

8 July 2010

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: legcon.sen@aph.gov.au

Dear Ms Dennett

Re: Human Rights (Parliamentary Scrutiny) Bill 2010

The Urban Taskforce is a non-profit organisation representing Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning, of the urban environment, to engage in constructive dialogue with government and the community.

The proposed definition of "human rights" refers to seven conventions.¹ None of these conventions provides explicit recognition for property rights. The bill's failure to recognise property rights as a human right is a serious oversight. Many human rights advocates are not as concerned by violation of property rights, as they are about violation of other human rights. Nonetheless, this is no basis for omitting property rights from the definition of human rights. Property rights are, unquestionably, also human rights. Many major human rights documents set out to protect private property rights:

The Universal Declaration of Human Rights, United Nations

Article 17 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 states that

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.

We note that, under Australian law, a corporation is a key mechanism by which people own property "in association with others" as envisaged by the Declaration.

United States of America

Article I, §10 of the United States *Constitution* bars states from passing any law "impairing the Obligation of Contracts," and the fifth and fourteenth amendments to the United States *Constitution* provide that no one may be deprived of property without "due process of law". The United States Supreme Court has said that the right not to be deprived of property prevents the government

from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole.²

Again, the US right for private citizens to be protected from deprivation of their property without compensation also extends to corporations.³ This is unsurprising, given that many individuals choose

¹ Section 3(1)

² *Armstrong v. United States*, 364 US 40, 49 (1960)

to hold their property through corporations – small and large alike – and the right of those owners to the protection of their property is just as important as the rights of those who choose to hold property personally.

Canada

In Canada, there is an *Expropriations Act* in place for federal and each provincial jurisdiction.⁴ This law has a “quasi-constitutional” status.⁵ In the case of a conflict between ordinary statutes, courts generally seek an interpretation that accommodates both pieces of legislation.⁶ Quasi-constitutional statutes completely trump any prior statute and any subsequent statute is presumed to have been written subject to the quasi-constitutional statute, unless it explicitly provides to the contrary.⁷

Each *Expropriations Act* provides a measure of protection for private property rights – providing a mechanism for private property owners to receive compensation when they are deprived of their assets.

Europe/UK

The *Human Rights Act 1998* (UK) gives statutory recognition to *European Convention on Human Rights*. Article 1 of the first protocol of the convention states that

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

As in the United States, the protection does not just extend to the property of an individual, it also embraces a “legal person”, that is, a corporation.

South Africa

Section 25 of the South African *Constitution* states that

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application -

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

Australia

Section 51 (xxxi) in the Australian *Constitution* permits the Commonwealth to enact laws relating to

the acquisition of property *on just terms* from any State or person for any purpose ... (emphasis added)

But while this provision limits the power of the Commonwealth Parliament to acquire property without paying just terms compensation, it does not have the same effect as a true guarantee of property such as is found in the fifth amendment of the United States *Constitution*.⁸ As a result, property owners have no such constitutional protection from acquisitions under state law and even

³ *Mo Pac. RR v. Nebraska*, 164 U.S. 403, 417

⁴ *Comparative Constitutional Law: United States/Canada*, 7th ed. 6-52.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Commonwealth v WMC Resources Ltd* [1998] HCA 8; 194 CLR 1, McHugh J [149].

sometimes have no protection from federal laws that take their property.⁹ In the past, for example, states have compulsorily acquired valuable mining interests without any constitutional requirement to pay just compensation.¹⁰

While the *Human Rights (Parliamentary Scrutiny) Bill 2010* is concerned with Commonwealth legislation, not state laws, Commonwealth legislation can purport to require or facilitate action by states that might infringe on property rights. Such legislation may be constitutional action,¹¹ but nonetheless still worthy of scrutiny under the new human rights framework.

The flaw in the bill is that it embraces and refers to the international instruments that do not contain explicit recognition of property rights and omits the international instrument (The United Nations *Universal Declaration of Human Rights*) that does give explicit recognition to property rights.

The omission of the *Universal Declaration* is ostensibly justified on the basis that the declaration is not binding in the same way as a convention that has been signed and ratified by Australia. We note, however, that Australia has "accepted" the *Universal Declaration*. The arcane distinction between the two categories of international instruments was no barrier to the statutory recognition of the *Universal Declaration of Human Rights* in the following Commonwealth acts:

- *Racial Discrimination Act 1975*;¹²
- *Sex Discrimination Act 1984*;¹³
- *Crimes (Hostages) Act 1989*;¹⁴
- *Crimes (Ships and Fixed Platforms) Act 1992*;¹⁵
- *Aboriginal and Torres Strait Islander Act 2005*;¹⁶
- *Housing Assistance Act 1996*;¹⁷
- *Supported Accommodation Assistance Act 1994*;¹⁸ and
- *Native Title Act 1993*.¹⁹

We strongly urge the committee to recommend the amendment of "human rights" in the *Human Rights (Parliamentary Scrutiny) Bill 2010* so that it includes the *Universal Declaration of Human Rights*, and therefore embraces the idea of property rights.

Thank you for giving us the opportunity to make a submission on the important legislation.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

⁹ Ibid.

¹⁰ The *Coal Acquisition Act 1981* (NSW) which vested in the Crown all coal in New South Wales which, but for the passing of the Act, would be private property. The Crown obtained the coal free from all trusts, leases, licenses, obligations, estates, interests and contracts

¹¹ As per the views of the majority in *ICM Agriculture v The Commonwealth* [2009] HCA 5.

¹² Schedule.

¹³ Schedule.

¹⁴ Schedule.

¹⁵ Schedule 1.

¹⁶ Preamble.

¹⁷ Preamble.

¹⁸ Preamble.

¹⁹ Preamble.