Constitutional Property Rights Committee

Submission to the Productivity Commission of Inquiry into the Impacts of Native Vegetation and Biodiversity Regulations.

For ease of referencing: the definitions in italics are drawn from those compiled in Butterworth's Concise Australian Legal Dictionary 2nd edition & reprinted 2003.

Introduction: This CPRC submission is written against the Magna Carta and the Bill of Rights, where each has established tenets for Natural Justice. The Attorney General, in year 2000, confirmed in writing to this committee, that both these charters remain an integral part of NSW law.

The courts have determined: *it is a cannon of construction for environmental law, that departure from that previously permitted, can only move sufficiently to obtain an objective, but if the departure takes away natural justice, the court will rule in favor of natural justice.* Thus it is that environmental and common law co-exist.

It is established in the High Court [Justices Mason, Dean and McHugh] that *it can now be taken as settled, that when a statute confers power upon a public official to destroy, defeat, or prejudice a persons' rights, interests, or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by words of necessary intendment.*

The Existing and Continuing Use Provision [since 1979] is now with parliamentary supremacy. Despite the bureaucratically contrived perception by the former DLWC [to justify and defend for 8 years, the misapplication] that the Parliament can do what it likes, when it likes and how it likes, the FACT remains. **Continuing Uses cannot be overridden** by imposing superimposed **Regulatory Control** when the landuse has already been determined; the developed approved; and the commercial business of Agriculture clearly established [since colony settlement].

- **Regulation and Control** are conditions of consent at the time of the application and excessive or unacceptable Conditions are appellable. **Only two places the NV&C Act can legally apply under current law i) a current transfer of Crown lease to fee simple ownership.** [Highly unlikely when National Parks and DILWC are retrieving freehold land by imposing conditions to render the land agriculturally unviable]. ii) **when 'use' of LAND for Agriculture is abandoned and a new'use'is sought.**

- **The Continuing Use Provision** remains central to the orderly effectiveness of the principal landuse planning instrument the EP&A Act where the lawful approval is **SAVED** in the Schedules of whatever the subordinate environmental instrument. The NV&C Savings Provision is SCHEDULE 4. As currently administered the NV Act is without legal force.

- **The Existing and Continuing Use Provision** evolved out of four other Statutory landuse instruments beginning with the various early Crown Lands Acts and more recently from 1916 ie Real Property: Conveyancing: Land Valuation and Local Government Acts. They co-exist to underpin the EP&A Act for Statutory effect; and to encourage and ensure longterm protection of the investment. Inconsistency has not been resolved to provide consistency.

- Each of these four Acts has a separate function yet each influences the other in order to cement the common understanding of a *fee simple* procedure for developing freehold LAND. Until 1979, "Continuing use" had inherently given investors longterm security. Natural Justice has been the basis of national economic wealth. During seasonal uncertainty and market force dictate, development 'protection' provides a measure of comfort no longer there.

- The principle of Continuing Use survived 800 years; without question or argument; until August 1995; when with the gazettal of the State Environmental Planning Policy 46, it was cast aside; being bureaucratically argued as being overridden so the government instead of landowner could take control of LAND management and 'use'.

- It was that: **Inexperienced public servants** selectively interpreted SEPP 46 to suit its intent. 'Authorised" servants ignored what was expressly written. By 1997 the administrative flaws were unconscionably being perpetuated to destroy, *defeat and prejudice a persons' rights and legitimate expectations* by now in the written admission [Director-General for the Department of Land and Water] that the NV&C Act was *deliberately structured to be administered as a stand alone consent role.* In bureaucratic denial for these rights he recklessly continued:-

- *"that rather than stall the process of* [implementing the NV& C Act] *by debating the legal standing of the Act, the Government had committed to fast-tracking the regional planning process.... " So* much for the law; justice; truth and order and some good old fashioned Aussie "fair-go". The inference is clear…. *until the court says we're wrong well keep going*

To substantiate **our strong objections for the unlawful impacts** of the Native Vegetation and Conservation Act as administered; and as it has unlawfully evolved, we work upwards from the LAND itself, and back to where it all began, rather than try to explain where we are NOW, and why, that which we are being asked to endure, was/is **never** able to be lawfully substantiated.

