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

Introduction

The Standing Committee raised four issues:

- **What is public good conservation?**
- **Impacts of conservation measures and their costs**
- **Financial assistance for conservation by landholders**
- **Sharing costs of conservation by all Australians**

Public goods are best thought of as goods from which people cannot readily be excluded. As a result, unlike food, warmth and shelter, their provision cannot easily be left to individuals pursuing their own separate interests. Clean air is often cited as the classic example. The notion of public goods conservation with respect to land can be divided into two categories: maintaining the productivity of the land by measures that will automatically affect all landholdings in a particular area; and preserving native flora and fauna which may compete with normal concepts of land productivity.

The first of these is a long-established issue. The general success over many centuries in maintaining the productivity of the land is due to ownership of land having been vested in individuals, thus creating powerful incentives to maintain and enhance its productivity. The legal obligations and rights of different property owners allow conflicts to be resolved where their activities impinge on each other. Private interests have broadly conformed to public goods as a result of these mechanisms. They may diverge where adverse impacts from features that are highly diverse and difficult to measure. River pollution from use of fertilizers is an example of this.

The second concern—preserving native species—is a more modern one. In the past, *elimination* of many such species may have been considered a public good, just as was drainage of wetlands (then known as swamps).

Public goods can be addressed using two broad routes:

- Maintenance of the rule of law based on individually-owned and tradable property rights so that just trade-offs are made where there is conflicting interests. This can be built upon in several ways but should not be undermined.
- The alternative approach is regulatory determination of the uses of property; a variation of this involves the use for regulatory purposes of the incentives—fees and rewards—that are automatically present with property rights.

The Rule of Law Based on Property Rights

The Need for Exclusive Property rights

Individuals will seek to make intensive use of free inputs whilst economising on inputs for which they have to pay. As a result, where the free input has a value, society will not be making the best use of its factor endowments such as land. Property which is unowned will lead each individual to maximise his own benefit with little regard to the ongoing value of the resource. Failure of the individual to take the value for himself will simply mean others will do so. Baden and Stroup[1] liken the process to five young boys sucking soda from a glass— the law of capture prevails and no conservation control or temporal allocation of the depletable resource is possible. If the asset's ownership is vested the owner will attempt to maximise its present value, taking into account future alternative uses. By ensuring that others are excluded, a landowner can determine whether the property merits conservation or modification; whether it warrants spending resources to improve its fertility, accessibility, aesthetic qualities etc..

For this reason, Hayek maintained "The aim of the rules of law is merely to prevent, as much as possible, by drawing boundaries, the actions of different individuals from interfering with each other." Drawing of boundaries and further defining them as the need arises has been a major force in allowing efficient trade to take place on the basis of separate pursuit of the individual's own interest. Boundary drawing and minimizing communal, and especially unowned, property allows the assignment of appropriate values to different inputs.

This boundary drawing has allowed normal legal recourse to adjudicate rights that are in collision. Over hundreds of years, litigation has established the priority of rights and obligations. It has also allowed the allocation of these rights to become modified to account for changes in community standards. Thus, during the nineteenth century, courts gave a greater priority of rights to productive uses of goods than to non-productive, a diversion from a neutral law that was perhaps justified by the public priority placed on increasing income levels. Some such similar priority is seen today in many developing countries where forest clearing is claimed to be placing an excessive value on immediate over longer term income and national welfare.

Beneficial Outcomes from Property Rights Protection

Legal definitions of rights and responsibilities based on firmly understood property rights have been major forces for economic progress while ensuring the sustainability of production. Faith in this process has often been shaky. Thus, Theodore Roosevelt in 1911 said,

> "..... the time has come to enquire seriously what will happen when our forests are gone, when the coal, the iron, the oil and gas are exhausted, when the soils have been further impoverished and washed into streams, polluting the rivers, denuding the fields and obstructing navigation."

[1] Baden R and Stroup J "Property Rights and Natural Resource Management" Literature of Liberty Vol II No 4, September-December 1979

Yet not one of Roosevelt's anxieties have proved well founded. Economies have become increasingly, not decreasingly productive. World development has clearly proven sustainable. Over the past 100 years income of OECD countries as measured by Gross Domestic Product has increased more than 20-fold and income per head has quintupled.

