Committee Secretar

Standing Committee on Environment and Heritage
House of Representatives
Parliament House
CANBERRA ACT 2600

8 May 2000

Dear Sir, Dear Madam,

Re: Inquiry into Public Good Conservation –
Impact of Environmental Measures Imposed on Landholders

I have lectured *Property Law* and *Environmental & Planning Law* here in the Law School at University of Melbourne since 1992. My Ph D work was on the history and meaning of registered (Torrens) private land title in Australia in relation to wider social and environmental responsibility, in comparison with the German land title system. I have enclosed a copy of my article "Environmental Obligation and the Western *Liberal* Concept of Property" which I presented at the International Conference *Environmental Justice - Global Ethics for the 21st Century* and later published in (1998) 22 *Melbourne University Law Review* 657. Earlier in my career I worked with the Law Reform Commission of Victoria on the reform of Land Law in Victoria. I have also worked in private legal practice, and for part of that time in rural areas.

I would like to have prepared a more extensive submission to this esteemed Committee on such a critical topic, but unfortunately the time frame and my academic commitments have worked together to require the utmost brevity.

First I would like to make the observation that there are two highly loaded assumptions at the heart of the Issues Paper circulated with the terms of reference. I will organise my submission around these points. They are the questionable assumptions that –

1 proprietors of fee simple estates in land, that is private landowners, are in basic principle entitled to do whatever they like with their land regardless of the ecological consequences, and

2 measures for the protection of ecological processes are primarily for the public good, rather than for the benefit of the environment of which the relevant private land parcel forms an inextricable part.

1 Limits of the Landowner's Powers

In Common Law systems there is no such thing as *absolute* property in land. One does not own the land, one holds an estate or an interest in it. The question then is what powers stem from the various estates and interests held in the land. For example, those who hold mortgages over land have very limited powers over it – essentially to recover from its value what they are owed in tightly defined situations. The powers of a person holding a fee simple estate in land are the focus of this inquiry. The existence of environmental constraints on those powers has been debated for some time.

There is a view that the owner is entitled to do anything with what he or she owns, including destroy it. Naturally, there is now extensive legislation at State and Federal levels requiring that land owners and others exercise environmental responsibility – land use planning law, pollution control, heritage protection and so forth – but there are very few requirements in this legislation that compensation be paid. Mere regulation of the use of land does not generally create an entitlement to compensation. There is a principle of statutory interpretation that an ambiguity in governmental controls on the use of private property is to be resolved in favour of the owner,[1] but this is not the same as saying that in the absence of express regulation the owner has in principle complete freedom to follow every whim, no matter how destructive, unless compensation is paid.

According to the British constitutional principles we have inherited in Australia – the common law of the Constitution – there is no automatic entitlement to compensation even if the full title to the land is taken from the private citizen. This entitlement is created by legislation at the State level and at the Federal level by section 51 (xxxi) of the Australian *Constitution*, which is given effect by the Lands Acquisition Act 1989 (Cth). In Australia we do not have a constitutional declaration of human rights which would otherwise protect private property rights – it is generally thought that the common law is sufficient. In the absence of these legislative provisions there would be no entitlement to compensation if the Crown *resumed* the title to land according to its powers of *eminent domain* implicit in the doctrine of tenures, according to which, all estates and interests in land are held ultimately of the Crown.

Further, there is very little to substantiate the claim that the freehold tenant in fee simple, the land owner, has complete and arbitrary pleasure in using the relevant land, in the absence of express laws. The usual expression of the power is that the fee simple proprietor has the right to "beneficial use and enjoyment" of the land. There is no case law to my knowledge supporting the interpretation of this as a freedom to use land in an anti-social or irresponsible way. On the other hand, when considering cruelty to domestic animals Napier J of the South Australian Supreme Court asked in *Backhouse v Judd*[2] what the source could be of a common law obligation to care for them –

> ... it seems to me that the only satisfactory basis for the duty is that of ownership. There is nothing novel in the idea that property is a responsibility as well as a privilege. The law which confers and protects the right of property in any animal may well throw the burden of responsibility for its care upon the owner as a public duty incidental to the ownership.[3]

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1 D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 4th ed, Butterworths, 1996, 138-9.

2 [1925] SASR 16.

