

2010 Federal Election

**FAIRNESS FOR ALL:
PROPERTY RIGHTS**



Growing
the Business
of Farming

NSW
Farmers
ASSOCIATION

“

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases...

Security consists in receiving no check, no shock, no derangement to the expectation founded on the laws...

”

Jeremy Bentham



PROTECTION OF PROPERTY RIGHTS

NSW Farmers' Association (the Association) is concerned about the frailty of the protection of property rights in Australia. Most notably the Association is concerned that State Governments are not required to pay just terms compensation when they acquire property.

For a farming business, the degradation of property rights is further seen in regulation eroding their ability to produce food and fibre; provide for their families; and contribute to the prosperity of the regions that they live and work in.

As such the Association is seeking the following commitments during the 2010 Federal Election to protect property rights.

'JUST TERMS' COMPENSATION

Pages 4 - 5

THE ASSOCIATION IS SEEKING a commitment from political parties and individuals contesting the 2010 Federal Election to protect all private property, by requiring State Governments to pay just term compensation upon the acquisition of property by:

- Amendments to the Constitution by referendum that enshrine the property rights of all people by requiring State Governments to pay compensation on just terms upon the acquisition of property.
- The passing of Federal Legislation that to the extent of its constitutional validity would require State Government's to pay compensation on 'just terms' upon the acquisition of property.

NATIVE VEGETATION

Pages 6 - 7

THE ASSOCIATION IS SEEKING the amendment of Inter-Governmental Agreements with the States to require all biodiversity and planning legislation to require Just Terms Compensation in all cases where private landholders are required by law to provide public conservation services.

MURRAY DARLING BASIN PLANNING

Pages 8 - 9

THE ASSOCIATION IS SEEKING commitments ensure that the Murray Darling Basin Planning process:

- Is undertaken as a collaborative planning process that engages local expertise and the farm sector at valley scale in a process of optimising water allocation;
- Includes equal consideration of the social and economic impacts to that of environmental management in any decision regarding any reductions of water available for agricultural production, or the security of that water.
- Integrates the use of engineering works, specific watering strategies and land management practices in setting the Basin's environmental water requirements to ensure efficient and effective use of environmental water
- Considers tradeoffs between different environmental outcomes, and between environmental and communities' needs, understanding that rivers are no longer pristine or natural but managed systems.

Further that 'just terms' compensation is made to water entitlement holders for all losses that arise as a result of the Murray Darling Basin Planning process.

If the current legislative framework for the Murray Darling Basin Planning process does not provide for the above, then the Association is seeking a change to the relevant legislation.

LANDHOLDERS AND MINING

Pages 10 - 11

THE ASSOCIATION IS SEEKING:

- The use of relevant Federal legislation to require an independent scientific process prior to the granting of any exploration licence to identify and protect high value natural resources and highly productive agricultural land.
- Amend the Water Act 2007 to recognise mineral and petroleum exploration and extraction as an interception activity; to require licensing of all water intercepted as a result of the above processes; and to account for such water in the water sharing plans.
- 'Just terms' compensation for the true effect of exploration and extraction of minerals and petroleum upon landholders, including loss of water or degradation of water title.

'Just Terms' Compensation

WHAT THE ASSOCIATION WANTS:

A commitment from political parties and individuals contesting the 2010 Federal Election to protect all private property, by requiring State Governments to pay just term compensation upon the acquisition of property.

HOW

- Amendments to the Constitution by referendum that enshrine the property rights of all people by requiring State Governments to pay compensation on just terms upon the acquisition of property.
- The passing of Federal Legislation that to the extent of its constitutional validity would require State Government's to pay compensation on 'just terms' upon the acquisition of property.

Overview

Property rights are the foundation of society and it is impossible for citizens to enjoy the security offered by a Commonwealth in the absence of law protecting individual property.

Justice Heydon, in the recent decision of the High Court, *ICM Agriculture Pty Ltd v The Commonwealth*, defended the need for property rights to be stringently applied, quoting the prominent English Jurist, Jeremy Bentham:

"Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.

As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil."

