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using the law to protect the natural and built environment

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Australian Human Rights Commission
Level 3, 175 Pitt Street
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By email: rights2014@humanrights.gov.au.

Dear Commissioner,

Rights and Responsibilities 2014

Thank you for the opportunity to provide comments on the *Rights and Responsibilities 2014 Discussion Paper* (the discussion paper). We note that during consultations in Hobart on 24 November 2014 you confirmed submissions could be received until Christmas 2014.

EDO Tasmania is a community legal centre specialising in planning and environmental law. We provide advice to members of the community on planning and environmental law issues and assist them to ensure that community concerns are considered in decision making. Our comments on the discussion paper are primarily concerned with property rights.[1]

EDO Tasmania is of the opinion that "property rights" as described in the discussion paper should not form part of the Human Rights Commissioner's ambit of work and consultations. If the Human Rights Commission is genuinely concerned about the protection of human rights with respect to property, this concern should be directed at consideration of the human right to a healthy environment, an emerging area of human rights law.

The role of the Human Rights Commission

The Commission's role is focussed on "human rights". This is reflected in the functions of the Commission under the s 11 of the *Australian Human Rights Commission Act 1986* (Cth) (the Act). The Act defines "human rights" as "the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument."[2] The notion of human rights including a right to property is found in article 17 of the *Universal Declaration of Human Rights,* as follows:

> (1) Everyone has the right to own property alone as well as in association with others.
>
> (2) No one shall be arbitrarily deprived of his property.

[1] Discussion paper, p. 8.
[2] Section 3, *Australian Human Rights Commission Act 1986* (Cth)

The *International Covenant on Civil and Political Rights* refers to property only in the context of prohibiting discrimination on the basis of property, such as the right to equality before the law (Article 26).

The discussion paper and your remarks in the Hobart consultations evidence an intention to go beyond the functions set out in the Act. As set out below, the scope of native vegetation laws (unless applied in a discriminatory fashion which is not within the described scope) is plainly outside the Human Rights Commission's remit. There is no suggestion that current restrictions on property rights impinge on the fundamental rights the Commission is intended to uphold.

Environment and planning laws and property rights

As Nicole Graham[3] said in a recent Conversation article:

> [T]he fact is that private property rights are not absolute, and never have been in Australian law. Property rights exist necessarily in relation to competing rights and interests…
>
> Environmental laws indicate the government's prerogative, indeed responsibility, to balance private rights against the public's interest in health and environmental protection…
>
> Those who think the sanctity of property rights supersedes the need to comply with environmental laws have a view of land ownership that is based on individual entitlement. But environmental laws are designed to deliver benefits at a scale far larger than the individual.

Despite this recognition of the need to regulate behaviour on private property in order to secure social benefits, the discussion paper appears to proceed on the basis that such restrictions cannot be warranted.

The discussion paper references s51(xxxi) of the Australian Constitution, which guarantees the acquisition on just terms of all types of property by the Federal government. This raises two issues, firstly whether regulation of activities on private property can be considered an 'acquisition' under s 51(xxxi) and secondly whether this is applicable to State based decisions under State laws. These two points will be addressed in turn.

Is regulation considered 'acquisition'?[4]

Planning law arose in part to address land use conflict arising from incompatible uses of private property, e.g. industrial and urban uses. The assertion that the government has whittled away traditional protections for private property rights is a misunderstanding of planning and environmental laws. There appears to be a fundamental misunderstanding of this in the discussion paper. This was also evidenced in your responses to question at the recent workshop in Hobart.

It has long been accepted under the common law, and pursuant to decisions of the High Court of Australia, that Government regulation of activities that can occur on private property (clearing of land or the granting of development consents) does not constitute an acquisition of property and therefore no right to compensation is triggered.[5]

Planning law is an example of this. Although a particular zoning may limit the development activities on a parcel of land and may therefore affect land prices, this is

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[3] Senior Lecturer of Law at University of Technology, Sydney. "Land Clearing Laws Bring Out Worrying Libertarian Streak". *The Conversation* , 4 August 2014. http://theconversation.com/land-clearing-laws-bring-out-worrying-libertarian-streak-29978

