australian network of environmental defender's offices

Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures

10 March 2010

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

Contact Us

EDO ACT (tel. 02 6247 9420)
edoact@edo.org.au

EDO NSW (tel. 02 9262 6989)
edonsw@edo.org.au

EDO NQ (tel. 07 4031 4766)
edonq@edo.org.au

EDO NT (tel. 08 8982 1182)
edont@edo.org.au

EDO QLD (tel. 07 3211 4466)
edoqld@edo.org.au

EDO SA (tel. 08 8410 3833)
edosa@edo.org.au

EDO TAS (tel. 03 6223 2770)
edotas@edo.org.au

EDOVIC (tel. 03 9328 4811)
edovic@edo.org.au

EDO WA (tel. 08 9221 3030)
edowa@edo.org.au

Submitted to:

Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures

The Australian Network of Environmental Defender's Offices Inc (ANEDO) is a network of nine community legal centres in each state and territory, specialising in public interest environmental law and policy. We welcome the opportunity to provide comment to the Senate Finance and Public Administration Committee *Inquiry into Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures.*

ANEDO supports the development of a comprehensive legislative scheme to facilitate payment to farmers for a range of verifiable ecosystem services; however we have serious concerns about mandating compensation for environmental regulation.

We have limited our comments to term of reference **(b) "compensation arrangements to landholders resulting from the imposition of such laws."** This submission therefore does not include a detailed analysis of specific state native vegetation laws, engage in debate on land valuation, include assessment of the CPRS or Mr Abbott's climate change measures, as suggested in the inquiry terms of reference. For our previous submissions on these issues, see: http://www.edo.org.au/edonsw/site/policy.php.

Native vegetation laws

Whilst ANEDO supports the use of incentive measures that encourage landholders to conserve and protect the high conservation value land on their properties, we do not support the provision of compensation for the imposition of native vegetation laws as this is not consistent with accepted legal principles. We therefore question the terms of reference of the inquiry as they are framed in a manner that presupposes that compensation is indeed payable for the imposition of native vegetation laws. This position is not legally tenable. We discuss this in detail below.

1. No compensation for regulation of property

It has long been accepted under the common law and through High Court decisions that Government *regulation* of activities that can occur on private property (such as whether land may be cleared or not) does not constitute an *acquisition* of property and therefore no right to compensation is activated.[1] An example is zoning laws in local plans. Although a particular zoning may limit the development activities on a parcel of land and may therefore affect land prices, this is 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, 'mere regulatory interference with land use or management does not constitute a deprivation of property for which compensation is paid'.[2]

Therefore, a state government implementing native vegetation laws to control or prohibit land clearing as a result of Government policy to regulate and protect natural resources 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

---

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

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

land. The ability to clear land is contingent on the landholder obtaining a relevant approval or permit to clear. Where no existing consent is obtained, there is no right to clear land. This has been firmly settled recently by the High Court. The Court recently 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 (NSW) always had the power to limit the volume of water to be taken. NSW exercised this right through legislation that established a licensing system and prohibitions on access at certain times. French CJ, Gummow J and Crennan J concluded when deciding whether the NSW Government's decision to cancel these licences amounted to an acquisition of property:

> *The changes of which the plaintiffs complain implemented the policy of the State respecting the use of a limited natural resource, but that did not constitute an "acquisition" by the State in the sense of s51((xxxi).*[3]

However, it has been argued that regulation can sometimes be so onerous as to effectively "sterilise" the right to the property. This was demonstrated by the case of *Newcrest Mining (WA) v Commonwealth.*[4] The case concerned mining leases acquired by Newcrest at Coronation Hill adjacent to Kakadu National Park. The Coronation area was incorporated into the National Park through proclamations under the Commonwealth *National Parks and Wildlife Conservation Act 1975*, which banned operations for the recovery of minerals. The Court held that, a mining company had been denied the exercise of its rights under the mining tenements it had been granted and that "there was an effective sterilisation of the rights constituting the property in question".[5] That is, as there was no other conceivable way to use the 'property' a quasi-acquisition had taken place. However, it has been noted it is unlikely that the sterilisation argument would "catch anything other than fairly rare and exceptional instances of regulatory intervention".[6]

This is not the case for native vegetation regulation as the imposition of native vegetation laws does not mean that the landholder cannot use their land for another purpose, such as the farming of already cleared land or private conservation measures.

2. <u>State Constitutions</u>

ANEDO notes that native vegetation laws are primarily made at the state level so are not subject to s51 (xxxi) of the Federal Constitution. Other than NT, no state constitutions contain provisions requiring compensation for the acquisition of property or any lesser modification of any property right. Therefore, unless they have legislation in place to the contrary, these jurisdictions can acquire on any terms they choose.[7]

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

---

[3] *ICM Agriculture Pty Ltd v The Commonwealth of Australia & Ors* (2009) HCA 51 at [84].
[4] (1997) 190 CLR 513.
[5] per Gummow J at 634.
[6] Kevin Gray, 'Can environmental regulation constitute a taking of property at common law?' (2007) 24(3) *EPLJ* pp 161-182 at 168.
[7] PJ Magennis Pty Ltd v Commonwealth;[7] Commonwealth v NSW.[7] See also Durham Holdings Pty Ltd v NSW.[7]

3. Public policy considerations

In addition to the legal position, ANEDO submits that there are strong public policy reasons why such compensation should not be provided for the imposition of native vegetation laws. There are three main concerns.