These rights, whilst often linked to houses and blocks of land are not exclusive to real estate; rather, the High Court of Australia has found property rights to include personal property, such as one's personal effects, or even a legal right to payment under a loan, or rent.

While most Australian citizens may feel secure in their property rights, but like the scenario in the famous Australian movie, 'The Castle', the property rights of all Australians are not as safe as they may imagine. This is because there are no constitutional protections that prevent State Governments from compulsorily acquiring land on any terms that they may pass in legislation.

In comparison, farmers are very aware of the current precarious nature of their property rights, with successive waves of State legislation eroding their ability to produce food and fibre; provide for their families; and contribute to the prosperity of the regions that they live and work in.

Property Rights for Farmers

Farming families bought their land believing that title to the land purchased provided the security they needed against the borrowings made in order to make a living from the production of food and fibre. But each year this security, the confidence that farmers hold regarding the foundations of their wellbeing, is being eroded by the action and sometimes inaction of government.

While this can be a tragedy for individual farming families and is a significant contributor to rural decline, it is also a matter of general strategic significance to Australia. This is particularly in light of the growing need to secure the World's future need for food; and the opportunities and responsibilities that this brings for Australia. In light of the UN Food and Agriculture Organisation's call for an increase in food production of 70 percent by 2050, it is obvious that security of investment in agricultural producing land will better enable Australia to secure the future opportunities presented by food and fibre production. This is not to mention the moral responsibility to avoid a future food crisis and the geopolitical consequences of failure to feed the world.

The Association believes that key to achieving this outcome is through the inviolable Constitutional recognition of the property rights vested within land for agricultural production.

Property Rights are for All Australians

The Association believes that protection of property rights through a requirement for "just terms" is not merely for farmers; rather it is important for all people, whether they own their own house, an investment in shares or

rental property or other personal property. With the NSW Government raising the spectre of compulsory acquisition of the homes of ordinary people to enable private property development in Sydney, never before has the need to protect property rights been more evident for all Australians.

Property rights are not merely about the protection of investment in land for the production of food and fibre, but also about the protection of the hard earned wages of Mums and Dads who have bought property or investments to provide for their families.

Constitutional Change

In 1988, proposed Constitutional changes put to referendum would have expanded the protection of property rights by requiring 'fair terms for persons whose property is acquired by any government'. However the question regarding "fair terms" was 'tacked' on to a larger question involving the enshrining of a right to trial by jury and freedom of religion. As such, the Association is concerned that the Australian public have never had the opportunity to make a clear stand on the defined issue of "just terms" compensation for the acquisition of property, let alone be involved in informed public debate on the subject.

As such the Association is calling for political parties and individuals contesting the 2010 Federal Election to commit to seeking constitutional change that will incorporate a protection of the property rights of all Australian's by requiring 'just terms' compensation when any government seeks to acquire a person's property.

Legislative Change

The Association has received advice from Professor George Williams, the Anthony Mason Professor of Law at the University of New South Wales, on the legislative options that are open to the Federal Government that

would require State Government's to provide 'just terms' compensation upon the acquisition of property.

Professor William's advice outlines that the Federal Parliament would be able to pass valid legislation, requiring 'just terms' compensation, when the property is acquired by a State from a trading and financial corporation, or when a trading and financial corporation undertakes business on the land.¹ The Association understands that such legislation could include when a corporation has a registered interest in the land. Either alternatively or cooperatively, such a law could also validly operate when the property is acquired for the purpose of trade and commerce among the States.²

Such a valid law would then prevail over an inconsistent State law by way of section 109 of the Constitution.

Given the noted difficulties in amending the Constitution by way of referendum, the Association is seeking a commitment from political parties and individuals contesting the 2010 Federal Election, to commit to supporting legislation that would protect property rights by requiring 'just terms' compensation when any government seeks to acquire a person's property.

2010 Federal Election

The Association will be running a public campaign, in the lead up to, and during the 2010 Federal Election campaign, to alert people to the frailty of property rights in Australia. This campaign will seek to highlight that property rights are not isolated to that required for the investment in food and fibre production. Rather they are equally applicable to the homes that house, and the investments that provide for the families of urban Australia.