If we look at agricultural output, we find even more encouraging signs. In the past forty years, Australia's farm production has increased by 130 per cent. Performance in other countries has been comparable. Table 1 offers some quantification of this in Australia.

TABLE 1

Average % Increase in Volume of Farm Output			
1951-1962	1962-1972	1972-1982	1977/8-1998/9
4.0	3.5	1.0	2.6

Source: ABARE

Even though many claim we are approaching the limits to increased productivity, and a downturn is imminent, in recent years, output has continued to increase faster than inputs[2].

These facts suggest scepticism is warranted with regard to a recent report published by the ACF and NFF[3]. The report calls for annually an additional $3.7 billion of government spending and a total $6.5 billion.

The report claims that, currently, degradation costs at least $2 billion each year, and is increasing at an accelerating rate. It estimates the investment expenditure it advocates has the potential to generate a 6.5% annual return, for the next 100 years. The bulk of the benefits are in forestry and the report envisages a 20 fold growth in that industry.

Secure Property Rights: the Key to Prosperity

The reasons behind the generally satisfactory out-turn are well known. Property rights offer individuals an unparalleled incentive to gauge immediate and longer term costs and benefits against their own preferences. Having these costs and benefits self-contained with the property owner has proven far superior to any other form of ownership. Its supremacy over its main rival, government determination of use, has been unambiguously demonstrated with the collapse of socialism over the past decade or so.

Indeed, the overwhelming cause of England leading the world's economic take-off of recent centuries was painstakingly documented by Tom Bethell[4]. Bethell showed this was due to the security over property rights that the English and, to a lesser extent, other Europeans enjoyed. Secure property rights allow basic human goals to be pursued by allowing those who are successful, frugal or hard-working to enjoy the benefits without

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[2] There is frequent concern about sustainability of present productivity trends. Thus, Bartle in the NFF publication, *Reform* Autumn 2000 notes that the WA Salinity Plan is estimated to expand to cover 32% of the land area from the present 9% in the coming decades. The numbers however refer to affected land which in the main remains productive. Like other parts of Australia, WA land productivity has not shown signs of falling.

[3] National Investment in Rural Landscapes, NFF and ACF, May 2000

[4] Bethell, Tom, *The Noblest Triumph*, St Martin's Press, New York, 1998.

having to share them, giving them much greater incentive to create wealth and preserve the value of assets.

Codifying the English implied property rights, the US Constitution under the Bill of Rights (Amendment 5, 1791) established the inviolability of property rights (called takings) from government seizure. This was adopted in the Australian Constitution (s 51 xxxi), although in a form that required an activist High Court shortly after the turn of the last century to fully define. In Australia, the provisions do not extend to State constitutions (and the Lucas case in the US demonstrates, in some people's eyes, that property rights are imperfectly protected in that country[5]).

De facto takings occur where governments adopt zoning laws to prevent certain crops being grown, thereby denying the landowner of the best possible use of the land. The High Court's "discovery" of native title in Mabo 2 also led to a considerable attenuation of property rights as they were previously understood. Nonetheless, Australian property rights have largely retained their value and certainty notwithstanding the various assaults on them by governments and a politically active judiciary.

Any departure from a property-rights approach to ensure a more sustainable productivity needs to be carefully founded on sound principles. The experiences of countries that have emasculated individual property rights (e.g. the former Soviet Union) or whose governments have not had the capacity to ensure the upholding of the owners' rights (e.g. much of Africa) does not offer hope of finding promising approaches that do not include a pre-eminent role for property rights.

The foregoing suggests that financial compensation is essential for any property rights that are taken. This accords with several sound principles, including:

- placing a direct impost on budgets, thus avoiding he misapprehension that a taking is costless and injecting a discipline into government to select priorities regarding goods that warrant such a taking; this also allows an accurate measure to be made of the costs of conservation measures;
- providing compensation conforms with equity;
- in the absence of conservation, perverse outcomes are likely; thus it is said in the US that the *Endangered Species Act*—which often paralyses income producing activity on private land once such a species is discovered—leads to the three SSS's; *Shoot, Shovel and Shut-up*.

