LU.730
16 May 2000

Mr Ian Dundas
Committee Secretary
Standing Committee on
Environment and Heritage
House of Representatives
Parliament House
Canberra ACT 2600

Dear Mr Dundas,

On behalf of this Association, I am pleased to present this submission to the House of Representatives Standing Committee on Environment and Heritage for its Inquiry into Public Good Conservation – Impact of Environmental Measures Imposed on Landholders.

I will appreciate your confirmation of having received this submission.

Yours sincerely,

John Hyde
Chairman, Private Property Rights Committee

enc. Submission

Submission to the House of Representatives Standing Committee on Environment and Heritage Inquiry into Public Good Conservation – Impact of Environmental Measures Imposed on Landholders

PGA SUBMISSION

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The PGA Experience

Over the past decade the Pastoralists and Graziers Association has been approached by landholders, most but not all with rural holdings, who have suffered grievous unanticipated financial loss when the values of their holdings have been reduced by the impact of planning or environmental law. To further its own understanding of the situation and where thought fit bring argument before the authorities, the Association formed a Committee that has accumulated knowledge of underlying principles and of the situation in Western Australia.

This submission is concerned directly with the impact of environmental measures but the argument has wider application.

The nature of private property

Whether in cash, shares, superannuation policies, machinery, leasehold and freehold land, mining, forestry and fishing titles or any of thousands of other forms, property has these features:

- It is always a bundle of rights—the right to possess, to occupy, to build upon, to plough, to graze, to fish, to extract minerals, to give, sell, lease, etc., etc.
- Its value is the value of its attendant rights.
- It is brought into private ownership by work and by saving.

Should the Crown remove a property right the property in question is inevitably reduced in value.

Governments' responsibilities

Governments acting in the community interest for a wide variety of reasons are often obliged to "take" private property, however it is generally understood that they are also obliged to compensate owners for their consequent losses. Indeed S51 xxxi of the Federal Constitution binds the Federal Government to taking only on just terms. There are no parallel clauses in State Constitutions.

Except by way of fines and taxation, Australian Governments are reluctant to take without compensation private properties in their entirety. Governments do recognise that private property has a certain inviolability but do not always seem to appreciate that the taking of the individual rights that attach to properties is the taking of property itself.

Some examples of the taking of private property rights that have actually occurred within Western Australia in recent times illustrate the point. A paddock that by an order to preserve remnant vegetation could not be cleared and farmed was reduced to little value to its owner. A piggery denied the ability to dispose of waste is now empty. Properties in the Peel region were hugely devalued when denied the right to use their river frontages. Others were devalued by the erection of power pylons that at least took away their owner's visual amenity.

By way of contrast consider a property right that for political reasons is unlikely to be taken. Public sector employees have invested much of their savings in superannuation policies. Although governments have been forced to change the rights conferred by these, they have been careful not to act retrospectively taking rights that attached to existing investments.

Although the Crown may and often should acquire the property rights of private persons for environmental protection or other public purposes, it should do so only:

- When there is evident necessity;
- By due process of generally applicable law; and
- After the payment of prompt and just compensation for all of the owners' significant consequent losses.

These conditions limit the right of the Crown not solely in the taking of whole properties but in the taking of each individual right. In short, a public benefit should be purchased at public, not private, cost.

The PGA concedes that hard cases abound. It contends, however, that these arise not because there ought to be doubt about the principle that S51 xxxi endeavours to enshrine, but because the relevant property rights are unclear. Again an example may assist. How long must a family have used a water source and to what extent must its use be built into the market value of the enterprise before its use is a "right"? In such a case the Association contends that if justice is to prevail the Crown has no option but to rely on some notion of "reasonable expectation". It is an inherently difficult concept but one with which the common law has long wrestled.

Experience has instructed the Association that small losses resulting from the loss of trivial rights are probably inevitable. That they are seems to be widely accepted because the only cases that it has been asked to take up have involved substantial loss to the private property owner.

Owners' obligations

It has on several occasions been put to the Association that owners also have obligations. Indeed they do but they are limited by ascertainable principles. A property owner may not for instance impose nuisances upon neighbours that exceed his rights – only so much noise, only so much shadow, only certain occupational uses etc. More generally it may be said that private persons, like governments, may not significantly take or destroy the rights of others without incurring the obligation to compensate. The law also rightly provides for injunctive redress. The existence of these obligations is not disputed and is a red herring in the property rights debate, which concerns the taking of significant existing private rights without just compensation.

The role of property rights in the social order

That property rights are human rights is explicitly recognised by Article 17 of the United Nations *Universal Declaration of Human Rights.* It states:

(1) Everyone has the right to own property alone as well as in association with others

(2) No one shall be arbitrarily deprived of his property.

