land Acquisition (Just Terms Compensation) Act 1991 provides that public authorities in NSW have a statutory obligation to pay the market value of real property they acquire, the High Court confirmed in the 2001 case of *Durham Holdings Pty Ltd v NSW*, that there is nothing to prevent states from evading such a requirement by amending or repealing the law.

This is not what is being proposed now, but it highlights how vulnerable property rights are in the states. In any case, no one in Australia has an absolute right to private property. Either level of government can move to acquire your holdings, but the traditional justification for this has been that the government will proceed to use the land itself for the public interest. What Sartor is

proposing is far more, shall we say, entrepreneurial. If he has his way, the state government as well as local councils, will be able to compel landowners to give up their property so that it may be sold in turn to developers. This may be to the profit of the government or council -- but the sale can also be to the developer at a loss.

Concerns that this has the potential to fuel corruption of elected representatives by development companies sending hefty political donations their way seem worth heeding. The Minister's response -- that property will only be acquired for sale to a developer when it is for "net public benefit" -- won't reassure many.

While controversial in themselves, these proposals are just an example of the ease with which Australian governments can strip away freedoms in the absence of a charter.

The public will have heard that claim before -- perhaps when new anti-terrorism measures have been introduced or when the residents of Sydney found themselves subject to extraordinary new police powers during APEC. Those powers have since been made permanent.

For many, alarm over these developments would not have had much resonance -- such laws often being perceived as likely to affect only those out to cause trouble. Capitalising on this assumption, opponents of charters regularly portray them as the refuge of criminals and ratbags.

That line is harder to run when governments start proposing to take people's property and sell it to big business -- whether to turn a profit or give developers' plans a smoother run. It makes it difficult to swallow Hatzistergos's insistence that the political classes should be trusted to respect our rights. We can be forgiven for thinking that something additional is needed to ensure this.

American experience shows that a charter of rights may not prevent a law of the kind Sartor is proposing. Adding a legal avenue to rights protection is no guarantee against disappointment. The meaning of freedoms is often contestable and courts can reach poor decisions -- which is why modern charters leave elected representatives with an ultimate power of override. But the benefit of a charter is not so much the expanded role it gives the judiciary but the responsibility it places upon the political arms of government.

This is the point Hatzistergos and other charter opponents never discuss. The existence of a legal instrument articulating citizen's rights compels politicians to lift their game. The difference a charter might make to the Sartor proposals is that the express recognition of property owners' rights gives them clear political value and compels the parliament to confront this before setting them aside for the "net public benefit".

Also, under a charter the right to compensation for those who lose property would be less precarious than now under ordinary statute.

A modern charter still enables parliaments to remove recognised rights -- but they are obliged to do so transparently, not by ambush or stealth. Charters promote political accountability and respect for the people beyond their role at the ballot box every few years. They enrich, rather than diminish, democracy -- for all "ordinary citizens".

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