Submission
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INQUIRY INTO ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (INFRASTRUCTURE CONTRIBUTIONS) BILL 2021

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The Tax that Dares Not Speak Its Name

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The NSW Government has been careful not to describe "betterment taxes" as such for many years now. Why has it become a tax which dares not speak its name? What is its relevance to the Infrastructure Contributions Bill?

[1.0] The Lessons of History

According to the New South Wales Parliamentary Record:

> "…it is provided in the bill that such schemes may contain provision for the recovery by the councils of a proportion of the increased value of the land brought about by the scheme – called "betterment". When hon. members receive the bill I invite them to pay this provision particular attention because it is something that has been discussed by reformers in the past. Where the operation of a town-planning scheme improves land values the owner of the land is not to receive the full advantage of the extra value added to it by this public service. Provision is made in the bill for the major portion of the increase in value to be taken by the council, and for the money to be used to compensate those whose lands have been injuriously affected, or to further the schemes that the councils have prepared."

If the references to betterment tax, and compensation of those whose lands have been injuriously affected by planning decisions, sound rather unfamiliar, it is because this Parliamentary extract dates from 1945. Yes, that's now over 75 years ago. The then Minister for Local Government, the Hon. J.J. Cahill M.L.A., made these comments in a speech introducing the Local Government (Town and Country Planning) Amendment Bill. (New South Wales Parliamentary Debates, vol. 176 at 1720-1721.)

Part XIIA of the bill included Div. 9, which provided for payment of compensation in certain cases, and Div. 10 which enabled betterment charges to be collected from the owners of land benefited by prescribed schemes.

So, what happened to this scheme? Was betterment tax collected? Were injuriously affected owners compensated? What lessons were learned?

According to the *Dictionary of Sydney*:

> "Released in 1948 but not legally gazetted until 1951, the County of Cumberland Planning Scheme was once described as 'the most definitive expression of a public policy on the form and content of an Australian metropolitan area ever attempted'. [25] With some inspiration from the famous London plans by Patrick Abercrombie, the County Scheme introduced land use zoning, suburban employment zones, open space acquisitions, and the green belt to Sydney. The Main Roads Department supplied a ready-to-go expressway network. Yet, despite the best intentions, the Cumberland County Council was an overall failure. It met strenuous opposition from property owners and by the mid-1950s had 22,000 claims against it for 'injurious affection' arising from County zoning." (Ashton P. & Freestone R., *Planning, Dictionary of Sydney*, 2008, http://dictionaryofsydney.org/entry/planning)

A textbook writer (Wilcox) noted:

> "In New South Wales the compensation funds have been so limited that compensation rights have almost disappeared. (The injustice to individuals is obvious....) The elaborate structure remains but the fact is that, in the fifteen years since the first town-planning scheme was prescribed in new South Wales (The first prescribed scheme was, of course, the County of Cumberland Planning Scheme Ordinance which came into force on 27th June, 1951.), there is not one single reported case where compensation has been awarded by a court." (Wilcox, M.R., *The Law of Land Development in New South Wales*, Law Book Co., (1967) at 278.)

Three points stand out from this historical experience:

1. There was no attempt to use sly euphemisms such as "value capture" or "profit capture" or "land value contribution" to conceal what was properly called a tax, i.e. a betterment tax;

2. There was a genuine concern to compensate landowners injuriously affected by planning decisions, which was seen as a matter of "common sense and justice" (Wilcox *ibid.*, at 277-278) in contrast with the current government, which has demonstrated an utter disregard for same; and

3. The scheme was in place for decades, but failed to actually raise tax or compensate injuriously affected landowners.

What lessons has the current government learned from this history? Possibly nothing, except perhaps to avoid calling a betterment tax a betterment tax.

[2.0] Betterment Tax

The *Australia's Future Tax System: Report to the Treasurer- Part Two: Detailed Analysis 2009 "Henry Tax Review"* at Box E4-2 noted that:

> "in practice, betterment taxes can increase the uncertainty associated with land Development….[and]… can involve lengthy disputes".

Here is an extract of the *Henry Tax Review* ("Part Two Detailed Analysis" at 423-424) dealing with betterment tax, in the broader context of infrastructure charges. (The focus of interest is the section about betterment tax, but the preceding section about infrastructure charges is included to provide some context.)