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We begin with OWNERSHIP of LAND registered with the Real Property Act: transferred with all benefits andlor encumbrances through the Conveyancing Act. Lawful approval to 'use' Freehold Land, is made according to the Zoning Provisions which determine a Valuation [Land Valuation Act for Rating purposes] and landuse "approval" is administered by Local Government [Local Environmental Plan] as the traditional Consent Authority [via Part 4 of the EP& A Act and s54] where under s76 No Development Consent is required.

In NSW since 1979, all the implicit Natural Justice principles of the Magna Carta and the Bill of Rights which had survived for 800 years, were then purposely, legislatively enacted into the EP&A Act [to prevent from what is happening today *from* happening] to guarantee **legislative SAVINGS of the developed 'existing' use.** The relevant part is **Division 10 EP & A Act s 106-109b** from where all **EXISTING APPROVALS** are progressively **SAVED** in the **Schedules of all Subordinate Environmental Legislation.** The NV&C Act is Schedule 4 where the Native Vegetation Regulatory Act is not to *prejudice or bias the* **rights** *of any person* **existing before the date of the publication.** [The next 4 definitions are from Butterworth].

"Fee simple is *an estate in land which is the most extensive in quantam, the most absolute in respect to the rights it confers of all estates known to law and for all practical purposes of ownership, it differs from the absolute dominion of a chattel in nothing, except the physical indestructibility of its subject'* [Commonwealth v NSW 1923 33 CLR 1].

LAND: *is physically the surface of the earth, the soil beneath [arguably to the centre of the earth unless modified by the terms of the grant] the airspace above,* **all things growing on** *or affixed to the soil including buildings,* **trees,** *crops, and all minerals except the royal minerals and any other minerals excepted by the terms of the Crown grant.*

For Statutory purposes *the land includes 'messuages, tenements and heriditaments, corporeal and incorporeal of any tenure or description...*

Statute of law supremacy is the *overriding effect of statute law over common law principles.* But: *Statute law operates, subject to the 'presumption' that in the absence of clear statements to the contrary, legislation does not override fundamental common law rights.*

We repeat: Common Law property-right is embodied within the 1979 Statutory landuse approval. It co-existed for the same subsequent *economic potential 'use' of the LAND* [as 'land' is/was legally and dictionary defined]. Rural landuse was procedurally administered 16 years by Local Government in consultation with all other departments when the consultative need arose [without question or consideration for any alternative interpretation] until August 1995 and the introduction of State Environmental Planning Policy 46. [SEPP 46].

CONCLUSION: this CPRC vigorously defends the **"Continuing and Existing Use Provision"** asset down in the EP&A Act 1979 and purposed constructed to 'encourage' the:-

- **Proper Freehold Management;** Orderly Development; and Conservation of Agricultural land to promote the social and economic welfare of the environment {s5 [1] EP&A Actfl.

- **We argue:** no Productivity Commission Inquiry can provide a Report according to its terms of reference where the assessment of the issues is implicitly perceived to be against legitimate Regulation and Control, when in fact, the terms of reference are being deduced from a plethora of landuse constraints which are **clearly** without legal force.

- **We argue:** that **"absolute title** *applies to the whole of the land with registered title under the Torrens system subject to any qualification contained in the indefeasibility provisions.* "'

- **We defend:** our legislative right to a **"continuing and existing use"** of the significant Freehold primary industry investment being *"Rights under planning legislation 'to continue' previous lawful activities on land to develop an economic potential which would no longer be permitted following the introduction of changes to environmental planning instruments. "*

- **We argue:** that there has been a very grave **error *of law*** and an equally unacceptable level of inexperienced and inappropriate administrative judgment causing *"misrepresentation andlor misapplication of a principle of law* ie SCHEDULE 4 of the NV&C Act and before it s10 of SEPP 46. Both these provisions SAVED the existing approval which prevails until a time in the future where the "existing use of the land" is abandoned for a subsequent alternative 'use'.

- The forgoing *misrepresentation and misapplication* has arisen where under s 59 of the NV&C Act *"any person who is a public servant with the Department of Land and Water can be an 'authorised officer' for the purpose of administering the Act".*

- **We instance disturbance** "where *in property law, an infringement of an [ancient right 20 years or more] to an incorporeal hereditament comes about when landowners are hindered in their regular and lawful rights to a use of the land".*

- We argue that landowners "*incorporeal hereditment rights"* have been unlawfully *abrogated* in Statutory non compliance.

