

ENVIRONMENTALLY SENSITIVE AREAS IN WESTERN AUSTRALIA: HIGHLIGHTING THE LIMITS OF THE ‘JUST TERMS’ GUARANTEE

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I INTRODUCTION

Despite property rights being one of the few human rights expressly protected under the Australian Constitution, the Australian Human Rights Commission identified the recognition and protection of property rights as an area of key concern during its 2014 national consultation on ‘Rights and Responsibilities’.¹ The Australian Law Reform Commission recently noted that environmental laws, in particular, have caused considerable controversy and debate in terms of their impact on private property rights.² While there is clearly a community interest in environmental protection, the question of how we strike a sensible balance between protecting the environment on the one hand and protecting private property rights on the other is a controversial one.

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¹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Final Report)* (ALRC Report 129), December 2015, [18.4].

² *Ibid* [20.3].

This paper will use one particular example of environmental legislation – namely the declaration of Environmentally Sensitive Areas (‘ESAs’) under s. 51B of the *Environmental Protection Act 1986* (WA)³ (and related legal framework in Western Australia – to highlight the limited practical protection that is actually provided to private property rights in Australia.⁴ In particular, the failure to extend the ‘just terms’ constitutional guarantee so that it applies to State Governments and the failure to expand its application to include compensation for significant government regulation or restriction of property rights will be considered. The paper will argue that the practical impact that environmental laws such as the *ESA* framework have had on individual property owners provides clear evidence of the limitations of the existing ‘just terms’ constitutional guarantee and highlights the need for reforms to strengthen the protection of property rights in Australia.

II A LIMITED CONSTITUTIONAL GUARANTEE

Section 51(xxxi) of the *Australian Constitution* provides that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... [t]he acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

As noted above, this ‘just terms’ guarantee is particularly significant as it is one of the very few express guarantees that is provided in the Australian Constitution concerning individual human rights. The idea that private property should not be taken without just compensation was described by Justice McTiernan as being ‘a rule of political ethics’.⁵ The ‘just terms’ guarantee under s 51(xxxi) reflects this notion, and was labelled by Chief Justice Barwick as a ‘very great constitutional safeguard’.⁶

There are, however, as recently noted by the Australian Law Reform Commission, two key limitations to this ‘very great constitutional safeguard’.⁷ The first is structural, namely that the ‘just terms’ constitutional guarantee

³ *Environmental Protection Act 1986* (WA) (‘EPA’).

⁴ Which will be collectively referred to throughout this paper as the ‘**ESA Laws**’.

⁵ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

⁶ *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 403 [8] (Barwick CJ).

⁷ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Final Report)* (ALRC Report 129), December 2015, [20.17].

doesn't extend to the States. The second is interpretive, focusing on the limited scope of the term 'acquisition' in s. 51(xxxi) and specifically its failure to extend to significant government regulation or restriction of property rights.

The first difficulty is that the 'just terms' guarantee provided under s. 51(xxxi) of the *Australian Constitution* ensures that the Commonwealth Government is required to provide 'just terms' compensation whenever it acquires property, but does not extend a similar requirement to the State Governments. This was confirmed by Chief Justice Latham in *P J Magennis Pty Ltd v Commonwealth* who observed that State Governments '... if they judge it proper to do so for some reason, may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust'.⁸ It is, according to the Law Council of Australia, 'a significant gap in the protection of property rights in Australia'.⁹

The example of environmental laws highlights the obvious problem with this. While there are certainly significant environmental laws at the Commonwealth level, there are equally also significant environmental laws at the State level that directly impact upon private property rights and the ability of an individual landowner to use their property for productive purposes. Given this context, any 'just terms' constitutional guarantee protecting property rights that doesn't extend to the States will inevitably fail to provide comprehensive protection.

A further important factor to be considered here is the increasing use of intergovernmental arrangements that see the Commonwealth encouraging the States (often through the use of tied funding) to implement policies that impact upon property rights. As these are technically State-based laws they side-step the constitutional 'just terms' guarantee. This was noted by the Law Council of Australia in their submission to the ALRC Freedoms Inquiry, who stated that '[i]n such cases, there has been no remedy available to the land-owner because the scheme might have been established informally, through mutual agreement, rather than through a federal statute'.¹⁰ The inter-relationship between

⁸ (1949) 80 CLR 382, 397-398. See also *Durham Holdings Pty Ltd v The State of New South Wales* (2001) 205 CLR 399, 425 [56] (Kirby J).