Use of Private Property Transactions to Achieve a Particular Outcome

Superimposed on this property-rights platform on which the rule of law can arbitrate conflicting interests, is the possibility that one party can resolve a conflict by buying out the property of another. Where the interests of parties clash, one option is for one party (or set of parties) to buy the opposing interests. This occurs not infrequently in urban real estate where a property owner may buy out an adjacent property that may have been developed in a way that would potentially (but legally) reduce his enjoyment of his own property. The purchaser may either retain the adjacent property

5 Henry N. Butler *Regulatory Takings after Lucas***,** Regulation, (1993 #3)

or re-sell it with a caveat on its use. Other private efforts, sometimes by single individuals, in the US have been important in preserving eagles, and even the native bison.

The Nature Conservancy in the USA is a major participant in strategies whereby clubs of interested parties operating through the law and property rights system to promote beneficial outcomes.. The Nature Conservancy obtains subscriptions from donors and buys land holdings to preserve certain features or species that would otherwise be lost. Sometimes the organisation buys a "hold-out" stake in an area which may be scheduled for changed use in order to influence the nature of the change to preserve or enhanced the values favoured by it, as the agent of its donors.

In Australia, environmental organisations have generally eschewed such approaches, preferring instead to use the funds at their disposal for advocacy purposes. This is a pity. Advocacy generally means seeking others—the private owner or the taxpayer—to fund their goals.

Regulatory Determinations of the Use of Property

The reflex action to the issues of public goods is to impose a regulatory solution. A public good often means a good that all will share in automatically–it is not practicable to exclude all from use of the good. The regulatory solution however has three major disadvantages:

- there is no yardstick on which to judge the real demand for particular public goods, and the strength of feeling in favour of it. Market research techniques, often called contingent valuation, were thought to offer promise in this regard but tended to throw up results that were highly improbable. Thus, a study conducted on the value of disallowing mining in Kakadu revealed an apparent value per hectare for "clapped out buffalo country" far in excess of that of the Sydney CBD.
- it disregards the dispersion of that demand; the preservation of tracts of land as "old growth" forests is unlikely to be valued similarly by different people and if the withdrawal of land from other uses is entailed in this, the benefits are unevenly spread. Commonly, environmnental benefits are valued more by the more affluent members of the community and regulatory moves (which are seldom costless) therefore have implications for many people's notions of equity.
- regulatory solutions often fail to provide the incentives to meet the objective to which they are targetted. This is because the (government) custodians lack the motives of individual gain that underpins the benefits brought by property rights and because governments tend to be poor managers and allocators of funds due to the distorted connection between incentives, consequences and decision-making.

A timely reminder of the disadvantages of regulatory solutions to conservation is offered by the recent fires in the forests enclosing the Los Alamos nuclear research facility has illustrated some of the deficiencies in having government agencies seek to preserve areas in a "natural" state. The fire, although due to a controlled burn that

went wrong, was a consequence of attempting to preserve forests in a way that is no longer possible. As Robert Nelson, Senior Fellow in Environmental Studies at the Competitive Enterprise Institute and author of the forthcoming book, *A Burning Issue: A Case for Abolishing the U.S. Forest Service* has said,

Unless it is removed mechanically, most of the wood will have to burn eventually. Consequently, an abundance of dead and dying trees due to the long time absence of fire results in fire intensities that cause enormous damage to soils, watersheds, fisheries, and other ecosystem components.

Some parallel deficiencies of government-controlled Australian national parks are well documented. These include lack of care and infestation by feral cats, pigs and vegetation like blackberries. Where the forest service is able to combat fire, this often stores up greater problems for the future.

Totally private forests with recreation as the main income earning feature are not a ready option in Australia, since the abundance of "free" government national parks crowds out most private provision. Nonetheless, a number of "exclosure"-based parks, particularly those operated by Dr Walmsley, appear to have been successful.