> **"E4–5 Infrastructure charges**
>
> Infrastructure charges (sometimes called 'developer charges' or 'developer contributions') are fees levied on developers to compensate governments for providing facilities necessary for land development. The charges are often associated with basic infrastructure (such as local roads and water mains), but more recently this has sometimes been extended to include major headworks (arterial roads and pumping stations) and social infrastructure (parks and libraries).
> Infrastructure charges are widely used by local government as well as some State governments, and are increasingly prevalent in other developed countries. There is limited information and few aggregate statistics relating to infrastructure charges in Australia. Chan et al. (2009) reported that in 2005–06, New South Wales councils collected $232 million and Victorian councils collected $454 million in charges.
>
> **What is the potential role for infrastructure charges?**
>
> In Australia, the practice of governments charging for infrastructure has been becoming more prevalent since the 1980s. This reflects increasing demand for

infrastructure and fiscal constraints on local governments, but also a policy shift towards using economic instruments to allocate infrastructure and influence development decisions (Chan et al. 2009).

In principle, efficient provision of infrastructure would be encouraged where its users pay for the construction of infrastructure that would be avoidable (that is, not needed) if the development did not proceed. By levying infrastructure charges that reflect these costs, State and local governments provide signals to develop housing in ways and places of greatest value. The cost of infrastructure increases directly with distance from essential headworks and inversely with the density of development (Slack 2002). To the extent that a developer can respond to these costs, for example, by choosing to build closer to an existing development or by increasing the density of housing, charging the developer can improve housing supply.

Indeed, in the absence of pricing, developers build without regard to such costs, and governments are more likely to rely on other policy instruments, such as planning regulations, to limit the budget costs of infrastructure associated with housing developments. The absence of effective infrastructure pricing increases the need for development regulations.

There are problems with infrastructure charges in practice

In practice, infrastructure charges have a number of problems.

First, infrastructure charges can sometimes be used to raise tax revenue, rather than focusing on providing efficient user charging. Where the charge exceeds the cost of providing infrastructure, it acts like a tax and can discourage development. This is more likely to occur where the size of the charge is not set relative to the cost of infrastructure but the developer's capacity to pay. In these cases, the charges may attempt to capture part of the increase in value resulting from the provision of infrastructure or from changes in zoning, that is, to impose a betterment tax (see Box E4–2). However, the benefit to the developer is difficult to determine, and attempting to set charges on this basis can lead to negotiations that are protracted and non-transparent. This can slow down development processes and result in payments that are not effective as prices for infrastructure. In general, infrastructure charges will operate more effectively if they are set to reflect the cost of infrastructure, not to tax the profit of development.

Box E4–2: Betterment taxes

A particular form of tax used when land is re-zoned for alternative use is a 'betterment tax' which attempts to capture some of the increase in land value. Betterment taxes are not infrastructure charges since the objective is to tax

economic rent, although sometimes the revenues are hypothecated (that is, earmarked) to infrastructure provision.

In concept, betterment taxes are attractive since they aim to tax the economic rent from land rezoning that would otherwise accrue to the landowner. However, in practice, betterment taxes can increase the uncertainty associated with land development. To operate effectively, betterment taxes need to isolate the increase in value attributable to the zoning decision or the building of infrastructure from general land price increases at the local level. This is often difficult since the value of land will move in anticipation of a change in re-zoning. Sometimes this can occur many years before the re-zoning. Betterment taxes may be applied on an ad hoc basis and the rate of the betterment tax is sometimes left to discussions between developers and government as part of the planning approval processes, rather than being set in a transparent manner. Betterment taxation can involve lengthy disputes as, by setting the tax conditions, the dispute is really about how to share the economic rent.

Additionally, having a betterment tax in place may encourage governments to create economic rent through additional zoning restrictions or delays in land release, in order to raise more revenue. Where zoning is used in such a manner, it is likely to stop land being devoted to its most productive use — at least in the short run. A land tax applied to all types of land (see Section C2 Land tax and conveyance stamp duty), is likely to encourage governments to allow land to be used for its most productive use as this will increase the value of the land (and hence increase the revenue raised from land tax).

Second…."

Some key points made in Box E4-2 may be explored here.

[2.1] Capital Gains Tax v Betterment Tax

Capital gains tax ("CGT") has these characteristics:

- clear purchase value
- clear purchase date
- clear sale value
- clear sale date
- tax payable only out of proceeds of sale. (No sale - no tax payable.)
- not assessable on the principal place of residence (or any substantially unaltered property purchased before 1985).