3 Ibid at 21.

Indeed, one might take the view that Environmental and Planning Law is an expression of this responsibility owed by a land owner, rather than a specification of it. This is certainly the case in Germany, where Article 14(1) of the *liberal* post-war *Constitution* [*Grundgesetz*] protects the institution of property, but Article 14(2) makes it clear that –

> "Property creates responsibilities. Its use shall at the same time serve the common good."

This was not a new principle in 1949. The idea that private title to land is pervaded by responsibility was in the *Constitution* of the Weimar Republic and a principle of the general law for centuries before that. The Torrens system of land title registration was largely modelled on the Hamburg system of the 1840s through the influence of a German migrant to the Barossa Valley, Dr juris Ulrich Hübbe. The Torrens concept of land title is also pervaded by responsibility, and most obviously the responsibility to register one's estates and interests in land at the risk of seeing them defeated by a competing interest.

Most recently, at the United Nations – FIG[4] *Workshop on Land Tenure and Cadastral Infrastructures for Sustainable Development*[5] one of the conclusions reached by the international experts working together on these issues was that –

> [t]he property rights in land do not in principle carry with them a right to neglect or destroy the land. The concept of property (including ownership and other proprietary interests) embraces social and environmental responsibility as well as relevant rights to benefit from the property. The registration of property in land is thus simultaneously a record of who is presumed to bear this responsibility and who is presumed to enjoy the benefit of relevant rights. The extent of responsibility is to be assessed by understanding the social and environmental location of the land in the light of available information and is subject to express laws and practices of the appropriate jurisdiction.[6]

The last sentence of this passage strongly resembles the way the idea of responsibility is implemented in Germany. If the governmental regulation of land use exceeds what is called for by the factual requirements of the land's actual social and ecological location then it is possible for the excessive regulation to amount to compensatable part-expropriation, but until that point is reached there is no compensation for exercising the responsibilities with respect to the land that a reasonable land owner would recognise.

With respect to land clearing, for example, the state of existence of a piece of land denuded of trees clearly is not the natural state for that land. There could be good ecological reasons for native vegetation to be retained on the land. It is a mystery from where an automatic right to clear land is supposed to stem when it would be ecologically unsound to do so. It might be protested that the owner has purchased the land with certain expectations, but these have little bearing on the best ecological course of action. One might equally point out that someone who wants cleared land should acquire cleared land, rather than acquiring forested land and clearing it. People acquire property that does not meet their expectations all the time. Usually it is the responsibility of purchasers to ensure that property being purchased will meet their expectations.

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4 Fédération International des Géomètres – International Federation of Surveyors.

5 Bathurst, Australia, 17-23 October 1999, http://www.sli.unimelb.edu.au/UNConf99/index.html

6 *The Bathurst Declaration on Land Administration for Sustainable Development*, 6, available at http://www.ddl.org/figtree/pub/figpub/pub21/figpub21.htm

2 The Value of Ecological Processes in their Own Right

When the owner of land takes measures to conserve the environmental quality or sustainability of land the environment is the immediate beneficiary. The owner, and his or her descendants, will always benefit because the land has benefited and the long term interests of all are enmeshed. Wider society will also benefit for similar reasons from the conservation of environmental quality, but, according to Adam Smith, wider society also benefits from free trade in goods and no one requires the public to pay compensation for that.

The idea that the government has to pay private land owners to exercise responsibility with respect to what they own is somewhat curious. Continuing with the example of land clearing used above, it is clear that the government did not place the ecosystem in question on the land. So, it is difficult to see why the government should be asked to pay compensation when it calls upon the landowner to act responsibly within the ecological constraints of the land itself. It is the responsibility of landowners to ensure that the land they acquire meets their expectations and that will often require some level of environmental assessment of the land. If the landowner undertook no environmental assessment, or an assessment failed to reveal the relevant environmental constraint, it is difficult to see why the government should be required to pay compensation for the consequent frustration of expectations. If the land must not be cleared for fear of salinity problems in a catchment, this is an ecological constraint of the land, not a result of governmental action.

The alternative conclusion, that the owner should be permitted to use the land in a way that causes environmental harm, unless constrained and compensated, depends on the idea that it is all right in basic principle for the owner to use land in an irresponsible way. For the reasons I have set out above I do not believe this to be the correct or desirable interpretation of basic principles, aside from constraints in planning and environmental legislation, concerning the powers of a land owner.

Yours faithfully

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