



3 March 2015

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: freedoms@alrc.gov.au

Dear Executive Director,

Issues Paper - Traditional Rights and Freedoms – Encroachment by Commonwealth Laws

The National Farmers' Federation (NFF) welcomes the opportunity to respond to the Issues Paper on Traditional Rights and Freedoms – Encroachment by Commonwealth Laws.

The NFF is the peak national body representing farmers and the broader agriculture sector. 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.

This submission outlines certain areas of Commonwealth legislation that, in our view, encroach upon the traditional freedoms of Australian farmers. Key concerns include Commonwealth laws dealing with land use as well as workplace relations laws involving general protections and the enterprise bargaining framework.

Property rights

Farmers in Australia are increasingly required to comply with environmental regulations that are designed to benefit the global community, by (among other things) limiting the range of activities that can be undertaken on agricultural land. Environmental outcomes such as the preservation of threatened species and the conservation of biodiversity provide a clear benefit to the entire community. However, these outcomes are most often achieved via the imposition of regulations on the use of natural resources by farmers - a small section of the broader community. As a result, farmers disproportionately carry the regulatory cost burden.

There is no doubt that native vegetation laws have significantly enhanced the ability of Australia meet its international carbon reduction targets. According to the Climate Change Authority reductions in land clearing by the agriculture sector has been the biggest sectoral contributor to emissions reductions in Australia since 1990, with net agricultural emissions declining by 85 per cent from 1990 to 2012. These reductions in land clearing were largely achieved through state based native vegetation management laws. The result has been achieved by taking away the property rights of farmers, without compensation.

The adverse economic consequences can be significant and widespread, particularly in the area of farm business financing. This is because property values decrease and the productive capacity of farm land is much less. Availability of finance is bound closely to asset values and future income of a farmer's 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.

Farmers shouldering the burden of providing a public good should be entitled to just compensation. Where property rights are compulsorily acquired by governments, or where farmers are required to undertake management practices above and beyond their regular duty of care, full and adequate compensation should be provided. This is regardless of whether the right is affected directly by Commonwealth legislation, or indirectly, through State and/or Territory legislation. Compensation should be determined in a nationally consistent manner, without State-based discrimination.

Particular legislation encroaching upon the property rights of farmers in this regard include:

Environment Biodiversity Conservation Act 1999

The primary legislation impacting upon the property rights of Australian farmers at the Commonwealth level is the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The EPBC Act is having a significant financial impact on farmers as a consequence of the limitations it places on property development and land use change. Compounding the direct impacts on property values, uncertainties in the complex operational aspects of the EPBC are denying farmers the ability to plan in the longer term and subsequently derive optimum value from their land assets.

Additionally, restrictions imposed by the EPBC Act limit farmer's opportunities to improve their farming practices and adopt modern technologies, and again do so without the provision of compensation. An example of this is 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 water ways), reduced soil compaction, and considerably lower fuel consumption with associated reductions in emissions. Under the EPBC – if the action is likely to have a significant impact, referral is required. Such restrictions substantially limit the continued profitability and viability of farms.

Whilst some states have in place compensation process for such a devaluation of property rights, this is not the case for all jurisdictions. To date NSW, Queensland or South Australia do not contain any provisions requiring compensation for acquisition of property or any lesser modification of any property right, including that resultant from state native vegetation regulations. Further to this, whilst Tasmania does have compensation provisions, the application and funding of the provisions has proven inadequate. Of specific interest to this inquiry is the fact that there is no compensation directly available under the EPBC Act. It is

crucial that such inconsistencies in state based compensation provisions are recognised at a Commonwealth level and addressed appropriately.

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. The NFF acknowledges that water property rights are enshrined in state water legislation. The NFF recognises that the Commonwealth has chosen to "bridge the gap" in the implementation of the Basin Plan through the market based acquisition of water entitlements and through infrastructure projects. However, the Commonwealth laws still fail to fully ensure that full compensation provisions are in place for any diminution in water access. Where such action undertaken by government results in diminution of entitlement reliability, water access entitlement holders should be fully compensable at the market rate.

It should be noted that whilst some states have moved to explicitly define compensation provisions in legislation, others including South Australia, have steadfastly refused to provide such security for water property rights. Hence the Commonwealth must respect water rights at a state level by either not encroaching upon them or by providing just compensation where States fail to do so.

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.

Fair Work Act 2009

Right of entry: new travel and accommodation rules

Recent amendments¹ to the *Fair Work Act 2009* (FW Act) compel occupiers of remote premises to enter into arrangements to which they do not consent, so that union officials can enter the premises and exercise right of entry powers under the FW Act.

In prescribed circumstances, including that the occupier does not consent to the arrangement, subsection 521C(2) of the FW Act provides that :

the occupier must enter into an accommodation arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

Similarly, subsection 521D of the FW Act provides that:

¹ Division 7, Part 3-4 of the FW Act.

the occupier must enter into a transport arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

The Fair Work Commission has the power to deal with the dispute, including by arbitration.²

These requirements are extraordinary in the sense that they authorise what would otherwise be the tort of trespass. Occupiers (usually employers) bear the lion's share of the risk, including in relation to compliance with workplace health and safety obligations. The provisions infringe the fundamental common law right of a person in possession to exclude others from their premises³ in a way that is unreasonable. The provisions should be repealed.

General protections: the burden of proof

The FW Act contains broad protections for individuals in and in connection with the workplace against adverse action for a prohibited reason. The 'general protections' set out a range of conduct that is prohibited, and define 'adverse action' as certain action that alters a person's position to their detriment.

Under section 361 of the FW Act, the onus of proof is reversed so that where an allegation of adverse action is made for a prohibited reason:

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

The reverse onus of proof offends the common law presumption of innocence and undermines confidence in the judicial process. In our view, the common law presumption of innocence should be restored.

Freedom of association

Majority support determinations are a mechanism introduced into federal workplace relations law in 2009 to compel employers to bargain. Previously, employers had the right to decide whether or not to engage in collective bargaining.

Section 237 of the FW Act permits the Fair Work Commission to make a majority support determination if a majority of employees want to bargain with their employer, and the employer has not yet agreed to do so. The effect of making a majority support determination is that the good faith bargaining requirements start to apply to the employer and employees (through their bargaining representatives).⁴

The right to collective bargaining is a key element of the freedom of association. According to the International Labor Organisation (ILO):

Collective bargaining is a voluntary process through which employers and workers discuss and negotiate their relations, in particular terms and conditions of work.⁵

² Section 505 of the FW Act.

³ *Coco v The Queen* (1994) 179 CLR 427.

⁴ Part 2-4 of the FW Act

⁵ ILO *Right to collective bargaining* http://ilo.org/empent/areas/business-helpdesk/WCMS_DOC_ENT_HLP_CB_EN/lang--en/index.htm

The ILO goes on to say:

Collective bargaining can only function effectively if it is conducted freely and in good faith by all parties.⁶

The NFF agrees. Compelling a party to bargain without their consent is ineffective, because it undermines the legitimacy of bargaining process. Overriding the voluntary nature of collective bargaining infringes the right to freedom of association. Majority support determinations, and any other mechanisms that compel a party to bargain for an agreement made under law without their consent, should be removed from the FW Act.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'ST', is positioned above the typed name.

SIMON TALBOT
Chief Executive

⁶ As above.