



Law Council  
OF AUSTRALIA

# National Water Reform

**Productivity Commission**

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
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The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of the Australian Environmental Planning Law Group (**AEPLG**) of the Legal Practice Section in the preparation of this submission.

# Introduction

1. This submission was prepared by the Australian Environmental and Planning Law Group (**AEPLG**) from the Law Council's Legal Practice Section. The AEPLG's primary objectives include:
  - to be a national focus group for environmental and planning law;
  - to represent members of the profession working in the areas of environmental and planning law;
  - to advise the Law Council of Australia (**Law Council**) on issues of environmental and planning law; and
  - to lobby Federal and State Government to implement 'best practice' in environmental and planning law.
2. The AEPLG welcomes the opportunity to comment on the Draft Report of the Productivity Commission's National Water Reform Inquiry (**Draft Report**).
3. The AEPLG supports the majority of the key points made by the Draft Report. This Submission primarily focuses on the security of water rights and trade-offs between consumptive and environmental uses of water.
4. The Draft Report recommends that 'State and Territory Governments should ensure that entitlement and planning reforms are maintained and improved'.<sup>1</sup> This recommendation refers to the National Water Initiative (**NWI**) reforms, which envisage rights to water severed from rights to the land on which it flows. It requires that such rights be exclusive, tradeable, mortgageable and enforceable. The rights are to be 'clear and secure'.<sup>2</sup>
5. In most States and Territories, water rights are now tradeable and mortgageable. However, while such rights are technically exclusive and enforceable at law, there are significant practical obstacles that inhibit the effective prevention of unauthorised use of water. These obstacles have implications for the appropriateness of characterising water rights as proprietary and suggest that current compliance and enforcement measures are not fit for purpose. Property rights in water will not be adequately secure until private holders of those rights are able, themselves, to take legal action to restrain unauthorised use of water.
6. Draft Recommendation 3.1, while helpful, addresses issues peripheral rather than core to the security of water rights. It appears to assume that the fundamental system of water rights established by the NWI reforms is adequate, and that any issues with security of water rights are issues of implementation and planning, rather than the structure of the rights itself. The AEPLG's view is that the current structure of water rights is deficient because it is overly reliant on public authorities in ensuring water users do not exceed their entitlements. A secure system of water rights requires individual rights holders to have recourse to a statutory or private law means of enforcing rights and ensuring that other water users do not exceed their entitlements.
7. The discussion of the trade-offs between consumptive and environmental uses of water in Chapter 3.4 of the Discussion paper is incomplete as it does not consider provisions for compensation to water rights holders whose rights, or ability to enjoy their rights, are curtailed for environmental purposes. The current Risk Assignment

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<sup>1</sup> Productivity Commission, *National Water Reform*, Draft Report, September 2017, Draft Recommendation 3.1 ('*Draft Report*').

<sup>2</sup> Productivity Commission, *National Water Reform*, Issues Paper, March 2017, 9 ('*Issues Paper*').

Framework (discussed at page 306ff in the Draft Report) addresses these trade-offs but there remains a role for the compensation provisions.

## Response to Key Points

8. The AEPLG supports the Commission's assessment of the importance of water management. As discussed below, the system of property rights in water created by the NWI reforms is not merely a means of protecting private rights to water access, but an essential tool for the management of water as a scarce resource. Any assessment of the NWI and the system of water rights must take this fundamental objective into account.
9. The AEPLG supports the proposition that 'the NWI remains nationally relevant and the principles it contains are sound'.<sup>3</sup> There is, however, further work to be done in implementing those principles, and the NWI requires further monitoring and performance evaluation.
10. The AEPLG supports the proposition that there has generally been good progress in implementing the NWI. However, as discussed below, there is still substantial obstacles to full security of water rights. While most States have implemented water rights systems based on the NWI reforms, these systems do not fully achieve the underlying objective of the NWI reforms.
11. With respect to the proposition that 'the NWI has delivered significant benefits to irrigators',<sup>4</sup> the AEPLG considers that the current Commonwealth and State water legislation does not sufficiently address the need for compensation to parties in some circumstances. Irrigators are particularly affected by this deficiency, as is evident from challenges to the constitutionally validity of NWI-based legislation.<sup>5</sup>
12. The AEPLG supports the Draft Report's assessment of further work that must be done and reform priorities. In particular:
  - (a) The AEPLG considers that the current frameworks for recognition of Indigenous cultural flows under the *Water Act 2007* (Cth) and most State water rights systems remain inadequate. Indigenous peoples often have the right to 'consultation', but generally no substantive rights or cultural entitlements. The position of Indigenous rights to water can be contrasted with the position of native title. It is well established that a native title right 'does not derive from the common law but is recognised by the common law'.<sup>6</sup> Cultural flows will not be appropriately recognised until water rights in Australia recognise substantive rights arising by virtue of Indigenous customs and traditions. The ongoing [National Cultural Flows Research Project](#) may provide solutions to these issues and the impending findings of its final law and policy component should be seriously considered once they are available.
  - (b) The AEPLG notes that the Victorian Government is currently holding an inquiry into environmental water, including its role in blackwater events, barriers to improved efficiency and the impact of management tools on environmental

