

I write in relation to the enquiry into regulatory burdens on agriculture, and your request for our approval to lodge certain items on the Commission's website.

1. The transcript of my evidence touching these matters before the NSW Senate, 21 February 2006 is public and could be lodged.
2. Paul Martin *The Changing Role of Law in the pursuit of sustainability* IUCN Academy of Environmental Law Colloquium, Biodiversity Conservation, Law and Livelihoods: Bridging the North-South Divide, Macquarie University 10-15 July 2005. This is a forthcoming refereed paper in international journal, and cannot be lodged at this time.
3. The paper at http://www.une.edu.au/aglaw/research/cartography_paper.pdf contains an extensive examination of the regulatory framework to which I refer in these other papers. We are currently updating the listing of laws and hope to be able to provide you with more information in the near future.
4. The paper at http://www.une.edu.au/aglaw/research/50million_australians.pdf includes discussion of an alternative concept for the architecture of NRM laws impacting on farmers and others.

We have completed two studies for Land & Water Australia which are directly relevant. We cannot release these. One is concerned with the use of tax instruments to replace or complement regulation in a rural context, and the other directly addresses rural regulatory reform. I will seek the permission of LWA to release these and for their lodgement on your website.

regards

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Witness: Professor Paul Martin, Director of the Australian Centre for
Agriculture and Law, University of New England
Time: 10:45am
Submission: No 100

INDICATIVE QUESTIONS

Question 1. One submission said farmers are no longer certain about ‘what they can do with their “own” land, water, vegetation and air’. Could you explain to the Committee the legal rights and limitations or obligations of property owners to utilise resources on their property? What powers or rights do governments have to regulate for activities on private property?

Some fundamentals to understand

- a. **Property is a political/economic concept translated into use through the law. It is all about society deciding who will have what levels of exclusivity in the use of valued things. The fundamentals of what ought happen are not legal, but social and political. Unfortunately the law has often moved from being a tool of the actors in these intense and legitimate debates, to being seen as an actor in its own right. That is in my view a distortion that is not serving society well.**
- b. **In answering these questions in an attempt to be legally accurate, I am not attempting to say what ought happen in terms of (for example) compensation, or adjustment of rights to use and access. I have my views, and they are legitimate so far as I am concerned, but they are of no greater status than another other view merely because they are put in a legal context.**
- c. **The use of ‘property rights’ as a political tool of debate – often technically wrong, self serving, and not necessarily well advised, but has a certain aura of legitimacy. Arguments are often based upon an importation of US constitutional law concepts, which comes from a different political history than ours, where property and freedom (and the right to bear arms) are closely intertwined.**
- d. **‘Property’ legal theory is not a single unified field – many issues, debates, disagreements. However, the idea of whether or how one can claim to have ‘ownership’ of fundamental natural assets has been long debated.**
- e. **Locke’s concept that there has to be an application of human energy and enterprise to transform the asset in some way before one can claim the basis for an ownership right seems to me to have some legitimacy.**
- f. **In the case of ownership of water and air, the language of ‘water rights’ or other such seems to reflect a fundamental error of reasoning. Distinguish between ownership of the asset (it is mine) and a use right or a right to extract from something that is owned in common (I am allowed to use it).**
- g. **What is traded is a permission, not an ownership, and this implies a full submission to the idea that you do not own the asset. However in political**

and economic terms, this important distinction is lost and this in turn helps to generate some rather misguided notions.

- h. I separate this technical discussion from the more fundamental economic and social reality that a government may wish to act as if there were ownership, by providing financial or other support when use privileges are adjusted or removed. The legal technicalities say nothing about what ought happen in these other domains.
- i. Another myth in some of the economic and political rhetoric is the concept of unattenuated property right – ie complete ownership unsubordinated to other interests. Only a little reflection is needed to see that this is a myth. Basis of my right is the constraint on my neighbours right. Property is exclusionary – it is about boundaries, which are adjusted through the political process.
- j. This also highlights the fact that governments as the Crown do have an absolute legal right to adjust interests subject to any constitutional constraint at the root of the power of government.
- k. The fact that property is subordinated to the legal acts of the crown is of course the historical reality, and calls into question some of the more naïve views that absolute interests are needed to promote market trading and investment

Question 2

The Committee understands there are common law rights to the uninterrupted flow of water. These can, however, be extinguished by statute. Can you expand on this principle citing NSW examples if possible?

