



National Farmers' Federation

Submission to the Traditional Rights and Freedoms – Encroachments by Commonwealth Laws – ALRC Report 127 (Interim)

September 2015

NFF Member Organisations



Australian Chicken Growers' Council Ltd



CANEGROWERS



COTTON AUSTRALIA



Goat Industry Council of Australia inc.



NEW SOUTH WALES IRRIGATORS' COUNCIL



RICEGROWERS' ASSOCIATION OF AUSTRALIA INC





National Farmers' FEDERATION

The National Farmers' Federation (NFF) was established in 1979 and is the peak national body representing farmers, and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities.

Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF.

Following a restructure of the organisation in 2009, a broader cross section of the agricultural sector has been enabled to become members of the NFF, including the breadth and the length of the supply chain.

While our members address state-based 'grass roots' or commodity specific issues, the NFF's focus is representing the interests of agriculture and progressing our national and international priorities.

The NFF has for 36 years consistently engaged in policy interaction with government regarding a range of issues of importance to the sector including trade, education, environment, innovation to name a few.

The NFF is committed to advancing Australian agriculture by developing and advocating for policies that support the profitability and productivity of Australian farmers.

Statistics on Australian Agriculture

Australian agriculture makes an important contribution to Australia's social, economic and environmental sustainability.

Social >

There are approximately 115,000 farm businesses in Australia, 99 percent of which are family owned and operated.

Each Australian farmer produces enough food each year to feed 600 people, 150 at home and 450 overseas. Australian farms produce around 93 percent of the total volume of food consumed in Australia.

Economic >

The agricultural sector, at farm-gate, contributes 2.4 percent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production in 2013-14 was \$51 billion – a 6 percent increase from the previous financial year.

Yet this is only part of the picture. When the vital value-adding processes that food and fibre go through once they leave the farm are added in, along with the value of all economic activities supporting farm production through farm inputs, agriculture's contribution to GDP averages out at around 12 percent (over \$155 billion).

Environmental >

Australian farmers are environmental stewards, owning, managing and caring for 52 percent of Australia's land mass.

Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 94 percent of Australian farmers actively undertaking natural resource management.

The NFF was a founding partner of the Landcare movement, which in 2014, celebrated its 25th anniversary.

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1. Introduction

The National Farmer's Federation (NFF) welcomes the opportunity to respond to Interim Report on Traditional Rights and Freedoms – Encroachment by Commonwealth Laws.

This submission outlines certain areas of Commonwealth legislation that, in our view, encroach upon the traditional freedom of Australian farmers. Key concerns include workplace relations laws and real property rights in relation to environmental laws and justifications for encroachment.

2. Property Rights

Farmers in Australia are being forced to disproportionately carry the regulatory cost burden of achieving environmental outcomes, such as the preservation of threatened species and the conservation of biodiversity, that provide a clear benefit to the entire community. Increasingly, farmers are required to comply with environmental regulations that are designed to benefit the global community, but involve limiting the range of activities that can be undertaken on private agricultural land. These environmental regulations are an unjustified interference with the property rights of farmers without due compensation.

Interference of property rights without due compensation occurs as a result of two legal barriers:

- a) The absence of a restriction on state acquisition of land that mirrors the constitutional restriction on Federal Government acquisition contained in Section 51(xxxi) of the Constitution.
- b) The distinction that has been made between an 'acquisition' and a 'taking', the former amounting to a right to compensation if it concerns a Federal law, while the latter does not give rise to such a right despite the severe economic consequences that this has on farm businesses.

The NFF recommends that legislative measures be implemented to address these inconsistencies.

While it is acknowledged that the purpose of the Interim Report is to examine encroachment on traditional rights and freedoms by Commonwealth laws, the NFF wishes to emphasise the necessity for the acquisition or 'taking' of property by State law to be restricted by a requirement that any such taking be performed on 'just terms'.

The narrow construction that the High Court has given the term 'acquisition' in s 51(xxxi) of the constitution has caused significant harm to farmers who are forced to comply with Commonwealth environmental regulations that do not amount to an 'acquisition' of property within the meaning of s 51(xxxi) and therefore do not give rise to a right to compensation, but nevertheless cause significant harm to these farm businesses meaning that farmers are disproportionately carrying the costs of achieving a broader public good.

