Environmental Justice Australia

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
By Email: freedoms@alrc.gov.au
11 March 2015

Dear Ms Wynn,

Re: Freedoms Inquiry – submission in response to 'Traditional Rights and Freedoms— Encroachments by Commonwealth Laws' (ALRC Issues Paper 46)

The universality of human rights and their underlying appeal to an innate sense of fairness and decency is what drives acceptance and respect for their protection. All human rights may be limited to achieve community benefits and arguably property ownership engages with community rights most frequently and most directly and consequently no right is more often or as comprehensively limited. The principle of a right to own property and not to be arbitrarily deprived of that property should not be confused with the substantive rights that an individual may have to any particular property and does not and should not be seen as a limitation on the ability of governments to enact laws to protect the environment.

Environmental Justice Australia advocates for the protection of the right of all Australians to clean air, clean water, healthy ecosystems and a safe climate. Everyone has a right to a healthy environment that is free from pollution and provides for both biodiversity and human amenity. There is not and has never been an innate human right to clear land of native vegetation or to use ones intellectual property to the detriment of the community and no one has an innate right to act in a way that is harmful to others. The intersection of public interest regulation and the consequent extinguishment of certain property rights are matters of legitimate policy debate, however it is not something that should be assessed within the human rights protection framework.

The Right to Property

Question 6–1
What general principles or criteria should be applied to help determine whether a law that interferes with vested property rights is justified?

The rights that attach to different objects, be they land, personal or intellectual property are not frozen in time. Just as for all legal rights, the nature and content of property rights will evolve and potentially change quite significantly over time. Community needs and expectations will

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necessarily change. Unlike other protected human rights which have a fundamental foundation in the integrity and dignity inherent in every person, particular rights to certain property as they exist at a particular point in time, as opposed to the principle right to ownership of property and against the arbitrary deprivation of that property, enjoy no such status.

The terms of reference make the extreme assertion that a law that interferes with 'vested property rights' encroaches upon a traditional right or freedom. The protected right to property does not and has never been found to extend this far. Analogies can be drawn between this debate and the debate over investor state dispute settlement (ISDS) clauses in international investment treaties. ISDS is universally condemned by civil society groups primarily because of the limitation that it seeks to create on the ability of governments to act in the public interest of the community they represent.[1]

The recognition, both internationally and domestically, of the right to property is tempered with the recognition that it will be subject to lawful limitations imposed by the state. For example in Victoria the right is characterised as a right not to be deprived of ones property other than in accordance with law.[2] Under the European Convention on Human Rights the right to property in protocol 1, article 1 is limited by "the public interest and subject to the conditions provided for by law and by the general principles of international law" and does not "in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest..."

Contemporary society simply would not function without the regulation of land use for the benefit of all in the community and the law in Australia has always recognised that government regulation may limit the permitted uses of private land.[3] In his 2007 article on the regulatory taking of private property rights Professor Gray neatly articulates the common law on incursions to property rights:[4]

> …privileges of ownership have always been intrinsically curtailed by community-oriented obligation.[5] The purchase of a bundle of rights "necessarily includes the acquisition of a bundle

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[1] See for example submissions to the Productivity Commission, *Bilateral and Regional Trade Agreements*, Canberra: Research Report, 2010 http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf and to the Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (August 2014).

[2] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s20.

[3] *Slattery v Naylor* (1888) 4 WN (NSW) 191; 9 LR (NSW) 95; LR 13 App Cas 446.

[4] Kevin Gray, 'Can Environmental Regulation Constitute a Taking at Common Law?' (2007) 24 EPLJ 161 at 163-164 citing Scrutton LJ in *Re Ellis and Ruislip-Northwood Urban DCs* [1920] 1 KB 343 at 372, "Parliament may have taken a view that a landowner in a community has duties as well as rights, and cannot claim compensation for refraining from using his land where they think that it is his duty so to refrain."; *Gazza v New York State Dept of Environmental Conservation* 679 NE2d 1035 at 1039 (1997).