The common law rights are Riparian rights. This is the right of a person whose property abuts a water-body not to have their use unreasonably interfered with by their upstream neighbours. Not that this is not a property right, but a right to prevent others from interfering with use. It is not ownership.

Embedded in this common law was a host of refinements through cases, which (for example) allowed weirs to be created to capture part of the water, and defined what uses or diversions were unreasonable.

What statute can do is to over-ride this, or adjust the concept of reasonableness. In effect, whilst in a technical sense riparian rights co-exist with statute, statute has reshaped these rights substantially, and does override them (not dissimilar to the Mabo concept of native title).

A number of NSW policies and the supporting legislative frameworks do precisely this, for example:

- a. Weirs Policy
- b. Reasonable Use Guidelines
- c. Tradeable water entitlements.

Rules and Regulations

Question 3. Submissions indicate that the confusing, complicated and expensive nature of natural resource regulation means that legislation either penalises those farmers who have been “good environmental managers” or there is a tendency for farmers to continue following old practices and restrict investment to a minimum level. Both approaches subsequently lead to resource degradation.

[Paul please note: *Do you think the Catchment Management Act and Native Vegetation Act 2003 have adequately addressed farmers' concerns? From a "cost-effectiveness" perspective, are there any aspects of the current rules framework that could still be considered contentious?]*

Would you agree and can you give examples as to what your remedies would be?

No one could argue that a regulatory system with over 250 statutes, thousands of regulations and a host of bodies is a workable and efficient system.

Example: Voluntary EMS.

Our studies – Cartography of NRM law, LWA 2000.

Recent attempt to use other less fundamental interventions are not necessarily effective at reducing the problem

- a. **PVP developer – problems of comprehensiveness, labour – concerns about the outcome versus expectations problem**
- b. **EMS sectoral codes – comprehensiveness – hidden risk of failure to comply**

Proposals: 3 level

- a. **reform rule-making process**
- b. **reduce transaction costs and make self-guided compliance worthwhile**
- c. **move to a streamlined national code structure**

My Centre has adopted this as a core approach to this aspect of our work, with projects proposed or underway attempting to generate a clear impetus to least-cost compliance, which ought to be the policy goal of an integrated strategy.

Property Rights, Duty of Care and Stewardship

Question 4. An options paper on land stewardship by the CSIRO suggests that relying on common law notions of environmental duty of care is "fraught with conceptual problems that, when tested, may prove to be inadequate."

Would you care to comment on whether there is a need to underpin a "duty of care" approach with legislation?

[Paul, please note: *Do you see any inherent problems with the way in which "property rights" and "duty of care" are interpreted and applied in efforts to achieve ecologically sustainable land and water use?]*

There is no 'magic bullet' that will be simple, effective, and lacking in complexity. The problem is not like that. Panglossian arguments about any form of intervention abound but the evidence does not support the view that simplistic responses to complex social and institutional issues can work.

Property rights line suffers from the same limits as Duty of Care (or the 'more regulation' or the "market" cases). Complex social system problems need multiple interventions across the system, using a range of tools. Trying to put an octopus into a box. Duty of Care can be taken to be an attempt to create a legally over-arching form of pressure, and at the same time improving producers' capacity to defend themselves from excessive and unstructured demands.

Duty of Care can be best understood by analogy with the duties of directors.

Explain

Underlying issues are complex, the duty gives rise to both civil and crown rights, it has been triggered by the crown specifying its existence through the Companies Act.

The benefits can be seen in the outcomes of the Corporations Code duties, but so too can the limitations.

The AgLaw Centre has just allocated a scholarship to study the managerial aspects of this multi-faceted issue. We are keen to develop a second line, to look at the legal and technical aspect to see just how this concept could be made to deliver the transaction cost outcomes that it ought, and how to minimise the risks that are inevitably attached to any such radical regulatory reform.

Question 5. Many submissions argue for incentive or stewardship payments to replace legislation. Do you think this can be justified? Can there ever be a case for removing the regulation of natural resources all together? If not, why not?

In particular, one submission says we need to develop a “very clear understanding of basic property rights and of duty of care” which will in turn provide a “basis for rewarding good stewardship”. Would you agree? If not, why not?

At the very high level this is an apple pie and motherhood statement. Would we prefer incentives to legislation if we had our druthers? Yes, but what cost and will it work.