⁹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Final Report)* (ALRC Report 129), December 2015, [20.21].

¹⁰ Law Council of Australia, *Submission to the Australian Law Reform Commission's Issues Paper Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (March 2015), [57] –

environmental protection policies at the Commonwealth and State levels in Australia means that it is simply no longer possible to neatly ‘carve out’ Commonwealth laws from State laws when considering the protection of property rights in Australia.

The second key difficulty with the current protection is that the term ‘acquisition’ has been read in a narrow, technical way by the High Court. This is despite the High Court stating in *Clunies-Ross v Commonwealth* that s 51(xxxi) ‘has assumed the status of constitutional guarantee of just terms ... and is to be given the liberal construction appropriate to such a constitutional provision’.¹¹ For example, in *Mutual Pools & Staff Pty Ltd v Commonwealth*, while Deane and Gaudron JJ noted that ‘the word “acquisition” is not to be pedantically or legalistically restricted to a physical taking of title or possession’ they also went on to find that:¹²

[t]he extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property ... For there to be an “acquisition of property”, there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property.

Indeed, Deane and Gaudron JJ went on to specifically conclude that ‘laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest’ were a category of laws ‘which are unlikely to bear the character of a law with respect to the acquisition of property notwithstanding the fact that an acquisition of property may be an incident of their operation or application’.¹³

This approach means that s. 51(xxxi) has become ‘an insurance policy with some disconcerting exclusion clauses’.¹⁴ In effect, the ‘just terms guarantee can effectively be side-stepped by the Commonwealth Government if it limits or

[59]. Accessed at: https://www.alrc.gov.au/sites/default/files/subs/75._org_law_council_of_australia_submission.pdf

¹¹ *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193, 201-202 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

¹² *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, 184-85. See also *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140, 179-180 (French CJ, Gummow and Crennan JJ).

¹³ *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, 189-190.

¹⁴ John Forbes, ‘Taking Without Paying: Interpreting Property Rights in Australia’s Constitution’ (1995) 2(3) *Agenda*, 313.

restricts property rights in a manner that does not amount to an actual acquisition'.¹⁵

This can be clearly seen in a number of recent cases. For example, in both *ICM Agriculture Pty Ltd v Commonwealth* and *Arnold v Minister Administering the Water Management Act 2000* a High Court majority held that the reduction of a licensee's groundwater entitlement by the replacement of groundwater bore licenses with aquifer access licenses did not constitute an acquisition of property.¹⁶ This was despite the fact that, for example, the plaintiffs in *ICM Agriculture* found that their water entitlements under the new aquifer access licenses were reduced by between 60-70%, which obviously had immense practical impact on the productive usage of the land and its value.

Another recent example can be found in the case of *Spencer v Commonwealth*,¹⁷ where the Federal Court acknowledged that NSW legislation controlling land management and native vegetation clearing had 'fundamentally altered and impaired'¹⁸ the bundle of rights that Mr Spencer exercise over his farm 'Saarahnlee' in NSW. However, the Court concluded that there was no 'acquisition' of the property, with Justice Mortimer stating:¹⁹

In the July 2007 decision of the NSW Rural Assistance Authority that Mr Spencer's farm was not commercially viable because of the impact of the State's native vegetation laws there was what can be characterized as a 'sterilisation' or a 'taking', but it was by the State, and there was no acquisition by the State nor by any other person of an interest or benefit of a proprietary nature in the bundle of rights Mr Spencer held in his farm.

The key issue that has emerged in cases such as *Spencer v Commonwealth* in which there has been a significant restriction of rights that does not technically amount to an acquisition of property, and which therefore falls outside the scope of the constitutional guarantee of just terms compensation. Government regulations may be so restrictive that they make it effectively impossible to productively use a particular parcel of land, but unless these restrictions constitute an 'acquisition' there is no requirement (at least at the Commonwealth level) for compensation to be paid.

¹⁵ Lorraine Finlay, 'The Erosion of Property Rights and its Effects on Individual Liberty' in Gabriel A Moens and Suri Ratnapala (eds), *Jurisprudence of Liberty* (LexisNexis, 2nd ed, 2010), [23].