In 1999 a capital gains discount was introduced to promote more efficient asset management and improve capital mobility, by reducing the tax bias towards asset retention, and to make Australia's CGT internationally competitive. Under the

discount, individuals and the beneficiaries of trusts pay tax at normal rates on only half of any capital gain realised on an asset held for at least twelve months. Superannuation funds receive a one-third discount.

One might wonder whether or not such considerations exercised the Minister's mind in the formulation of the Bill's "land value contribution". What about the interaction with CGT and other taxes? Investment and commercial properties in NSW would now seem to be subjected to two capital gains taxes, namely the existing CGT, and this new BSCGT, plus land taxes. Further, principal places of residence would be taxed under the BSCGT.

The Bill creates many uncertainties about the calculation and applicable rates of betterment tax proposed. Many of these uncertainties will prove to be unresolvable because the premise of a betterment tax is that the value of betterment caused by rezoning may be easily identified, but it is not.

[2.2] Pre-Betterment Valuation

For the purpose of setting a betterment value, the commencement of the betterment period would be the date of rezoning. The presumption might be that the value of the property on the day before the rezoning announcement would be the "pre-betterment" value, from which any consequent betterment value would be calculated.

However, is that zoning date the correct date? As noted above by the *Henry Tax Review*: "since the value of land will move in anticipation of a change in re-zoning. Sometimes this can occur many years before the re-zoning." This can occur in a variety of ways, for example:

- many landowners might make a long term investment on the basis that eventually population pressure will lead their land to be rezoned, so that the possibility is "priced in" accordingly;
- the development of land use plans by NSW may become public knowledge over time, particularly given the common requirement for community consultation, so that such information becomes priced into the market;
- the process might be compared with financial market speculation, where announcements of Reserve Bank interest rate changes are almost completely "priced in" at the time of the announcement.

Such market pricing sensitivity is in fact indicative of an efficient market, but the implication for calculating the pre-betterment value of a parcel of land is that a significant portion of the betterment might already have occurred at the rezoning date.

So, what is the correct pre-betterment date? How is it valued? Who pays for the valuation? Is the owner entitled to appeal the valuation? If not, might it not be

challenged in court? What happens while this process is played out? If this process is duplicated on not one, but hundreds or thousands of properties, what effect will that have on the market liquidity for land, and the rate of development? Given the significant reported shortcomings with the current acquisition valuation process in relation to the Aerotropolis, the question must be asked: could the bureaucracy cope efficiently with this process?

[2.3] Post-Betterment Valuation

For the purpose of setting a betterment value, the conclusion the of the betterment period would be, it appears, at the time of sale of the land, at which time the relevant council would issue a "land value contribution certificate" which would specify the "contribution", i.e., the betterment tax. Because payment is required at the time of sale, it has also been described as a "vendor tax". (Gadiel, Aaron, "New vendor tax on future development sites", *Mills Oakley*, June 2021.)

The evident intention is that the council would value the land at the time of sale, subtract the pre-betterment value to obtain the betterment value sum and then apply the applicable rate of tax to determine the value of the "land value contribution".

While the sale contract would provide a fixed price on which to base calculations, the "land value contribution" does not purport to be a capital gains tax, but rather a tax on betterment caused by rezoning. So, what is the "post-betterment" value? Similar questions arise did so with the pre-betterment valuation.

How is post-betterment valued? Who pays for the valuation? Is the owner entitled to appeal the valuation? If not, might it not be challenged in court? What happens while this process is played out? If this process is duplicated on not one, but hundreds or thousands of properties, what effect will that have on the market liquidity for land, and the rate of development?

The valuation post-betterment is actually vastly more complicated compared to pre-betterment valuation because of the large range of other factors which could influence the land value during the betterment period, whatever its length. Some examples include:

- rising or falling interest rates;
- changes in Australian Prudential Regulation Authority prudential requirements for banks which restrict or encourage property landing;
- rises or falls in foreign exchange rates which affect economic activity;
- inflation, and changing rates of inflation;
- net migration rate ebbs and flows;
- variation of zoning of other land in the district;
- improvements which might be made to the land during the period; and

- organic economic development which occurs after the “value uplift” or betterment caused by the zoning changes exhausts.

No doubt the reader might suggest other variables which might influence land values during the betterment period.

