Senate Finance and Public Administration Committee
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Parliament House
Canberra ACT 2600
Australia

Submission to the Senate Finance and Public Administration Committee rgarding inquiry into Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures

I request that you keep my name as the author of this submission confidential, but the contents of this submission need not be confidential. I work as a NSW public servant.

The Terms of Reference for this inquiry are as follows:

> (1) The impact of native vegetation laws and legislated greenhouse gas abatement measures on landholders, including:
> (a) any diminution of land asset value and productivity as a result of such laws;
> (b) compensation arrangements to landholders resulting from the imposition of such laws;
> (c) the appropriateness of the method of calculation of asset value in the determination of compensation arrangements; and
> (d) any other related matter.
> (2) in conducting this inquiry, the committee must also examine the impact of the Government's proposed Carbon pollution Reduction Scheme and the range of measures related to climate change announced by the Leader of the Opposition (Mr Abbott) on 2 February 2010.

In sum, this submission submits that any funding provided by the Federal Government relating to native vegetation laws, greenhouse gas abatement measures and indeed any other relevant environmental law duties should not be seen as triggering a need for “compensation” as a matter of rightful entitlement.

Introduction

The imposition of restrictions on landclearing (and water entitlements) does not trigger a right to compensation, as suggested by previous Federal Coalition Government Parliamentary inquiries and the rural industry, and any so called 'compensation arrangements' need to be mindful of this.

Under Australian common law, freehold title is not an absolute title to land enabling landholders to be immune from environmental regulation. Such regulations do not constitute an "acquisition" of property. The primary purpose of environmental regulation and related economic instruments should be to ensure ecological integrity of land, and prevent harm to land resources by passing on full environmental costs to polluters. It is Government's role and responsibility to carry this out. This view is in contrast to the previous Federal Coalition Government's proposed model where environmental laws that go beyond a minimum "stewardship duty" or duty of care are providing a consumable "service" to the public, and must be paid for by the "recipients" of this service. Of course, financial assistance should be provided in order to re-structure the rural industry towards ecological sustainability. The deliberate use of the term "compensation" influences the assumptions of the debate. It encourages expectations of moral or legal entitlement to government assistance. This undermines proper principles of stewardship, innate responsibility for the environment, and good governance.

Ill-conceived 'compensation' measures may be expedient for this Federal government, in terms of gaining favour with rural industries, but will be detrimental to future governments and future generations. Rural industry is an industry and needs to be treated as such. To the extent that subsidies are supporting Australian community and other treasured rural lifestyles, then what are being discussed are assistance packages, not compensation. If there is one point from this submission, I wish that the Committee appreciate that the difference in language used is important.

Background to environmental issues

Whilst the present public awareness is on climate change, it is noteworthy that similar policy issues about land, native vegetation and water have been around for a considerable time. Much of my submission will draw upon issues that were topical over the last decade, not necessarily the most recent reports on climate change and native vegetation. In my view, the arguments for and against compensation have not progressed very far in the political sphere. The strategic question still remains- in imposing environmental protection on a market economy, who pays? The Committee needs to consider this fundamental question before making other findings.

Land use changes since European settlement, such as clearing and replacement of native trees and grasses with annual crops and pastures, irrigation developments and poor urban water management means that much less rainfall

that soaks into the ground is being used by vegetation[1]. This has implications for biodiversity, climate change and water usage.

The effects of salinity and greenhouse gases have been well-known for over two decades More recently it has become clear that practices in the rural industry, such as excessive landclearing and water use must change, in order to be economically "sustainable"[2].

I do not argue that public funding should not continue to provide assistance packages to the rural industry[3]. Instead what is of concern is the notion that "compensation" is rightfully due where individuals give up "property rights" by restricting landclearing and accepting lower water entitlements in the broader public interest.

2002 Federal inquiry

The House of Representatives Standing Committee on Environment and Heritage ("**Federal Committee**") released in 2002 a report on its Inquiry into the impact of public-good conservation measures on landholders and farmers in Australia ("**Inquiry Report**").

The Inquiry Report affirmed the Committee's recommendation in its Report into Catchment Management dated December 2000[4], which recommended that the Commonwealth examine the feasibility of introducing an environmental levy to pay for implementing the policy of ecologically sustainable use of Australia's catchment systems. The Committee recommended that the Government establish a revolving fund to buy land if it becomes economically unviable through mandated changes in land management which causes a significant fall in value of the landholding[5].