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<sup>3</sup> Draft Report, 2.

<sup>4</sup> Ibid 2.

<sup>5</sup> See, eg, *Lee v Commonwealth* [2014] FCA 432.

<sup>6</sup> See, eg, *Wik Peoples v Queensland* (1996) 187 CLR 1, 122 (Toohey J).

water.<sup>7</sup> Outcomes from this review, and similar State based reviews, should form part of this inquiry to ensure and improve national and State troubleshooting and policy integration.

13. The AEPLG supports the Draft Report's proposition that there are 'strong reasons for Australian, State and Territory Governments to recommit to a renewed NWI'.<sup>8</sup> The NWI is now over a decade old, and a new NWI would be helpful in incorporating the experienced and learning of the past few years.

## Part I: Security of Water Rights

### Current Arrangements

14. In Victoria, the *Water Act 1989* (Vic) Part 3A establishes a regime of statutory property rights in water. Section 33E makes it an offence to take water from a water source without a water share, with some exceptions relating to domestic and stock use. Section 33F provides for the issuing of 'water shares', which authorise the taking of water under the 'water allocation' for the share, during the 'water season', for which the water allocation is allocated. Ownership of water shares can be transferred under s 33S, subject to ministerial approval. The concept of a water share is dependent upon the water allocation, which is an amount of water determined by the Minister under s 33AC. A holder of a water share cannot use more than that amount of water in the relevant water season. Water allocations can also be assigned under s 33U. The aim of this scheme is to create a set of property rights in water that can be dealt with separately to land.
15. Similar systems are in place in most Australian States and Territories,<sup>9</sup> except in the Australian Capital Territory, where water licences are not transferable.<sup>10</sup> In the Northern Territory, water rights are not severed from land rights, and licences are transferred along with the land to which they are attached.<sup>11</sup> There are subtle differences between these systems of rights. For example, in Queensland and Victoria, water rights are completely independent of licences while other States retain licences to which the water rights are attached.

### Tradeability

16. Legislative facility of the trade and assignment of water rights would ordinarily indicate that they are proprietary.<sup>12</sup> However, as Mason J held in *R v Toohey; Ex parte Meneling Station Pty Ltd*, assignable rights might still lack the permanence and stability required to be proprietary in nature.<sup>13</sup> The same argument was made of NSW bore licences, which are also subject to allocations determined by a Minister, by the Commonwealth

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<sup>7</sup> Environment, Natural Resources and Regional Development Committee, Parliament of Victoria, *Inquiry into the Management, Governance and Use of Environmental Water* (2017) <<https://www.parliament.vic.gov.au/enrrdc/inquiries/inquiry/919>>.

<sup>8</sup> Draft Report, 2.

<sup>9</sup> See, eg, *Water Management Act 2000* (NSW) s 71M; *Water Act 2000* (Qld) s 106; *Natural Resources Management Act 2004* (SA) s 146; *Rights in Water and Irrigation Act 1914* (WA) Schedule 1; *Water Act 1992* (NT) s 45; *Water Management Act 1999* (Tas) s 60.

<sup>10</sup> *Water Resources Act 2007* (ACT) s 54.

<sup>11</sup> *Water Act 1992* (NT) s 92.

<sup>12</sup> *National Provincial Bank v Ainsworth* [1965] AC 1175, 1247–8 (Lord Wilberforce).