So how are the effects of variables such as these separated out from the changing market value of the land, so that the value of the betterment effect itself could be correctly calculated for all alienated (by Crown grant of freehold or leasehold) land in NSW -about half its land area?

In principle, this could only be done by the application of advanced statistical techniques, such as linear regression or factor analysis. It really requires a dynamic three-dimensional spatial model of value effects (think Star Wars style visual 3D with declining land values indicated by dales and increases by hills), accurate to within say +/- one metre (to be sensitive to individual property boundaries), with detailed assumptions verified by a multiple-cross-valuation process acceptable to landowners and government. The Australian Bureau of Statistics would have to open a new department to cope with the workload and the statisticians would have a great time. Who would pay for this time-consuming and colossally expensive space-age-style misallocation of resources?

At this point, the Government might say oh well, we’re not going to worry about that: we’ll just deem the conventional land valuation at rezoning date and the sale price as the betterment values. By using these values as proxies for betterment values, this approach effectively turns the betterment tax/land value contribution into a CGT. The only difference with the existing CGT which it would substantially duplicate, is that the starting date is the rezoning date rather than the purchase date, and that it would apply additionally, as a NEW HOME ZONE TAX to principal places of residence.

The “land value contribution” betterment tax would thus in truth be an arbitrary CGT. Significant uncertainties remain in the form of the valuation process, appeals processes and consequent land market disruption. As noted by the *Henry Tax Review* (above): “Betterment taxation can involve lengthy disputes….”. The County of Cumberland Scheme failure is evidence of that.

[3.0] Further Complications

What about restorative zoning? Much land in recent years has been adversely rezoned from rural to environmental, destroying “value”. Many of said properties have since been recognised to have been inappropriately rezoned, and after a period of years are being restored to their original rural zoning, with a consequent restoration of “value”. There is no indication in the Bill that these situations, where a landowner’s pre-existing rights of use are simply being restored, would not be caught by the land value contribution betterment tax. Why not?

What about if the betterment value, using the Government's proxy measure, peaks then falls (due perhaps to a faltering economy, or a bust following an "irrationally exuberant" boom)? Is there provision for a refund for the lower betterment value?

What would be the tax incidence of the land value contribution/betterment tax? Tax incidence is the manner in which a tax burden is divided between buyers and sellers. Although as described in the Bill, the tax is effectively a vendor tax, who ultimately pays the tax depends on supply and demand.

The tax incidence depends on the relative price elasticity of supply and demand. When supply is more elastic that demand, existing landowners bear most of the tax burden. When demand is more elastic than supply, buyers bear most of the cost of the tax. Past experience in the UK (with their betterment tax failures) suggests that in practice, supply is relatively inelastic because most landowners are not, for the time being at least, active sellers, so they will only consider selling if the purchaser pays the "land value contribution" in addition to the net price required by the vendor. The purchaser, being in this context likely to be a developer, will only pay that tax premium if confident that it can in turn be passed on to its customers after development. If those customers are for example, first home buyers, it is they who end up funding the tax. If therefore home buyers are priced out of the market as a consequence, then that would contribute to the "housing shortage" and "high cost of housing".

There does not appear to be any indication that the Government, in proposing the land value contribution, has considered the pattern of consequential tax incidence.

On the very same day that the subject Bill was tabled in NSW Parliament, the South Australian budget was also presented. Here's a comment:

> "The Treasurer highlighted in his briefing that whilst other states had increased their land tax rates and introduced new property taxes for rezoning, he had ruled that out.
>
> To his credit, it was the right thing to do, particularly for rezoning, because that type of tax would only inhibit new development and supply in a very tight market." ("Budget overlooks chance for property tax changes", *Business Insight*, 27 June 2021.)

As noted in the *Henry Tax Review* above: "..in practice, betterment taxes can increase the uncertainty associated with land development". It should be clear from the above analysis that the Bill increases uncertainty in many ways, and its practical complications with regard to valuations in particular will clearly cause delays and hesitancy, with owners reluctant to go to market, inhibiting new development and supply.

Your humble correspondent submits that attention should be paid to this further point made in the *Henry Tax Review* (above):

> "A land tax applied to all types of land (see Section C2 Land tax and conveyance stamp duty), is likely to encourage governments to allow land to be used for its most productive use as this will increase the value of the land (and hence increase the revenue raised from land tax)."