Species Protection

The previously mentioned ACF/NFF report *National Investment in Rural Landscapes* calls for expenditure of $8.3 billion ($7.1 billion in public money) for non-commercial or biodiversity plantings and $722 million (all of it public money) for rangeland retirement for biodiversity. While the report has the merit of apparently fully compensating land owners for foregoing their income levels in the pursuit of these public goods, it can be criticised in two respects: first the level of urgency may be exaggerated; and secondly, it makes no efforts to explore private means of pursing the target.

The Extent of the Problem

In terms of extinctions, the report notes that since European settlement some 20 mammals have become extinct and suggests that 97 plant species are also known to be extinct. While any species loss is a matter of regret, two factors need to be considered in addressing these sorts of numbers.

First, the extent of the loss comprises about 7 per cent of the pre-European mammals and a tiny fraction of the 25,000 plant and 40,000 plus other vegetation species identified in Australia. The loss was not caused by deliberate extirpation but as a consequence of new species. The previous isolation of Australia made it inevitable that native species would be vulnerable to competition of new strains. Other isolated areas like Hawaii and the south west of the US suffered comparable species loss.

Secondly, species loss largely occurred in the period prior to 1920. In that period, the premium on species preservation was much weaker than it is today. If it has not been

arrested, species loss has certainly been considerably reduced in recent decades. This casts doubt on the estimates of future loss ("3329 plant categories threatened" and an estimated "50% of Australia's woodland birds will become extinct") in the ACF/NFF report. Such figures also seem to be considerably higher than those in the OECD *Environmental Data Compendium*, 1999, which records 1,085 plant species as threatened out of 25,000 (or 4 per cent) and 50 threatened bird species out of 777 (or 6 per cent).

Making Use of Market Mechanisms to Preserve Species

Owned species with market value are not in danger of extinction. Vesting of ownership of species presents a potentially useful way of recruiting the market system to promote environmental goals. At present many Australian fauna are devalued because they have no market value, hence they are often considered vermin.

Outcomes overseas present pointers to a more hopeful win-win approach. With Kenyan elephants, protection in national parks under government ownership has resulted in the excessive hunting of creatures that have valued properties but are also a nuisance; by contrast, southern Africa's herds are vested with villages who ensure their protection to take advantage of tourism and the outcome has been far superior in terms of preservation. Those with the property right or its franchise equivalent will assume an automatic role of policing against poachers (who would be seizing their property).

Such experiences present useful indicators for Australian policy. Overseas demand for Australian birds and wildlife is high and "harvesting" the wildlife could promote its sustainability while:

- ensuring against excessive taking
- ensuring humane collection and transport

Such solutions are inhibited by current ideological attitudes against commercialising wild life and these need to be combated. There is scope for gain (including gain in rural employment levels) by deregulating and franchising. This scope should be explored, especially since such measures could contribute to species preservation and protection without impositions on the taxpayer.

Limits of Individual Property Rights and Use of Market Mechanisms

In many cases the environmental values cannot be maintained by private action. In the case of much pollution, for example, non-point sources it is impracticable to measure the individual causes and voluntary actions may be impracticable.

However, there is an over-abundance of voices calling for regulatory action to combat imperfections. Salt encroachment in dry land areas (especially in Western Australia) and in the Murray Darling system is presently the object of considerable attention. Real though these issues are, a sober judgement on the need to take action is suggested by their ostensibly modest impact on overall levels of agricultural

productivity (see Table 1).

If regulatory measures are to be taken, these are best done through use of market-based instruments. Tradeable rights are one such instrument capable of being employed in the case of wildlife preservation. Taxes are another means of using market-based incentives. In principle, there is little difference between the two methods. Both encourage behaviour under which costs are minimised with the stimulus of a financial incentive.

Taxes, for example on river pollutants, have been very effective in cleaning inland waterways in the US. Tradeable rights to pollute have the same effect (placing a quantitative limit on pollutants and allowing the price to determine itself, rather than setting a price for polluting and allowing the quantity to set itself).