[4] See EDO NSW submission (2010) 'Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures': http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/144/attachments/original/1380528535/100310final.pdf?1380528535

[5] ICM Agriculture Pty Ltd v The Commonwealth of Australia & Ors (2009) HCA 51, Commonwealth v Tasmania (1983) 158 CLR 1 at 145-6

not tantamount to an acquisition of land as the zoning does not affect the property rights in the land itself. As Professor Gray, a pre-eminent property lawyer expresses it, 'a mere regulatory interference with land use or management does not constitute a deprivation of property for which compensation must be paid'.[6]

Therefore, a state government implementing native vegetation laws to control or prohibit land clearing or regulating development on coastal land is clearly not an acquisition for which compensation is payable. Neither under the common law nor under statute in Australia is there a recognised general proprietary right to clear vegetation or to undertake development. The ability to clear land or undertake development is contingent on the landholder obtaining a relevant approval or permit under statute (or being explicitly exempted from the need to do so).

Where no consent is obtained, there is no right to clear land or develop the land. This has been firmly settled by the High Court of Australia. The Court held in *ICM Agriculture Pty Ltd v The Commonwealth of Australia & Ors* [2009] HCA 51, in the context of groundwater licences, that the ability to take groundwater is not a private right as it is a natural resource and therefore the State always had the power to limit the volume of water to be taken.

The imposition of native vegetation laws or land use zoning does not mean that the landholder cannot use their land for another purpose, such as farming or other types of development. It only means that the government has prevented a certain activity proposed in a certain manner. Furthermore, it is entirely circumstantial whether preventing an activity causes economic loss.

The very intention of environment and planning law is to regulate activities of individuals in the public interest. Planning law in particular arose as a result of competing and incompatible private property uses. It is not plausible to allow private property rights to be absolute as they often conflict and result in tension between neighbours and communities. These types of issues form the majority of the queries EDO Tasmania receives from members of the public.

Do you propose that the development assessment framework should not place restraints on types of development that is undertaken? We cannot envisage a system where some regulation of land use would not be required. Absolute property rights are not possible in today's society. If you propose to recommend certain amendments to planning and environmental laws, EDO Tasmania is of the opinion that this is outside the ambit of the Human Rights Commissioner.

State based laws

It has long been established that the operation of s.51(xxxi) does not affect acquisitions made under State legislation, even in the event that the State legislation is designed to give effect to a Commonwealth policy[7].

Vegetation clearing laws and land use planning laws are State based pieces of legislation.[8] Other than the Northern Territory, no state constitutions contain provisions requiring compensation for the acquisition of property or any lesser modification of any property right. Therefore, unless States have legislation in place to the contrary (some State laws do allow for compensation for zoning changes and the introduction

[6] Kevin Gray, 'Can environmental regulation constitute a taking of property at common law?' (2007) 24(3) EPLJ pp 161-182 at 168

[7] *Alcock v The Commonwealth* (2013) 210 FCR 454 at 475 (particularly [82])

[8] Unless the vegetation or development is prohibited under the *Environment Protection and Biodiversity Conservation Act 1999*

of vegetation protection laws), these jurisdictions can acquire on any terms they choose.[9] Section 51(xxxi) of the Constitution has no operation in such situations.

As above, there is no acquisition of property involved in the imposition of native vegetation laws or development controls but it is important to note that, even if there was an acquisition, there is no right to compensation under state constitutions.

Climate change adaptation

Our office, along with other members of the Australian Network of Environmental Defenders Offices (ANEDO), has been heavily involved in efforts to reform planning law, and have emphasised the importance of making it more responsive to the implications of climate change.[10]

It is particularly interesting that *Gippsland Coastal Board v South Gippsland Shire Council (No. 2)* [2008] VCAT 1545 was used in the discussion paper as an example of an "erosion of traditional protections for private property rights". The Tribunal's findings were based on two particular grounds: firstly, that there were insufficient planning grounds to support the development; and secondly, that the impacts of climate change were too great to allow the development to proceed. The area was zoned for farming purposes, and the overwhelming weight of planning policy discouraged residential development in the area. Consequently, the zoning would not have permitted the development in any event. Also worth noting is the particular mention the Tribunal made regarding the potential liability that councils would be subject to if such proposals were to proceed.