Refer to the Sustainability Strategy text. Total systems management

Comment: Fundamentals are resource flows and information flows, and the weight of these is the critical concern. Fundamental strategy problem is the capacity to fund a taxation based program of interventions.

Explain

AgLaw programs

- **market-based interventions including common law as a market instrument**
- **Innovation in taxation.**

Question 6: The Environmental Defender’s Office has told the Committee that the Native Vegetation Act 2003 attempts to provide for sustainable management of native vegetation and provides incentives for landholders to maintain or improve environmental outcomes with respect to native vegetation. Do you have a view on the effectiveness of this approach? What would your response be to this?

Again, at the broadest level one would have to agree, but the question is whether this is the optimal mix. The economics case studies and a range of one-off instances would suggest that there are real problems in the implementation, and that the costs are high on some people. The issue of equity needs more careful attention.

That is not the same as saying that we ought go soft of native vegetation protection – I am merely saying that the suite of instruments being used are being developed in a piecemeal way, due to the legal, administrative and

organisational mess we live within, and to the lack of a coherent approach to strategising for such things.

It is not just ‘what’ we do, it is also ‘how’ we do it in the formulation of such strategies that needs a serious rethink.

Question 7. A paper produced by the WWF says that focusing on property rights is unlikely to provide security, equity or efficiency benefits and that structural adjustment assistance, cost-sharing and matching responsibilities to rights are more constructive approaches to reform. On the other hand, irrigators say that they should be paid compensation for the regulatory restriction of their “property rights.” Where do you stand on this issue?

In our LWA report and book we try to outline the limits of a property rights based system, and make the case that an over-emphasis on property may give rise to not only some serious problems for the overall community and for government but also may fail to deliver what the advocates want. Aspects of this include:

- a. ‘freezing’ one set of interests at one point in time, with the resultant complexity of adjustment and future wealth transfers. Particularly an issue with natural systems under increasing pressure, but this also increases the value of certainty for some stakeholders.**
- b. Failure to deal with the negative effects of trade and ownership, such as stranding, the transfer of opportunity to third parties and the like. Social inequity can arise readily through markets, as well as through regulation.**
- c. Rightly, what the ‘property’ is can be tailored. Since it is primarily a license to extract from the crown-controlled pool of resources, then this can be tailored to be a limited right (for example contingent on a range of issues, time bound etc) or a broad right (complete and volumetric). Saying that it is a ‘property’ right does not say very much about it, really, except that it has some exclusionary character.**
- d. Serious justice problem of renewing *terra nullius* in relation to those things for which we create property rights.**
- e. Courts only can deliver ‘compensation’ by measuring the economic value of what is lost. This will often be far less than the amount that the political advocates would want or expect, or indeed than the amount that is socially justified or which will meet the functional need.**

Again, my argument is not for or against the use of property. It is rather an argument against the naïve broad brush that is being used in these discussions. We need to develop strategies, not promote brands of instruments (like ‘regulation’ or ‘market’) because otherwise we are making major choices for our future without really dealing with the issues.

[Paul, WWF argue that attention given to property rights has narrowed the debate to one of “regulation and compensation” and that a more holistic and big picture approach to sustainable natural resource management is needed. They also say that whilst it seems that compensation may be desirable, necessary and fair, it is possible that focusing on property rights may not provide security, equity or efficiency benefits

and that structural adjustment assistance, cost-sharing and matching responsibilities to rights are more constructive approaches to reform.]

Compensation

Question 8: Some argue that compensation is desirable, necessary and fair. However, in your paper, you point out that compensation for “acts of the state” comes from the pool of taxation revenues and as a claim against the common purse, competes against other interests. In fact you say “To frame it as a rights issue is to distort it.”

Particularly given the view that farmers were only doing what Government asked them to and were provided with incentives to clear land and develop regional areas, what would you say is the most socially appropriate and economic justification for compensation within a structural adjustment framework which also may facilitate “behavioural change.”

Start with a functional, pragmatic choice about the behaviours you want

- a. what is the behaviour you want? Of whom?**
- b. What is the least cost way of manipulating these people to deliver the behaviour you want.**
- c. Then, if there is a social justice issue, what is the least cost way of managing that social justice issue.**

It is not about legal right, it is about least-cost pursuit of social priorities.

Solution/Vision

Question 9. We gather from your submission that institutional reform that improves cost effectiveness of government, develops sustainable businesses and establishes conditions for system wide shifts in sustainability is needed.