Notably, the Inquiry Report rejected an outright recommendation to provide compensation to farmers, but instead left its recommendations open-ended and uncertain. For instance, recommendation 3 is:

> *"… that the policy foundations for public good conservation funding be focused upon attaining good conservation outcomes while addressing the equity issues revealed in this inquiry…Furthermore, the Commonwealth*

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[1] Murray Darling Basin Ministerial Council *Draft Basin Management Strategy 2001-2015*, (2000), p1.
[2] Commonwealth House of Representatives Standing Committee on Environment and Heritage, *Report "Co-ordinating Catchment Management*" December 2000, at [1.3].
[3] Many assistance programs exist, for instance the Commonwealth Salinity and Drainage Strategy 1988; the Murray Darling Draft Basin Salinity Management Strategy 2001-2015; Council of Australian Governments Water Reform Framework; funding available under the Commonwealth National Heritage Trust; the National Dryland Salinity Program; the National Action Plan on Salinity and Water Quality- see Select Committee on Salinity, op cit 3, p7-11.
[4] Op cit n 8.
[5] Inquiry Report, op cit n 11, Recommendation 8.

> *should work with the States to re-case the existing cost-sharing principles…including a full recognition of the equity concerns of landholders raised in this inquiry"* [emphasis added]

Around this time, the National Farmers' Federation claimed that a 5000 ha property in central Queensland suffered a diminution in market value of 29% due to the enactment of state vegetation controls[6]. A studies found that in Moree Shire the cost to farmers of the now repealed *Native Vegetation Conservation Act 1997* (NSW) was $20m per year[7].

Impact of Property rights

In determining 'compensation arrangements', the first issue is whether landholders' legal *property rights* have been infringed by environmental law responsibilities.

(a) What is property?

Article 17.2 of the *Universal Declaration on Human Rights* provides that no person shall be arbitrarily deprived of his property. But what is "property"? The term *property* does not constitute a "thing", rather it is a description of a legal relationship with a thing[8]. It constitutes a "bundle of rights" including the right to exclude others, sell, mortgage, and subdivide.

The common law position in Australia is that any legislation that purports to interfere with property rights, considered fundamental to democracy, must do so in a clear, specific and precise manner[9]. Statutes permitting the acquisition of property rights by public authorities will not be construed to support such acquisition without just compensation unless they are expressed "in clear and unambiguous terms"[10].

While personal property rights have long been considered absolute, property rights in land have not been considered absolute since Norman times, because since that time only the Crown could own land absolutely[11]. As landholders' title lies ultimately with the Crown[12], property rights vested in the Crown give relative, rather than absolute rights. The Crown retains rights in property, including the police power to restrict use and the right to tax property. Property rights in land

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[6] National Farmers' Federation *Property Rights Position Paper* (May 2002), section 3.
[7] Ibid.
[8] *Yanner v Eaton* (2000) 201 CLR 351.
[9] *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 119 ALR 577.
[10] *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343; *Haig v Minister administering the National Parks and Wildlife Service* (1994) 85 LGERA 143, 150.
[11] The Hon Justice Stein "*Ethical Issues in Land use Planning and the Public Trust*" (2001) 13(6) EPLJ 493
[12] *Mabo v State of Queensland* (1992) 175 CLR 1.

are neither absolute, paramount, nor static in operations and character[13]. The resumption of land can be viewed as the taking back from the subject the rights which the Crown previously granted[14].

When a person buys land which is zoned in a certain way, he or she takes a risk that the current use of land will be permitted to continue. The Government does not guarantee that the proposed use will be allowed for any future period. This is similar to a basic principle of land law- "*caveat emptor*" or "buyer beware".

In summary, landholders' property rights are not absolute and remain subject to general environmental regulations.

(b) Misguided assumption of absolute property rights

The Federal Government has for the past decade relied on a misguided view of property rights. It was mistakenly assumed that property rights are in some sense absolute and certain and that development is a *right* of the property owner[15]. This assumption about property rights leads to the conclusion that environmental regulations which infringe these absolute property rights should trigger compensation. This is the discourse that I see in debates about water 'rights'.