<sup>13</sup> (1982) 158 CLR 327 at 342.

in *ICM Agriculture Pty Ltd v Commonwealth*.<sup>14</sup> In that case, Hayne, Kiefel and Bell JJ,<sup>15</sup> and Heydon J separately,<sup>16</sup> accepted that the bore licences were property because of their tradeability. French CJ, Gummow and Crennan JJ found it unnecessary to decide their proprietary status.<sup>17</sup> From an economic perspective, commodification and tradeability are sufficient for a resource to achieve proprietary status,<sup>18</sup> though from a legal perspective, lack of permanence and stability may deny that status.

## Permanence and Stability

17. An essential feature of water shares in Victoria is their variable content. Under s33F, a holder of a share may take only so much water as is determined by a water allocation made by the Minister. Similar provisions apply to the other States and Territories which have adopted the National Water Initiative system of statutory water entitlements. This characteristic, however, is essential to the regulation and planning of a scarce resource like water. It is necessary for authorities to be able to control the amount of water used in a water season to ensure that usage levels are sustainable. It is not necessary or desirable for this variability to be removed merely to make water rights more 'secure'. There are many rights – notably ordinary shares in a company, which do not carry with them an invariant right to dividends<sup>19</sup> – that exhibit similar characteristics, and for similar reasons of the scarcity and variability of resources.

## Exclusivity<sup>20</sup>

18. Exclusivity is the ability of rights holders and the States to prevent non-entitled persons from using water. Exclusivity marks the removal of the subject of a right from the commons, where it would otherwise remain available for use by all.

19. The underlying impetus for developing a system of water rights – namely, the scarcity of water in Australia – also highlights the importance of exclusivity.

*Early explorers of the inland geography of Australia discovered 'that strange phenomenon of Australia' where even apparently substantial rivers evaporated, especially during drought, 'from the intense heat of the plains'.<sup>21</sup>*

*... [as a result] the need for sustainable and efficient management of water resources has attracted a good deal of attention'.<sup>22</sup>*

20. From the scarcity of water follows the need to develop a system of entitlements to its use and to prevent persons from exceeding their entitlements. The Intergovernmental Agreement on a National Water Initiative recognised 'an increase in demand for water,

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<sup>14</sup> (2009) 240 CLR 140.

<sup>15</sup> Ibid [147]

<sup>16</sup> Ibid [197].

<sup>17</sup> Ibid [80].

<sup>18</sup> See, eg, M J Radin, 'Market-Inalienability' (1986–87) 100 *Harvard Law Review* 1849, 1855ff.

<sup>19</sup> A shareholder has a right to receive whatever dividends are declared by the company (generally the Board of Directors), but there is discretion for the company not to declare any dividends for a given year.

<sup>20</sup> There is substantial overlap between this Section and a Section of the LCA's submission to the Senate Rural and Regional Affairs and Transport References Committee Inquiry on the Integrity of the Water Market in the Murray-Darling Basin: <<https://www.lawcouncil.asn.au/resources/submissions/integrity-of-the-water-market-in-the-murray-darling-basin>>.

<sup>21</sup> *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, [51].

<sup>22</sup> Ibid [50].

and an increased understanding of the management needs of surface and groundwater systems'.<sup>23</sup> This, too, requires effective controls on access to water. One of the greatest obstacles to the establishment of an effective water rights scheme has been the difficulty of preventing persons from using water outside or beyond their entitlement.

