PROPERTY RIGHTS RECLAIMERS MOREE

Chair: John Atkins **Secretary Ros O'Neill**

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SUPPLEMENTARY SUBMISSION TO SENATE COMMITTEE INQUIRY
NATIVE VEGETATION AND PROPERTY RIGHTS

OUR ORGANISATION

Property Rights Reclaimers Moree ("PRRM") believes that if the Australian community and its various governments wish to have in this country a sustainable agricultural industry, able to provide a stable food supply for a rapidly growing population and to continue to earn high level export income, the community and the governments need to recognize that appropriate agricultural needs and expectations must in some instances be given priority to all but essential environmental demands.

The present relationship between agricultural and environmental interests is one of almost complete dislocation. That situation has been created fundamentally by the introduction since 1996 of unreasonably intrusive and restrictive legislation, the effect of which has been to impede agricultural growth and development in many areas, and consequentially, to reduce both profit and incentive for farmers and related industries. This process has gradually become more and more oppressive, and more and more detrimental, to both farmers and the general community.

If this process is not brought to a halt, and in some cases reversed, the long term effects on Australian agriculture and the community overall, will be appalling. The consequences include an unstable food supply, far greater dependence on foreign food supply, degeneration of food quality standards accordingly, and a complete loss of enormous export income potential.

OUR SPECIFIC OBJECTIVES

A. To bring about changes in NSW and related Commonwealth land use legislation and agreements, in order:

(1) to remove discriminatory and inequitable land use restrictions;
(2) to provide schemes of redress and compensation in instances where land use restrictions remain in place;
(3) to ensure that more specific and effective guidelines are adopted and implemented by Catchment Management Authorities ("CMA's") in order to give greater priority to local agricultural developmental needs;
(4) to provide for greater landholder and local community involvement in the operation and function of CMA's,

(5) to provide for greater landholder and local community involvement in any appellate or review process in connection with land use restrictions, and in particular, to transfer to CMA's the discretions currently given to the Minister in connection with final decisions relating to land use restrictions;

(6) in the alternative to (4) and (5), to provide a detailed set of guidelines to be included in native vegetation legislation, recognizing the need for effective land management practices and revising and extending those practices ("RAMS") identified in the current legislation.

B. To find ways in which burdens imposed on landowners who are asked to restrict the use of their land in order to provide environmental and other benefits to the general community, or state and federal governments, may otherwise be appropriately redressed or relieved.

ISSUES WITH WHICH WE ARE MOST CONCERNED

1 The operation and effect of the NSW Native Vegetation Act of 2003, and the attendant Commonwealth legislation and interstate agreements ("the Spencer Issues");

2 The operation and effect of the NSW Crown Lands Act 1989 Part 4A, and the NSW Crown Land (Continued Tenures) Act 1989 ("the covenant issues");

3 Identification of appropriate legislative changes;

4 Identification of appropriate ways to measure and redress inequities and unfairness in the operation of current legislation, and to identify alternatives to compensation and farmer exit assistance schemes.

OUR SUBMISSION TO THE COMMITTEE

A. GENERALLY

PRRM is a group of people from all walks of life, dedicated to the general principle that agriculture is fundamental to our existence, and needs to be protected and developed for the good of the community overall. Its reasonable needs and requirements must be recognized, and given priority to other needs and interests, where that is necessary for the benefit of the community. As an obvious consequence, PRRM believes that no one section of the community should be asked to bear more than its fair share of any burden imposed by legislation designed to benefit the whole of the community.

Landholders should have and be permitted to exercise, with but minimum necessary legal restraint, their freehold land rights for their own personal or commercial gain, given that that gain is one that almost always benefits the entire Australian community. PRRM

concedes that there are circumstances where common sense might suggest restraints or restrictions as being necessary – but it believes that landholders and their community, not governments, should be the final arbiter of any dispute, or should at least have a much greater say than is presently the case, in resolving any such disputes. In this latter respect, the present CMA structure needs to be revisited, and radically revised, to ensure that appropriate guidelines are adopted and implemented, in order to provide a framework in which CMA's are effective in encouraging and facilitating local agricultural development. Bureaucracy is overrepresented on these committees, and oppressive and sometimes irrational environmental demands override proper agricultural objectives.

Reform of the legislative structure, in accordance with these aims and objectives, involves not only altering the intrusive extent and impact of the existing provisions – it means, as well, providing for a much greater degree of people and community involvement in the process, giving them the greater role in exercising discretions, some of which presently may only be exercised by the Minister.