The social environment developed by trial and error over millennia. It is as complex and as little amenable to human understanding and design as any ecosystem. As events in other countries in the 1900s show, attempts to change its more fundamental rules (as opposed to modest changes at the margin) are fraught with hazard. In particular, attempts to curtail private property rights have an exceptionally poor record. The social environment appears to be every bit as fragile as the physical environment.

The uncompensated taking of private property rights is:

Poor justice
People who have invested their savings only to have the value of their property devalued by changing the rules that apply to it have been unfairly treated. (The Association carefully distinguishes this situation from one where the property owner fails to benefit from a hoped for favourable rule change. That, however, is a situation encountered more often with land use planning law.)

Poor economics
Without the reasonable certainty that ownership will be respected in the long run, only short-term investment is undertaken, discount rates rise, and economic growth is curtailed.

Poor environmental management
Where there are no property rights, as there are not for the seas, most rivers, the air, some fish stocks and much else, stewardship is very difficult and depletion and degradation are probable – this is the well known "tragedy of the commons". Where property rights are merely attenuated, stewardship is proportionately compromised.

Of more immediate concern are the perverse incentives given to landholders by the fear that they may lose property rights. Farmers today burn or plough in anything they suspect of being rare from fear that they will lose the use of the land upon which it resides and the situation could be made worse from an environmental perspective.

Poor administration
No government that assumes the right to take property rights from some citizens while leaving them with others, whatever its good intentions, easily escapes the charge of corruption.

We turn to the four issues raised by the Standing Committee.

What is public good conservation?
A public good is a thing or circumstance that provides amenity to individual people but from which they are not excluded and therefore cannot be charged. Often this is because people cannot practicably be excluded. Streets lights are a commonly employed text book example. It is a much-abused term. Prevention of salt encroachment upon neighbouring property, visual amenity and much else are inherent public goods, that is, there is no way yet known of establishing private property rights and hence incentives to conserve them. The preservation of a rare species might or might not be inherently a public good depending upon the circumstances. Private wildlife parks seem to be successful.

Because markets in such goods are impossible, no measure of the trade off of the other ends that is appropriate to their provision is reliable. The regulator is, therefore, faced with making a judgement as to what cost is appropriate in each case. Full and prompt compensation obligations are perhaps the only way of keeping his/her feet somewhere near the ground.

The issue is confounded by what is alleged to be bad science. For instance, before spending public or private monies trying to recover salted land we need to understand whether lateral movement of underground water is making a significant contribution to the problem.

Impacts of conservation measures and their costs

While landholders known to the Association would probably be prepared to testify as to their own costs, without markets there are no prices to establish the extent of community benefits. Shadow pricing is inherently unreliable and, in any case, a complex model would be required to weight costs and benefits even within a confined catchment area. That is not to argue that such exercises should not be attempted, incomplete knowledge is better than none at all, but the results should be treated with appropriate scepticism.

Financial assistance for conservation by landholders

The Association believes that the principle is simple, namely, that the assistance (or tax) should match the externality after compensation has been paid for the loss of existing rights or new rights have been sold to the highest bidders. Since the externalities are hard to measure, the practice will be, at best, approximate.

Since the PGA believes that the Federal system is an important element of our social environment that offers the citizen insurance against very bad government, it does not believe that the Commonwealth should use its financial powers to over-ride the states. It submits this in spite of the hope that it will substantially agree with your ultimate findings.

Sharing costs

You say: “If the cost of conservation measures is to be shared by all Australians, it will be necessary to distinguish between the private and public benefits that result from landholders’ conservation efforts and attribute costs accordingly”. The PGA regards this as an admirable statement of principle. The practical difficulties have already been discussed; however, want of precision will not often be the limiting constraint. Since the limits to landholders’ abilities and willingness to rort any scheme will be well beyond the limits of acceptability and the Crown’s own resources are limited, a government should proceed only with great caution. It should concentrate on the most important areas accepting that it may be better to do nothing than to set up a large compensation scheme that will inevitably be ripped off. It should not, in particular, inflict net losses on individuals because it is unwilling itself to accept the cost.

In conclusion

The relevant principle, although too often honoured in the breach, is that if a benefit is a public benefit then it should be at public cost not that of some unlucky sod who has invested his savings in a place that has taken the eye of the Crown.

If individual landholders are to be asked capriciously to bear the cost of public goods, not only will injustice be done to them, they will plough in or burn anything rare for fear it is being discovered on their land. They will also reduce their willingness to invest in proportion to whatever they believe is the relevant "sovereign risk". To do other than preserve existing property rights is bad justice, bad conservation and bad economics.