

EDO Submission in response to the Productivity Commission Draft Report into the impacts of native vegetation & biodiversity regulations

January 2004

This submission is on behalf of the following
organisations:

- EDO ACT
- EDO NSW
- EDO NQ
- EDO NT
- EDO QLD
- EDO SA
- EDO TAS
- EDO VIC

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Submission on the impacts of native vegetation and biodiversity regulations

Productivity Commission

Executive Summary

In its July 2003 submission, the Australian Network of Environmental Defenders Offices (hereafter ANEDO) restricted itself to commenting on the following terms of reference:

- 3(f) “the degree of transparency and extent of community consultation when developing and implementing the above regimes”
- 3(g) “recommendations (of a regulatory or non-regulatory nature) that governments could consider to minimise the adverse impacts of the above regimes, while achieving the desired environmental outcomes, including measures to clarify the responsibilities and rights of resource users”.

ANEDO stands behind its original submission, which is attached for convenience. However, the EDOS¹ wish to particularly re-emphasise and expand upon the legal and policy issues around compensation as they do not appear to be well understood, nor their implications considered.

Legal Analysis of Claims For Compensation

This section considers the legal basis for the claim that farmers both possess property rights in relation to their use of natural resources and that compensation should be paid should such rights be infringed.

What are Property Rights?

A property right arises where the community recognises a person’s exclusive use and enjoyment of an entitlement, allowing that entitlement to be traded or passed to others.² The notion of property rights has changed over time, with rights being substantially modified by legislation.

Common Law Rights

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.³

A *freehold* land owner (the exception in Australia) was generally 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.⁴

In relation to leasehold landholders (the norm in Australia), the right of property in native vegetation is ordinarily 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.

In essence, the common law has long recognised that the basis of ownership to land is not absolute, but relative, titles.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”.⁶

Modification of Property Rights by 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.

The issue of whether property rights adhere to entitlements conferred under legislation has been considered in a number of cases. The High Court has taken an expansive view of the definition of property in cases which considered section 51(xxxi) of the Constitution. In *Minister of State for the Army v Dalziel* (which concerned the Commonwealth taking possession of a vacant lot used as a commercial car park for an indefinite period of time), McTiernan said:

The word “property” in s 51(xxxi) is a general term. It means any tangible or intangible thing which the law protects under the name of property.⁷

Furthermore, as Rich J stated:

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.⁸

More recently, in *Mutual Pools & Staff Pty Ltd v Commonwealth* 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.⁹

Rather, as noted in *Yanner v Eaton*,¹⁰ 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.

Not all entitlements created by legislation, however, will be considered to create property rights. In *Roy F Griffith v Civil Aviation Authority*¹¹, the Federal Court noted that two principles are relevant to the characterisation of an entitlement such as a licence as creating property rights. First, the context of the legislation, and second, whether the licence is freely assignable. Based on these principles, the courts have classified licences such as liquor licences and taxi licences (which are freely assignable) as property, while commercial pilots licences (which are not assignable) are not property¹².

(a) Land

A permit or consent to clear land generally has the character of a property right: for example, they attach to and pass with the title to the land (*Park Street Properties v City of South Melbourne*¹³; *Health Insurance Commission v Peverill*¹⁴; and *Commonwealth v WMC Resources Pty Ltd*).¹⁵ Subject to the details of the legislation, they would normally be expected 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”.¹⁶

Legal Analysis of When Compensation Must Be Paid

The preceding section analysed the nature of property rights in natural resources and the circumstances in which such rights might arise. This section examines the interrelationship between property rights and compensation.¹⁷

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. “Acquisition” has been found 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”. Mere regulation does not entitle a person to compensation.

b) The State Constitutional position

The Northern Territory is the only one of the States and Territories Constitutions that contains a provision requiring compensation for acquisition of property or any lesser modification of any property right.

Therefore, all other jurisdictions may modify the common law position without requiring the payment of compensation. Indeed, unless they have legislation in place to the contrary, these jurisdictions can acquire on any terms they choose, even though the terms are unjust: *PJ Magennis Pty Ltd v Commonwealth*;¹⁸ *Commonwealth v NSW*.¹⁹ See also *Durham Holdings Pty Ltd v NSW*.²⁰

It should be 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). The proposed constitutional amendment was rejected by the people of every State.

c) Compensation under legislation

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. Legislation protecting amenity in the 12th Century imposed losses on landholders without compensation. For instance, 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 already granted*, limited rights to compensation exist where the permit is revoked. Such compensation are only for “sunk costs” and do not extend to future losses.