21. In Victoria, s 33E of the *Water Act 1989* (Vic) creates an offence of taking water without authorisation, punishable by a fine or imprisonment. There are equivalent provisions in other States.<sup>24</sup>
22. These offences may not be enough to make water rights truly exclusive. Gray explains the ways in which a resource can fail to be exclusive (or 'excludable', in his terminology), and thereby fail to be property.<sup>25</sup> In *Victoria Park Racing*, the majority of the Court held that a spectacle is not property because it is not exclusive, and it is not exclusive because it is physically impossible or impracticable to control people's use of it.<sup>26</sup> Such things are *physically* non-exclusive. Alternatively, something might be legally non-exclusive, if the holder of a property right fails to (or is unable to) use the legal mechanisms created to protect that right. Lastly, something might be non-exclusive as a matter of political morality. Some resources are so fundamental to human existence that it would be intolerable to allow a person or group to exclude them. The legislative authorisation of 'domestic and stock' use of water might be a recognition of the moral non-exclusivity of water to the extent that it is necessary for survival and ordinary life.
23. The purposes of the NWI reforms, and the legislative schemes of water rights, cannot be achieved unless the use of water is reliably excluded from those not entitled to it. There is much to indicate that water use is, currently, not legally exclusive.
24. As is apparent from the character of the provisions discussed above, water rights are enforced by State government authorities only. Murray-Darling Basin Authority chief executive Phillip Glyde was recently quoted as saying that all responsibility for compliance falls to the States.<sup>27</sup> That claim is supported by the structure of water legislation. Rights to water use are just rights to use, not rights to exclude. The statutory prohibitions are the only means of enforcing the limits and exclusivity of those rights. Only the government has the power to protect private water rights, notwithstanding that they are meant to be *private* (though statutory) rights. Consequently, water use rights in their current form may be legally non-exclusive because public authorities do not have the resources, or perhaps the will, to enforce the exclusivity of those rights, and private rights holders do not have the legal power to enforce them. If they are legally non-exclusive, they lack an essential element of private property.
25. Where water rights are unbundled from land rights, they are legally classified as personal property.<sup>28</sup> Further, they are intangible forms of personal property, resembling *choses in action*. It is not possible to physically possess or occupy them, unlike real

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<sup>23</sup> Council of Australian Governments, *Intergovernmental Agreement on a National Water Initiative*, signed 25 June 2004.

<sup>24</sup> NSW (Water Management Act 2000 (NSW) Part 2 Div 1), Queensland (Water Act 2000 (Qld) s 808), South Australia (Natural Resources Management Act 2004 (SA) s 127), Western Australia (Rights in Water and Irrigation Act 1914 (WA) s 5C), Tasmania (Water Management Act 1999 (Tas) s 54), the Northern Territory (Water Act 1992 (NT) s 44) and the Australian Capital Territory (Water Resources Act 2007 (ACT) s 77A).

<sup>25</sup> Kevin Gray, 'Property in Thin Air' (1991) 50 Cambridge Law Journal 252.

<sup>26</sup> (1937) 58 CLR 479, 495 (Latham CJ).

<sup>27</sup> Linton Besser, Mary Fallon and Lucy Carter, 'Murray-Darling Basin Plan: Irrigation Lobbyists Offered Access to Confidential Government Documents', ABC News Online, 24 July 2017.

<sup>28</sup> The *Natural Resources Management Act 2004* (SA) s 146 explicitly provides that water licences are personal property, but in all jurisdictions with unbundled water rights, the nature of those rights is such that they can be classified as personal property under the general law and the relevant general law doctrines would apply.

property or tangible personal property. The only way to recover the benefit of a water right is to sue under the relevant legislation, which means that the scope of a water right is defined by who the rights holder can sue, and by what they can sue for. Currently, a rights holder can use general principles of administrative law to sue the relevant Minister or public authority, if the Minister or authority denies the rights holder the benefit of his or her water rights. The remedy would be limited to compelling the Minister or authority to allow the rights holder to access water in accordance with his or her entitlement. It likely would not extend to compelling the Minister or authority to restrain another person from exceeding his or her entitlement. No other rights to sue are available to a rights holder, and the water legislation does not create any private law causes of action for rights holders to restrain unauthorised use of water by others. This reliance on public power makes water rights significantly less secure than other property.

26. 'The distinction between public power and private power is not clear-cut and one may shade into the other'.<sup>29</sup> However, no system of land rights could function in a jurisdiction like Australia if the sole mechanism for enforcing them were through a public regulatory authority. The ability of a private landowner to bring an action for trespass and nuisance is indispensable to the protection of private land rights and, as water rights become more important, similar options should be available to holders of water rights. While public authorities should retain their current powers of enforcement, private holders of water rights should be able to prevent unauthorised use of water subject to some requirement of proximity based on the geographical divisions drawn in the legislation.<sup>30</sup>