¹⁶ (2009) 240 CLR 140; (2010) 240 CLR 242.

¹⁷ [2015] FCA 754 (24 July 2015).

¹⁸ *Ibid* [550].

¹⁹ *Ibid* [4].

III 'ENVIRONMENTALLY SENSITIVE AREAS' IN WESTERN AUSTRALIA

The *ESA Laws* in Western Australia provide a clear example of both of the limitations outlined above. As State Government laws they avoid entirely the 'just terms' constitutional guarantee. The interference with property rights under this framework also falls short of an acquisition, although the laws clearly have a significant impact on the property rights of individual property owners by substantially restricting what they can lawfully do with their land.

A complicated native vegetation protection framework in Western Australia has been created under the *EPA, Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA) and related subsidiary legislation such as the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* (WA) ('*2005 Notice*'). This framework has been described by the President of the Gingin Private Property Rights Group, Murray Nixon, as 'some of the most complicated and difficult to interpret of any legislation ever'.²⁰ The Standing Committee on Environment and Public Affairs ('*Standing Committee*') described the framework as 'a complex web of interrelated laws'.²¹ The complexity is significant in terms of the difficulties that are created for individuals attempting to understand and comply with their legal obligations.

Under s 51B of the *EPA* the WA Environmental Minister may, by notice, declare an area to be an *ESA*.²² It is an offence under s 51C of the *EPA* to clear native vegetation unless this is done under a legislative exemption or permit. The clear legislative presumption is against clearing. While there are stated legislative exemptions (including 'day to day' clearing exemptions²³), it is important to note that none of the exemptions apply to land containing an *ESA* designation. The clearing of native vegetation on *ESA* land will always require a permit. The offence of illegally clearing native vegetation without a permit

²⁰ Quoted in Standing Committee on Environment and Public Affairs (WA Legislative Council), *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)*, August 2015, [10].

²¹ *Ibid* 43.

²² *Environmental Protection Act 1986* (WA) s 15B.

²³ This refers to the 26 clearing exemptions authorised under Regulation 5(1) of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA) that allow for native vegetation to be cleared without a permit. See Standing Committee on Environment and Public Affairs (WA Legislative Council), *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)*, August 2015, [3.14].

attracts fines reaching \$250,000 for individuals and \$500,000 for companies.²⁴ In addition to this, a person convicted of this offence is liable to a daily penalty of \$50,000 for individuals and \$100,000 for companies for each day during which the offence continues once a written warning of the alleged offence has been given by the CEO of the Department of Environmental Regulation.²⁵ The evidentiary matters outlined in s 51R raise further concerns here, effectively reversing the onus of proof for landowners charged with unlawfully clearing native vegetation.²⁶

This offence is a broad one, with a wide definition of 'clearing' being created. Under s 51A of the *EPA* 'clearing' means:²⁷

- (a) the killing or destruction of; or
- (b) the removal of; or
- (c) the severing or ringbarking of trunks or stems of; or
- (d) the doing of any other substantial damage to,

some or all of the native vegetation in an area, and includes the draining or flooding of land, the burning of vegetation, the grazing of stock, or any other act or activity, that causes –

- (e) the killing or destruction of; or
- (f) the severing of trunks or stems of; or
- (g) any other substantial damage to,

some or all of the native vegetation in an area.

On its face, this obviously captures various routine day-to-day farming activities, including clearing re-growth or grazing cattle.

There is considerable uncertainty over how this definition of 'clearing' is applied in practice. The Department of Environmental Regulation released a final *Guide to Grazing of Native Vegetation* in September 2015²⁸, which was designed to provide guidance to farmers on this very matter. In determining 'whether grazing constitutes substantial damage and is therefore clearing' the

²⁴ *Environmental Protection Act 1986* (WA) ss 51C, 99Q, sch 1.

²⁵ *Ibid* s 99R.

²⁶ *Ibid* s 51R.

²⁷ *Ibid* s 51A.

²⁸ Department of Environment Regulation (Government of Western Australia), *A Guide to Grazing of Native Vegetation Under Part V Division 2 of the Environmental Protection Act 1986*, September 2015 ('*Guide*').

