

The AgLaw Papers

BOOK 3

ON FARMING & ENVIRONMENTAL RULES

Farmers: what do you own? Are environmental regulations changing the nature of land rights?

Karen Lee

ON AGRICULTURAL SUPPLY CHAINS

Market power, wheat exports, law and cases

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Associate Professor Mark Lunney

The Australian Centre for Agriculture and Law

UNE's AgLaw Centre started in June 2003. The Centre, a unique initiative for Australia and likely world-wide, is a joint venture of the Faculty of Economics, Business and Law, the Faculty of The Sciences and the School of Law. Dr Sandra Welsman was commissioned as Founding Director to establish the Centre over six months.

AgLaw's reason for being is to bring together skills from across these disciplines to achieve a range of outputs that will contribute to the progress of Australia's agricultural industries and businesses in the context of the domestic economy and global marketplaces.'

Priorities during 2003 included firstly to develop the new Bachelor of Laws/Bachelor of Agriculture double degree'– the only such course in Australia. Enrolments for the BAg/LLB commenced late 2003 for start-up in February 2004. In addition, over 2004 the Centre will be looking to develop postgraduate courses and practical seminars at the key working interfaces of agricultural business, science and law.

The AgLaw Papers has been a parallel priority. Our aim has been to achieve a series of original and useful publications that examine key agri-law issues from first principles and from a 'for Agriculture' perspective'– initially in the four linked areas identified through an AgLaw marketplace scoping study late in 2002.

- **Farming and environmental rules**
- **Rural industry regulation**
- **Agricultural supply chains**
- **Agriculture and biotechnology**

This series of AgLaw Papers has been developed for a wide readership, with a particular eye to interested farm and agri-business managers, researchers and agri-industry and government leaders. Within the University, our aim has been to start building cross-disciplinary investigative teams harnessing and enhancing current skills, and opening up ag-law research areas. We are looking to position our work with key audiences and to indicate University and AgLaw Centre capacities through interesting, informative papers.

The first set variously achieves these aims. Styles and communication approaches vary but the intent of each is consistent with the AgLaw aims.

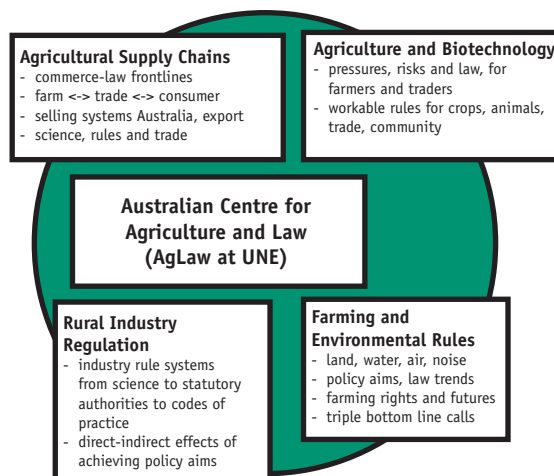
Looking forward

Coming decades will see Australian rural enterprises and scientists aiming for substantial long-term productivity increases even as world marketplace, economic, social and environmental expectations become more complex.

Laws, policies and rules of many types define the basics of rural business and hover at scientific and economic frontiers of production and supply chain innovation. Regulatory regimes affecting Australian agricultural businesses from farms through processing, transport, export and sale of products to consumers are unlikely to get simpler – or at least not without considerable effort.

Challenges facing agribusinesses in dealing with law and policy changes have been recognised by the University with the formation of the unique Australian Centre for Agriculture and Law, as a cross-faculty venture. The UNE Sciences Faculty is recognised for research and teaching, is leading or involved in six Co-operative Research Centres. The new BAg/LLB double degree will have the highest entry requirements for Bachelor of Agriculture or similar studies in NSW. Economics Business and Law has a long-standing reputation for courses and research in economics, agricultural economics and agribusiness. The UNE Law School is one of the largest enterprises in the University with growing demand for places.

Now ‘founded’, the AgLaw Centre will continue to work with interested academics and researchers across these disciplines to achieve outputs that contribute to Australian agricultural industries.



The AgLaw Papers 2004

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Farmers: What do you own?

Karen Lee

To explore the question, are environmental regulations changing the nature of land rights, this paper from basic concepts of land law and rights, at common law and under statutes across Australia. The analysis concludes that:

- environmental regulations and other legislation have substantially altered and continue to alter the common law notion of property rights
- constitutional and other legal constraints, mean the battle for land rights will be fought at Commonwealth and State policy levels.

Market power, wheat exports, law and cases

Dr Hui-Shung (Christie) Chang

Dr Sandra J Welsman

A consideration of wheat exports and single desk from economic, policy and legal perspectives. The economic analysis indicates that AWB does not have sufficient market power to influence world prices and promised higher returns. This suggests policy and perhaps legal issues given the 'benefits to growers and community' basis to current legislation and structural arrangements especially when/if those mooted benefits are not secured.

Farmers: what do you own?

Are environmental regulations changing the nature of land rights?

*Karen Lee, Attorney at Law, Solicitor of England and Wales
School of Law, The University of New England*

The submissions made by members of the farming community to the Productivity Commission inquiry into Impacts of Native Vegetation and Biodiversity Regulations (the Regulations), highlight numerous costs of the Regulations and other environmental and planning legislation to farming industries.¹

Many of these submissions assert that the Regulations and other applicable legislation have undermined their property rights as private land-owners by imposing restrictions on their rights of land use, resulting in reduced property values and skewed returns on capital investments made on the land.² Such interference, they argue, merits compensation from the taxpayer.

Although these submissions utilise the rhetoric of property rights, they provide little or no explanation as to the nature of property rights in law or the legal basis on which compensation should be paid.

The absence of any legal analysis of property rights is surprising given the Productivity Commission specifically asked farmers in its Issues Paper about their understanding of their 'rights' to use their land and the basis for their understanding.³ The absence of legal analysis is even more surprising as the Productivity Commission stated:

Clarification of the extent of the rights of land-holders to clear, use and manage native vegetation on their properties, as well as the extent of their environmental responsibilities, would open the possibility of payment for extension of these responsibilities and/or curtailment of rights.