Policy Perspectives Regarding Compensation

It has been noted that the right to compensation under law is narrow, in contradiction to the terms sought by such proponents of broad-based compensation as the Deputy Prime Minister, the Honourable John Anderson, or the National Farmers Federation.²¹ Nevertheless, it is certainly open for Governments to compensate farmers in this way. Furthermore, as Bates²² and others have argued, there are political and moral arguments as to why Governments may feel compelled to offer compensation in such circumstances. However, compensation for regulation would potentially have a number of drawbacks.

First, there is the danger that demands for compensation may create an expectation by others of a right to a piece of the compensation pie.

As Bates has argued in defence of compensation in certain circumstances, there is a difference between regulating polluting activities (for which there is no right to pollute insofar as there are impacts on others) and restricting rights pertaining to natural resource management, which do not impact on other landholders. However, it is submitted that the difference is one of degree, rather than type.

The difference between the impacts of regulating pollution and restricting rights is simply that they are more diffuse, in time and/or space. The regulation of ozone-depleting substances is arguably analogous to restrictions on land clearing – both activities may have no impact on neighbours and both are based on broader public and environmental grounds. Restrictions on trade and commerce more generally – whether imposed for environmental, public safety, occupational health or moral grounds – may also give rise to calls for compensation. As discussed below, compensation is a backward-looking payment and an inefficient use of public monies. As such, the line should remain drawn between compensation for acquisition and regulation.

Second, compensation for restrictions on land clearing may create a climate whereby Governments are hesitant to regulate properly and effectively for fear of the financial repercussions. As many commentators have noted, this has been the case where such schemes have existed in South Australia and Victoria.²³

In the USA case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*²⁴ Justice Stevens echoed a similar concern in relation to “reluctant regulation”, noting that land use regulations are ubiquitous and most of them impact upon property values in some tangential way -- often in completely unanticipated ways. Treating them all as *per se* takings (restrictions requiring compensation) would transform government regulation into a luxury few governments could afford."

Third, moving away from the well-established principle that compensation should only be paid where property is acquired may potentially involve the community in complex and costly litigation over what regulations require compensation. This has certainly occurred in the USA with Court decisions made on an *ad hoc* basis amidst what would seem to be an increasingly acrimonious, divisive and ideologically-driven public debate.²⁵ If Australia goes

down this path, the security sought by the Productivity Commission and other interests may prove illusory.

Fourth, there are difficulties associated with dividing restrictions into public and private elements. The National Farmers' Federation has proposed that compensation be linked to "public-good environmental benefits". In particular, they are seeking:

a statutory-based, compensation package in state and Commonwealth legislation for those cases where a property's market value is reduced because there are limits or constraints imposed on using or developing certain natural resources.

The level of assistance is to be based on a "before and after" test of the property's market value. However, only those things of "public benefit" will be included in the before and after" assessment.²⁶

In a similar vein, other commentators have advocated models that seek to distinguish between private and public good in terms of conservation management. For instance, Fensham and Sattler have devised a methodology for providing compensation to landholders "who shoulder a disproportionate share of the financial burden for biodiversity conservation" based on the notion of a duty of care (although not a duty as lawyers would understand it).²⁷ The idea of a duty of care – as used by Binning and Young – is to require sustainable land management of landholders.²⁸ Restrictions that demand more than this – what Binning and Young term "public conservation services" – should be paid for by the community.

These approaches are an attempt to delineate more precisely the circumstances where the community should pay compensation. Their attraction is their recognition of the dualistic nature of property – rights and responsibilities go with ownership.²⁹ However, the divide is conceptually problematic. Is it not the *raison d'être* of government to regulate in the public interest? Is it illegitimate for governments' to regulate in anything but the public interest?