[5] As Scrutton LJ observed in *Re Ellis and Ruislip-Northwood Urban DCs* [1920] 1 KB 343 at 372, "Parliament may have taken a view that a landowner in a community has duties as well as rights, and cannot claim compensation for refraining from using his land where they think that it is his duty so to refrain."

of limitations."[6] Deep at the heart of the property concept lies a fusion of individual right and social responsibility.[7] When viewed from this perspective, as Justice Frankfurter once said,[8] regulatory control of land use simply represents "part of the burden of common citizenship."[9] The community is already entitled – has *always* been entitled – to the benefit of a public-interest forbearance on the part of the landowner.[10] The landowner has *never* had any entitlement to degrade his or her land or to utilise it in an environmentally detrimental manner.[11]

A further problem with the idea of protecting the content of particular interests - in particular property - is that the effect of such protection would, unlike other human rights, not be universal and be concentrated in the hands of the very few. This is of course fundamentally inconsistent with the idea of rights protection and the universality of human rights. The property rights of 1.73 million households in Australia are less than the ten wealthiest families in Australia.[12] Globally 1% of the population has 48% of the property rights and 50% of the population less than 1% of the rights.[13] In effect if human rights based protection was given to substantive property rights not only could additional human rights in effect be purchased but the level of protection would be far greater for the wealthy and often in practice at the expense of the poor who are more likely to depend on public interest regulation for their health and wellbeing. Unlike the right to free speech or to privacy the protection would not be equal for all individuals. It is simply not practical to see an interest in particular property at a particular point in time as giving rise to a right that cannot be altered or should be compensated for when the legislature acts in the best interests of the community.

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[6] *Gazza v New York State Dept of Environmental Conservation* 679 NE2d 1035 at 1039 (1997).

[7] See Gray KJ, "Equitable Property" (1994) 47(2) *Current Legal Problems* 157 at 188-189. For a powerful elaboration of the same theme, see Singer JW, *The Edges of the Field: Lessons on the Obligations of Ownership* (Beacon Press, 2000). See also Alexander GS, *Commodity and Propriety* (University of Chicago Press, 1997); Singer JW, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000).

[8] *Kimball Laundry Co v United States* 338 US 1 at 5; 93 L Ed 1765 at 1772 (1949). See also *Kim v City of New York* 659 NYS2d 145 at 152 (1997) (Court of Appeals).

[9] The citizen may also be expected to shoulder his or her share of the burden of the state's compliance with international obligations (see, eg *Keane and Naughton v An Bord Pleanala* [1998] 2 ILRM 241 at 260-262 (construction of radio mast as navigational aid for international shipping)).

[10] See Gray KJ, "Land Law and Human Rights", in Tee L (ed), *Land Law: Issues, Debates, Policy* (Willan Publishing, 2002), pp 239-243.

[11] There is, for example, an extensive body of American case law, reaching back into the 19th century, which denies that any compensable "taking" can be effected by land regulations which merely suppress "noxious" or anti-social users which are "injurious to the community" or threaten "public health, safety, or morals" (see *Mugler v Kansas* 123 US 623 at 665; 31 L Ed 205 at 211 (1887) per Harlan J; *Pennsylvania Coal Co v Mahon* 260 US 393 at 417; 67 L Ed 322 at 327 (1922) per Brandeis J). For a willingness to apply similar logic in Australia, see *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 415; 53 ALJR 696 per Stephen J.

[12] Richardson and Denniss, Income and wealth inequality in Australia, The Australia Institute Policy Brief No. 64 (July 2014) p10.

[13] Credit Suisse, Global Wealth Report 2014 <https://publications.credit-suisse.com/tasks/render/file/?fileID=60931FDE-A2D2-F568-B041B58C5EA591A> p11.

As identified in the discussion paper the concept of property is somewhat illusory in that property is not a thing but a right to a thing. The protected right is therefore better characterised as a right to have certain undefined rights, which a person may be able to acquire, recognised by law and only removed by law. Following the passage from the joint majority judgment in *Yanner v Eaton* extracted in the discussion paper, their honours also make the point that:

> "Property" is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not "a monolithic notion of standard content and invariable intensity".[14] (footnote omitted)

Australian authorities draw a distinction between a law for the acquisition of property and laws that simply regulate rights and interests.[15] For example, in *JT International SA v Commonwealth of Australia*[16] French CJ said:

> [the law] reflects a serious judgment that the public purposes to be advanced and the public benefits to be derived from the regulatory scheme outweigh those public purposes and public benefits which underpin the statutory intellectual property rights and the common law rights enjoyed by the plaintiffs. The scheme does that without effecting an acquisition.[17]

In the same case Kiefel J said:

> A closer analogy to the level of restriction placed upon the plaintiffs' use of the trade marks and other property is with restrictions which may be placed upon land for the purposes of town planning and other public purposes. Such restrictions, or even prohibitions, would not usually be said to result in an acquisition of land by a local authority. Even the sterilisation of land by regulation has not been said to have this effect.[18] (footnote omitted)

In addition to whether there is an acquisition the only real principle that can meaningfully be applied to assess whether a law is justified is the historically recognised test of whether or not the law is arbitrary. The European Court of Human Rights has said that the capacity to limit property rights in the general interest is necessarily broad, and primarily the reasonableness of any limitation is a matter for the legislature:

> The notion of "general interest" is necessarily extensive. The Court finds it natural that the margin of appreciation available to the legislature in implementing social and economic

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[14] *Yanner v Eaton* (1999) 201 CLR 351, at 366 (Gleeson CJ, Gaudron, Kirby and Hayne JJ); see discussion paper page 50.
[15] See for example *Mutual Pools & Staff PTY Ltd v Commonwealth* (1994) 179 CLR 155; *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140; *JT International SA v Commonwealth of Australia* (2012) 250 CLR 1.
[16] (2012) 250 CLR 1.
[17] (2012) 250 CLR 1 at [43].
[18] (2012) 250 CLR 1 at [363].

> policies… should be a wide one, and will respect the legislature's judgment as to what is "in the general interest" unless that judgment is manifestly without reasonable foundation. (references omitted)[19]

This is a sensible application of the right that is consistent with the position at common law and which together with the right to compensation for the acquisition of property provides a fair balance between the need to protect individuals and the need of the community to be able to regulate conduct and the use of resources in the broader public interest.

The alternative approach that effectively amounts to a proportionality test weighing the degree of impact on particular individuals in the context of the benefit to the wider community is in our view even more value laden and subjective than the tests applied to limitations on rights protected under the ACT and Victorian human rights Acts.

In terms of proportionality, unless the regulation was truly arbitrary or for an improper purpose - in which case it would arguably be beyond the legislative power of the Commonwealth which can only acquire land for a purpose 'in respect of which the parliament has power to make laws'[20] - the benefits for the community of public purpose regulation will always outweigh the limitations on individuals. The protection of the content of particular property rights is simply not suitable to a human rights style evaluation framework.

The protection against the acquisition of property by parliament without compensation operates to protect individuals and ensure that they do not bear a disproportionate burden for the benefit of the community. The idea that, for example, the listing of a wetland which ensured its protection could then give rise to compensation for the theoretical exploitation of that resource would result in rent seeking and windfall gains by property owners and create an impossible barrier for the rest of the community. Governments simply do not and never could have sufficient resources to pay the potential costs of the theoretical exploitation of all land that they may wish to regulate in some way. Protection against unjust acquisition, the requirement that laws be for a proper purpose and not arbitrary without reasonable foundation together with the political consequences of decisions are sufficient to ensure that a fair balance is achieved between private and public interests.

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[19] *Berger-Krall and Others v. Slovenia* European Court of Human Rights application no. 14717/04 12 June 2014) at [192].

[20] Constitution section 51(xxxi); see *Bank of New South Wales v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1 at 349 per Dixon J. Similarly State acquisition of property Acts include the requirement that the acquisition be for a public purpose, see for example *Land Acquisition and Compensation Act 1986* (Vic) s1; *Acquisition of Land Act 1967* (Qld) s5 and schedule 1.

Judicial Review

Judicial review and access to the courts can be seen as an inherent right in itself but it is also facilitatory of the protection other rights and freedoms. The attempted or purported removal of judicial review is in most cases ineffective or invalid, [21] and certainly never justified. There are no circumstances where a member of the executive should be permitted to Act outside the power given to them.

The existence of judicial review and the right to access to the courts must be supported by an effective means of review and this includes ensuring that artificial limits are not placed on who can seek review by a court. Currently this right is restricted by the *Administrative Decision (Judicial Review) Act 1977* (Cth) (ADJR Act) to those who are persons aggrieved and whose interests are affected by government decisions.[22] A number of expert reports including from the ALRC have recommended significantly expanding the scope of who has standing to seek review.[23] Together with the policy benefits highlighted in these reports, the rights based protection that it affords is also significant.

Protecting public goods and undertaking public interest litigation in matters such as the protection of the environment should be recognised by the ADJR Act to ensure that where rights are shared equally by everyone, those with the capacity to try and enforce those rights are given the opportunity to do so. Limitations on standing create an unjustified limitation on the right to access a court to protect important public rights and interests.

If you have any questions or would like to follow up any of the matters raised please don't hesitate to contact me.

Yours sincerely

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[21] *Plaintiff s157 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
[22] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s5.
[23] Australian Law Reform Commission *Beyond the Door Keeper. Standing to Sue for Public Remedies*, Report 78, 1996; Administrative Review Council *Report 50: Federal Judicial Review in Australia,* 2012, <http://www.arc.ag.gov.au/Publications/Reports/Documents/ARCReport50-FederalJudicialReviewinAustralia-2012.PDF>.