## Interferences with Water Rights

27. The development of private law actions capable of protecting water rights is beset by some conceptual difficulties. If an upstream holder of water shares takes water beyond his or her entitlement, there is not always, *prima facie*, a direct interference with the right of a downstream user, because the downstream user can still make full use of his or her water rights. The situation appears to be unlike that of a private nuisance or a trespass to land, where there is a clear interference with the physical bounds of the private landholding, or the landowner's enjoyment of his or her rights.
28. To an extent, a right holder's lack of recourse to an action in nuisance mirrors the position of some common law water rights. In *Mayor of Bradford v Pickles*,<sup>31</sup> the House of Lords held that a downstream user of water had no action in nuisance against an upstream user who interfered with the flow of that water.
29. However, unauthorised use of water in a declared water system or other geographical area causes indirect detriment to other water users in that area, as it reduces the total amount of water available. This reduction could prompt the relevant authority to reduce the water allocation available to rights holders in the area. While this is not an interference with water rights themselves – as noted above, water allocations are necessarily variable in quantity – holders of water rights have a legitimate interest in maintaining the quantity of water allocations. Unauthorised use of water interferes with that interest in an unlawful way. This interest is over and above the general public interests in the sustainable and efficient management of Australia's water resources and general compliance with the system of water rights and regulation.

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<sup>29</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 107 (Murphy J).

<sup>30</sup> In Victoria, for example, water shares are conferred in respect of a 'declared water system', so private rights to sue could be limited to holders of water shares in the same declared water system. The New South Wales legislation uses 'water management areas' and 'water sources'.

<sup>31</sup> [1895] AC 587.

30. Another practical problem arises on this approach: the effect of any reduction in water allocation would be shared by all the water rights holders affected, generally resulting in an infinitesimal actual effect on their water rights. The amount of compensable harm suffered would thus be very small and any liability to damages, unless punitive damages could be awarded, would be an insufficient deterrent to the defendant and an insufficient incentive for any potential plaintiffs.
31. There are potential means of addressing this problem. First, a class action system could be introduced for water theft cases, allowing one or more water rights holders to commence proceedings on behalf of all the affected water rights holders. Second, the remedy for exceeding one's entitlement need not be monetary compensation – it could simply be an order requiring the defendant to undertake to implement more onerous monitoring and reporting measures.
32. Property rights to water cannot be 'clear and secure', nor can they support the sustainable and efficient management of water resources, unless there is a private right to prevent persons from exceeding their entitlement. 'Water theft' undermines the entire system of private water rights, and failure to enforce it defeats the fundamental purpose of that system (ie the sustainable management of a scarce resource). A broader concept of interference, and private causes of action to restrain it, are needed so that private rights holders can themselves enforce water rights, without relying on an under-resourced public authority vulnerable to corruption and regulatory capture.

## Implementation

33. Private causes of action to protect water rights face other difficulties. Currently, water rights are conferred by State legislation, so it would be necessary to establish a system for enforcing these rights across State borders – an issue especially pertinent to the Murray River, which supplies water to three States.
34. The power to bring a private action for 'water theft' would be useless unless private persons have means of detecting and collecting evidence of unauthorised water usage. If there are no such means, water will remain a legally non-exclusive resource due to the impracticality of enforcement. Such a means could be created by maintaining public records of water shares, licences, allocations and balance, etc. While making this information public might create privacy concerns, the privacy issues are no greater than those created by land title registers.

## Part II: Curtailment of Water Rights

### Property Rights and the NWI Reforms

35. Chapter 3.4 of the Draft Report addresses the trade-offs between environmental and consumptive use. It States that 'difficult trade-offs are unavoidable when setting the balance between environmental and consumptive use of water' and 'the balance should reflect the relative values that the Australian community places on environmental, social and economic outcomes'.<sup>32</sup> However, the Report's discussion of trade-offs makes no mention of compensation provisions such as s 254(1) of the *Water Act 2007* (Cth). This is a significant omission. Compensation provisions are an essential tool for adjusting

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<sup>32</sup> Draft Report, 82.

the balance between environmental protection and the enjoyment of private property rights. Whether such provisions are fair and fit for purpose is an important question.