The assumption is reinforced by the views of the rural industry. In the past, some landholders claimed an inalienable right to own land and rejected all forms of government interference with private capital [16]. This claim mistakes the nature of property rights and planning laws, designed to balance private development with environmental and other public concerns. In the past, certain farmers' groups have incorrectly claimed compensation when governments reduced their entitlements to water, which they argued were "property rights"[17]. However, there is a clear statutory framework in NSW providing for the licensing of water entitlements to private persons[18]. Landholders in NSW no longer possess a common law right to take water[19]. Water is vested in the Crown[20].

Arguments for compensation for the effects of environmental laws rely on a misconceived and outdated view that property rights are absolute and immune from government interference. A future area of law reform could be that

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[13] Professor Leon Geyer (US), unpublished article "Property Rights- a Fundamental Right requiring Constitutional protection or a Political Right manufactured without a duty" (1996).
[14] Kirby P of NSW Court of Appeal did not disagree with this submission in *Haig v Minister administering the National Parks and Wildlife Service* (1994) 85 LGERA 143, 150.
[15]Inquiry Report, op cit n 11, at [1.3], [2.23], [6.18], [6.118].
[16] JM Powell *Environmental Management in Australia 1788-1914: guardians, improvers and profit: an introductory survey,* (1976) p170.
[17] *The Land*, 16 May 2002, p3.
[18] ss56-88 *Water Management Act 2000* (NSW). Note s 87 of the WM Act contains a limited form of compensation when a bulk access regime is changed.
[19] s393 *Water Management Act 2000* (NSW).
[20] s 392 *Water Management Act 2000* (NSW).

landholders, whether leasehold or freehold, lose their rights to land if the land becomes degraded. The land would revert to the Crown, with the possibility that the land becomes open to a claim for native title. This recognises the fact that all interests in land are temporary, yet the legacy of environmental degradation remains for future generations. A similar scheme of forfeiture operated under ss 204-212 of the *Crown Lands Consolidation Act 1913* (NSW), and ss 18 & 50 of the Western Lands Act 1901 (NSW).

c) State laws

On a purely legal level, can environmental law responsibilities constitute an "acquisition" of property rights under existing Commonwealth and State laws?

The Constitution of the State of NSW provides no power or requirement to pay compensation for environmental law responsibilities[21]. However the NSW Parliament has passed several laws that provide for compensation for acquisition of land[22]. These laws deal with situations where government acquires interests in land, or where the Government revokes or modifies a development consent without the approval of the consent-owner.[23] The laws do not provide for compensation where land is merely affected by regulation[24]. Some old laws allowed a certain form of acquisition for public roads without compensation[25].

The powers to award compensation under the *Environmental Planning and Assessment Act 1979* (NSW) ("EP& A Act") are narrow. No compensation is awarded when zoning restrictions are imposed on a property, despite the fact that a restrictive zoning may detrimentally affect the value of a property, unless the rezoning is so harsh that there is no reasonable use of land remaining (section 26(1)(c), also see NSW Court of Appeal decision of *Carson*).

Part 6 of the National Parks and Wildlife Act deems Aboriginal relics to be property of the Crown. No compensation is payable in respect of this vesting.[26]

(d) Commonwealth laws

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[21] The following proposal to alter the Australian Constitution in 1988 failed to pass at a Referendum held under s 128 of the Constitution "s 115A- A law of a State may not provide for the acquisition of property from any person except on just terms". See H Charlesworth *The Australian Reluctance about Rights* (1993) 31 Osgoode Hall LJ 196 at 210. The National Farmers Federation's view is that the protection of property rights should be a requirement of each state, through an Intergovernmental Agreement-NFF report, op cit n 16, section 4.

[22] Notably, these laws rely on the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). For example, s 145 of the NPW Act. Also s 30 *Forestry and National Park Estate Act 1998* (NSW).

[23] S. 96A EP& A Act.

[24] For instance, restrictions on landclearing under the *Native Vegetation Conservation Act* 1997 (NSW) do not attract compensation.

[25] For example, s 224(3) *Local Government Act 1906* (NSW) relating to public roads.

[26] Section 83 NPW Act.