Human Right to a Healthy Environment

The Commission would be acting more consistently with its legislative remit by considering a concept that is gaining momentum in international human rights law, namely the right to a healthy environment. The human right to a healthy environment currently has an uncertain status at international law and has not been formally recognised in any binding global international agreement.[11] Despite lacking formal recognition, there are existing civil and political rights which could provide a basis for an individual to argue that they have a right to a healthy or sound environment.[12] Consequently, there is an increasing push for its formal recognition.[13]

Emeritus Professor Bernhard Boer has written a lot on this subject and has advocated for increased recognition of human rights to a healthy environment. In the Australian context there is a recent example which illustrates the impact of poor environmental health on the basic needs, namely the Morwell coal fire in Victoria.

The Morwell coal fire saw vulnerable people living in the area subjected to three weeks (arguably considerably more) of air pollution which impacted on human

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[9] PJ Magennis Pty Ltd v Commonwealth (1949) 80 CLR 382; Commonwealth v NSW. See also Durham Holdings Pty Ltd v NSW (2001) 205 CLR 399.

[10] For example, EDO Tas submission 'Submission to Low Carbon Tasmania Issues Paper': http://www.edotas.org.au/wp-content/uploads/2013/10/130621_EDO_Tasmania_submission_re_Low_Carbon_Tasmania_Issues_Paper.pdf ; Environmental Defenders Office (NSW), Submission to the Review of the NSW Planning System: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/200/attachments/original/1380536865/111104review_nsw_planning_stage_1.pdf?1380536865,

[11] Good, M, 'Implementing the Human Right to Water in Australia' (2011) 30(2) *University of Tasmania Law Review* 107, 117; Boer, B and Boyle, A 'Human Rights and the Environment 13th Informal ASEM Seminar on Human Rights: background Paper' (2013) *Sydney Law School Research Paper No. 14/14* , 13.

[12] Boer, B and Boyle, A 'Human Rights and the Environment 13th Informal ASEM Seminar on Human Rights: background Paper' (2013) *Sydney Law School Research Paper No. 14/14* .

[13] Donald K Anton and Dinah L Shelton, Environmental Protection and Human Rights, Cambridge University Press, 2011, 519–43.

health. Some were forced to seek medical attention and others were required to leave the area. With more than 3,000 Australians dying every year from air-pollution-related illness, nearly twice the national road toll,[14] the human right to healthy environment seems like a much more pressing human rights issue than "property rights".

Access to Justice

During the Hobart consultation you drew a distinction between "having rights versus the freedom to exercise those rights". With respect to property rights, a critical aspect of this is access to justice. EDO Tasmania is regularly contacted by people with property rights (either freehold or leasehold) who are having the quiet enjoyment of their property disturbed or risk having their property value and/or amenity diminished due to proposed development in their vicinity. Impacts can range from increased noise and dust intrusions to reduced water quality or soil contamination, subsidence, salinity or erosion as a result of vegetation clearance.

EDO Tasmania (together will all other EDOs around the country) have had all Federal funding withdrawn. As the only community legal centres advising on environmental and planning issues, we provide an invaluable service to people unable to afford to seek advice in relation to adverse impacts on their property and their health. The removal of Federal funding from EDOs will significantly reduce the community's capacity to access the advice they need to take action to uphold their rights. We urge you to become a champion for EDOs so that the most disadvantaged in society have access to justice when it comes to their property rights.

Conclusion

The discussion paper's approach to property rights evidences a misunderstanding of human rights principles as they relate to property rights. Furthermore, the Commission is potentially going beyond its legislative remit. There is no suggestion current limits impinge on the fundamental rights the Commission is intended to uphold. Indeed in the context of the emerging human right to a healthy environment it may be appropriate to impose greater restrictions on traditional property rights in order to protect broader public interests.

Please contact us if you would like to discuss this submission.

Yours sincerely,

EDO Tasmania

Adam Beeson

Lawyer

[14] Places you Love (2014) "The Australia we Love: A Report on Key Issues affecting nature and society in Australia": http://www.placesyoulove.org/australiawelove/