If the number and extent of disputes can be reduced by these means, then so too, should there be a significant reduction in the number and extent of compensation and other monetary claims likely to be made upon the financial resources of both State and Federal Governments.

PRRM is well aware that in respect of issues relating to carbon pollution, and even if global climate change and mankind's contribution to it is accepted unreservedly, Australia contributes a very minimal 0.4 of one percent of total global emissions. Agriculture contributes about 20% of Australia's total emissions. Given that, there is much force in the argument that any legislative intervention, designed to reduce carbon emissions, is both totally unnecessary, and totally unproductive, in a global context.

Even so, PRRMis prepared to concede that it may be desirable to have in place a clear and transparent legislative structure capable of adjusting, where necessary, competing private and public land use detriments and benefits.

It is PRRM's fundamental aim to have brought into being such a structure – one that is fair, equitable, and flexible, able to meet the changing needs of both the farming community, and the general population, with minimal dispute or disruption.

B. SPECIFICALLY

1. The Spencer Issues

Peter Spencer's situation is that the operation and effect of the native vegetation legislation has effectively "sterilised" his property from any real productive use, and that Commonwealth involvement has resulted in an acquisition of his land other than on "just terms", as required by the Constitution. To date, his claims in that respect have been

defeated in both the State and Federal Courts, and now, it would appear, in the High Court.

Certain of Mr Spencer's claims are being dealt with in proceedings in the Supreme Court of New South Wales.

Regrettably, Mr Spencer's litigation prospects at this point are not as hopeful as everyone concerned would have wanted them to be. Even if he enjoys some measure of success in terms of his current proceedings, the case for reform will remain a strong one.

The reason for that is essentially as follows :-

A number of Judges involved in these proceedings have expressed sympathy for Mr Spencer's position, whilst having to determine that his legal claims could not succeed.

Brereton J. on 4th April 2007 referred to (and in so doing seems to have adopted in Mr Spencer's context) what was said by McPherson and Williams JJA in a Queensland case, their Honours saying that:

"Despite feeling a measure of sympathy for (the appellant) for the scant respect with which his rights as owner have been trampled on, an appeal...cannot succeed.", and

"Fair minded citizens would regard it as only just that a person in that position should be compensated for the loss suffered...many right-thinking citizens would consider that the absence of a provision for compensation made the Ordinances unreasonable but for the reasons given above (rather reluctantly) I must conclude that the absence of such a provision for compensation does not make the by-law invalid ."

Notably, Rothman J. in Mr Spencer's Supreme Court litigation has said :

"Whilst all members of society must accept that there will be restrictions on their activities for the 'greater good of society', when those restrictions prevent or prohibit a business activity that was hitherto legitimate, because of the area in which it is operating, and assistance is offered which does not fully compensate for the restrictions imposed, society is asking Mr Spencer, and people in his position, to pay for its benefit".

His Honour went on to say: "Nothing in the forgoing is intended as a criticism of either the current State or current Federal Government. These schemes were implemented by previous Governments, both Federal and State, with bipartisan support. Nevertheless, it is a most unfortunate aspect of the operation of the scheme that a person in Mr Spencer's position is effectively denied proper compensation for the restrictions imposed upon him by a scheme implemented for the public good. As earlier stated, ultimately that is a matter for government" .

Emmett J. on 26th August 2008 said: "One cannot but feel the utmost sympathy for Mr Spencer if it be the case that Sarahnlee has been effectively sterilised by the State Statutes, with the effect that he can no longer carry on at Sarahnlee the activities which he was able to carry on prior to the enactment of the State Statutes."

In the Full Court on appeal from Emmett J, Jagot J. (who wrote the judgment with which Black CJ and Jacobson J agreed) said "In common with the primary judge it is easy to sympathise with Mr Spencer if the effect of the State statutes has been to sterilise his land fom any productive activity".

PRRM adopts these expressions of judicial sympathy for a cause which is considered to have no present legal ground, as the fundamental basis and aim of its reform programme.

2. The Covenant Issues

In respect of a large number of NSW Crown leases which are now able to be converted to freehold land, the Minister is given power to impose conditions upon the grant of conversion, by way of requiring the landholder to enter into a covenant – to be registered upon his land – containing whatever land use restrictions or limitations the Minister (after seeking advice from other Departments) may decide to impose.