The use of the 'rhetoric of property rights' has not been limited to submissions to the Productivity Commission. The NSW Farmers' Association has been actively lobbying the Prime Minister, State Premiers and Territory leaders with the message that secure property rights are essential if farmers are to invest in modern technologies to promote agriculture and the environment or if banks are to lend farmers capital to make these improvements.⁴

Again, land rights are referred to often but there is little or no legal analysis of their meaning in law.

The purpose of this paper is therefore to provide an analysis of what is meant by rights to land in law,⁵ and to review constitutional and other legal mechanisms which aim to protect private property from governmental interference.

Given that property rights are afforded little protection from regulatory initiatives by the Australian Constitution and case law, this paper concludes by suggesting that farmers need to develop economic, environmental and scientific arguments which support a 'hands-off' approach to regulation and (where appropriate) the inclusion of statutory mechanisms to compensate farmers when interference occurs to land rights.

Fundamental concepts of land law

Before the scope and meaning of rights to land can be understood, it is important to review a few basic concepts that underpin land law. Two concepts essential to an understanding of land law are 'ownership' and 'title'.

Ownership. In land law, ownership is typically seen as a collection of rights procured or received from the Crown and means that the owner has rights that may be enforced against all other third parties.⁶ The precise composition of the bundle of rights has been widely debated,⁷ however no clear consensus has emerged. Some have argued that ownership includes rights and obligations; others have suggested that ownership involves only rights with no obligations. It is widely agreed that from a legal perspective that an owner acquires rights to the land rather than the land itself.⁸

For the purposes of this paper, the meaning of 'ownership' (as understood by several authorities⁹) involves the acquisition of the following rights in relation to 'land':

- a right to take possession of the 'land'
- a right to exclude others from the 'land',¹⁰ subject to rights of native title
- a right to transfer the interests in the 'land' (including possession) in whole or part to third parties.

Ownership also involves the acquisition of additional rights in land. The precise nature of those additional rights is determined by common law and/or by statute as discussed below. However, any owner will be able to exercise each of the three rights listed above in relation to 'land'.

Title is also used to describe ownership of rights to land but the term can be misleading. In certain circumstances, 'title' can mean that the holder of title has rights which may be enforced against anyone; in other cases, the holder of title may have rights which are either inferior or superior to those of a third party.¹¹

An example of the sliding scale of 'rights of title' is the distinction between freehold and leasehold interests. A freehold interest means that the rights to the land are of unlimited duration; a leasehold interest confers rights to land for a specific and limited period of time. However, both interest holders can say that each has 'title' to their respective freehold and leasehold interests.

The scope and meaning of rights to 'land'

As mentioned, ownership may confer additional rights depending on the nature of the 'land' purchased. The nature and scope of these additional rights are derived from two sources: the common law as determined by judges in case law, and legislation passed by State or Federal government.

Both sets of laws apply unless there is a conflict between the two in which case legislation prevails over the common law.¹² The majority of land law principles in common law were developed by English judges and incorporated into Australian law (with some modifications) by Australian judges.

Common law rights to land

At common law, 'land' is defined as an area of three-dimensional space, which may include the surface of the earth, the airspace above the earth or the soil and other minerals below it.¹³ An owner of 'land' at common law can therefore own or have rights to one or more of these three spaces. At common law each of these rights can be sold separately to third parties. In addition, each right can be subdivided vertically or horizontally into different strata.¹⁴ Whether or not an owner acquires one or more of these rights depends on the terms on which the owner purchases the right(s) from a vendor. For the purposes of this paper, it is assumed that an owner of 'land' holds each of these three rights.

Rights to occupy airspace. These give the rights holder ability to occupy the space and to exclude third parties who enter its airspace without permission. The right to airspace does not give its holder the right to the air,¹⁵ but the right to occupy the space above the physical earth. If intrusion occurs, the rights holder may sue for trespass. If successful, the landowner is entitled to damages. The intrusion can

be temporary or permanent and the courts have held that trespass has occurred in both cases.¹⁶

It was originally thought that the right to airspace extended infinitely towards the sky; however, English courts have recently limited the right to the height necessary for the ordinary use and enjoyment of the surface of the land and buildings on the land. The holder of airspace rights does not have any rights in excess of this height. Thus, trespass does not occur if a third party enters the airspace of a land owner at a height in excess of the ordinary use and enjoyment of the landowner's property. The position under Australian law appears to be the same.¹⁷

Rights below the surface. At common law, the surface rights holder is permitted to remove minerals, including coal, and to use the sub-soil and geothermal resources. The rights holder is able to prevent others from interfering with its minerals and resources and sue for trespass if interference occurs. Any gold or silver found under the land, however, remain the property of the Crown.¹⁸

This restriction can be traced back to the terms on which the Crown gave the original grants of land to Australian settlers. The term 'minerals' is widely construed and includes substances within the meaning of the word as used in the mining industry, business and landowners at the time the land was conferred by the Crown. It also includes minerals which could not be used or were considered to be worthless at the time of the grant.

Rights to the surface of the land. These include rights to the natural resources found on the land, including vegetation and forests.¹⁹ Provided the rights holder does not interfere with the rights of other land owners, it is entitled to exploit these resources in its discretion.

Natural rights. In addition to rights above, on or below the surface of land, a land owner will also be entitled to certain other 'natural rights' which confer benefits to the landowner even if they are not specified in transfer documentation. All landowners enjoy a right to support and owners whose land is adjacent to a river or stream or through whose land runs a river or stream also have certain riparian or water rights.²⁰

Subject to a number of limitations,²¹ the right to support entitles a landowner to have his soil supported by the land of his neighbour so as to avoid subsidence. It is important to note that this right to support applies, however, to only land which

has not been built upon. Where land is adjacent to a river or stream or where a river or stream runs through land, ownership of the land at common law also confers a right to the uninterrupted flow of water in the river or stream, subject to reasonable use of landowners upstream. Under Australian common law, land owners may use the water for ordinary household purposes such as cleaning, for supplying water to cattle and, subject to a number of limitations, irrigation purposes.²²

Wild Animals. At common law, land owners also had certain rights to wild animals. However, these rights were qualified as the landowner was entitled to an animal while it remained on the land. The animal became the absolute property of the land owner if the owner successfully hunted and killed the animal.²³

Qualifications

As has been suggested, none of the rights held by landowners is unqualified or absolute at common law. Many of the rights to airspace and rights to land below its surface, for example, are restricted to a reasonable height or depth. Removal of water is also subject to a reasonableness requirement. Moreover the scope of each of these rights continues to evolve through court decisions. Following the decision of the High Court in *Mabo v Queensland (No 2)*,²⁴ for example, common law rights of landowners are now subject to the rules of native title.