Commonwealth laws are subject to the operation of s 51(xxxi) of the Australian Constitution[27]. The section guarantees that any acquisition of property from a person must be on "just terms". However, environmental regulations do not constitute an "acquisition" unless it renders the land economically worthless or sterilises the land[28]. Environmental regulations are more likely to have the purpose of preventing harm and nuisance. If there is an incidental impact on a landholder that leads to modifying, but not sterilising, use of land, this does not constitute an acquisition[29]. This can be distinguished from a law that targets a particular property by imposing obligations for a public purpose which deprives the landowner of enjoyment of his/her land[30].

By comparison, the Fifth Amendment of US Constitution states that private property shall not be "taken for public use, without just compensation". This article does not examine the US cases surrounding what constitutes a "taking" for the purposes of the Fifth Amendment[31], because the American system of land tenure is fundamentally different to that which has been adopted in Australia Generally the US cases[32] support the proposition that if a law is reasonable, and it advances a legitimate state interest, then these are reasons why the law is not viewed as a "taking" deserving of compensation[33]. Diminution in property value by itself is insufficient to demonstrate a taking.[34]

In summary, neither NSW nor Commonwealth laws support the proposition that environmental law responsibilities constitute an "acquisition" of landholders' property rights.

(e) Exception-forestry

One possible exception could be the *Regional Forest Agreement Act 2002* (Cth) which contains a compensation provision. Section 8 refers to "reasonable loss or damage arising from the curtailment of legally exercisable rights" relating to

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[27] For example, see s 519 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
[28] see *Commonwealth v Tasmania* (1983) 158 CLR 1; *Western Mining Corporation v Commonwealth* (1998) 194 CLR 1. *Newcrest Mining (WA) Ltd v Commonwealth and the Director of National Parks and Wildlife Service* (1990) 190 CLR 513; *Yanner v Eaton* (2000) op cit n 18.
[29] see *Victoria v Commonwealth* (1996) 70 ALJR 680 at 732.
[30] In *Newcrest* (op cit n 38), the High Court held that incorporation of certain mining leases into the Kakadu National Park where mining was prohibited constituted an acquisition of property.
[31] Interestingly, some US States have passed "right to farm" legislation. These Acts protect farmers from changing common law rules on nuisance and prevention of odours, and give farmers a right to continue farming despite amenity or environmental problems. These laws have been challenged as a "taking" of neighbours' property, on the basis that they prevent neighbours from protecting their land from intrusion of odours, and prevent neighbours having peaceful enjoyment of their property. (Hamilton N, Testimony before US House Committee on Agriculture, Sub-committee on Resource Conservation Research and Forestry, 15/2/95).
[32] see for instance *Lucas v South Carolina Coastal Commission* 505 US 1003 (1992), US Supreme Court; *Concrete Pipe & Products of California v Construction Laborers pension Trust* (1993) US Supreme Court, 113 S Ct 2264 (1993).
[33] Ibid.
[34] *Concrete Pipe* case; ibid.

Regional Forest Agreements. The background to this Act and the *Forestry and National Park Estate Act 1998* (NSW) is beyond the scope of this article. Both Acts introduce compensation issues into forestry regulation, and expressly exclude other environmental laws, and open standing.

Understanding environment as a commodity

Environmental laws are driven by a need to contain the ecological effects of private and public land use, and a need to ensure the continued ecological integrity of land[35]. Increasingly, Parliaments are deriving these powers from international instruments, for instance the 1992 Convention on Biological Diversity. These laws, which form a sub-set of public laws deemed necessary for a civil society, set an appropriate balance between private rights of development and protection of public assets. Owners of property rights should expect to be subject to such laws, just as persons are bound by labour standards and human rights obligations.

Rural industries assume a different view, that environmental protection introduces issues of "individual" property rights versus the "State", because environmental laws provide a "commodity" or "public good" in the form of "public good conservation"[36]. The assumption leads to the conclusion that such goods can be bought and sold on the market place, and that that individuals were providing this good, but were not receiving payment from the recipient ie the public.

To take this reasoning to its logical conclusion, it would be absurd to suggest that companies provide a commodity the public must pay for when they abide by either planning restrictions designed to prevent harm to the environment, or human rights standards designed to protect harm to humans. The implementation of the principles of ecologically sustainable development ("ESD") is not necessarily a service, or a commodity that must be purchased[37], despite the fact that economic instruments can be useful in supporting ESD. It may be arguable that where the dominant purpose of a regulation impacting on property rights is not for ecological protection, for instance where landholders' properties are subject to heritage protection, a moral entitlement to compensation may arise[38].