- **We argue** there has been a grave and unacceptable level of *"abuse of power and an improper exercise of a power"* by inexperienced 'authorised' public servants, [both elected and appointed]. This 'inexperienced' *abuse in the procedural process* has deprived landowners [in non compliance] the legislative right for each individual person to have timely objection to any "modification and revocation" of a statutory "existing and continuing use provision"; and in the landowner objection, a right of appeal to the Land and Environment Court with provisional Right to apply for compensation for any "abrogation" of the modified or revoked "existing approval".

- **Acquired Rights** *are* we believe a lawful *"corporeal or incorporeal object of value vested in a legal person* [ie a landowner] *under municipal law* where the *acquired rights include a Property Right for an economic benefit from the use of the land."* {Zoning and LG Rates]. Landowners for 8 years have been paying LG Rates on a Land Value where the LAND is prevented on non-planning grounds from a full economic potential benefit of its developed use.

- We argue against **derogation** in the factual denial of Schedule 4 SAVINGS Provisions where the administratively flawed application <u>before</u> the 'lawfully approved use" has been abandoned, *"has lessened, partly repeated, and put at risk, property rights previously granted ….limiting the scope of and impairing the utility of that right which previously existed."*

- We evidence **Zoning** where Butterworth defines it " as *a way of controlling land development and is a feature of the Local Environmental Plan it separates divisions of land and controls future development whilst* **activities already *developed are* granted "existing use rights" to ensure continuity.**"

Precis:

1 . Rural land is the primary alienation from the Crown and is still with its primary landuse property right as transferred from the Crown for the purpose of Agriculture.

2. There is a plethora of evidence that all Vegetation is part of the Land [it is not apart *from* the land. Vegetation has been conveyed and transferred and is implicitly [if not stated] in the Deeds for the use of the landowner who has
transferred right at any given time grant is to all *heirs and successors.*

3. Justice Else-Mitchell in the 1974 Land Tenure Commission of Inquiry prior to 1979 determined that "t*here was no remaining virgin freehold land .... it had all been developed by virtue of its continuing use".* The Leasing Repair Inquiry {Industry Commission 1977} states that there is only 13% Freehold land Nationally. There are 135000 farmers {today's ABS figures}.

4. Agriculture is defined as a rotational tilling of the soil. Without a primary industry, there can be no secondary industry and at the end of the day no tertiary industry.

5. There is deliberate planning protection to ensure that Agriculture does not require consent for development.

6. The 'activity' of Agriculture underpins the economic foundation of the nation. The commercial business has been established in the continuing use of the land since Colony Settlement.

7. Once a public service authoritative person leaves the main road and enters Freehold Rural Land that Authority is trespassing into the private domain of a freehold business. Unless the entry is by way of invitation or through Statutory Compliance of the Procedure for Entry, the unauthorised trespass is an offence.

This is a brief indication of the concerns of the Committee.

I would appreciate being able to speak [Canberra hearing Monday August 4th] to what is written here with considerable omission of further unlawful applications and injustices [in haste to beat the deadline] and also time to add to other factors specially relevant but not mentioned here.

Your faithfully

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CONSTITUTIONAL PROPERTY RIGHTS COMMITTEE

Precis: to previous two submissions.

Planning Law saves the existing lawfully approved use of the land which remains unfettered until such time as the existing use changes to another.

The Native Vegetation Act has SAVED the existing lawful use of the land and the Provisions of the NV&C Act *ONLY* come into force when the use of the land for Agriculture is abandoned and the primary use of the land gives way to a secondary use ... eg urban encroachment in Rural Residential of peri-urban uses.

- Please Note the National Parks & Wildlife and the Threatened Species Acts.
- Both these Acts reflect the SAVINGS PROVISION in their respective Schedules but take it one step further in precis
- in several instances both articulate a protection for Agriculture where *it is not an offence if harm or damage is caused to flora or fauna and the harm or damage has been caused during activities of Agriculture.*
- *It is not an offence and this part of the Act does not apply where the existing lawful use of the land has been approved under Part 4 of the EP&A Act.*

There is NO offence for picking protected flora on Freehold land.