Use of land is further restricted by the doctrines of trespass and nuisance. Trespass involves a direct, intentional interference with land such as entering onto a neighbour's land and removing their crops whereas nuisance is an indirect interference with a person's land or enjoyment of the land.

For example, if the smell from a pig farm interferes with a neighbour's land, then the farmer could be sued for nuisance. If trespass and nuisance are established, then a landowner is required to pay damages and/or cease the offensive conduct.

Common Law Right	Name of Statute	Effect on Common Law Right
Airspace	<i>Damage by Aircraft Act 1952</i> (NSW)	Precludes actions for trespass for intrusion of aircraft.
Right to Coal (Sub-surface)	<i>Coal Acquisition Act 1981</i> (NSW)	All coal vested in the Crown.
Support	The <i>Conveyancing Act</i> as amended by the <i>Conveyancing Amendment (Law of Support) Act 2000</i> –(NSW)	Abolishes common law right to bring an action in nuisance for the removal of support of land. Landowners now have a duty of care not to do anything on or in relation to supporting land which removes the support to land.
Riparian	<i>Water Administration Act 2000</i> (NSW)	Riparian owners are given statutory rights to use water for domestic purposes and watering stock; they may no longer sue upstream owners for interference with common law water rights.
Wild Animals	<i>Wildlife Conservation Act 1950</i> (WA)	Prohibits taking of protected species.

Statutory provisions

Although the common law confers a significant number of rights to landowners, these rights can be and are often substituted by other rights created by statute. Common law rights may also be abolished by statute. In other instances, the uses to which a particular right may be directed have been further restricted or qualified by statutory obligations.

Examples of where statutory obligations have displaced or overridden common law rights are set out in the table above.

The political and policy reasons used to justify these changes are not within the scope of this paper. Broadly speaking, however, they have been motivated by growing concern over environmental management and a view that government-led action rather than initiatives of individual landowners are better able to manage limited resources effectively. It is clear, however, that farmers need to look to multiple statutes to

determine what (if any) rights they hold on, over or under their land as a result of environmental legislation.

The process used to determine what a landowner 'owns' is not necessarily straightforward. 'Land' can be defined in many different ways in statute. Some definitions correspond to common law meanings; other definitions have been adopted to achieve the underlying purpose of the statute. For example in NSW, under the *Interpretation Act 1987*, the meaning of 'land' in legislation is as follows:

messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein.

This definition of 'land' is used in legislation except if a contrary intention appears in a piece of legislation. Schedule 99 of the *Noxious Weeds Act 1993* (NSW), for example, defines land for the purposes of that Act as including any watercourse, river or inland water, whether tidal or non-tidal.

With the amount of existing environmental and planning legislation and future initiatives, the central question for farmers is to what extent are their land rights protected by law from government intervention.

Constitutional protection of property rights

The level of protection afforded to common law and statutory rights to property from regulatory interference from Commonwealth and State legislatures differs.

At the outset it should be stressed that neither the Commonwealth Constitution nor the Constitutions of the States recognise absolute rights to land.

As a number of farming groups have recognised, the Constitutions of the six States and Territories of Australia do not impose any obligation on the State governments to compensate land owners even if they 'acquire' rights to the land.

Protection of Property at the Commonwealth level

At the Commonwealth level, the Constitution provides that where rights to land are 'acquired' by the Commonwealth government, then those rights should be acquired on 'just terms'.

The limited protection of land owner rights from regulatory interference is set out in s51(xxxi) of the Constitution.²⁵ S51(xxxi) gives the Federal government the right to make laws for the 'peace, order and good government of the Commonwealth' with respect to:

the 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.

S51(xxxi) appears at first blush to give land-owning farmers a broad level of protection.

However, in order to substantiate a claim that the Commonwealth must compensate for interference with a land right, a farmer must be able to show that:

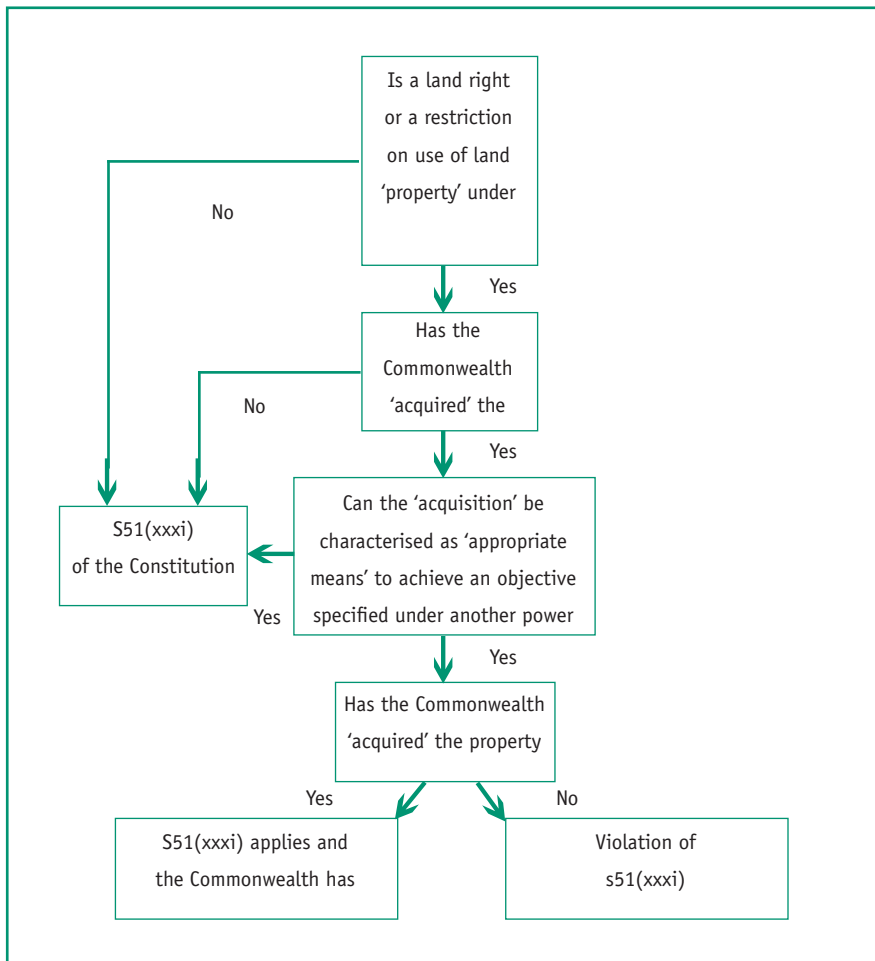
1. his land right is 'property' for the purposes of s51(xxxi) and
2. his land right has been 'acquired' for the purposes of s51(xxxi) by the Commonwealth.