The Interim Report uses the term 'taking' and 'acquisition' interchangeably to refer to an acquisition that gives rise to a right of compensation.¹ However, the courts have been careful

¹ ALRC at 216

to distinguish a ‘taking’ from an ‘acquisition.’ In the recent Federal Court case *Spencer v Commonwealth of Australia*, Mortimer J found that there was a ‘taking’ of Mr Spencer’s property as ‘the bundle of rights held by Mr Spencer in Saraahnlee was recognised as fundamentally altered and impaired.’² However, he goes on to say that ‘proprietary rights may be extinguished and “taken” without being acquired.’³ Mortimer J refers to both Gummow J and Kiefel J in the High Court of Australia’s *Plain Packaging Case* as authority for this proposition.⁴ Both Gummow J and Kiefel J explain that this distinction illustrates ‘one of the principal differences in the scope of s 51(xxxi) from the takings clause of the Fifth Amendment to the *United States Constitution*’ which gives rise to a right of compensation where physical damage results to property because of government action or where regulatory action limits activity on the property or otherwise deprives it of value.⁵

This distinction has significant and widespread economic consequences for Australian farmers, particularly in the area of farm business financing. This is because property values decrease and the productive capacity of farm land is lowered. Given that the availability of finance is closely bound to asset values and future income of a property, when farm property assets are impinged by legislation and policies, or where seasonal production cycles are broken or missed because of uncertainties arising from complex and unclear legislative requirements, farmers livelihoods are put at risk.

Therefore, this distinction allows Commonwealth laws to encroach property rights in a manner that is unjustified as it means that regulations which fundamentally alter and impair the property rights held by a farmer do not give rise to a right of compensation within the meaning of s 51(xxxi) despite the economic loss that they impose to achieve their aim of recognising a broader public good. The NFF recommends the implementation of measures to address this harm and ensure that environmental objectives can be achieved without necessitating undue harm to landowners.

As was identified by the ALRC in the Interim Report, the EPBC Act and the *Water Act* are the two key Commonwealth Statutes that unjustifiably interfere with property rights in a way that falls short of triggering invalidity pursuant to section 51(xxxi) of the Constitution.

Environment Protection and Biodiversity Conservation Act 1999

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) places severe limitations on property development and land use change that is a direct encroachment of the landholders’ property rights and therefore the Act should require compensation for the resulting financial impact. The ALRC notes in the Interim Report that:

Justification for the prohibition of these actions and interference with vested property rights draws primarily on the requirement for an action to have, or be likely to have, a ‘significant’ impact.⁶

² *Spencer v Commonwealth of Australia* [2015] FCA 754, 162 [550-551].

³ *Ibid* [551].

⁴ *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth* [2012] HCA 43, [100] (Gummow J), see also [355-357] (Kiefel J).

⁵ *British American Tobacco Australasia Limited v The Commonwealth* [2012] HCA 43, [100] (Gummow J), see also [355-357] (Kiefel J); Thompson Reuters, ‘Annotation 16 – Fifth Amendment’ *FindLaw* <<http://constitution.findlaw.com/amendment5/annotation16.html#1>>

⁶ P 226

However, the requirement for a ‘significant impact’ does not justify landholders carrying the bulk of the financial burden that necessarily arises in the pursuit of achieving the goals of these measures, which are primarily aimed at protecting a broader public good. Despite the environmental benefit that may be gained from land use restrictions under the EPBC Act, the direct impact on property values, and uncertainties in the complex operational aspects of the EPBC Act, mean that farmers are denied the ability to plan in the longer term and subsequently derive optimum value from their land assets. Such impacts are unjustified and disproportionate in comparison to the environmental benefit that flows to the landholder.

As the ALRC notes, The Senate Finance and Public Administration References Committee Inquiry into Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures, reported that ‘there comes a point at which regulation of land may be so comprehensive as to render it of a substantially lower economic value to the landowner’ and ‘in such circumstances consideration should be given to compensation being provided to the landowner in recognition of this.’⁷ The Committee did not make final recommendations in this regard however, these comments represent an acknowledgement that compensation may be appropriate in circumstances that do not amount to a direct acquisition of property within the meaning of section 51(xxxi).

While Section 519 of the EPBC Act provides for compensation in certain circumstances, this section is limited to the acquisition of property within the meaning of section 51(xxxi) and therefore does not apply to a ‘taking’ in the sense of a fundamental alteration or interference with the property rights of a landholder. Therefore, there are a broad range of property rights that are restricted by the EPBC Act, that seriously harm the property rights of a landholder, but do not amount to an acquisition within the meaning of section 51(xxxi).

The example that has already been stressed by the NFF in response to this inquiry is restriction on the removal of isolated paddock trees that may be required to adopt controlled traffic and precision cropping practices. Precision cropping has many benefits, including reduced chemical and fertiliser use (and run-off into waterways), reduced soil compaction, and considerably lower fuel consumption with associated reductions in emissions.

The ALRC accepts that there is no clear boundary between a taking or acquisition of property by the government and the regulation of use of rights.⁸ The NFF argues that environmental legislation in Australia transgresses this boundary and therefore unjustly encroaches on the property rights of farmers. Compensation for farmers who suffer severe economic loss as a result of regulations under the EPBC Act that do not amount to an acquisition within the meaning of section 51(xxxi) should be legislated.

Water Act 2007

The Water Act 2007 and in particular, the Murray-Darling Basin Plan (Basin Plan) which it prescribes, has the potential to erode farmers’ water rights and entitlements. While section 254 of the Water Act provides for just terms compensation for any acquisition of property, this is inadequate as the Federal Court has made it clear that ‘sections such as s 254 are

⁷ Senate Finance and Public Administration References Committee, Parliament of Australia, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (2010) referred to AGLC p 228.