Department has indicated that ‘sustainable grazing at levels that are consistent with existing, historic grazing practices where such grazing does not result in significant modification of the structure and composition of the native vegetation is not considered to be clearing’.²⁹ Similarly, grazing ‘that involves the severing of stems or taking of leaves or minor branches, but does not compromise the long term health of the native vegetation’³⁰ will not be considered to be clearing.

This is a sensible and practical approach, but it does not reflect the substantially broader definition that is expressly provided for on the face of the legislation. For example, the legislation expressly states that the grazing of stock that causes substantial damage to ‘*some or all* of the native vegetation in an area’³¹ will be considered clearing. Any native vegetation that is consumed by grazing stock must necessarily have been substantially damaged – it has been eaten! Given that the legislation only requires substantial damage to *some* of the native vegetation in the area this would, on its face, meet the definition of clearing. While the practical approach suggested by the Department should be welcomed, until it is reflected in the actual wording of the legislation farmers are left in an position of considerable uncertainty and run the risk that they are breaking the law if they conduct routine farming activities on *ESA* designated property. Indeed, this is reinforced by the *Guide* itself which contains a disclaimer indicating that it should not be relied on as legal advice.³²

A farmer who finds their property declared as an *ESA* will effectively be unable to continue using the declared area for farming, at the risk of a criminal conviction. To continue farming they need to obtain a permit, which relies upon a bureaucrat from the Department of Environmental Regulation deciding to exercise their discretion to grant such a permit. There is no certainty for property owners, and it is difficult to engage in long term planning when permits can only be granted for a maximum period of two years (in the case of an area permit) and five years (in the case of a purpose permit).³³ This is not to

²⁹ Ibid 4.

³⁰ Ibid 4.

³¹ (Emphasis added).

³² Department of Environment Regulation (Government of Western Australia), *A Guide to Grazing of Native Vegetation Under Part V Division 2 of the Environmental Protection Act 1986*, September 2015.

³³ See *Environmental Protection Act 1986* (WA) s 51G.. As the names describe, an ‘area permit’ is one that relates to the clearing of a particular area specified in the permit application, whilst a

say that it is impossible to obtain permission to clear native vegetation on private property. Certainly in the ten years between 2004 – 2014 a total of 924 clearing permits were granted for land within an *ESA*.³⁴ However, less than 20% of these permits related to farming or grazing activities³⁵ and during that same period a total of 245 clearing permits were refused.³⁶

Importantly, before you can apply for a permit you also need to actually know that your property has been declared as an *ESA*. In fact, landowners are not individually consulted or notified before their property is encumbered and the *ESA* designation is not recorded on a property's Certificate of Title. The Minister for the Environment confirmed in Parliament in 2007 that all landholders with declared *ESAs* on their properties as a result of the 2005 *Notice* had not been individually notified of that declaration. Instead, the Government confirmed that declared areas under the 2005 *Notice* were only identified in published sources, notably the Government Gazette.³⁷ The failure to formally notify affected landowners has been described by the Standing Committee that recently examined this issue as 'extraordinary'.³⁸ The Standing Committee recently considered this *ESA* framework in detail in the context of having been referred a petition that had been tabled in the WA Legislative Council in June 2014 calling for the repeal of the 2005 *Notice*.

The failure to notify was compounded by a consultation process before the introduction of the 2005 *Notice* that could best be described as limited. The Department of Environment Regulations confirmed in evidence before the Standing Committee that they did not consult with individual landowners, stating that 'the view was that it was more practical to consult with peak bodies and that is a common practice, and still is' and suggesting that 'there was an

'purpose permit' is one that relates to the clearing of different areas from time to time for a particular purpose specified in the permit application.

³⁴ Western Australia, *Parliamentary Debates*, Legislative Council, 21 August 2014, 5672-5681a (Helen Morton).

³⁵ Standing Committee on Environment and Public Affairs (WA Legislative Council), *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)*, August 2015, 25.

³⁶ Western Australia, *Parliamentary Debates*, Legislative Council, 25 November 2015, 8597c (Helen Morton).

³⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 March 2007, 537b (David Templeman).

³⁸ Standing Committee on Environment and Public Affairs (WA Legislative Council), *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)*, August 2015, at Executive Summary [5].

expectation during consultation, as there always is with these kinds of things, that peak bodies will discuss these issues and disseminate information to their members'.³⁹ This is an extraordinary admission given the significant impact that the *2005 Notice* would inevitably have had (and continues to have) on the property rights of affected landowners. If, indeed, it is common practice in these types of cases, it should not be.