Even if the government does 'acquire property' within the meaning of the Constitution, the level of compensation that it must pay the affected landowner is limited to 'just terms' which may or may not be equal to the full economic value of the land.

Each of these key terms – 'property', 'acquisition' and 'just terms' – has been considered by the High Court of Australia and has a specific meaning in law which, in most cases, does not correspond to the ordinary meaning of the word.

The High Court has typically adopted a narrow interpretation of these terms which has had the effect of limiting the situations where s51(xxxi) is applicable and where compensation is owed.

Diagram of Constitutional Analysis



The power of the Commonwealth Parliament to make environmental laws

Before the elements of a s51(xxxi) claim are reviewed in detail, it is helpful to briefly review the power of the Commonwealth to make laws whose intended purpose is 'to improve the environment'.

S51(xxxi) gives the Federal legislature the power to acquire property on just terms for 'any purpose on which the Parliament has power to make laws.' The powers of the

Parliament to make laws are set out in s51 of the Constitution. These powers list the broad subjects on which the Commonwealth Parliament may legislate. Technically, the subject-matter of these powers is not exclusive to the Commonwealth; however, under section 109 of the Constitution, if there is a conflict between Commonwealth legislation and State laws, then the Commonwealth legislation will prevail.²⁶

Contrary to popular belief, s51 does not expressly give the Commonwealth any powers to legislate on environmental matters. The legislature has to rely on a number of other powers in s51, such as: trade and commerce with other countries,²⁷ external affairs,²⁸ corporations,²⁹ and taxation.³⁰ In practice, however, the Commonwealth uses any one or more of the powers listed in s51 to be able to adopt environmental initiatives. The *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, for example, is based in part on the powers to legislate external affairs.

The power of the Commonwealth Parliament to pass environmental legislation has been a contentious issue and litigated extensively between the Commonwealth, private parties and the States. It is therefore worthwhile reviewing some of the powers that the Commonwealth has relied upon to pass environmental laws which has imposed significant regulatory obligations on farmers and the agricultural industry, particularly the: (1) trade and commerce power; (2) powers in relation to external affairs; (3) corporations power; and (4) taxation power.

The trade and commerce power. S51(i) of the Constitution enables the Commonwealth to make laws with respect to trade and commerce with other countries and among the States. This power has been widely interpreted so that the Commonwealth can require goods ultimately destined for export and their production methods to meet specified environmental standards.³¹ The High Court in a number of cases has held that the use of the trade and commerce power for environmental objectives is constitutional.³² The ability of the Commonwealth to pass legislation dealing with trade and commerce among the States is subject to restrictions; however, the legislation will satisfy the courts provided it is not discriminatory or protectionist in favour of or against a particular State(s)³³.

External affairs. S51(xxix), which gives the Commonwealth the power to make laws relating to 'external affairs', has been used as a basis on which to promulgate environmental legislation. The famous *Tasmanian Dam* case³⁴ which involved a challenge by Tasmania to Commonwealth legislation which prevented Tasmania from constructing a dam on the Gordon River sets out the scope of this constitutional power. Pursuant

to the case, the Commonwealth may enact legislation in relation to 'external affairs' on one of two grounds: (1) if the underlying subject matter of the legislation involves an 'international concern' or (2) if it implements the requirements or purposes of an international treaty or other obligation.³⁵

Whether or not the purpose of a piece of legislation is an 'international concern' is a question of degree. It generally turns on the extent to which the world political community believes the legislation is an appropriate subject for international action.³⁶ However, Justice Murphy stated that the requirement of 'international concern' may be satisfied if, for example, the world scientific community expresses concerns about Australian domestic matters.

If domestic Australian legislation is adopted in accordance with an international treaty or other obligation, it must be an appropriate means of implementing the obligation. To meet this test, legislation must be conducive to the performance of the international obligation. In the *Tasmanian Dam* case, for example, the High Court struck down a number of legislative provisions which imposed blanket bans on the destruction of trees. However, it upheld the inclusion of a generic power in the relevant legislation to proscribe certain activities in relation to designated world heritage areas on a case by case basis.³⁷

When passing legislation on the basis of the external affairs power, the Commonwealth is also under a duty to act in good faith. In practice, trying to overturn legislation by arguing that the Commonwealth acted in bad faith can be difficult to substantiate and the courts will not interfere with legislative judgment where any reasonable basis for enacting the legislation can be found.³⁸

The corporations power. Under s51(xx) of the Constitution, the Commonwealth is entitled to adopt legislation dealing with 'trading or financial corporations within Australia'. This provision has been interpreted by the courts to give the Commonwealth the power to regulate the trading activities of corporations and the non-trading activities of corporations which are carried out for the purposes of their trading activities.³⁹

Some judges have suggested that s51(xx) can be applied to *all* activities of trading corporations, although whether or not this is the case remains unclear.⁴⁰ Other judges have adopted a more restrictive reading of s51(xx) which limits the Commonwealth's corporations power to corporate activity directly related to the nature of the corporation (ie trading and financial activities of corporate entities).⁴¹ However, many scholars have suggested that the present justices of the High Court and recent case law favour a broad interpretation of s51(xx).⁴²

If a broad interpretation of s51(xx) is accepted, s51(xx) is a wide ranging and significant power of the Commonwealth as most business activity in Australia is conducted via trading corporations. For example, under this power, the Commonwealth could regulate the sale of corn (maize) by a grain corporation and the activities which it undertakes to produce the corn. However, the Commonwealth's power would not extend to individual farmers who carry out their activities through unincorporated entities. In such cases, the Commonwealth would need to find an alternative basis on which to regulate their business and trading activities.