These covenants are registered under the NSW Conveyancing Act. They are imposed in perpetuity, and it would seem, are able to override other legislation and planning policies

It has become clear that the NSW Department of Lands uses this "tool" as a means of implementing NSW Department of the Environment agendas in relation to native vegetation.

The approval of an application to convert land from leasehold, is said to result in an acquisition of land which becomes, at law, "freehold". The use of that term really disguises the true nature of the result of the conversion process.

Experience in recent times reveals that the covenants which have been drafted by the Minister as being appropriate to impose, contain conditions which, for the most part, replicate the provisions of the NSW Native Vegetation Acts, are in quite similar terms, or are (in many instances) even more restrictive.

Given that there are already fairly native vegetation legislative sanctions in place for the rest of the world (meaning freehold land), it is difficult to see why even more draconian legislation – Part 4A of the NSW Crown Lands Act, introduced in July 2005, and Schedules 6 and 7 of the Crown Lands (Continued Tenures) Act 1989 – is necessary.

This legislation needs to be repealed. It serves no reasonable purpose, is discriminatory, and is contrary to the spirit and intendment of the previous Crown Lands leasehold

legislation. Adequate and appropriate environmental protection can be achieved by a process of reform of the existing native vegetation legislation.

The native vegetation legislation at least applies to the community as a whole. That does not appear to be the case with respect to the "covenant" legislation, which permits the Minister to seek advice from other Government departments, and then apply his own mind in the exercise of a final discretion, available only to him, in deciding what conditions to impose by way of covenant. It is by this means that bureaucratic agendas and radical environmental demands, are implemented, in place of balanced and transparent policy development.

This also permits a "case-by-case" approach, which, depending upon the ability of the individual landowner to protect and conserve his own interests, has the very real potential of being highly discriminatory. A competent and forceful landowner may very well find himself able to negotiate very much more effectively with the Department, so as to produce a more beneficial outcome for himself, than is a landowner less able to research and articulate his own case, when approached by the Department. There are already many instances of such discrimination having been made the outcome of the way in which the Minister's powers are being exercised.

On the other hand, native vegetation legislation must be applied across the board, and without discrimination.

Covenants are notoriously difficult to remove, or to alter, if circumstances change, particularly if in future years available land for food production requirements need to be greatly extended. On the other hand, native vegetation legislation may allow for such changes, or be implemented having such changes in mind. The legislation can be easily amended and applies to all landholders equally.

Covenants are the obvious product of input from a number of governmental sources. Their content obviously reflects the interests of a bureaucracy, and not the legitimate and common sense interests of the landholder. Ministerial decisions made in the exercise of a discretionary power, are difficult to review. On the other hand, native vegetation legislation is implemented and given effect in accordance with its current provisions, which are themselves subject to judicial interpretation, appeal, and review. That process is one which is very much more transparent, and very much less susceptible to allowing entrenched agendas and interests to prevail at the expense of sustainable agricultural development.

C. WHAT NEEDS TO BE DONE

1. There are a number of amendments to the NSW Native Vegetation legislation which need to be implemented, and the Crown Land legislation – Part 4A and Schedules 6 and 7

of those Acts – needs to be repealed. This will also involve a complete review of the State and Commonwealth Agreements, presently in place in connection with the existing legislation.

2. Specific emphasis needs to be given to restructuring the CMA network to provide for far greater and far more effective input from landholders and agriculturalists in the relevant decision making processes.

3. A set of guidelines needs to be drawn up for implementation in CMA decision making processes – these guidelines must include the following:

(a) identification of an approved list of non-native vegetation able to be introduced on land to extend and facilitate grazing operations;
(b) approved rural land management practices to be upgraded and extended;
(c) land clearing to be given more consideration, along with identification and specification of conditions and guidelines to be implemented as conditions of approval;
(d) sucker regrowth control, in both extent and means of carrying out, to be revised and extended.

IN CLOSING

PRRM. believe that the current legislation has and currently is having a serious and adverse effect, to this point specifically, upon rural land owners' income; asset equity; expansion ability; and correct productive management; together resulting in lesser family successions, a downward effect on businesses; and population; in the communities, therefore, the appropriate unfair and unreasonable legislation must be changed as a matter of urgency.

Property Rights Reclaimers Moree
Authorized by the Executives

Signed .

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19th March 2010