Draft Paper on Property Rights and Compensation

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Introduction

In opening the third day of the Outlook 2002 conference in Canberra, the Deputy Prime Minister, John Anderson, acknowledged that natural resource management was the most important environmental issue facing Australia, as well as the most important long-term economic issue facing rural Australia.[1]

He pledged his government's commitment towards sustainable land and water use but argued that it was unfair to expect rural Australia to meet the whole cost of the country's environmental requirements, because all Australians benefited from the wealth generated by the rural sector.

He outlined a "new approach to environmental management", based on four principles: information, property rights, incentives, and partnership. IN speaking about compensation, he stated:

> "The best way to protect our land and water resources is to create a system of secure environmental property rights. The importance of property rights is

recognised in the wider economy; historically they are one of the reasons that western countries grew rich. They are a prerequisite for long term investment and planning.

"The Government believes that landholders who give up property rights in the interests of the environment must receive compensation or adjustment assistance. Compensation is strictly a matter for the states and territories, but we are committed to ensuring they provide fair compensation when rights are lost.

In a similar vein, the National Farmers' Federation (NFF) has called for compensation for the removal of farmers' property rights. In particular, the NFF is asking Governments to offset any reduction in property values where rights and legitimate and reasonable expectations have been diminished.[2]

Debates over property rights and compensation have frequently taken place at a rhetorical level. Likewise, Governments have provided "compensation" (such as ex gratia payments) despite there being no legal basis to do so.[3] As Bonyhady has argued:

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[1] Media Release, John Anderson
[2] See National Farmers' Federation "Property Rights Position Paper" May 2002.
[3] Bonyhady T (1992) "Property Rights" in Bonyhady T *Environmental Protection and Legal Change* Federation Press at pp 64-68.

> Both ownership and property have such powerful rhetorical force: even if constitutionally entitled to do so, governments are reluctant to infringe them without paying full compensation which in turn constrains government action because of the limitations of the public purse.[4]

Consequently, it is felt that it would be a useful exercise to set the legal framework, from which political and policy responses may spring. This paper thus deliberately confines itself to the legal position in relation to property rights and compensation for land,[5] with analysis largely restricted to the jurisdictions of NSW, Queensland and South Australia.

What are property rights?

a) Common law

Ownership of land in Australia at settlement originally depended upon the common law of England, which was introduced into the colony of New South Wales and invested the Crown with rights of property in all land in the colony. Even today, at least formally, all land is held directly of the Crown: *Mabo v The State of Queensland* (1992) 175 CLR 1 at 80 per Deane and Gaudron JJ.

[4] Bonyhady T (1992) "Property Rights" in Bonyhady T *Environmental Protection and Legal Change* Federation Press at p 45. See also

[5] In this respect, it is noted that, in their own terms, the other principles advocated by the Deputy Prime Minister - information, incentives and partnership – could well form part of a package of measures to effectively address land clearing and its attendant environmental problems.

The common law conception of land included all substances attached to the land, which would include native vegetation, and minerals (except royal minerals) underlying the surface of the land. Ownership was said to be of everything reaching up to the very heavens and down to the depths of the earth (*Bury v Pope* (1586) Cr Eliz 118; 78 ER 375).

The position of Crown ownership was altered where the Crown alienated land from itself creating an estate in fee simple, or freehold land. With the exception of any reservations as to Crown rights to natural resources, the freehold land owner has a property right in any native vegetation attached to that land. For example, the Crown may grant freehold title over land but retain rights to harvest timber.

Under the common law, A freeholder was said to own all things growing on or affixed to the soil including buildings, trees, plants, crops (including cultivated and uncultivated growing crops) and minerals (except royal minerals). These things were treated as part of the land until severed *(Re: Ainslie; Swinbourne v Ainslie (1885) 30 Ch D 485; Corporate Affairs Commission v Australian Softwood Forest [1978] 1 NSWLR 150.* In relation to leasehold land, the right of property in native vegetation is vested in the Crown. The lease operates as a personal right and whether the holder of leasehold land may take any action in relation to the vegetation on the land depends upon the terms of the lease.