Taxation. S51(ii) of the Constitution allows the Commonwealth to pass taxation laws whereby the Commonwealth can provide incentives to farmers to adopt environmentally friendly land management practices by making certain expenditure and capital works tax deductible.

Framework of Constitutional Analysis

Assuming the Commonwealth has the power to enact legislation to regulate the use of land rights, to substantiate a claim for compensation, a farmer must be able to demonstrate the following: (1) his land right is 'property' for the purposes of s51(xxxi) and (2) his land right has been 'acquired' for the purposes of s51(xxxi).

The following sub-sections of this paper discuss:

- meanings of 'property' and 'acquisition'
- the doctrine of 'characterisation' of an acquisition
- interpretations of the expression 'just terms'.

'Property' for constitutional purposes

The term 'property' is not defined in the Constitution. In an effort to understand its meaning and its purpose, the courts have recently permitted lawyers and judges to refer to the debates that framed the Australian Constitution.⁴³ The constitutional debates, however, do not provide any legal clarification of the meaning of 'property'.⁴⁴

Australian judges have therefore had to construe the meaning of 'property' and, broadly speaking, they have adopted a wide interpretation of the term because of the constitutional guarantee of 'just terms' that s51(xxxi) is intended to provide. One of the leading cases describes 'property' for constitutional purposes as:

every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and chose in action.⁴⁵

The court has held that the following types of rights are 'property' for the purposes of s51(xxxi):

- full title or ownership of land
- a right of possession to land or leasehold interests in land. For example, it has been held that a tenant's lease of vacant land owned by a third party was 'property' for the purposes of the Australian Constitution⁴⁶
- rights to sue for negligence causing personal injury⁴⁷
- statutory rights to payment of Medicare benefits for doctors who have provided medical services⁴⁸
- rights awarded pursuant to legislation that gave fishermen permission to undertake commercial fishing operations⁴⁹
- rights to explore for petroleum in a designated area of the Timor Sea.⁵⁰

When assessing whether or not an interest constitutes property, the Australian courts appear to focus on three principal questions:

- (1) is the right definable?
- (2) is the right identifiable by third parties? and
- (3) does the right have some degree of permanence or stability?⁵¹

Another relevant factor is whether or not the interest can be transferred. The ability to assign an interest will not conclusively determine if an interest constitutes property as defined for constitutional purposes; however, the absence of an ability to transfer the property usually suggests that there is no property.⁵²

Farmers trying to construct a legal argument that Commonwealth legislation infringes their land rights must be able to show that the right or interest in land that is affected by the legislation is 'property' as the term is construed by the courts.

Each right or interest which they allege has been restricted will need to be reviewed on a case-by-case basis. It is clear that leasehold or freehold interests in land will be treated as property for the purposes of s51(xxxi).

The High Court has also suggested that prohibitions on the use of property may amount to restrictive covenants which should be classified as property.

The most significant problem that farmers will encounter centres on the need to demonstrate that the Commonwealth's interference with their property constitutes an 'acquisition' for the purposes of constitutional law.

Acquisition

The term 'acquisition' is also not defined in the Constitution and the constitutional debates do not shed much light on the scope of its meaning in law. The High Court has thus been responsible for trying to ascertain its meaning and its application where Commonwealth legislation affects rights to property.

To date, the High Court has defined narrowly the circumstances where legislative interference with property will constitute an 'acquisition' for the purposes of s51(xxxi) so that mere interference with property by the Commonwealth will not amount to an 'acquisition'. The view adopted by the High Court is consistent with its understanding that the purpose of s51(xxxi) is to prevent arbitrary acts of government rather than to offer absolute protection for property against government action.⁵³

The narrow meaning given by the High Court to the term 'acquisition' has been heavily criticised by members of the farming community and academic scholars alike. If s51(xxxi) is to offer any real protection for property against Commonwealth action, they argue, then a broader interpretation of acquisition is necessary.⁵⁴

The narrow interpretation of acquisition is also in sharp contrast to the liberal interpretations the High Court has given to constitutional provisions conferring power to the Commonwealth. The wide scope of the trade and commerce power and the corporations power are often cited as examples of the High Court's inconsistent approach.⁵⁵

The effect of the High Court's judgments is to pass the full cost of environmental compliance to farmers with individual consumers and taxpayers paying less than their fair share of the burden even though they enjoy the environmental benefits.

In addition to the narrow definition of 'acquisition' of property, the courts have developed a number of exceptions to s51(xxxi) that permit the Commonwealth to interfere with property interests independently of s51(xxxi) constraints.⁵⁶ Because of the contentious nature and importance of the case law in this area, three leading cases on 'acquisition' in the context of the imposition of regulatory controls are discussed.

Trade Practices Commission v Tooth & Co Ltd (1979)

Here,⁵⁷ the High Court addressed the issue of whether or not certain exclusive dealing provisions of the *Trade Practices Act 1974-1978* (Commonwealth) led to an 'acquisition' of property under s51(xxxi). The exclusive dealing provisions prohibited a corporation from refusing to renew a lease or licence of land if the other party to the lease or licence purchased goods or services from a competitor

to the property owner. The provisions had the effect of giving a tenant a right to a further lease. They also effectively denied the capacity of a landowner to use his own land to sell goods or services if he elected to lease the land to a third party who subsequently purchased goods from a third-party manufacturer.

The trade practices restriction was challenged by Tooth & Co. Ltd, which owned a number of pubs throughout Australia. It argued that the restriction amounted to an acquisition of property for the purposes of s51(xxxi).

The High Court ultimately concluded that the trade practices restriction did not amount to an acquisition; however, the case is significant for two reasons:

- a majority of the High Court held that the Commonwealth does not need to acquire the property interest in order for s51(xxxi) to apply. Acquisitions of property for the purposes of the Constitution will be found even where a property interest is transferred to a third party
- the court's discussion of s51(xxxi) suggested that the Commonwealth's use of regulatory powers could amount to an acquisition of property.