⁸ 222.

directed to acquisition, not deprivation.⁹ As the interim report notes, where there is no measurable advantage conferred on the Commonwealth, the court has been reluctant to find any acquisition of property rights.¹⁰ However, despite this line of authority, Justice Heydon's dissent in *ICM Agriculture Pty Ltd v Commonwealth* indicates that there is some support for the proposition that Commonwealth or State Governments may obtain an advantage within the meaning of s 51(xxxi) in some circumstances where water rights are removed for environmental purposes.¹¹

The interim report notes the following:

‘the NFF views a ‘diminution’ of water access entitlements (caused by the Commonwealth’s administration of the *Water Act*), unaccompanied by compensation ‘at market rates’, as an unjustifiable interference with property rights. However, the judgments in the *Lee* litigation suggest that any diminution of the consumptive pool caused by the Commonwealth under the *Water Act* will be by consensual purchase of water entitlements and from water savings associated with investments in more efficient infrastructure. In such circumstances, the argument could be advanced that the Commonwealth was sufficiently concerned about property issues that it implemented a policy that required consensual arrangements which overcame the need for compulsory acquisition and compensation. That is, that it introduced measures to address any unjustifiable interference with property rights. Accordingly, some might say that the operation of the *Water Act* does not amount to an unjustifiable interference with property rights.’

The NFF agrees that the Commonwealth has adopted a policy that participation in water recovery is voluntary, either through buybacks or efficiency projects. However, in the NFF's view the extent to which the *Water Act* ensures this approach to water recovery is adopted is limited and should be strengthened. Water security, and subsequent property rights, for irrigators could be improved by amending the risk assignment provisions to enshrine the voluntary recovery approach in legislation and provide assurance that the SDL gap will not be recovered by measures that diminish the reliability of entitlements over time.

Commonwealth laws still fail to fully ensure that full compensation provisions are in place for any diminution in water access for existing entitlement holders. Where such action undertaken by government results in diminution of entitlement reliability, water access entitlement holders should be fully compensable at the market rate. Additionally, The NFF also holds concerns about the impact of the Basin Plan's Constraints Management Strategy (CMS). In this context, constraints are river management practices and structures that govern the volume and timing of regulated water delivery throughout the river system. The CMS seeks to improve environmental outcomes in the Basin by managing these constraints. Unfortunately the “management” of the constraints has the potential in many instances to result in the flooding of private land. A clear process to implementing the CMS is required to ensure that potential impacts on affected landholders are managed and that their property rights are respected.

⁹ *Lee v Commonwealth* (2014) 220 FCR [200].

¹⁰ ALRC, 233; *Lee v Commonwealth* [2014] FCAFC 174 [15].

¹¹ *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 [235].

The NFF seeks the ALRC to explicitly explore the issue that is likely to arise under the Government's constraints management strategy – whereby private land is deliberately flooded in order to deliver environmental water held by the Commonwealth Environmental Water Holder. The CMS Annual Progress report itself highlights our concerns. As stated in the report '*there are some hotspots where access, crops, livestock, sheds and pumps can be affected*' - i.e. where private property will be flooded.¹² . The report goes on to further note that '*Negotiated agreements with landholders to create easements that enable regulated water to access the privately owned parts of the floodplain*'¹³. This is an example where the policy direction for implementation infers that rights will be affected (and thus the need to negotiation agreements/easements has been identified) – however the legal underpinning of implementation - The *Water Act* and its accompanying regulatory instrument the Basin Plan - do not seem to explicitly protect rights in such instances.

3. Work Health and Safety Laws

The *Work Health and Safety Act 2010* (Cth) (WHS Act) is raised in the Interim Report in relation to strict liability provisions, the burden of proof and the privilege against self-incrimination.

The WHS Act should be outcomes-based legislation, designed to ensure safer workplaces through shared responsibility for minimising harm to workplace participants. Instead, it is punitive in nature. Penalties are high, strict liability common, and regulators have statutory enforcement powers. Safety breaches are easy to prosecute both because of the reverse onus of proof and the fact that long and often complex Codes of Practice are taken to be in the knowledge of the defendant for the purpose of prosecution. Severe penalties can be imposed for relatively minor infringements – up to \$500,000 for providing wrong information about safety rights.

A copy of the NFF's submission to Government on *Improving the model Work Health and Safety laws Issues Paper and Consultation Regulation Impact Statement Questions* (August 2014) has been attached to this submission, and outlines our concerns in more detail. The WHS Act (and identical state WHS laws in other jurisdictions) are scheduled for review in 2016. We encourage the Commission to consider whether these matters should be the subject of further detailed consideration in that forum.

¹² Constraints Management Strategy: Annual Progress Report 2013-14, p.12.

¹³ Ibid. p.24