[4.0] Taxing Inflation: A Covert New Land Tax

The nominal value of land is influenced by the rate of inflation. Indeed, one reason for investment in land rather than cash is as a hedge against inflation. At the moment, the rate of inflation is historically low. For the purposes of a betterment tax, the relevant valuation dates might be taken to be the date of rezoning and the date of sale of the land (the "betterment period").

Assuming, for example, a rate of inflation of 1.5% per annum over a betterment period of say fifteen (15) years, *ceteris paribus* the cumulative nominal increase in property value by the end of the period would be a calculated 25%. Thus, at a 1.5% p.a. inflation rate, the nominal end value of a property valued initially at say $1m would be $1.25m. However, this $250,000 rise in value, being due to inflation, is merely nominal: the real value is unchanged at $1m in rezoning date dollars.

It follows from this that any increase in nominal land value due to inflation is not betterment at all. Taxing this nominal increase in value would effectively be a land tax, not a betterment tax or "value capture", as there is no real "value" to be captured. Accordingly, to avoid the betterment tax effectively being a tax on "non-betterment", provision ought be made for use of a deflator price index (such as the State Consumer Price Index) to adjust for real prices over the betterment period. This has not been done in the Bill.

It is well known that the Reserve Bank has a policy of achieving an annual rate of inflation of 2% to 3% and that in the past interest rates have been much higher – say 17% p.a. in. the late 1980's, and bank bills reaching over 20% during the Whitlam Commonwealth Government period.

So, to take a couple more examples, assume inflation rates of merely 3% and 5% over a betterment period of say ten (10) years, again *ceteris paribus*. The cumulative nominal increases in property value by the end of the betterment period would be calculated at 34.39% and 62.89% respectively, with the nominal values being $1.3439m and $1.6289m. It is clear that these values would continue to rise exponentially, the longer the duration of the betterment period with respect to each affected piece of land.

In the third example, the nominal value of the land is already 62.89% higher than the real value at the rezoning date, and none of this change is attributable to rezoning – if betterment did exist, the nominal and real values would both be higher again at the end of the betterment period. To take a purely illustrative hypothetical betterment tax rate of 20% of "betterment", without allowing for inflation, the tax taken would be 20% x $628,900 = $125,780. This sum is thus not a tax on betterment, but a land tax. In this way, a "betterment tax" without an inflation adjustment mechanism would covertly introduce land tax onto the place of principal residence which has been rezoned (i.e. create a NEW HOME ZONE TAX), and duplicate existing land tax burdens for other rezoned properties.

The question must be asked in this respect: does the Government know what it's doing, in failing to make provision for use of a deflator price index to adjust for real prices over the betterment period?

[5.0] Hawke & Keating v Perrottet

The Bills introduced on motion by Mr Dominic Perrottet (Epping—Treasurer), including the Bill which is the subject of your Committee's Inquiry, were the subject of his speech, entitled:

> "YOUR FAMILY, YOUR FUTURE"

One relevant extract from the Treasurer's speech as recorded by Legislative Assembly Hansard 22 June 2021, reads:

> "What sets the NSW Government apart from every other State—and the Commonwealth—is that we are not just focused on today, we are focused on the future.
>
> **Productivity is everything**
>
> And the key to that is productivity.
> Lifting productivity means the people of our State get more value for their efforts and more reward for their work.
> Higher productivity means higher wages, better jobs, better services and more freedom.
> But since the Hawke, Keating and Howard governments, productivity reform has virtually stopped.
> It takes imagination to build a better future.
> And long before any pandemic, this Government saw the future coming.
> In 2018 we appointed the NSW Productivity Commissioner, and we've acted on advice to get the ball rolling.
> We're advancing reforms to deliver a more streamlined planning system, to get more houses built faster and more affordably…."