One of the justices, Justice Stephen, approached the issue of whether or not the trade restrictions issue amounted to an acquisition of property from two angles.

First, he considered if the trade restriction amounted to a 'taking' of property as that term is used in the case law of the United States Supreme Court. In the United States, the Supreme Court has held that property may be regulated to a certain extent; however, where the regulation amounts to a confiscation of property then a 'taking' occurs. Regulation does not amount to a taking if it seeks to protect public health, safety or morality. If property is taken, then the government is obliged to pay compensation to the property holder. Justice Stephen suggested that in Australia far reaching restrictions of property imposed via regulations may in appropriate circumstances involve an 'acquisition'. He stated:

That the American experience should provide guidance in this area is testimony to the universality of the problem sooner or later encountered wherever constitutional regulation of compulsory acquisition is sought to be applied to restraints, short of actual acquisition, imposed upon the free enjoyment of proprietary rights. In each case the particular circumstances must be ascertained and weighed, and as in all questions of degree it will be idle to seek to draw precise lines in advance.

Under Stephen J's view, whether or not regulation(s) gives rise to an acquisition for the purposes of s51(xxxi) is to be determined on a case-by-case basis. However, in principle, he acknowledged that regulatory intervention with property rights may amount to an 'acquisition'. Justice Stephen then considered if the trade practices restriction amounted to an 'acquisition' as the term has been defined under Australian case law. In his view, 'acquisition' occurs when there is some form of forced requisition as opposed to an agreed transfer of the property interest.

His Honour ultimately held that under either of these tests the trade practice restriction did not amount to an acquisition. Applying the first test, he held that the purpose of the restriction was to prevent exclusive dealing – a public interest objective – and, provided a landlord does not supply his goods or services to a tenant on an exclusive basis, there is no interference with property rights.

Under the second test, no acquisition occurred as, in his view, even if the landlord had engaged in exclusive dealing, he was able to agree the terms on which the tenant's lease could be renewed.⁵⁸

The High Court decision did not expressly turn on the issue of whether regulations with the effect of confiscating property amount to an acquisition. The High Court revisited this in *Tasmanian Dam*.

Tasmanian Dam (1983)⁵⁹

In the early 1980s, Tasmania authorised construction of a dam on the Gordon River for the purposes of generating electricity by enacting the *Gordon River Hydro-Electric Power Development Act 1982*. The Commonwealth tried to stop construction of the dam via a number of regulations under two pieces of legislation: (1) *National Parks and Wildlife Conservation Act 1975* (Commonwealth) and (2) *World Heritage Properties Conservation Act 1983* (Commonwealth). These regulations prohibited construction of the dam and prohibited, subject to approval of the Commonwealth Minister, the clearing and excavation of 1400 acres surrounding the proposed dam as well as building activities on land designated as property of 'cultural or national heritage' which had been submitted for inclusion on the World Heritage List under the World Heritage Convention of the United Nations.

Tasmania argued that, although the provisions under the *World Heritage Properties Conservation Act* did not transfer title from State to Commonwealth, the legislation

so restricted its rights in relation to the area around the proposed dam that the Commonwealth Minister ‘acquired’ its land. A majority of the High Court rejected this argument.

It argued that s51(xxxi) uses the term ‘acquisition’ which is different from the word ‘taking’ which is used in the Constitution of the United States. S51(xxxi) therefore requires an acquisition of an interest in property by the Commonwealth or a third party for the purposes of the Commonwealth. The fact that Commonwealth legislation adversely affects or terminates a pre-existing right enjoyed by an owner of property is not sufficient to establish an ‘acquisition’. However, where the Commonwealth acquires title, exclusive possession, exclusive control or other proprietary interest over the land then an acquisition will be deemed to have occurred. Subsequent case law has held that a reduction in the value of property rights without acquisition of title, exclusive possession, exclusive control or other proprietary interest will not amount to an ‘acquisition’.⁶⁰

The Court recognised that the effect of the legislation was to ‘sterilise’ the use of the land surrounding the dam in Tasmania; however, it concluded that the Commonwealth did not acquire a property interest in the land as the power of the Minister to refuse consent under the Act was a power of veto and not a proprietary interest. The Minister did not have the authority to authorise positive acts on the land. Tasmania retained that power and, as such, it remained the owner of the land. The grant of the veto power to the Minister also did not result in the transfer of possession of the land to the Commonwealth.

Justice Deane dissented. He argued that in certain cases that ‘the mere extinguishment or deprivation of rights in relation to property’ does not amount to an acquisition. He agreed with the approach of Justice Stephen in the TPC case, that in certain cases far reaching restrictions on use of property may amount to an acquisition. Deane J also suggested that in certain cases where an identifiable and measurable advantage flows to the Commonwealth or third party as a result of legislation then an acquisition for the purposes of s51(xxxi) may be involved. On the facts, Deane J concluded the Commonwealth did acquire a proprietary interest. The legislation effectively froze the ability of Tasmania to exercise its rights of use and development of the land and the Commonwealth acquired the benefit of a restrictive covenant which should be viewed as a ‘property’ for purposes of s51(xxxi).

Newcrest Mining (WA) Ltd v Commonwealth (1997)⁶¹

Although the High Court adopted a narrow interpretation of 'acquisition' in *Tasmanian Dam*, it held in *Newcrest Mining*, that land use restrictions imposed by the Commonwealth resulted in the acquisition of property.⁶²

In 1987, Newcrest Mining purchased a number of mining leases from BHP Minerals which gave Newcrest the right to mine uranium at Coronation Hill in the Northern Territory. These mining leases were procured from the Commonwealth over a number of years. In 1989, under the *National Parks and Wildlife Conservation Act 1975* (Commonwealth) (*Conservation Act*), the Commonwealth declared that it was enlarging Kakadu National Park to include Coronation Hill. The *Conservation Act* was later amended to prohibit all mining to a depth of 1000 metres in the Kakadu National Park and to make the Commonwealth not liable for any compensation to affected rights holders. The Commonwealth stated, however, that its interest in Coronation Hill did not extend to the mineral rights held by Newcrest and other holders of mining rights.