36. In 2010, a Senate Committee inquiring into native vegetation clearing laws reported a widely held view that such laws amounted to a stripping of farmers' property rights without compensation.<sup>33</sup> It expressed concerns that such a view could undermine investor confidence and market stability in the agricultural industry and, therefore, food security.<sup>34</sup> The question of when environmental regulations amount to a compensable acquisition has been considered by the Federal and High Courts<sup>35</sup> and the Australian Law Reform Commission.<sup>36</sup> It has been the subject of academic commentary in Australia, the United States, and elsewhere.<sup>37</sup>
37. A parallel concern exists with respect to water access. The National Irrigators' Council submitted that 'the risk of climate change is shared by all those impacted and not borne only by the agricultural sector. Irrigators, in many systems already bear this risk through the annual allocation process.'<sup>38</sup>
38. In *ICM Agriculture v Commonwealth*, a group of farmers challenged a decision of the NSW government to reduce the amount of water available to holders of bore licences (rights to groundwater).<sup>39</sup> The Court held by majority that such a reduction could not amount to an acquisition of property and was therefore not compensable under s 51(xxxi) of the Constitution.
39. In *Lee v Commonwealth* [2014] FCA 432, two farmers challenged the NWI reforms under the *Water Act 2007* (Cth). They argued that the reforms substantially reduced the amount of water available to their farms. As water rights are property, they argued that they were entitled to compensation under s 254(1) of the *Water Act 2007* (Cth), which allowed for compensation if the operation of the Act 'would result in an acquisition of property from a person otherwise than on just terms'. The farmers' argument was rejected by a judge of the Federal Court. An appeal to the Full Court of the Federal Court was unanimously dismissed.<sup>40</sup> The High Court dismissed an application for special leave to appeal.<sup>41</sup>

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<sup>33</sup> Senate Financial and Public Administration Committee, Parliament of Australia, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (30 April 2010) [3.22].

<sup>34</sup> *Ibid.*

<sup>35</sup> See, eg, *ICM Agriculture v Commonwealth* (2009) 240 CLR 140; *Spencer v Commonwealth* [2015] FCA 754; *Esposito v Commonwealth* [2015] FCAFC 160; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Bone v Mothershaw* [2003] HCATrans 829.

<sup>36</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (March 2016) chapters 18 and 20.

<sup>37</sup> See, eg, Pamela O'Connor, 'The Changing Paradigm of Property and the Framing of Regulation as a "Taking"' (2010) 36 *Monash University Law Review* 50; Kevin Gray, 'Can Environmental Regulation Constitute a Taking of Property at Common Law?' (2007) 24 *Environmental and Planning Law Journal* 161; Charles Wise, 'Property Rights and Regulatory Takings' in R Durrant, D Fiorino and R O'Leary (eds), *Environmental Governance Reconsidered: Challenges, Choices and Opportunities* (MIT Press, 2004) 289; Richard Epstein, *Takings, Private Property and the Power of Eminent Domain* (Harvard University Press, 1985); Karla Sperling, 'Going Down the Takings Path: Private Property Rights and Public Interest in Land Use Decision-Making' (1997) 14 *Environmental and Planning Law Journal* 427.

<sup>38</sup> National Irrigators' Council, Submission to the Productivity Commission Review of the National Water Initiative (2017).

<sup>39</sup> *ICM Agriculture v Commonwealth* (2009) 240 CLR 140.

<sup>40</sup> *Lee v Commonwealth* [2014] FCAFC 174.

<sup>41</sup> *Lee v Commonwealth* [2015] HCATrans 123.

## The Question of Principle

40. The question raised by *ICM Agriculture and Lee* is when, if ever, owners of water rights are entitled to compensation when the government substantially reduces the amount of water available to them, whether by legislative scheme (such as the NWI reforms) or periodic decisions on allocation under the various water statutes and the Murray-Darling Basin Plan. In those cases, the answer given by the courts was ‘never’. The farmers were not entitled to compensation because the Commonwealth did not ‘acquire’ their water rights. An acquisition requires the acquiring authority to gain a property right. Deprivation or curtailment of the property rights of another is insufficient. That answer may be correct as a matter of constitutional law, but as a matter of public policy it ought to be revisited.
41. In *Minister of State for the Army v Dalziel (Dalziel)*, McTiernan J described as a ‘rule of political ethics’ the principle that property must not be taken without compensation.<sup>42</sup> The ultimate justification for this rule is not to privilege private land rights over public purposes. It is to ensure that where property is used for public purposes at cost to the owner, the cost should be borne by the public rather than fall disproportionately on the owner. In the words of Black J, delivering the judgment of the US Supreme Court in *Armstrong v United States*, the purpose is ‘to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole’.<sup>43</sup> Emphasis on the ‘balance between environmental and consumptive use’ is therefore an incomplete description of the policy choice that must be made.
42. The requirement for the acquiring authority to gain a property right enables authorities to circumvent the requirement to pay compensation for acquisition of property. That possibility was noted by Rich J in *Dalziel*, who suggested that the Commonwealth could ‘[take] care to seize something short of the whole bundle [of rights] owned by the person whom it was expropriating’.<sup>44</sup>
43. The acquisition requirement represents a disconnect between the law’s operation and its normative justification. The normative justification of the law is to ensure that the cost of furthering public purposes is not disproportionately borne by a single landowner or group of landowners. However, by limiting and regulating property rights in a manner falling short of acquisition, authorities are able to impose such disproportionate costs on landowners in achieving environmental and other public purposes. ‘Acquisition involves receipt of something seen from the perspective of the acquirer’,<sup>45</sup> but unlike the ‘just terms’ provision of the Constitution, the purpose of which is to give a supplementary power to the Commonwealth,<sup>46</sup> the ‘rule of political ethics’ referred to by McTiernan J is about fairness to the person who is deprived of property rights. As a matter of political ethics, the rule should be viewed from the perspective of the person who loses his or her rights or ability to enjoy them, not the perspective of the acquirer.
44. The public purpose served by water legislation is the management of a scarce resource and the protection of important features of the environment, notably the Murray-Darling river system. Reductions in water availability pursuant to these purposes would not necessarily impose a *disproportionate* burden on all holders of water rights – only the