Further, it appears that even the consultation with peak bodies was extremely limited. For example, while eleven peak bodies⁴⁰ were given an opportunity to comment on the *2005 Notice* they were given only three business days to actually respond and make any comments.⁴¹ Indeed, the Standing Committee described the consultation process (or lack thereof) in the following terms:⁴²

The Committee finds that the then Department of Environment limited its consultation in relation to the draft [*2005 Notice*] to only seven days (and for peak stakeholder bodies only) before the Notice was published in the *Government Gazette*. This consultation was so limited as to be pointless and was merely undertaken to 'technically' comply with legislative requirements.

Checking whether or not your property has been declared as an *ESA* is also not a straightforward or user-friendly process. The fact that an *ESA* designation is not recorded on the Certificate of Title is an obvious problem. Further, the Standing Committee found that there is limited public information available on *ESAs*, observing that '[p]rinted maps are not readily available and it remains a challenge for landowners to identify an *ESA* using the Government's internet resource WA Atlas'.⁴³ This point was highlighted during the hearings of the Standing Committee, with one Member of Parliament observing that:⁴⁴

the department brought in a geographic information systems specialist who, in the hearing, struggled to determine and find, lot number by lot number, where the environmentally sensitive areas were, so it beggars belief how a person without GIS

³⁹ Quoted in *Ibid* 30.

⁴⁰ Including the Pastoralists and Graziers Association and the WA Farmers Federation.

⁴¹ Western Australia, *Parliamentary Debates*, Legislative Council, 9 September 2015, 5953c-3960c (Simon O'Brien).

⁴² Standing Committee on Environment and Public Affairs (WA Legislative Council), *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)*, August 2015, [Finding 6] at 33.

⁴³ *Ibid* 40.

⁴⁴ Western Australia, *Parliamentary Debates*, Legislative Council, 9 September 2015, 5953c-5960c (Mark Lewis).

skills would be able to get under the first two or three layers of that information system.

It appears to be unnecessarily difficult for land-owners (and potential purchasers) to find out if their property is affected, and how it is affected, by an ESA designation.

The combined effect of the lack of prior consultation, lack of individual notification, failure to record an *ESA* designation on a Certificate of Title, and non-user friendly search system is that many property owners are simply not aware that their property is affected, and it is unnecessarily difficult for them to find out. As a result, many current landowners may unknowingly be committing a criminal offence. Furthermore, it is difficult for prospective purchasers to identify whether the land they are interested in purchasing is covered by an *ESA*. While ignorance of the law is no excuse, there must surely be sympathy for an individual whose legal obligations are so significantly altered from one day to the next, without any attempt being made to consult with them, to notify them of the changes, or to make it easy for them to directly identify themselves what changes have been made.

Indeed, the President of the Gingin Private Property Rights Group, Murray Nixon, has said that there is 'huge confusion and few people were aware of the law'.⁴⁵ In a similar vein, the Standing Committee found that there 'is significant confusion and concern about *ESAs* and their impact on landowners, occupiers and persons responsible for the care and maintenance of *ESA* land'.⁴⁶

There is no doubt that the protection of environmentally sensitive areas is an important public good, and something that the community rightly values. This is not being challenged. Rather, what is being questioned in this article is whether the existing *ESA* framework in Western Australia strikes an appropriate balance between environmental protection and private property rights. The broad and sweeping way in which the WA framework prioritizes environmental protection, and yet provides no compensation to affected private landowners, highlights the practical need for reforms to strengthen the protection of property rights in Australia.

⁴⁵ Peter Henderson, 'Bureaucratic Nonsense', *Farm Weekly*, 31 January 2013.

⁴⁶ Standing Committee on Environment and Public Affairs (WA Legislative Council), *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)*, August 2015, [4].

Importantly, the existing *ESA* framework is not a protection framework that has only a limited application to designated areas of the highest environmental value. Indeed, the primary practical impact of the *2005 Notice* is that all wetlands in the Agricultural area of Western Australia have been declared as *ESAs*. The *2005 Notice* was made by the Minister for the Environment under s 51B of the EPA and declared that (amongst other areas) ‘a defined wetland and the area within 50 m of the wetland’ was declared to be an *ESA*.⁴⁷ The definition of a ‘defined wetland’ under this framework is also extremely broad, and not a definition that makes it particularly obvious to a lay-person whether or not their property may be affected without further research being conducted.