"Compensation arrangements" allude to the role of economic instruments in environmental management. Capitalising the environment assumes to some

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[35] David Hunter "*Takings and Ecology*" (1988) 12 Harvard Environmental law Review 311.

[36] Inquiry Report, op cit n 11, at [2.13]; [2.18]-[2.29]. Similarly, the National Farmers' Federation states that the Commonwealth and State Governments should adopt a "Public Interest Test" prior to the introduction of any environmental regulations. If the regulation generates a Net Public Benefit for the community, the community should bear the associated costs-NFF report, op cit n 16, section 3.

[37] in contrast, see Inquiry Report, op cit n 11, [6.84].

[38] see ss 103-105 of the *Heritage Act 1977* (NSW). There also exists special taxation and rate discounts for properties subject to heritage protection. See D Farrier *The Environmental Law Handbook* (3rd Ed 1999) p321

extent that the environmental can be considered a "commodity". Economic instruments may have a valid purpose and role, however economic instruments will not replace the need for environmental regulation, and hence why environmental values can never be completely commodified.

Over the past decade there has been increasing government support for a neo-classical economic approach to the environment, and introducing markets to capture the value of the environment. Indeed Australian competition laws may require such reforms to take place[39].

A neo-classical economic outlook has some benefits. By reducing the need for regulation, which may be an impediment to productivity, this increases efficiency, ensures the optimal allocation of resources, and lowers costs for landholders[40].

However this rigid economic outlook also has its limitations. An optimal allocation of environmental resources to their highest value users may be contrary to fairness/equity concerns, or public interest concerns such as the public's wish that development is ecologically sustainable[41], or that a species not become extinct, or that a World heritage item be protected. Perfect competition under neo-classical economic theory assumes that producers seek to maximise their profit. It is arguable that economic instruments do not ensure "consumer welfare". Also, it is likely that very large corporations will be largely immune from market forces introduced by economic instruments.

Governments have a right to intervene and regulate the economy, in order to maintain the public benefits promised by market reforms[42]. Governments should be wary that a purely neo-classical economic view of the environment can lead to some naïve and unrealistic conclusions. For example, the Productivity Commission observed that if conservation is not fully priced and passed onto the public, demand for it may become excessive and more conservation may occur than is optimal for society[43]. In the current climate this kind of reasoning is hardly helpful.

If the Federal Government persists in its neo-liberal economic assumptions about 'compensation arrangements' for environmental protection, it should at least by consistent and pass on the costs of environmental degradation to those who caused it. The former Federal Minister for the Environment made this point:

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[39] ibid, p35. In particular, the discussion on the Independent Commission of Inquiry into National Competition Policy 1992.
[40] ibid; p37.
[41] Ibid, p37.
[42] Sustainable natural resource management should be achieved through a mixture of voluntary market determined and regulatory instruments- Commonwealth Department of Agriculture, Forestry and Fisheries (2001) *Managing Natural Resources in Rural Australia for a Sustainable Future.* Also, see generally Corones (1990) *Competition law and Policy* .
[43] Productivity Commission (2001); op cit 15, p29.

> *"The investment of public monies in environmental repair works is pointless if landholders seek to continue to gain private benefit from unsustainable management practices which simply inflict further damage on our natural systems"* [44].

If public compensation is provided to landholders to protect the environment it is inequitable to require the public, who can be deemed to suffer the consequences of reduced environmental quality, to pay farmers to stop the activities that cause the harm[45] ("**victims' principle**"). The previous Federal Government Committee rejected the "victims" principle as a legitimate basis for environmental laws[46], and adopted the assumption that landholders are provide benefits to the public by foregoing their "development right", and stopping their harmful activities[47]. This is similar to the argument that landholders have "legitimate and reasonable expectations" about what they may do on land.[48]

Applying this reasoning to another situation, the public would have to pay people not to smoke in restaurants, instead of enforcing a right to a smoke-free environment[49]. As a further example of this counter-logic, assume that a compensation scheme was set up to prohibit protection of wetlands unless compensation was provided to landholders. This would probably lead to a lessening in legal protection for wetlands, and consequently less protection for fish breeding grounds. The fisheries industry could obtain compensation against the government for failure to protect breeding grounds for fish. The Federal Committee's reasoning on this issue, where the "polluter gets paid" rather than "polluter-pays", could have a detrimental effect on industries reliant on natural resources.