Perhaps the real problem with this approach is its implicit legitimation of the debate; its assumption that landowners deserve compensation. It is certainly true that Governments' have historically encouraged natural resource management practices which have been detrimental to the land and that they are now discouraging such practices. However, this so-called about face has not been as abrupt as some have suggested. In South Australia, land clearing laws have been in place for nearly 20 years while laws pertaining to threatened species and biological diversity have been around for 10 to 15 years.³⁰

Fifth, some commentators have argued for a pragmatic approach to compensating for restriction. This sentiment is echoed by Dr Black³¹: "If Governments are now prepared to pay substantial sums of money to help achieve what is our desired aim [biodiversity-determined controls on clearance], we should not hinder the process".

While there are certainly cogent arguments for a pragmatic approach to environmental issues in some circumstances (such as where factors such as time and irreversibility are evident), this approach seems flawed.

On the one hand, supporting compensation needs to be weighed against the other disadvantages discussed in this submission. On the other hand, it suggests that the options are compensate or bust. This is clearly not the case and this approach ultimately amounts to a failure of imagination and a limited reading of the experience in Australia and overseas.

There are a wide range of alternative financial devices that need to be considered as part of any cost-benefit analysis of the problem. Compensation results in the inefficient use of limited resources devoted to the protection of the environment, and provides no incentive for farmers to alter unsustainable practices. It is a curious irony that the accepted wisdom today is that national parks need to be actively managed, not “locked-up” yet for private land the idea of compensation is based on “locking-up” land, rather than active management.

The limited monies available to redress social dislocation and improve the environment should seek to go as far as possible. Looked at from the economic perspective of opportunity cost, the question arises: what alternate programs could be funded for the price of any compensation to farmers and is overall well-being maximised by compensating the farmers? It is submitted that financial assistance or incentives for the performance of certain duties offer a more efficient and equitable solution and are to be preferred.

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 – and financial incentives will be part of such a change.

Financial assistance can be based on models used in other industries. Structural adjustment packages have been used for both the fishing and timber industries. Generally, they are comprised of assistance packages targeted to workers and industries, with additional help for those who wish to exit the activity.³²

Financial incentives - such as property agreements and covenants, grants for restorative works, competitive auctions, tax and rate relief and trading schemes – are forward-looking and provide an ongoing commitment to the protection of the environment.³³ They would serve to complement structural adjustment packages.

Finally, there are clear equity arguments associated with such an approach.³⁴ Under National Competition Policy reforms, significant job losses have been felt across a number of industries, including the utilities sector. The Productivity Commission has openly acknowledged these effects, but has highlighted the broader community benefits and sought to encourage and assist people to cope with the changes.³⁵ Yet in the context of management of natural resources, strong support has been given to an approach which could “reward undeserving recipients and have an unequal impact on different industries and regions”.³⁶

Conclusion

As noted, there is a very narrow right to compensation in legislation and this should not be broadened. Regulation is a fact of life across all industries, and where there is very strong argument for financial assistance, this would be better done by structural adjustment, rather than a specific legal right. Reversing environmental decline will require fundamental change: industrial, cultural and institutional and financial assistance, including financial adjustment

packages based on equitable principles that address real hardships. However, such financial assistance should be linked to the protection of the environment, and should provide real incentives for rural producers to alter unsustainable practices.

¹ For the purposes of this submission, EDO WA was unable to obtain sign-off in the relevant time-frame. This submission is therefore on behalf of the eight remaining EDOs in Australia.

² See, for example, Becker. L.C, “Property Rights: Philosophical Foundations” (London: Routledge and Kegan Paul, 1977).

³ *Bury v Pope* (1586) Cr Eliz 118; 78 ER 375.

⁴ *Re: Ainslie; Swinbourne v Ainslie* (1885) 30 Ch D 485; *Corporate Affairs Commission v Australian Softwood Forest* [1978] 1 NSWLR 150.

⁵ *Asber v Whitlock* (1865) LR 1 QB 1, 5.

⁶ *Yanner v Eaton* [1999] HCA 53 at [30]. Although, as Poh-Ling Tan has noted, the Court in this case cast doubt on the usefulness of the bundle of rights analogy: see Tan. P-L, (2002) “Changing Concepts of Property in Surface Water Resources”, a paper presented to the Nature Conservation Council of NSW Futurescapes Conference Sydney 2002.

⁷ (1944) 68 CLR 261 at 295.

⁸ *Ibid* at 285.