What is frankly bizarre is that the effect of the subject Bill being introduced by this speech would, if enacted, directly contradict these sentiments. Note the Ministerial Statement by Mr Keating (Treasurer) on reform of the Australian taxation system (Hansard 19 September 1985 at 1345ff), where Mr Keating states:

> "We will establish a capital gains tax so that in the future taxpayers who take their income in the normal manner will not be disadvantaged as against taxpayers who choose to take their income as capital…..
>
> CAPITAL GAINS TAX
>
> …The Government has decided to introduce a capital gains tax but, in the light of the public debate, to incorporate several major modifications to the proposal outlined in the White Paper in June.
>
> These changes address the concerns which have been expressed and will substantially reduce the impact of the tax and allow the community a lengthy period in which to adjust to its application. In particular, it has been decided that the tax will be in every sense be prospective. That means it will apply only to gains on assets purchased or acquired after today. All assets already owned by taxpayers will be exempt from the tax when sold by them, both in respect of gains accrued until now and all future gains. The Government has decided that the deemed realisation at death proposal, outlined in the draft White Paper, will not apply. Liability for tax in the case of death will be rolled over to successors, and will only be assessed on any subsequent disposal. Therefore the capital gains tax will not apply in the case of death.
>
> Other main features of the tax include:
>
> …It will apply only to real capital gains calculated by fully indexing the cost of the asset for inflation;
>
> …a complete exemption will apply to gains on the taxpayer's principle *(sic)* residence…..
>
> …there will be provision for nominal losses to be offset against gains;
>
> …the tax will be levied, on real gains, at ordinary rates of personal and company income tax..
>
> As an illustration of the fact that this tax will affect only a tiny proportion of the population, its expected revenue yield, in the fifth year of operation is expected to be only $25m….

> …I repeat….that every asset already owned by taxpayers will be exempt from the tax."

The contrast between Keating's capital gains tax (CGT) and the Bill's so-called land value contribution (LCV) could not be more stark. Most obvious is the complete prospectivity built into the CGT, whereas the LCV applies to lands already owned. The CGT excludes the principal place of residence, but the LCV does not. The CGT excludes inflation from asset valuations, but the LCV does not. The CGT is applied at marginal tax rates, but the LCV rate applies regardless of the marginal tax rate: this makes the LCV a highly regressive tax. The CGT demonstrated an acknowledgement that property owners make long term investment decisions, and that it would be both unjust, and damage investor confidence, if rule changes were not made prospectively: the LCV does not. The CGT did not apply in the case of death: the LCV makes no such commitment. The CGT tax rate is predictable and consistent nationwide, whereas the LCV in NSW will compete with other states (such as South Australia) where the LCV is always zero, and worse, potentially be assessed by individual councils adding further uncertainty to investment decisions by homeowners and business investors alike. Unlike the CGT which duplicated no other tax, the LCV will effectively duplicate the CGT for property investors.

Far from being a "Your family" budget, the LCV provisions constitute a big kick in the guts for family landowners. Far from being a productivity enhancing measure, it is a productivity and incentive destroying measure which is in complete and utter contrast to the Keating productivity enhancing policies admired by the NSW Treasurer, which begs the question as to why such a stinker of a tax would be introduced by his Government. Any Committee member might pass a copy of the Bill and this submission to Mr Keating and ask him which he thinks to be the stinker.

As explained elsewhere in this submission, betterment taxes have a history of failure, being costly and complex to administer, prone to litigation, impairing the market efficiency of property trading and increasing costs which are often passed on to the final end users, which can include first home buyers. It is clear that betterment can not in practice be accurately measured, so that CGT type valuations will be used as proxy values, making the LCV in fact a type of CGT, and if no account is taken of inflation, a land tax as well. The proposed LCV is the complete antithesis of Hawke and Keating style productivity initiatives.

As noted in the submission, if NSW requires more revenue, the *Henry Tax Review* has noted that a land tax applied to all types of land is more efficient – and of course improved economic efficiency is key to productivity, which the NSW Treasurer so fervently espouses.

[6.0] Government Moral Hazard & Legal Misconceptions

The *Henry Tax Review* (above) made many pertinent observations about betterment tax in a short passage. Here's another:

> "…having a betterment tax in place may encourage governments to create economic rent through additional zoning restrictions or delays in land release, in order to raise more revenue

This raises the issue of the effect of Government zoning strategy as a market manipulation technique. The introduction of a betterment tax might provide additional incentive for such manipulation.

One glaring example of this moral hazard at the outset is the Government's complete disregard for the "common sense and justice" displayed in the 1945 NSW legislation referred to above, which provided for money to be used to compensate those whose lands have been injuriously affected. Even though that scheme ultimately failed, the intent to provide appropriate compensation to landowners adversely affected by rezoning was clear, in contrast to the current Bill, where it is arbitrarily and unjustly absent.