Under the *2005 Notice* a ‘defined wetland’ means:⁴⁸

- (a) a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention⁴⁹;
- (b) a nationally important wetland as defined in ‘A Directory of Important Wetlands in Australia’ (2001), 3rd edition, published by the Commonwealth Department of the Environment and Heritage, Canberra;
- (c) a wetland designated as a conservation category wetland in the geomorphic wetland maps held by, and available from, the Department;
- (d) a wetland mapped in Pen, L. ‘A Systematic Overview of Environmental Values of the Wetlands, Rivers and Estuaries of the Buselton-Walpole Region’ (1997), published by the Water and Rivers Commission, Perth; and
- (e) a wetland mapped in V & C Semeniuk Research Group ‘Mapping and Classification of Wetlands from Augusta to Walpole in the South West of Western Australia’ (1997), published by the Water and Rivers Commission, Perth.

The Standing Committee expressed concern ‘about the seemingly all-encompassing but untested inclusion of wetlands captured by the [*2005 Notice*]’.⁵⁰ Evidence was given during the public hearings that categories (c)–

⁴⁷ *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* (WA) s 4(1)(c).

⁴⁸ *Ibid* s 3.

⁴⁹ This is a reference to the *Convention on Wetlands of International Importance*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975). Australia was one of the first countries to sign the *Ramsar Convention*. Within Australia, there are currently 65 wetlands of international importance listed under the Convention, which cover approximately 8.1 million hectares. See Department of Environment, <<https://www.environment.gov.au/water/wetlands/ramsar>>.

⁵⁰ WA Legislative Council, Standing Committee on Environment & Public Affairs, *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)* (August 2015), 20.

(e) of the 'defined wetland' definition were problematic because the relevant maps were never intended to be used for the purpose of imposing environmental restrictions on private land. A range of issues with using these maps for this transformed purpose were identified, including the fact that the maps were mainly desktop studies from aerial maps, were never field tested, may contain inaccuracies, and were never open for any public comment or review. In particular, concern was expressed about the fact 'that a Department assessment of whether land is an *ESA* may be based on desktop studies and maps, without a Departmental officer visiting the land in question to assess whether the land is environmentally sensitive'.⁵¹ Indeed, there are reports of inaccurate designations with, for example, 'sandhills that are declared as wetlands'.⁵² The Standing Committee also noted that it was 'obvious to the Committee from the above terms that identifying whether you have an *ESA* on your property from the terms of the *ESA* Notice is a very difficult task'.⁵³

The Standing Committee also found that around 98,042 parcels of land in Western Australia include land that is an *ESA*.⁵⁴ It is difficult to see how it can be sensibly claimed that each and every one of these parcels of land contains areas of the highest environmental significance and deserving of the highest possible levels of environmental protection. Given the extensive areas of land across Western Australia that have been classified as *ESAs* it is apparent that it is not only areas of high conservation value that are being impacted.

The individual impact of this is enormous, with it being estimated that between 4,000 – 6,000 landowners are impacted by an *ESA* designation.⁵⁵ In terms of illegal land clearing, the Pastoralists and Graziers Association estimated in 2013 that approximately 480 farmers claimed to be under investigation by the then Department of Environment and Conservation.⁵⁶

It should be noted that the actual number of warnings and prosecutions recorded by the Department is much lower than this, with the Department indicating that between 8 July 2004 and 4 March 2015 they issued seven letters or warning for clearing that was contrary to s 51C(c) and thirty prosecutions

⁵¹ Ibid [4.21].

⁵² Western Australia, *Parliamentary Debates*, Legislative Council, 9 September 2015, 5953c (Mark Lewis).

⁵³ Ibid [4.10].

⁵⁴ Ibid 13.

⁵⁵ Western Australia, *Parliamentary Debates*, Legislative Council, 21 August 2014, 5672b-5681a (Mark Lewis).