¹ Australian Constitution s 51(xxxi).

² Australian Constitution s 51(i).

Other Resources:

- Association Submission to the Senate Inquiry on the Impact of Native Vegetation Laws and Legislated Greenhouse Gas Abatement Measures on Landholders
- George Williams and Nicola McGarrity "Briefing Paper on Property Rights in New South Wales"



Native Vegetation

WHAT THE ASSOCIATION WANTS:

The amendment of Inter-Governmental Agreements with the States to require all biodiversity and planning legislation to require Just Terms Compensation in all cases where private landholders are required by law to provide public conservation services.

Current native vegetation policy, in NSW and elsewhere in Australia, is designed to:

- Create proxy national parks on private land at no-cost to the public purse;
- Offset increases in fossil fuel emissions from coal-fired power stations, which have increased more than 50% since 1990.

Proxy “national parks” on private land

National parks are costly to purchase and costly to manage. Cash-strapped governments have realised that the cheapest way to extend the national reserve system is to lock up vegetation on farm land using legislation and without any compensation to the land owners. This cost shift, however, has catastrophic impacts on farmers as their income and mortgage payments depend on using all of their land.

Not only are these farmers prevented from developing their land, they have to deal with the weeds, feral animals and dangerous fuel loads that build up in these unfunded, compulsory nature reserves

Carbon offsets – the missing billions

A similar cost shift has occurred with regard to carbon emission reduction. The all-inclusive clearing bans imposed in the 1990s were designed to offset increased emissions with decreased emissions from land clearing. (Avoided land clearing can be used as an offset under Article 3.7 of the Kyoto Protocol - the infamous ‘Australia Clause’). These emissions have increased more than 50% since 1990. Without the clearing bans as an offset, Australia would be seriously in breach of the Protocol and its international obligations.

It is profoundly inequitable that the carbon offsets embodied in native vegetation on farmland, have not been paid for, either by industrial carbon polluters, or by Government. These offsets have been valued at billions of dollars by the Climate Institute (Mission Billions, Climate Institute 2006).

Policy out of balance

Few urban citizens understand that the governments’ so called ‘broad scale’ clearing bans in fact apply to single specimens of plants. In other words, approval is required to clear a single tree or shrub. This level of

micro-management is absurd and blocks the intelligent, sustainable development of ‘mosaic’ rural landscapes, where conservation coexists with efficient production.

Current NSW vegetation policy excludes any opportunity to consider social and economic factors in relation to clearing approvals. If the clearing will enable increased or more efficient production, that is considered irrelevant by the Government; if the clearing is vital to the economic viability of a farm, or the social viability of a farming region that, too, is irrelevant. No tradeoffs or compromise can be permitted when biodiversity on farm land is involved. This is in stark contrast to the rules that apply to property developers or mining companies.

The Solution

Farmers value both native vegetation and biodiversity and voluntarily retain certain native vegetation in mosaic patterns on their land. Where this retention goes beyond a reasonable duty of care, however, farmers must be paid for the conservation service at a rate equivalent to the lost value of production. This is not a minority view; it is mainstream in the academic and economic literature on conservation, and best practice in many nations.

The Productivity Commission, in its major report, Impacts of Native Vegetation and Biodiversity Regulations (2004) found that native vegetation legislation imposed unreasonable costs on farmers and was an inefficient way of achieving public conservation outcomes in rural Australia. It recommended proper consideration of the social and economic impacts in relation to clearing approvals.

Likewise, the Wentworth Group of Concerned Scientists has called for farmers to be paid for provision of environmental services and for more flexible, collaborative approaches to conservation on private land.

Governments throughout Australia have continued to ignore these recommendations.

The 2010 Federal Election

NSW Farmers’ Association will continue to fight for a restoration of the ability of farmers to sustainably develop their properties, for market rent for provision of environmental services and for other forms of just terms compensation.