Nevertheless, even putting aside the title vested in the Crown, property rights at common law have never been absolute. The common law has long recognised that the basis of ownership to land is not absolute, but relative, titles (*Asher v Whitlock* (1865) LR 1 QB 1, 5). This has found expression under property law as the idea of a "bundle of rights" or "rights less than the rights of full beneficial, or absolute, ownership" (*Yanner v Eaton* [1999] HCA 53 at [30].

b) Legislation

Regardless of this common law context, property rights in Australia have long been created and derived from extensive legislative regimes and are regulated under such legislation. For example, New South Wales, Queensland and South Australia have all introduced legislation to regulate native vegetation, although the controls differ significantly in each jurisdiction. New South Wales uses traditional planning mechanisms (such as regional vegetation management plans and development consents) while the Queensland approach is more akin to threatened species laws. Both New South Wales and Queensland have a large number of actions that are exempt from the operation of these regimes. South Australia has a much more ecosystem-based approach (presumably as a response to historical practices), with the discretion of decision-makers fettered along ecological bases.

These legislative regimes supplant the position at common law, although there is no express abolition of common law rights. These jurisdictions regulate native

vegetation clearing through various approval mechanisms, such as permits or the granting of consent. The question thus arises as to whether an entitlement conferred under legislation is a property right.

This has been considered in a number of cases. The High Court has taken an expansive view of the definition of property. In *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 (which concerned the Commonwealth taking possession of a vacant lot used as a commercial car park for an indefinite period of time), McTiernan said (at 295):

> The word "property" in s 52(xxxi) is a general term. It means any tangible or intangible thing which the law protects under the name of property.

Furthermore, as Rich J stated (at 285):

> Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle.

More recently, in *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 184-5 Deane and Gaudron JJ noted that:

> Once it is appreciated that "property" in s 51(xxxi) extends to all types of "innominate and anomalous interests" (*Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 349), it is apparent that the meaning of the phrase "acquisition of property" is not to be confined by reference to traditional conveyancing principles and procedures.

Rather, as noted in *Yanner v Eaton* [1999] HCA 53 at [17-21], property is best conceptualised as a description of a legal relationship with a thing or as constituting a relationship between a person and a subject-matter.

A permit to clear, therefore, could be said to fall within the terms of this expansive definition of property that extends to "every species of valuable right and interest including…choses in action" (*Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290).

A permit or consent to clear generally has the character of a property right. For example, they attach to and pass with the title to the land: see *Park Street Properties v City of South Melbourne*) [1990] VR 545 at 553 per the Full Court; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 243 per Brennan J; and *Commonwealth v WMC Resources Pty Ltd* [1998] HCA 8 at [9] per Brennan J.

An example of this is section 29(10) of the *Native Vegetation Act (SA)* in South Australia. It provides:

> A consent under this Division is subject to such conditions (if any) as the Council thinks fit to impose, and any such conditions are binding on, and enforceable against, the person by whom the clearance is undertaken, all subsequent owners of the land and any other person who acquires the benefit of the consent.

In summary, it is generally true that where a permit or consent has been granted, this can be said to be a proprietary right.[6]

When must compensation be paid?

The preceding section analysed the nature of property rights in native vegetation and the circumstances in which such rights might arise. This section examines the interrelationship between property rights and compensation.

a) The Commonwealth Constitutional position

Section 51(xxxi) of the Commonwealth Constitution gives the Commonwealth the power to acquire property from any State or person for any purpose for which Parliament has the power to make laws. Such acquisition must be on just terms.

[6] It is, of course, possible that a permit or consent may - under the general legislative scheme or specifically in its terms – be limited in such a way as to raise issues as to its proprietary nature. Nevertheless, i

Section 519 of the Environment Protection and Biodiversity Conservation Act gives effect to s 51(xxxi). It provides:

> *Compensation for Acquisition of Property*
>
> *When compensation is necessary*
>
> (1) If, apart from this section, the operation of this Act would result in an acquisition of property from a person that would be invalid because of paragraph 51(xxxi) of the Constitution (which deals with acquisition of property on just terms), the Commonwealth must pay the person a reasonable amount of compensation.
>
> *Definition*
>
> (2) In this Act:
>
> Acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution

Court can decide amount of compensation

(3) If the Commonwealth and the person do not agree on the amount of compensation to be paid, the person may apply to the Federal Court for the recovery from the Commonwealth of a reasonable amount of compensation fixed by the Court.

Other Compensation to be taken into account

(4) In assessing compensation payable by the Commonwealth, the Court must take into account any other compensation or remedy arising out of the same event or situation."

As noted above, property has been expansively defined. The cases have thus focussed on the notion of "acquisition". The application of section 51(xxxi) – and by extension section 519(2) - was considered by the High Court in *Commonwealth v Tasmania* (1983) 158 CLR 1 (the *Tasmanian Dams* case). Three of the four judges who dealt with the issue, determined that there was no acquisition by the Commonwealth as it had not acquired a proprietary interest in the land. As Mason J said (at pp 145-6):

> to bring the Constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the

> Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.