The dominant issue for Australia is the health of the Murray-Darling system. Governments have struggled to overcome salinity and other degradation in this system for decades. Some prospect for improvement is evident with appropriate pricing levels being introduced for water use. A superior approach, in view of the importance of property rights (and current water users and their bankers clearly consider they have firm rights to a level of water use) is to vest ownership of the water at an aggregate level considered to be appropriate for the recovery of the waterway. Trading in these rights should be permitted and this would ensure the water is used for its most valued purposes. It would allow farm and other output to be maximised while reducing the public "bad" level of salinity.

This use of quasi-property right solutions is likely to yield far superior outcomes than micro-regulating farm and water use.

Concluding Comments

The Australian Constitution, like the American, incorporates the view that individual freedom should prevail alongside a limited role for government. Section 51(xxxi) requires that if the government acquires property from any State or person, it does so on just terms. Just terms have been defined by the High Court as 'full and adequate compensation' where the acquisition is a compulsory taking.

However, section 51 (xxxi) only applies to the Commonwealth. It does not bind the States nor do the States have 'just compensation' clauses in their own constitutions.

Declining Support for Property Rights

There has been a substantial decline in support for upholding the security of private property rights by the courts and by governments of all levels over the last 50 years.

This decline has not led to ignoring these property rights altogether. Rather, it has led to the narrowing of the definition of property rights, a widening of the definition of 'public use' and the limiting of the grounds for compensation.

When governments expropriate property outright, taking title from the owner, courts relying on Section 51(xxxi) generally require governments, at least the Commonwealth government, to compensate owners for their losses. The modern problem does not lie there. The problem lies with governments taking part of the use of the property while leaving title with the owner. Courts have been reluctant to award compensation in such cases because they have failed to grasp the principle of the matter---due, in part, to an unwarranted deference to the regulatory state.

The central principle is that property is not a singular concept. Property is a *bundle* of rights and different owners can co-exist by owning different services on the same piece of land—the normal case in Australia for mining rights and is also found with water rights. But if any of these rights is taken away the owner is deprived of something.

Contrary to this reality, *takings* law has clung to the idea that only if the entire bundle is taken does the government have to pay compensation. This all-or-nothing view enables government to extinguish nearly all uses through regulation---and hence to regulate nearly all value out of the property---yet escape the compensation requirement because the all-but-empty title remains with owner.

This is clearly wrong. Compensation should be required when government takes any right---whether partial or full title.

When Is Compensation Required?

It is preferable to answer the question when is compensation *not* required? Rather than the question when is compensation required?

Compensation is not required

- First, when government acts to secure rights---when, for example, it stops someone from polluting his neighbour's land---it is acting under its police powers and *no compensation is due* to the owner, whatever his financial loss, because the use---pollution---was wrong in the first place. Since there is no right to pollute, we do not have to pay polluters not to pollute. The relevant question is not whether value has been taken by regulation but whether a right has been taken.
- Second, if governments act to provide the public with some good and that act does not take a right, then even if it results in a financial loss, *no compensation is due*. For example, if a government builds a public housing estate and neighbouring property values decline, no compensation is due because the action took nothing that they owned. The neighbours own their property and its uses. They do not own the value in their property.

Compensation is required when governments act not to secure rights but to provide the public with some good---for example, a wildlife habitat or the preservation of historic buildings---and in doing so take away some otherwise legitimate use.

The principle is quite simple: the public has to pay for the goods it wants and takes,

just like any private person would have to.

Promoting Increased Private Provision of Public Goods

Although public goods benefit us all, a great many such goods are freely provided by individuals—many may gain enjoyment from a neighbour's flower garden but nobody would chip in to maintain it. In fact people are very often unable to obtain all the benefits from a purchase or action but the market system still operates without an additional massive transfer of notional benefits.

Hence it makes sense to leave room for those placing a higher priority on public goods conservation to do so of their own volition. It is also more admirable for those with strong environmental preferences to use their own monies to fund the provision of public goods rather than campaign to have government force the taxpayer to fund them.

In addition, the need to provide funding for public goods could be reduced by allowing ownership and trade in wildlife species. Particularly in the case of the major fauna—exotic birds, frilly necked lizards, koalas etc, there is a ready demand both for observing the species *in situ* and for specimens.