Murray Darling Basin Plan

WHAT THE ASSOCIATION WANTS:

To ensure that the Murray Darling Basin Planning process:

- Is undertaken as a collaborative planning process that engages local expertise and the farm sector at valley scale in a process of optimising water allocation;
- Includes equal consideration of the social and economic impacts to that of environmental management in any decision regarding any reductions of water available for agricultural production, or the security of that water.
- Integrates the use of engineering works, specific watering strategies and land management practices in setting the Basin's environmental water requirements to ensure efficient and effective use of environmental water
- Considers tradeoffs between different environmental outcomes, and between environmental and communities' needs, understanding that rivers are no longer pristine or natural but managed systems.

Further that 'just terms' compensation is made to water entitlement holders for all losses that arise as a result of the Murray Darling Basin Planning process.

If the current legislative framework for the Murray Darling Basin Planning process does not provide for the above, then the Association is seeking a change to the relevant legislation.

Triple Bottom Line Outcomes – Environment, Industry & Communities

The Association agrees that water planning within the Basin must be improved. However, the new Basin Plan must be developed collaboratively with the farming communities that depend on this water for their livelihoods. This process must include careful consideration of the economic consequences to Australia of crippling the production capacity of our most important and productive agricultural system.

Communities Grow Where Water Flows

The current planning methodology involves determining how much water is required for the environment and then allocating what remains between the other water users in the Basin. This process bypasses the cost benefit analysis necessary to optimise triple bottom line outcomes; only one third of the picture is visible. An informed discussion about how much water should be allocated to different environmental needs in the Basin cannot be had without a clear understanding of social and economic consequences of removing this water from its current uses.

The basin planning process is coinciding with the worst drought in recorded history and on the basis of scientific modelling regarding future water inflows is subject to low statistical confidence levels. All parties acknowledge that predictive science is uncertain, but whilst a precautionary approach is being taken with regard to the environmental values in the Basin the same cannot be said for social and economic values.

The current planning regime risks over-regulating environmental water to produce outcomes that do not reflect the natural environmental characteristics of the Basin; a system well adapted to long periods of dryness. Far less flexibility exists for irrigation businesses that have been founded on the basis of a secure share of regulated water supply. While environmental systems in the Basin may rebound quickly following extended dry periods, rural and regional communities once dislocated will take generations to recover or may result in a population shift to larger regional centres, coastal areas or capital cities.

Cuts such as those recommended by the Wentworth Group to the Murrumbidgee and Murray Valleys would be catastrophic for well established rural cities, such as Griffith, let alone for the many smaller communities, to whom the cuts would be fatal.

Food Security

Maintaining the capacity of the Basin to secure Australia's food requirements while meeting the needs of increasingly valuable food export markets must surely be a national priority. In 2005-06, 39% of the gross value of Australia's agricultural production came from the Basin with a value of \$38.5 billion (ABARE, 2008).

The consequences of the current Basin planning process on national food security are dire. It is not the individual farmer who is using the water, but it is those 600 people who are being fed by that farmer's production. The Australian community needs to understand that policy decisions that reduce the availability of water resources affect not just the

farmer, but also the 600 people who rely on that farmer for their food.

We call on all Australians to reflect on the economic and social consequence of the Basin Plan. All due care must be taken to ensure that our farming communities and Australia's food security are not sacrificed for the sake of fulfilling political agendas: there is simply too much at stake to get this wrong.

The 2010 Federal Election

The Association will be campaigning to show the effects of an ill balanced Murray Darling Basin Planning process on rural communities. The Association will also be linking the effect of this to the planning issues faced in Australia's metropolitan cities and urban coastal regions. Each family forced from rural NSW as a result of a Murray Darling Basin Plan which fails to properly weigh the effects on rural communities, is another family fighting to use ill planned metropolitan infrastructure.



Other Resources:

- Association Submission to the Senate Inquiry on the Impact of Native Vegetation Laws and Legislated Greenhouse Gas Abatement Measures on Landholders

Landholders and Mining

WHAT THE ASSOCIATION WANTS:

- The use of relevant Federal legislation to require an independent scientific process prior to the granting of any exploration licence to identify and protect high value natural resources and highly productive agricultural land.
- Amend the Water Act 2007 to recognise mineral and petroleum exploration and extraction as an interception activity; to require licensing of all water intercepted as a result of the above processes; and to account for such water in the water sharing plans.
- ‘Just terms’ compensation for the true effect of exploration and extraction of minerals and petroleum upon landholders, including loss of water or degradation of water title.