⁹ (1994) 179 CLR 155 at 184-5.

¹⁰ [1999] HCA 53 at [17-21].

¹¹ (1996) 41 ALR 50.

¹² See Poh-Ling Tan, “Water Licences and Property Rights: the Legal Principles for Compensation in Queensland” 16 *EPLJ* 284.

¹³ [1990] VR 545 at 553 per the Full Court.

¹⁴ (1994) 179 CLR 226 at 243 per Brennan J.

¹⁵ [1998] HCA 8 at [9] per Brennan J.

¹⁶ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290). 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”.

¹⁷ For further detail please refer to EDO Submission on Water Property Rights In Response to the Draft Report of the CEOs Group on Water of the Natural Resources Ministerial Council, February 2003; and Jeff Smith, “Property Rights and Compensation” ‘I can see clearly now... land clearing and law reform’ EDO Network Conference, 5 July 2002.

¹⁸ (1949) 80 CLR 382, 397-8, 412.

¹⁹ (1915) 20 CLR 54, 77.

²⁰ (2001) 177 ALR 436.

²¹ See the Honourable John Anderson opening the third day of the 2002 Outlook Conference in Canberra and the National Farmers Federation (2002) *Property Rights Position Paper* (May 2002).

²² See, for example, Bates G (2002) *Environmental Law in Australia* 5th Edition at p 34.

²³ See Bonyhady T (1992) “Property Rights” in Bonyhady T *Environmental Protection and Legal Change* Federation Press at p (South Australia) and Raff M (1998) “Environmental Obligations and the Western Liberal Property Concept” 22 *Melbourne University Law Review* 657 at p 659 (Victoria). For a concise overview of these issues see also Bates G (2002) *Environmental Law in Australia* Butterworths at pp 33-38.

²⁴ 2002 WL 654431 (US. 23 April 2002).

²⁵ See *Pennsylvania Central Transport Company v. New York City* 438 U.S. 104. For a comprehensive bibliography in relation to the takings cases and debates see Dorsett MH (1999) *Shifting Terrains: Upsetting the Balance Between Public and Private in the Takings Debate* (Southwest Missouri State University, which can also be found at <http://208.13.158.54/departments/plan/issue/linkpgs/takings.html>). For a sense of the complexities at work, see Raff M (1998) “Environmental Obligations and the Western Liberal Property Concept” 22 *Melbourne University Law Review* 657 at pp 681-683.

²⁶ National Farmers Federation (2002) *Property Rights Position Paper* May 2002.

²⁷ Fensham RJ and Sattler PS “A Proposal for Financial Assistance and a Duty of Care to Accompany Legislation Controlling Remnant Native Vegetation Clearing on Freehold Land in Queensland.”

²⁸ Binning C and Young M (1997) *Motivating People – Using Management Agreements to Conserve Remnant Vegetation* CSIRO, Canberra.

²⁹ See generally Raff M (2000) “We Need a New Wave of Environmental Law” *Architect Victoria* at pp 22-25.

³⁰ See, for example the Biodiversity Convention 1992, the (CTH) *Endangered Species Protection Act 1992*, the (NSW) *Endangered Fauna (Interim Protection) Act 1991* (the predecessor to the *Threatened Species Conservation Act 1995*) and the (VIC) *Flora and Fauna Guarantee Act (1988)*.

³¹ Black AB (2002) “Property Rights, Politics, Policy and Pragmatism” in *Environment SA* Volume 9 # 1 at p 4 (Letters).

³² See Crosthwaite J (2002) “Vegetation Clearance – Is Compensation or Adjustment the Issue?” 1 *Ecological Management and Restoration* 2

³³ See Crosthwaite J (2001) “Policy Formulation – the Duty of Care and Putting the Farm First”, a paper presented to the Australian Agricultural and Resource Economics 45th Annual Conference, South Australia 22-25 January 2001

³⁴ It is beyond the remit and expertise of the Environmental Defender’s Office to comment on Government microeconomic reform, except insofar as calls for compensation by farmers raise equity issues.

³⁵ See, for example, its 1999 Annual Report.

³⁶ See “Farmers compensation push is legally unsound, says leaked Ministerial brief” noted in *Environmental Manager* Volume 418, 3 December 2002 at p 1.