First, any mandated right to compensation for regulatory action by Government may lead to a stagnation of environmentally beneficial action. Compensation in this context creates a climate "whereby governments are hesitant to regulate property for fear of the financial repercussions".[8] Indeed, it has been observed that "the progress of civilised society would effectively grind to a halt" if every regulatory action by the government would activate an entitlement to compensation.[9] Mandating compensation in one regulatory area (ie, native vegetation) could open the floodgates to a range of claims relating to all land-use regulations. This would be unworkable, as governments need to be able to regulate land use in the public interest.

Second, a move away from the well-established principle that compensation should only be paid where property is acquired may potentially involve the community in complex and costly litigation over what particular regulations require compensation.[10] Macintosh and Dennis agree, finding that substantial resources could be wasted in court proceedings that would be "better spent on improving environmental outcomes and providing other government services".[11]

Third, the attribution of rights to compensation for natural resources may lead to environmental degradation. Water management is an example of how secure property rights, or at least the belief that they existed, led to environmental degradation. This resulted in over-allocation, particularly in the Murray-Darling Basin, as landholders believed they were free to use their 'property' as they pleased.

4. Incentive mechanisms

ANEDO supports incentive mechanisms and legislative schemes to facilitate payment for ecosystem services as efficient and equitable alternative to compensation. In addition, in certain circumstances, structural adjustment schemes may be appropriate as an acknowledgement that although there is no right to compensation, certain landholders and businesses will suffer economic and social hardship from environmental regulation. Governments in the 1990s introduced structural adjustment packages in several industries such as the fishing and timber industries.[12] These were successful at addressing the hardships suffered by people in those industries as a result of restrictions on their

---

[8] EDO (NSW) submission, Jeff Smith , *Water Property Rights* (2003) at 17. http://www.edo.org.au/edonsw/site/pdf/water_prop_rights.pdf

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

[10] Environmental Defender's Office, *Submission of water property rights* (2003) at p9. Found at: http://www.edo.org.au/edonsw/site/policy.php (6 September 2007).

[11] Andrew Macintosh and Richard Denniss, 'Property Rights and the Environment: should farmers have a right to compensation?' (2004)- The Australia Institute at 34.

[12] Environmental Defender's Office, *Submission of water property rights* (2003) at p9. Found at: http://www.edo.org.au/edonsw/site/policy.php at p9.

exploitation of these resources. Some of the tools used were grants for restorative works, tax rate relief, and assistance in transitioning to other industries.[13]

ANEDO supports the use of such mechanisms by State governments to encourage landholders to protect native vegetation on their land by providing financial incentives and technical support. Private conservation measures include voluntary agreements[14], Property Vegetation Plans[15], philanthropic programmes[16], rate relief[17] and tax incentives.[18] We would welcome the development of a comprehensive legislative scheme to promote incentive mechanisms and facilitate payments for ecosystem services.

Greenhouse gas abatement and climate change measures

In terms of compensation relating to laws imposed for greenhouse gas abatement, the debate to date has focussed largely on compensation for large industrial emitters under a legislated emissions trading scheme. ANEDO has repeatedly opposed compensation being provided to such industries, consistent with the legal and public policy principles noted above.[19]

ANEDO does however support the development of greenhouse gas abatement options for farmers through payments for ecosystem services or verifiable carbon credits connected to emissions trading and abatement schemes. These mechanisms may include carbon sequestration in trees or soil carbon in the future. Although this is a new and emerging area of law, the generation of carbon credits is already happening to some extent. For example, in NSW carbon sequestration rights are recognised as a property right under the *Conveyancing Act 1919*. This right gives the holder a property interest in the carbon stored in trees found on their land. If obtained, carbon sequestration rights can be used to generate abatement certificates under the NSW GGAS scheme. This gives a significant incentive to private landowners to replant areas of cleared forest or maintain forests grown since 1990 in order to obtain a carbon offset.

ANEDO submits that a clear legislative regime is needed to ensure that any generation of carbon credits (whether under CPRS or otherwise) must be subject to rigorous standards relating to monitoring and quantification, additionality, permanence and conformity with international carbon accounting rules and ecologically sustainable development.

For more information on this submission please contact Rachel Walmsley on (02) 9262 6989 or rachel.walmsley@edo.org.au.

---

[13] J Crosthwaite, J, 'Vegetation clearance – is compensation or adjustment the issue?' (2002) 1 *Ecological Management and Restoration* 2.
[14] *National Parks and Wildlife Act* 1974 (NSW) s69C(1).
[15] *Native Vegetation Act 2003* (NSW) s14(4).
[16] For example, *Nature Conservation Trust Act 2001 (NSW)*.
[17] For example, *Local Government Act 1993* (NSW), s 555.
[18] See *Income Tax Assessment Act 1997* s 31.5.
[19] ANEDO has commented extensively on a range of climate change measures including the development of an ETS. For example, for specific comment on property rights and compensation relating to an ETS please see the ANEDO *Submission on the Carbon Pollution Reduction Scheme Green Paper*, 10th September 2008, pp16-19 (available at http://www.edo.org.au/edonsw/site/policy.php).