The restrictions on use were irrelevant to the question of acquisition. Subsequent cases have talked about the Commonwealth acquiring an "identifiable benefit or advantage": per Kirby in *Commonwealth v Western Australia* [1999] HCA 5 at [185].

This principle was distinguished in the case of *Newcrest Mining (WA) v Commonwealth (1997)* 190 CLR 513. The case concerned mining leases acquired by Newcrest at Coronation Hill adjacent to Kakadu National Park. The Coronation area was incorporated into the National Park through proclamations under the *National Parks and Wildlife Conservation Act 1975 (CTH)*, which banned operations for the recovery of minerals. The Court held that Newcrest was denied from exercising its rights under the tenements and that "there was an effective sterilisation of the rights constituting the property in question" (per Gummow J at 634). In this respect, a distinction was explicitly drawn between "sterilisation" and "mere impairment" where, for example, other uses were available (per Gummow J at 634).

However, in *Commonwealth v WMC Resources Pty Ltd* [1998] HCA 8 there was found to be no acquisition where a Commonwealth law extinguished an exploration permit over part of the continental shelf between Australia and East Timor. This was distinguished from the position in Newcrest because the Commonwealth had no underlying common law interest in the shelf (as compared to *Newcrest* where the

tenements were not just created by statute, but a modification to the Commonwealth's pre-existing common law title).

Applying this analysis to the denial of an approval to clear native vegetation, it is difficult to envisage circumstances where such denial would amount to acquisition, as opposed to mere impairment of the "bundle of rights" held.

In summary, these cases, taken together, arguably signal a move by the High Court to find acquisition in two circumstances. First, where there has been a formal acquisition of some interest in the land. Second, where there has been an indirect (or de facto) acquisition – that is, where the land has been "sterilised". Nevertheless, it is clear that the law in this area is in a state of flux. As Blackshield and Williams have noted:

> The refusal to find an "acquisition of property" in [three cases decided in 1994] combined with the willingness to do so in [three other mid 1990 cases] has resulted in difficult questions of judgement dependent on subtle distinctions and exacerbated by the judicial differences in emphasis and approach.

b) The State Constitutional position

The Constitutions of NSW, Queensland and South Australia do not contain any provisions requiring compensation for acquisition of property or any lesser

modification of any property right. Therefore, State legislation may modify the common law position without requiring the payment of compensation. Indeed, unless they have legislation in place to the contrary, States can acquire on any terms they choose, even though the terms are unjust: *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 397-8, 412; *Commonwealth v NSW* (1915) 20 CLR 54, 77. See also *Durham Holdings Pty Ltd v NSW* (2001) 177 ALR 436.

It is noted that, in 1988, the Federal Labor Government sought to make acquisitions of property by State Governments' subject to a provision similar to the Commonwealth's obligations under s 51(xxxi) (see question 7 below). The proposed constitutional amendment was rejected by every State.

c) Compensation under legislation

(i) Native vegetation laws

A distinction has long been made, dating back to the Magna Carta, between compensation for acquisition of land and no compensation where mere restrictions were imposed.[7] Legislation protecting amenity in the 12th Century imposed losses on

[7] See Bonyhady. A statement at common law reflecting the distinction between compensation for acquisition vis-à-vis no compensation for restrictions has not been found. However, it is implicit in certain judgements that no such proposition exists at common law. As Sugerman J said in *Baker v Cumberland CC* (1956) 1 LGRA 321, 333:

Whether a right to compensation has been conferred is, however, a question of construction of the Act, to be decided…by an examination of the provisions in which the Legislature has expressed its intention as to compensation, remembering that compensation in these cases is the creature of

landholders without compensation. The native vegetation legislative regimes in New South Wales, Queensland and South Australia do not provide for compensation where land clearing is merely regulated. Put another way, there is no right to compensation where an application to clear land is refused.

Where a permit is granted, limited rights to compensation exist where the permit is revoked. For example, in NSW, a person may need development consent to clear native vegetation if development consent is required under a regional vegetation management plan or no plan is in place (ss 15, 18, 21 of the *Native Vegetation Conservation Act 1997 (NSW)*). Furthermore, development consent may be required for 'protected land' (ss 19, 22 of the *Native Vegetation Conservation Act 1997 (NSW)*). Such a development consent is granted under planning legislation (that is, the *Environmental Planning and Assessment Act 1979 (NSW)*).

Under the *Environmental Planning and Assessment Act 1979 (NSW)*, the Director-General and councils have the power to revoke or modify the granting of such consents in limited circumstances. Revocation or modification must be in writing. The terms under which a revocation or modification can be made are quite narrow; a revocation or modification may be done 'at any time it appears…having regard to *draft* [relevant planning instruments]…that the development…should not be carried out or completed' (s 96A(1)). That is, the grounds under which the power can be exercised only arise in relation to, for example, rezonings.