⁵⁶ Peter Henderson, 'DEC bullseye on farmers', *Farm Weekly*, 15 February 2013.

for an offence against s 51C.⁵⁷ To date, there have been no actual prosecutions that relate to grazing in an *ESA*.⁵⁸ However, far from allaying concerns, the significant difference between the broad reach of the legislation on its face and its seemingly narrower enforcement in practice by the Department is itself concerning in three respects. Firstly, the broad terms of the legislation means that property owners remain at risk of prosecution should the Departmental practice ever change (which could potentially happen without notice and without parliamentary scrutiny). Secondly, the current regime provides property owners with no certainty or clarity regarding their obligations. Finally, if the legislation is not being enforced on its current terms then the obvious question is why such broad legislation is needed in the first place. Surely it is strongly desirable from a rule of law perspective for legislative requirements and bureaucratic practice to be more closely aligned?

Notwithstanding that this legislative framework effectively results in *ESA* land being 'locked away', unable to be used for regular farming activities, and often renders the land commercially unviable, it technically amounts to a restriction on land and not an acquisition. This is particularly concerning when the broad area concerned includes some of the most productive farming land in Western Australia, as 'the area covered by *ESAs* goes from Gingin and along the coastal strip, all the way down to Esperance'.⁵⁹ The idea that productive land can effectively be 'locked away' without compensation being payable is concerning from both an economic and moral standpoint.

IV THE CASE OF PETER SWIFT

The case of Peter Swift falls under this legislative framework and is just one example of the extremely heavy burden being placed on individual property owners. Indeed, the case was described in Federal Parliament by the then local Member, Don Randall MP, as 'the worst case of injustice that I have seen in my role as a political representative in my 16 ½ years in this federal parliament'.⁶⁰

⁵⁷ WA Legislative Council, Standing Committee on Environment & Public Affairs, *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)* (August 2015), 23. Although it is noted that no figures were given in terms of the number of active or ongoing investigations.

⁵⁸ *Ibid* 23-4.

⁵⁹ *Ibid*.

⁶⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 June 2015, 181.

Peter Swift was prosecuted by the then Department of Environment and Conservation in Western Australia for clearing 14ha of native vegetation on his Manjimup property without a permit.⁶¹ This was despite the evidence establishing that the clearing had actually been done by a previous owner before Mr Swift purchased the property in 2007, and that the only actions undertaken by Mr Swift himself were the maintenance of existing fire breaks. Although he was ultimately cleared after a lengthy and expensive court battle, Mr Swift was then faced with his grazing land having been effectively reduced from 1200 acres to around 240 acres due to the *ESA* designation. Four-fifths of his property has effectively been 'sterilized'. He has – to date – received no compensation for this, and yet he is personally responsible both for a continuing mortgage based on the original value of 1200 acres of productive land, as well as for meeting continued compliance costs arising from the *ESA* designation. Added to this, the value of his property has been destroyed by the *ESA* restrictions, making the sale of the property an unlikely prospect. This case starkly highlights the moral need for reform in this area.

The clear problem with the current framework of environmental protection is that it imposes substantial restrictions on land use, but fails to provide any compensation to land owners who purchased their land before these restrictions were put in place and who can no longer realize the true productive value of their property.

V ESTABLISHING AN EXPANDED COMPENSATION MECHANISM

The argument here is not that property rights should always be given priority or indeed supersede environmental protections. Rather, the focus should be on finding an appropriate balance, and on ensuring that compensation is provided to individual land-owners when they are obliged to 'sterilize' their land for environmental purposes. The key arguments in favour of an expanded 'just terms' guarantee to protect property rights that are significantly restricted include the modern pervasiveness of compensation, the moral case for sharing costs, and the practical case for improved environmental outcomes.

⁶¹ The formal charge was that he had breached ss 51C and 99Q of the *Environmental Protection Act 1986* (WA).

A *The Pervasiveness of Compensation*

Compensation for government policies has become a pervasive concept. Modern politics seems to require that compensation measures be provided for anybody who is likely to be left even slightly worse off by a change in government policy, to the point recently where the compensation measures to be introduced with the carbon tax were left in place even when the original tax itself was repealed. In this environment an obvious question is why providing compensation for the significant restriction of property rights should be viewed any differently?

