

21 April 2010

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

Dear Sir/Madam

Inquiry into native vegetation laws, greenhouse gas abatement and climate change measures

In response to questions on notice, please note the following responses:

State legislation compensation provisions (Q. 2)

The Productivity Commission's 2004 Inquiry Report into the Impacts of Native Vegetation and Biodiversity Regulations noted "*compensation for the impacts of native vegetation regulations has been and remains the exception rather than the rule*". In South Australia and Western Australia, limited compensation was offered. Assistance packages were announced to NSW and Queensland landholders but the Productivity Commission noted that it was not clear whether compensation had actually been paid.

A draft paper on Property Rights and Compensation by Jeff Smith (no date), Environmental Defender's Office, which focussed on Queensland, NSW and South Australian legislation, notes:

The Constitutions of NSW, Queensland and South Australia do not contain any provisions requiring compensation for acquisition of property or any lesser modification of any property right. Therefore, State legislation may modify the common law position without requiring the payment of compensation. Indeed, unless they have legislation in place to the contrary, States can acquire on any terms they choose, even though the terms are unjust".

NFF also draws attention to 1997 Remnant Native Vegetation - Perceptions and Policies report available on the Department of Environment, Water, Heritage & the Arts website¹ commissioned by South Australian Farmers Federation, Victorian Farmers Federation and

¹ <http://www.environment.gov.au/land/publications/remveg.html>

NSW Farmers' Association. This report contains an appendix which summarises the compensation provisions in state legislation. It should be noted however, that there have been significant changes to state legislation since this work was done.

The NFF notes that Governments are reluctant to offer compensation to individual landholders due to the likely precedent. Governments are more inclined to establish programs to assist farmers manage for biodiversity outcomes (e.g. fencing of remnant native vegetation). Such funding programs are not, and should not, be taken to be compensation for foregone or impeded property rights.

Torrens Title and Ownership of Vegetation (Q. 3)

Land is separately defined in various statutes. Where these definitions are not applicable, or there is nothing evident in rebuttal, the Common Law definition applies, i.e. land extends from the centre of the earth to the sky, including not only the surface but also the soil beneath it and the air above it and all things growing on it or attached to it, but does not include minerals belonging to the Crown.

Land is defined in the Real Property Act (NSW) 1900 as Land, messuages, tenements, and hereditaments corporeal and incorporeal of every kind and description or any estate or interest therein, together with all paths, passages, ways, watercourses, liberties, privileges, easements, plantations, gardens, mines, minerals, quarries, and all trees and timber thereon or thereunder lying or being unless any such are specially excepted.

Therefore, given the above it is reasonable that any vegetation growing on the land belongs to the owner of the Torrens Title.

Federal and State Negotiations (Q. 1, 4-9)

The 2000 COAG Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality includes the clause 27 in relation to land clearing:

“States and Territories agree to institute controls on land clearing by June 2002 or as otherwise agreed in Bilateral Agreements, which at minimum prohibit land clearing in the priority catchments / regions where it would lead to unacceptable land or water degradation. For the purpose of this clause ‘unacceptable land and water degradation’ will be defined in conjunction with the development of the interim standards to be developed under clause 20.”

This appears to be an ad hoc clause in an IGA largely to establish the NRM regional organisations and for the development of regional investment plans that would be funded under the IGA funding framework. The intention of the subsequent land clearing laws appears to be to limit broad scale clearing but which was applied at an individual plant level.

In early 2001, NFF's members expressed growing concern about the impact of State and Federal water and vegetation legislation, with the matter highlighted at the NFF Policy Council in May.

NFF developed a campaign for the 2001 Federal election, seeking a commitment to legislate to protect landowners' property rights and if those rights were constrained by legislation, for compensation to be paid. Leaders of both political parties publicly recognised the issue, culminating with an address to the National Press Club by the Prime Minister, John Howard. The Prime Minister recognised that compensation should be paid to individuals who give up property rights in the interests of the broader community, and that payment of fair compensation was not negotiable. The Prime Minister undertook to address the issue through COAG.

Following the election, the NFF developed a position paper to use for discussions with Federal and State politicians and officials. This paper sought recognition of property rights in the first instance and for an adequate package of compensation and transition incentives. Moreover, the NFF sought through an Intergovernmental Agreement, the requirement for the States to protect property rights.

COAG rejected the NFF principles and proposed solution in December 2002. At this point vegetation and water issues were separated with COAG signing the National Water Initiative in 2004. In the meantime, NFF successfully lobbied for the Productivity Commission's 2003 Inquiry into the Impacts of Native Vegetation and Biodiversity Regulations.

During 2003, the NFF sought a commitment from State Premiers for in principle support – this being provided by all except the Queensland Premier, Peter Beattie.

NFF continued to develop its policy position in 2004, and this work has been provided in the NFF submission to the Senate Inquiry.

In June 2005, COAG again considered the issue of an Intergovernmental Agreement for Native Vegetation and Biodiversity Management. In a joint media release with the Australian Bankers Association, the NFF indicated that it would not seek to wind back land clearing controls or retrospective compensation provided State and Federal Governments, through COAG, made significant changes to the way they were managing environmental regulations and their acknowledgement of the property rights of farmers. This IGA proposal was rejected by COAG.

In terms of any of the 2001-2004 negotiations in relation to land and property rights, the NFF are unaware whether any of these discussions included discussions relating to compensations arising from the Kyoto protocol.

In terms of the high level, in-confidence negotiations between governments on Intergovernmental agreements or Cabinet decisions, NFF are not privy to such discussions. NFF suggests that the Senate Committee is in a better position to be able to seek access to such discussions and negotiations.

ABARE Report (Q. 4 & 8)

Since the Wagga hearing, the NFF contacted ABARE about the report of interest. It can be located on the BRS website: http://adl.brs.gov.au/brsShop/data/landclearing_prop.pdf. The

NFF cannot ascertain whether or not it had access to this report during the period of interest to the Inquiry.

The Future

While it may be of interest to a limited few to look to laying blame for past action or inaction, or to investigate the history of where the property rights debate has developed over the last decade or more in Australia, it would be more beneficial to look a practical resolutions to avoid the mistakes of the past. Therefore, the NFF would like to take this opportunity to again draw the attention of the Inquiry back to the possible policy resolutions outlined in the NFF submission to the Inquiry.

Hansard

The NFF has no substantive changes to make to Hansard.

Yours sincerely ,

BEN FARGHER
Chief Executive Officer