Externalities should be passed onto the consumer, not subsidised

Refusing to pass on externalities to landholders, implicit in the notion of providing subsidies via compensation to landholders, would implicitly reject the 4th principle of ESD, which requires improved valuation, pricing and incentive mechanisms to include environmental factors[50]. This principle means that the users of goods and services pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets[51].

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[44] Federal Minister for the Environment, Senator Hill, July 2001. Presentation to Meat and Livestock Australia industry forum.
[45] Inquiry Report, op cit n 11, [5.28].
[46] Inquiry Report, op cit, n 11, [6.116]- [6.121].
[47] ibid.
[48] NFF, op cit n 16, section 2.
[49] Productivity Commission (2001), op cit n 15, p33.
[50] s 6(2)(d) of the *Protection of the Environment Administration Act 1991* (NSW).
[51] Ibid, s 6(2)(d) (i).

Instead of an environmental levy on all tax payers, the principles of ecological tax reform would be better served by an environmental levy on rural production, such as wheat and wool.

Other reasons why environmental laws do not give rise to compensation

There are other reasons why it is undesirable to pay compensation for environmental law obligations.

(a) Stewardship

Firstly, the public should not have to pay for the implementation of environmental laws that protect ecological integrity, because it destroys any belief that landholders inherently owe a duty of "stewardship" to protect ecological integrity. Once subsidies are established for farmers, it would be difficult to phase them out, as farmers will expect to be paid in order to carry out their "stewardship" duties[52]. Already some commentators think that the only way to protect the environment is to pay for it.

> *"Unless we value our environment and generously compensate landowners for significant land they own, the environment will not be treated seriously by land owners"*[53]

This statement reveals the unsubstantiated logic of equating "valuing our environment" (a desirable purpose), with paying compensation to property owners before it can be protected.

(b) Administrative problems

Secondly, there are enormous practical difficulties in administering a compensation scheme. Compensation would encourage farmers with no intention to clear land to apply for assistance, especially if commodity prices have fallen. Claims for compensation would be speculative. It is unclear how levels of compensation would be determined. There may be more efficient ways to achieve conservation outcomes using public funds. For instance, commentators have pointed out that the total annual payments to landholders under the US Conservation Reserve Program could have been better spent on outright purchase by the Government[54].

(c) Inter-generational equity

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[52] Furthermore, amounts provided as compensation to meet new environmental laws may be insufficient to address on-going management of land- Productivity Commission, op cit n 15, p32..
[53] Houweling T *Compensation for reserved land under the WA Metropolitan Region Twin Planning Scheme* (2002) NELR 4
[54] Productivity Commission, op cit n 15, p35.

One of the reasons used to support paying subsidies to landholders for environmental protection is that it is inequitable for the present generation to take economic benefits derived from past degradation, and not pay for it[55]. This is known as the so called "legacy of the past".

There are two responses to this argument. Firstly, it is doubtful whether the current generation is obtaining a net benefit from environmental degradation. The present generation is already paying for previous land degradation. The impact of land and water degradation costs Australia $3.5 billion per year.[56] In 1998, the Prime Minister's Science, Engineering and Innovation Council estimated that the costs of dryland salinity included $700m in lost land and $130m (annually) in lost production[57]. Presumably, this does not include consideration of the effects that the current and future Australian generation will suffer from the greenhouse effect contributed to by landclearing, loss of biodiversity, reduced river water quality, and other amenity issues. Landholders who claim that the present generation is benefiting from environmental degradation should have to demonstrate in respect of their landholding how the public has made a net gain from the degradation.