Newcrest argued that the restrictions imposed by the Commonwealth were invalid. One of its arguments turned on the complete devaluation of the mining rights. Although it retained a legal right to the uranium, the ban on mining effectively prevented it from accessing or using its rights to the uranium in any economic or practical way. It argued that two property interests were acquired for the purposes of s51(xxxi). First, the Director of National Parks and Wildlife obtained the right to Coronation Hill free of the rights of Newcrest to occupy and conduct mining operations on the land. Second, the Commonwealth acquired the minerals to a depth of 1000 metres without the rights of Newcrest to mine them.

The High Court agreed. Justice Gummow stated that the language of the provisions adopted by the Commonwealth did not expressly or directly effect an acquisition of property. Newcrest retained ownership of the minerals. Nevertheless, he stated that there was no reason why the benefit or advantage relating to the ownership or use of property which was acquired should correspond precisely to what was taken. He further argued that Newcrest's rights were not merely impaired but they were effectively sterilised. As such, an acquisition of property had occurred.

Justice Kirby who also concluded that s51(xxxi) was applicable to the facts of *Newcrest* adopted an alternative approach. He argued that where the Australian Constitution is ambiguous (as is the case with s51(xxxi)) the High Court should

adopt meanings which conform to the fundamental principles of international law, including human rights. He then cited provisions from Magna Carta, the French Declaration of the Rights of Man and of the Citizen, the Fifth Amendment of the United States Constitution and legal instruments from other nations which protect the deprivation of property (as opposed to the acquisition of property) by government. Although he did not expressly criticise the *Tasmanian Dam* case and the limited meaning of acquisition it adopted, he stated:

“Ordinarily, in a civilised society, where private property rights are protected by law, the government, its agencies or those acting under authority of law may not *deprive* a person of such rights without a legal process which includes provision for just compensation”. (emphasis added)

It has been argued that *Newcrest* marks a shift in the thinking of the High Court. For the first time, the High Court is concerned that planning and environmental law can impose significant restrictions on property rights which should be compensated by the Commonwealth. It has also been suggested that *Newcrest* effectively over-turns the *Tasmanian Dam* case discussed above.⁶³

Newcrest may indicate a greater willingness of the High Court to mandate payment of compensation to property rights holders. In subsequent decisions of the High Court, however, it continues to retain a distinction between the terms ‘deprivation’ and ‘acquisition’, although it is prepared to find that an acquisition for the purposes of s51(xxxi) may occur even if something other than a proprietary interest is acquired.⁶⁴

Characterisation

Acquisitions made by the Commonwealth under s51(xxxi) must be accompanied by or in conjunction with an exercise of one of its other powers listed in s51 of the Constitution. In the *Newcrest Mining* case, for example, the Commonwealth ‘acquired’ the rights of Newcrest to mine uranium in order to further the objectives of the *National Parks and Wildlife Conservation Act 1975* (Cth), which was enacted under its constitutional powers over trade and commerce, external affairs and corporations.

The High Court, however, has developed a doctrine which permits the Commonwealth to ‘acquire’ property solely by reference to another head of power listed in s51 of the Constitution. This doctrine has two consequences:

- (1) if the doctrine applies, the issue of whether or not an ‘acquisition’ has occurred is irrelevant, and
- (2) if the doctrine applies, the requirement of ‘just terms’ set out in s51(xxxi) does not apply even if an ‘acquisition’ of property has occurred.

This so-called 'characterisation' doctrine therefore may have significant ramifications for farmers trying to substantiate a claim that environmental regulation has resulted in an – 'acquisition' of their 'property' without compensation on 'just terms'.

Under the High Court doctrine that Commonwealth legislation acquiring property can be supported exclusively by another power in Constitution s51, the acquiring legislation is then not subject to the constraints of s51(xxxi).⁶⁵ Under this rule, the Court must determine the principal 'character' of the relevant legislation by assessing its principal purposes and effects.⁶⁶ If an acquisition of property is a necessary or a characteristic feature of the means used to achieve an objective which falls within a specified power listed in s51, then the Commonwealth does not also need to rely on its s51(xxxi) power of acquisition to effect the acquisition.

The High Court's rationale is that s51(xxxi) restrictions should not defeat the very purpose of the grant of the Commonwealth's other powers in s51. The Court has stated that the following acquisitions of property were made solely by reference to another head of power in s51 of the Constitution (so compensation is not required):

- where a seizure of property or the removal of property is a punishment for a breach of law⁶⁷
- where a law is made in the exercise of the Commonwealth's power with respect to bankruptcy or insolvency⁶⁸
- if property is seized from an enemy during war⁶⁹
- the imposition of taxation laws⁷⁰
- if the legislation is otherwise concerned with the 'adjustment of the competing rights, claims or obligations of persons in a particular relationship or areas of activity'.⁷¹ This principle has typically been applied to property rights created by statute and not common law rights.⁷² The Court has stated that statutory entitlements are 'inherently susceptible to variation'.⁷³

These examples suggest that the doctrine of 'characterisation' should be narrowly applied. However, the High Court has never properly set out the method that it uses to determine if a law is characterised or derived solely from a s51 power or if it is based on a s51 power plus the power set out in s51(xxxi).

In a 1994 decision of the High Court, Justices Deane and Gaudron stated there was no set test or formula to determine if a law could be characterised as an acquisition for the purposes of s51(xxxi). They did, however, identify two categories of laws where acquisition of property would be viewed as 'incidental' to their general purpose,⁷⁴ and

consequently enacted pursuant solely to a power (other than s51(xxxi)) set out in s51 of the Australian Constitution:

- where they relate to the general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest
- where they define or alter rights under a government scheme involving the expenditure of government funds to provide for social security benefits or other public purpose.

However, in a 1999 decision, which has been applied in subsequent cases, the High Court appeared to adopt a test which turned on whether or not the acquisition of property without just terms is a 'necessary or characteristic feature' of the 'means appropriate and adapted to the achievement of an objective falling within another head of power'.⁷⁵

What does this mean for the agricultural sector?