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statute and that a right to receive it exists only if that right is found to have been granted by the

Before revoking or modifying the consent, the Director-General or council must give affected parties the opportunity to show cause why the change should not be effected (s 96A(3)).

An 'aggrieved person' is entitled to recover compensation (from either the Government or council) in a limited context. Such compensation are only for "sunk costs" and do not extend to future losses. Specifically, compensation is only for expenses incurred pursuant to the consent during the period between the date on which the consent becomes effective and the date of service of the "show cause" notice under s 96A(3) and which have been rendered abortive by the change (s 96A(7)). Consents granted by the Minister or by the Land and Environment Court are not subject to compensation provisions (s 96A(9).

By contrast, in South Australia, the *Native Vegetation Act 1991* makes no provision for revoking or restricting a consent (and hence no provision for compensation). Consents remain in force for 2 years or for such longer time as fixed by the Council (s 29(13)).[8]

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statute.

[8] *c) Queensland*

i) Freehold land

No powers exist to revoke or alter development approvals, which include approvals to clear vegetation on freehold land unless there is some fraud or other illegality attached to the approval. In those circumstances, there are no rights of compensation legislatively provided.

ii) Leasehold land

(ii) Land acquisition legislation

The Commonwealth, NSW, Queensland and South Australia have all passed land acquisition legislation. This legislation is complex and technical. It is primarily directed at the permanent acquisition by the State of ownership rights (such as legal or equitable estate or interests). In *Commonwealth v Western Australia* [1999] HCA 5 Kirby J explained the function of the constitutional provision in section 51(xxxi) (concerning the acquisition of property on just terms). Kirby J (at [185]) contrasted it with the domain of land acquisition legislation:

> The constitutional provision is designed to provide protection against the taking of property interests which fall short of ownership and for durations of control falling short of permanency [the latter being the traditional domain of land acquisition legislation].

The chief executive of the Department of Natural Resources and Mines may cancel a tree clearing permit if one of a number of grounds are satisfied including fraud, contravention of the permit or if there has been a substantial change of circumstances since the issuance of the permit and it would now not be issued (section 226 Land Act). The landholder can appeal from such a decision first by way of internal review, and if unsuccessful there, by appeal to the Land Court. The Court has the powers to:

confirm the review decision; or
set aside the review decision and substitute another decision; or
set aside the review decision and return the issue to the Minister with directions the court considers appropriate.

This does not include powers to award compensation to an affected landholder. Therefore, no legislative right of compensation exists for holders of leasehold land.

Nevertheless, as the relevant legislative regimes do not generally bestow any rights, powers or privileges in relation to the clearing of land, it is difficult to see how the legislation could have application in this context.

The one exception is where there has been a permit to clear. This is generally likely to be considered a proprietary right, which seems to be caught by the definition of land in New South Wales and South Australia:

- an easement, right, charge, power or privilege over, or in connection with, the land (New South Wales)
- an easement, right, power, or privilege in, under, over, affecting, or in connection with, the land (South Australia)

However, to fall within the compensation provisions there must also be an "acquisition". Without examining the individual jurisdictions on this question, it is difficult to see how there has been such an acquisition by the State Government when a permit has been revoked. Generally, as discussed above, there needs to be an acquisition of some interest or identifiable advantage (most obviously, where the land is resumed) or a "sterilisation" of the land.

Conclusion

This paper has sought to outline the position regarding property rights and compensation under Australian law. As such, it arguably serves as an important

backdrop to the policy and politics surrounding debates on compensation for land clearing in Australia. There is currently no legal right to compensation in the terms sought by the Deputy Prime Minister or the NFF. Nevertheless, it is certainly open for Governments to compensate farmers in this way. However, compensation for regulation would potentially have the following drawbacks:

- create precedents for other sectors (such as where industries seek compensation for the regulation of pollution)
- result in an inefficient use of the limited resources devoted to the protection of the environment (as compared to, say, financial assistance or incentives for the performance of certain duties)
- create a climate whereby Governments are hesitant to regulate properly and effectively for fear of the financial repercussions
- involve Australia in complex and costly litigation over what regulations require compensation (as has happened in the USA)

A better approach is to recognise that reversing the decline in the quality of the Australian landscape before it is too late will require fundamental change: industrially, culturally and institutionally. Financial assistance – adjustment packages based on equitable principles that address real hardships – will be part of such a change.