Secondly, it is worthwhile considering who has really benefited in the past from land degradation? People who may have "lost" are farmers who have acted responsibly for the past 150 years, including landholders who have entered into conservation agreements[58], and not degraded their land. They may not have made as much short term profit as their neighbour who has degraded their land. The Federal Government's response of 'compensation' to difficult environmental issues, including climate change fails to address the equity concerns of those landholders. It is possibly arguable that all Australians have benefited from cheap rural produce, including wheat and wool, as a result of broadscale landclearing. However, if this is correct, the most appropriate response in accordance with the principles of ESD is to pass on the full environmental costs to the present day consumer, not the Australian taxpayer.

Summary

This submission has presented arguments why 'compensation arrangements' should not be made by Government as a way to ensure environmental law duties are met. In summary, the arguments were as follows:

- There is little legitimate merit for claiming that where landholders have to satisfy environmental law duties, their property rights have been "acquired".
- Environmental protection laws prevent harm, as well as nuisance to neighbouring properties and the wider public interest in ensuring ecological

[55] Inquiry Report, op cit n 11, at [6.38].
[56] Lyster R (2002), op cit n 50, p41.
[57] NSW EPA, *State of the Environment Report* (1997).
[58] For instance, in western Sydney, Glenorie Wildlife Refuge conserves 130 ha of endangered Shale Sandstone Transition forest.

integrity. It is illogical for the public to pay 'polluters' to stop engaging in activities deemed harmful.

- The principles of ESD require that the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets. In other words, the full costs of externalities, such as environmental degradation, should be passed onto consumers (ie "impact" pays). This remains so, even if it can be demonstrated that the present generation has benefited from previous environmental degradation.
- If the Australian Government considers that it ought to be providing compensation for wrongs or misdirected policy from 30-150 years ago (like say with Stolen Generations) then that is a larger issue that requires broader analysis beyond this Inquiry.

Conclusion

I do not suggest that the rural industry is not in need of financial assistance. The National Farmers Federation has in the past stated that financial institutions are reviewing their exposure in rural areas, presumably due to tougher environmental pressures[59]. Financial assistance may be necessary to attain a transition from unsustainable agricultural farming practices undertaken for over a century, which has caused obvious degradation to a fragile ecosystem, to farming practices that are ecologically sustainable for both farm productivity and the environment[60]. Lack of effective regulation of Australia's 'commons', for instance native vegetation and scarce water resources, has been a major contributor to the problem[61]. Now is not the time to water down the Government's response to ecological problems.

There are probably persuasive reasons why the Australian tax-payer should subsidise the rural industry[62] and fix a legacy of land mismanagement. Existing legislation like the *Rural Assistance Act 1989* (NSW) could be expanded[63]. However, Federal, State and Territory governments should resist recent political pressure from the rural sector, which is wrongly insisting any monies should be given as "compensation" as a matter of rightful entitlement. Importantly any assistance package must be framed clearly that is does not generate expectations that if the Government regulate the environment and prevent environmental degradation costs, the tax payer must pay for that privilege.

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[59] NFF report, op cit n 16, section 1.
[60] see ACF/NFF report, op cit n 7.
[61] Powell, op cit 26.
[62] Note that there are many existing hidden subsidies for farmers. For example, the rural industry receives favorable treatment under the *Income Tax Assessment Act 1997* where perpetual conservation covenants are entered into. Arguably, landholders receive a hidden subsidy by not making payment to previous owners of native titlle. The Inquiry Report at [5.58] concluded that paying subsidies to farmers for environmental protection is unlikely to violate any free trade agreements or World Trade Organisation ("WTO") rules, on the basis of the Committee's view of the WTO website. Further research should be done on this complex topic.
[63] This Act, and its predecessor the *Rural Assistance Act 1932* (NSW) does not require environmental protection or consideration of the principles of ESD as a precondition before funds are made available to farmers (s 17).

The transition to ecological is an imperative demanded by human dependence on the environment, as highlighted by the 1992 UN Conference on Environment and Development. It is not a restriction on property rights. Protecting the environment is a fundamental underpinning of civil society, not a “user-pays” compensation scheme. Implementing the principles of ESD will require both regulatory restrictions and economic instruments relating to landclearing and water entitlements. But the use of economic instruments should not generate a false expectation that ecological sustainability must be purchased from a privatised environment. The Committee should be upfront about what kind of “sustainability” they are focused on- the economic sustainability of industries, or the sustainability of environment. As can be seen with rural industries, it is a convenient myth that both kinds of sustainability always go hand in hand.