The Government, quite apart from maintaining an utter disregard for justice in this field is, partly due to failures of NSW legal practitioners, under a misapprehension as to the legal rights of landowners injuriously affected by adverse rezoning.

This is explained in your humble correspondent's "Real Property Rights - and Wrongs", Submission 30 to the *INQUIRY into the acquisition of land in relation to major transport projects: Portfolio Committee No. 6 – Transport & Customer Service*, June 2021 ("Submission 30").

Very briefly, the Russell Review's textbook citation of *Commonwealth v New South Wales* (the *Wheat Case)* (1915) 20 CLR 54 as authority for the proposition that State Parliaments may enact legislation to compulsorily acquire land without the payment of compensation or with reduced compensation is fallacious. A startlingly obvious problem with citing the *Wheat Case* for such a proposition is that in the *Wheat Case*, as the nickname suggests, the property in issue was wheat. Wheat is a chattel, not real property. The High Court did not consider the law of real property in the *Wheat Case*.

What the High Court <u>has</u> said with regard to real property is, *inter alia*, that:

> "..An estate in fee simple is, 'for almost all practical purposes, the equivalent of full ownership of the land' and confers 'the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination.'

> "As the Crown is not competent to derogate from a grant once made, a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorizing any impairment of an interest in land granted by the Crown or dependent on a Crown grant."

Citations and a full explanation are provided in Submission 30. The point being made here is that the Government's working assumption that it can willy-nilly impose zoning restrictions on landholders without compensation is very open to challenge.

The immediate relevance to this submission is that "Submission 30: PART II The Rights & Wrongs of 'Value Capture'" examines the behaviour of State Governments in relation to the manipulation of zoning restrictions, identifying "**Four Strategies of Injustice**". These are -

A. the **Private Land Sterilisation Strategy:** maintain the adverse zoning indefinitely, claiming that it has achieved environmental benefits for the public (of course, at the cost of the landowner, which is not acknowledged);

B. the **Landowner Loss Realisation Strategy**: at some later time of its choosing, compulsorily acquire the land for exclusive public use, at the lower, zoning affected market value, thus making the landowner's loss permanent with a bargain price achieved for the government;

C. the **Mandated Developer Compliance Strategy:** at some later time of its choosing, require developers to contribute green space to projects at their own cost, by purchasing the sterilised land at the post-zoning depreciated value, prospectively from owners distressed by the zoning and consequently under pressure to sell at any price; and

D. the **De-sterilisation Uplift Strategy:** at some later time of its own choosing, after the injuriously affected owners have sold out, and after some "change in circumstances", rezone the affected land more favourably to a successor landowner (which could be a developer, or the government itself), capturing the uplift in value, if not itself as the owner, then by using the favourable rezoning to negotiate better terms with developer/owner or receive the proposed "land value contribution".

Each of the four strategies relies in one way or another on the existence of uncompensated injurious affection being imposed on a landowner, so this sort of "value capture" is nothing like a betterment tax. However, in the case of the *De-sterilisation Uplift Strategy*, the government could compound the injustice by the

imposition of a betterment tax on the manufactured uplift. For further analysis, see Submission 30.

The point of including these observations here is that in addition to all its other shortcomings, the proposed betterment tax is not balanced by any concern for landholders injuriously affected by adverse rezoning.

[7.0] Conclusion

The Bill's proposed "land value contribution" may also be described as "value uplift", a betterment tax, a type of vendor tax, and a NEW HOME ZONE TAX.

Betterment taxes are historically failed taxes, with a demonstrated record of failure in NSW. The *Henry Tax Review* criticised betterment taxes as being administratively and economically inefficient.

The Bill's proposed land value contributions raise numerous unanswered questions about their practicality. It is submitted that potentially affected property owners deserve to have them all addressed. The likely result of their implementation will be to inhibit development and supply. The interaction with other taxes is not evidently constructive, and the failure to apply an inflationary deflator would constitute imposition of a new land tax. Imposition of land value contributions on principal places of residence will be an arbitrary and novel imposition on some home owners. A tax on all types of land would be more efficient. Far from being productivity enhancing, the proposed land value contribution is a productivity killer.

Further, unlike in 1945, the Bill completely fails to attempt to balance "value capture" with the "common sense and justice" of compensating landowners injuriously affected by adverse rezoning.

Thank you for the opportunity to make a submission to your Inquiry.

Peter Ingall
Barrister

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