1. can you tell the Committee what you mean by ‘system wide shifts’?
2. how would you describe the new institutional arrangements that will deliver more sustainable landscape use? For example, would there be a need for PVPs and other environmental instruments under the reforms you propose?
- 1. Economic viability of sustainability strategy**
 - a. The Intergenerational Report issue – how can we afford tax-dependent interventions?**
 - b. How can we expect relatively impoverished producers to carry the full costs of protection/improvement**
Need new instruments: taxation, promotion of private investment.
Need to be much more accurate in understanding least cost behavioural change
- 2. Reduction of transaction costs and wastage**
 - a. A new regulatory architecture based on corporations law**
 - b. Rationalisation of roles, including an effective but credible self-regulatory aspect**
 - i. Few agencies**
 - ii. Audited compliance with self-regulation**
 - iii. Serious penalties**
 - c. Altered resource access conditions**
 - i. Proof of governance system**
 - ii. Bans and other credible penalties**
 - d. Radical changes to financing system**

- i. Private taxation incentives
- ii. Real markets
- e. Transactions cost-effective regulation
 - i. Designed for implementation
 - ii. Risk transfer to the potential violaters
 - iii. Rationalisation of jurisdictions
 - iv. Strong incentives to successfully prosecute

Question 10. Another submission says that current institutional arrangements reflect a “symptoms” approach to delivering sustainable land and water use, one that is ultimately a bandaid solution. The submission argues a more fundamental approach is required, one that in the words of the Wentworth Group “redesigns Australian agricultural systems”.

What is your view on this?

Broadly I agree with this – our structures are a mess.

Do you see the Resource Rules Portal as providing a tool during a transitional approach?

The Rules Portal is a way of coping, but also may provide a framework for moving towards a self-assessment based approach to compliance checking . Particularly important in removing a barrier to voluntary compliance i.e. barriers to implementation of ISO 14001 EMS systems requirement to have a system for evaluation and monitoring of legal compliance.

Support from NSWf, VFF, WFA, BFA, HAL, IAA, NSW DPI, QldDNRI and a range of CMAs and others.

COULD be used to justify a certification scheme analogous to the Annual Report and other compliance systems in the Corporations Code. This would require that a credible system be in place supported by credible random inspection and penalties for fraudulent assessments. Proven to work in enterprise management

[Paul please note: Dr John Williams (Wentworth Group) has said that the success of Australian agriculture has come at “significant cost to the environment” and that Australians must come up with biodiversity-based solutions for reconstructing the landscape, ensuring a sustainable future for both rural and urban communities.]

Question 11: What will be the implications for rural economies and societies of responding to the “new rules framework”? Can you provide the Committee with any examples, or case studies, of the kinds of socio-economic and ecological benefits of the rules framework you are proposing?

In 1987 the Senate Standing Committee on Constitutional and Legal Affairs published a report titled "The Role of Parliament in Relation to the National Companies Scheme" - substantial problems with the cooperative scheme, including lack of uniform administration by the state Corporate Affairs Commissions, lack of accountability and duplication of functions between the state Corporat Affairs Commissions and the National Companies and Securities Commission. Corporations Act 1989 (Cth) and the Australian Securities Commission Act 1989 (Cth). However, the High Court judgment in *New South Wales v*

Commonwealth

Signed in June 1990. Each state would enact its own Corporations Act and the Commonwealth Corporations Act would apply only to the Australian Capital Territory and not to the states. However, in order to have a national structure for the regulation of companies, a number of key federalising features were added.

Question 12. Finally, in summary, can you outline to the Committee what other factors or forces you think generally contribute to unsustainable land and water use in Australia?

In particular, can you tell us whether the Resource Use Portal facilitate more sustainable farming systems and land use patterns? Will the cost of externalities of unsustainable land and water use being factored in?

Behavioural fundamentals – flows of resource and flows of information.

Change the behavioural contingency that gives access to resources and you will change the outcome. Make resource governance a key contingency for resource access – grants, rights to use, credible penalties. This works for fiscal capital conservation, and ought be harnessed for natural capital.

Information flows have to support this. Remove transaction costs to allow the markets to work. This is where the rules portal fits in.

Major problem is that the contingencies do not reinforce the value of sustaining natural capital and this creates a conflict between fiscal and environmental interests. In essence, we have to create a contingency structure that reduces this, and which makes good environmental citizenship a path to success, not a drain on success.