The Standing Committee raised a number of difficulties that would arise when determining compensation for *ESA* land, notably that it might be difficult to determine the cost of compensating landowners, that it might be difficult to determine when a clearing permit is refused because the land is designated as an *ESA*, and that there are other legislative restrictions imposed on property owners (such as, for example, town planning laws) that do not attract compensation.⁶² These are certainly issues that would need to be carefully considered. For example, one of the advantages of the line being drawn at compensating ‘acquisitions’ but not ‘restrictions’ is that it recognizes that there are a significant range of government restrictions placed on every single piece of property (covering everything from planning laws through to water restrictions) and that it would simply not be realistic to require that compensation be paid every single time a restriction was imposed or altered.

This does not, however, change the moral case to be made for compensation when it comes to this particular area of public policy. In the case of *ESA* designations, the restrictions are not just trivial but – as seen in the case of Peter Swift – they result in large areas of productive land being effectively ‘sterilized’ for evermore. These particular restrictions were imposed without the individuals who would be affected being consulted, without them being subsequently notified, and without the information being easily accessible so that any future buyers are appropriately notified when they are choosing whether or not to purchase the land.

⁶² WA Legislative Council, Standing Committee on Environment & Public Affairs, *Petition No. 42 – Request to Repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005 (Report 41)* (August 2015), 51.

B *The Moral Case for Sharing Costs*

One common argument against provided compensation for 'restrictions' is that it would 'open up the floodgates' and would be simply unaffordable for governments. This misses the simple point that there is *always* a cost attached to environmental protection policies. At the moment, however, we are simply forcing the private land owner to bear this cost, rather than the community who wishes to see the particular parcel of land being protected. The moral case for sharing these costs is obvious. If the community believes that it is important to impose particular environmental restrictions on a particular parcel of land, then the community should be willing to bear this cost. As was recently observed by Glen McLeod '... the issue is not about the desirability of conservation, but who should pay for the value which our society places on conservation'.⁶³

C *The Practical Case for Improving Environmental Outcomes*

There is also a practical argument that an expanded compensation mechanism would actually lead to improved environmental outcomes. At present, a broad-brush approach tends to be applied as there is no tangible cost that government departments or individual bureaucrats need to consider before they 'sterilize' large areas of land under the guise of environmental protection. Forcing the bureaucracy to actually consider the cost of these policies by imposing compulsory compensation mechanisms will lead to environmental policies that are more targeted and better focused, effectively prioritizing areas of key environmental significance rather than the current 'super trawler' approach to environmental protection.

A further consideration is that the current system creates perverse incentives. Locking up vast tracts of land actually prevents the sustainable management practices that ultimately benefit the environment in the long term. There are many examples across Australia that demonstrate that the productive use and development of land and environmental protection need not be mutually exclusive concepts.

⁶³ Glen McLeod, 'The *Tasmanian Dam* Case and Setting Aside Private Land for Environmental Protection: Who Should Bear the Cost?' (2015) 6 *The Western Australian Jurist* 125, 134.

More broadly, the failure to apply an expanded compensation regime has broader impacts in terms of economic productivity and governance. In relation to the latter, Suri Ratnapala has observed:⁶⁴

the denial of compensation is damaging to good governance. The denial of compensation eliminates the discipline that the price mechanism brings to decision making. A government that need not compensate owners has less reason to 'get it right' than a government that must. The uncoupling of power and financial responsibility allows governments to seek short term political dividends. It promotes politics and ideology over facts and science.

VI CONCLUSION

There are significant concerns regarding the protection of property rights in Australia at present, based primarily on two significant 'gaps' in the s 51(xxxi) 'just terms' compensation guarantee. The compensation guarantee does not currently extend to the States, and does not encompass significant restrictions to property rights that are imposed by government policies.

These two limitations are serious gaps in the current protection of property rights in Australia today, and they are starkly highlighted by the *ESA* framework in Western Australia. While the *ESA* framework has the laudable public policy goal of ensuring that vulnerable areas of environmental sensitivity are protected, it significantly overreaches and asks private property owners to bear the full cost of protecting land that the community supposedly values. The case of Peter Swift demonstrates the very real and human cost that has resulted from these policies, and the urgent need for some form of compensation mechanism to be implemented.

⁶⁴ Suri Ratnapala, 'Constitutional Vandalism under Green Cover' (2005) 17 *Upholding the Australian Constitution (Proceedings of the 17th Conference of the Samuel Griffith Society)*.