Effect of Mining on Property Rights

Currently, mining and planning legislation fail to adequately protect agricultural resources and farmers' property from the impacts of mining.

It is impossible to undertake any large scale mining without permanent, destructive changes to natural resource systems and a range of negative amenity, health and financial impacts to the surrounding district. Current standards and processes, for selecting appropriate sites, minimising cumulative impacts, controlling risk and compensating affected citizens are unacceptably low.

It may be possible to limit the damage and risk resulting from one mine, but experience shows that one mine tends to be followed by others, and the cumulative impacts are catastrophic – not just in environmental terms, but on the entire social and economic character of the district. Planning legislation and the mining approval process makes no provision for managing these cumulative impacts.



THE PROBLEMS:

Exploration

Currently in NSW, mining exploration licences are granted with little or no consideration to the impacts that these licences will have on freehold land and water titles in the affected area. To make matters worse, licences are awarded without any inter-agency or stakeholder consultation, assessment of scientific data, independent assessments of natural resources, consideration of cumulative impacts, or consideration of the agricultural production activities that are potentially affected by them.

Landowners are not individually notified of exploration licences granted over their properties and often have to read about these in the local press. There are no government resources to assist the landowner to deal with the implications of the granting of the exploration licence over their property.

Approval

When a production licence is granted, it is done without resolving the complex resource allocation and risk management questions that must be addressed when considering areas for mining development. This is particularly the case when highly valuable agricultural and water resources are involved.

The current process encourages significant investment in exploration and the development of mining project proposals in isolation and without any consideration of competing values (for example agricultural values) and potential risks to those values.

Compensation

In any legal challenge the onus is on the landholder to provide all evidence regarding the extent of any damage that has been done, prove that the mining activities are directly responsible for this damage, and bear all costs associated with the process, including any adverse cost orders in the Land and Environment Court.

Farmers do not have the resources to defend themselves against the financial clout of multinational mining companies. The miners know this, and openly practice a policy of fear, often pouring unlimited resources into cases they know they cannot win, simply to scare other individuals from taking them on.

Currently there is no requirement for independent monitoring of environmental issues during the exploration or mining process, with these activities being left in the hands

of the miners themselves. This makes it nearly impossible for farmers to gather the evidence needed to prove their case.

The limited compensation currently available to landholders typically stops at the boundary of the directly affected property which can mean the farmer adjacent to the mine, or in range of the mines dust and noise, gets nothing.

Finally, there is currently no provision in any statutory instrument to compensate farmers for impacts from mining or exploration on water assets to which farmers hold legal title.

Proposed Solution

The Association is seeking a commitment from political parties and individuals contesting the 2010 Federal Election to utilise all legislative powers available to the Commonwealth to:

- Require an independent scientific process prior to the granting of any exploration licence to identify and protect high value natural resources and highly productive agricultural land.
- Include an independent body in the assessment process.
- Notify every title holder prior to publication of the awarding of a licence.
- Provide an initial appeals process prior to awarding exploration licences.
- Establish an integrated strategic planning process for mining development that factors in all competing social, environmental and economic values, with explicit, upfront provision for cumulative impacts.
- Ensure the planning and approval process, including the issuance of exploration licences, incorporates inter-agency discussion, strategy, advice and recommendations.
- Establish an independent tribunal to investigate mining impacts and assist landholders in gathering evidence.
- Provide statutory arrangements for proportional just terms compensation to all landholders affected by mines; and
- Provide statutory arrangements for just terms compensation for loss of water or degradation of water title.

Other Resources:

- Association Submission to the Senate Inquiry on the Impact of Native Vegetation Laws and Legislated Greenhouse Gas Abatement Measures on Landholders
- Case Study – The Impact of Mining: The Bowman Family, Singleton
- Case Study – The Impact of Mining: The Duddy Family, Caroon
- Case Study – The Impact of Mining: Louise Crites-Forster, Walgett/Lightning Ridge

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