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<sup>42</sup> (1944) 68 CLR 261, 294–5 (*Dalziel*).

<sup>43</sup> 364 US 40 (1960) 49.

<sup>44</sup> *Dalziel* (1944) 68 CLR 261, 285.

<sup>45</sup> *JT International SA v Commonwealth* (2012) 250 CLR 1, [42] (French J).

<sup>46</sup> *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290–1.

most severe reductions. Any such reduction should be considered on a case-by-case basis. In jurisdictions where an acquisition is not required to trigger a right to compensation (merely deprivation), judges have adopted an ad hoc ‘balancing’ approach to consider whether the economic losses resulting from a curtailment or regulation of rights gives rise to a compensable deprivation of property.<sup>47</sup> Such a test is sensitive to all the circumstances and context of a case.

45. The AEPLG acknowledges that significant uncertainty and complexity could be introduced by modelling compensation provisions after American-style ‘regulatory takings’ law. Full implementation of the Risk Assignment Framework may be a sufficient measure to compensate for many kinds of changes in water access entitlements. For example, changes in water entitlements resulting from improved knowledge of water systems are addressed in the Risk Assignment Framework in a manner that shares the risk between water rights holders and governments.<sup>48</sup> Further, governments bear the risk of reductions in water access entitlements arising from ‘changes in government policy’.<sup>49</sup>
46. Thus a mechanism for distributing the costs of public policy choices already exists in the Risk Assignment Framework (**the Framework**). The continuing relevance of ‘just terms compensation’ provisions might therefore be doubted in determining the trade-off between environmental and consumptive uses. However, the role of such provisions is not wholly supplanted by the Framework. The Framework represents a political compromise. A compensation provision should operate as a ‘last resort’ provision, independently of that compromise, where rights are so substantially affected by changes in government policy that they are made effectively valueless.
47. Taking into account the incongruity between the normative justification of ‘just terms acquisition’ provisions and their actual operation, s254(1) of the *Water Act 2007* (Cth) should be amended to create a right to compensation where the operation of the Act would result in a *substantial curtailment* of property rights or the ability to enjoy property rights other than on just terms, where such curtailment makes a person’s water rights effectively valueless. Equivalent provisions should be inserted in State water legislation. Such provisions would better reflect the normative justification for ‘just terms acquisition’ requirements. The requirements for a ‘substantial curtailment’ would ensure that only drastic changes in water rights would attract compensation.

## Contact

48. The AEPLG would welcome the opportunity to discuss the submission further. Please contact John Farrell, Policy Lawyer, at [john.farrell@lawcouncil.asn.au](mailto:john.farrell@lawcouncil.asn.au) or (02) 6246 3714, in the first instance if you would like further information or clarification.

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<sup>47</sup> See, eg, *Penn Central Transport Co v City of New York*, 438 US 104 (1978) 124.

<sup>48</sup> *Water Act 2007* (Cth) sch 3A cl 49.

<sup>49</sup> *Water Act 2007* (Cth) sch 3A cl 50.