If industry were to try to argue that environmental or other legislation regulating the farming sector resulted in an acquisition of property, it would need to take into account the following:

- the term 'acquisition' is narrowly defined but there is a trend toward a broader interpretation of the term, as the *Newcrest Mining* case indicates. If a restriction on a right to use land can be classified as a restrictive covenant and hence property, it could be argued that the transfer of that covenant to the Commonwealth amounts to an 'acquisition'
- there has been some support among certain justices of the High Court that the term 'acquisition' should extend to 'deprivation' as that term is used in the United States and other countries. At present, this view has not been adopted by a majority of the High Court
- if the provision(s) of Commonwealth environmental legislation which restrict property rights can be enacted solely by reference to a single head of power in s51 of the Constitution, then s51(xxxi) is not applicable even if an 'acquisition' of property has occurred. If farmers want to argue that s51(xxxi) is applicable in such cases, they will need to argue successfully that the restriction of property is an *inappropriate* means to achieve the objective of the single head of power
- the legislation vexing farmers will need to be looked at on a case-by-case basis. It is unlikely that farmers will be able to substantiate a claim that each

legislative act results in an acquisition. There is, however, some precedent for farmers to argue that the cumulative effect of individual pieces of legislation is an acquisition of property.

Just terms

If farmers can demonstrate that the Commonwealth has acquired property, s51(xxxi) requires that the acquisition must be on 'just terms' or it will violate the s51(xxxi) mandate.

The phrase 'just terms' is not defined in the Constitution and the High Court has formulated the constitutional requirements of 'just terms'. This has evolved through a number of cases. Older cases stipulate that 'just terms' were concerned with 'fairness'. The Court took the view that s51(xxxi) did not guarantee property owners full compensation or a market price for their property. Under the 'fairness' standard, the Commonwealth was permitted to take into account the 'community interest' or 'public interest' in setting the level of payment that a property owner was entitled to receive.

The High Court appears, however, to have adopted a more favourable view to property holders.⁷⁶ In the 1994 case *Georgiadis v Australian and Overseas Telecommunications Corporation*, the Court refused to take into account the interests of the public when evaluating whether or not the payment offered to a property holder by the Commonwealth was on 'just terms'. Justice Brennan speaking for the High Court said:

In determining the issue of just terms, the court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.⁷⁷

This language suggests that the Court has adopted a 'full compensation' model for property owners.

The starting point for the analysis of 'just terms' is that they should reflect the 'market value' of the property acquired. Market value is the 'price which a willing purchaser would give a not unwilling vendor of the property in question, neither being under any compulsion, the price to be assessed at the value to the owner'.

Market value may not, however, be a sufficient measure of loss, and, in certain cases, the High Court has required the Commonwealth to pay the market value of property and compensation for the loss of future profits that could have been earned by using the acquired property.

The older cases which suggested market value should reflect community interest have been distinguished from the recent cases on the basis that many of them were litigated during wartime when concern for national security and the market economy was at its greatest.⁷⁸ Although the language in *Georgiadis* suggests that community interest is no longer relevant to the calculation of ‘just terms’, the balancing of the interests of the community and property owners does remain relevant when the High Court must assess if an ‘acquisition’ of property has occurred.⁷⁹

For farmers, availability of full compensation ensures that the central purpose of s51(xxxi) – to require the acquisition of property on just terms – is protected.

However, the main hurdle farmers face at a federal level is the narrow definition of ‘acquisition’ which permits the Commonwealth to restrict rights to use property without any obligation to compensate.

Protection of Property at the State Level

Unlike the Federal Constitution, the constitutions of the States and Territories do not impose any obligation on those governments to compensate land owners even if they ‘acquire’ rights to land. The absence of any constitutional provisions at State level does not mean State Governments can interfere with property rights in their absolute discretion. Land owners and other holders of land interests receive some protection as a result of two mechanisms: (1) the rules of statutory interpretation used by the courts and (2) enacted State legislation which mirrors the ‘acquisition on just terms’ provision of the Federal Constitution.

Statutory Interpretation

Rules used by courts to interpret legislation may afford some protection to farmers. When interpreting a statute, the courts will apply a legal presumption that it does not intend to interfere with property rights without adequate compensation.⁸⁰ However, the presumption may be rebutted if the language of the statute clearly intends or permits the acquisition. The presumption is therefore relevant only where there is ambiguity or uncertainty on the face of the legislation.⁸¹ The presumption is also stronger where legislation enacted by the State seeks to interfere with common law rights.

As a creation of legislation, statutory rights are typically seen as inherently capable of variation.⁸² The courts have applied this presumption most frequently to situations where property owners continue to use land for an existing purpose which no longer conforms to a current or future planning scheme adopted by town councils. Australian judges have tended to construe broadly the meaning of 'existing uses' thereby giving some protection to property rights.⁸³

State Legislation Pertaining to Acquisition of Land

Each of the six States and principal Territories has adopted legislation based on the Commonwealth *Lands Acquisition Act 1989* which sets a statutory procedure with which they must comply if they seek to 'acquire' either 'land' or an interest in 'land' through compulsory acquisition, by negotiated agreement or purchase of property available in the open market from land owners.

Broadly speaking, each State or Territory must give the owner of land a statutory notice informing of its intention to acquire the land. Land owners are offered an opportunity to require the State or Territory to give reasons for the acquisition and to appeal to a court against the acquisition. If the State or Territory does acquire land, it must pay compensation to the land owner. The definitions of 'land' and 'acquisition' vary in the relevant legislation.

A table listing the applicable legislation for each of the six States and Territories and a comparison of their definitions of 'land' and 'acquisition' is provided on the next page:

State, Territory	Name of Act	Definition of 'Land'	Meaning of 'Acquisition'
New South Wales	<i>Land Acquisition (Just Terms Compensation) Act 1978</i>	Includes any 'interest in land' which is defined as (a) a legal or equitable estate or interest in the land or (b) an easement, right, charge, power or privilege over, or in connection with, the land.	Acquisition means an acquisition of land or any interest in land.
Northern Territory	<i>Lands Acquisition Act 1978</i>	Means land (including seabed) within the limits of the Territory, includes an interest in land; 'interest' means (a) a legal or equitable estate or interest in the land; or (b) an easement, right, power or privilege in, under, over, affecting or in connection, and includes native title rights and interests.	Not defined.
Queensland	<i>Acquisition of Land Act 1967</i>	Means land, or any estate or interest in land, that is held in fee simple, but not a freeholding lease under the Land Act 1994.	Not defined.
South Australia	<i>Land Acquisition Act 1969</i>	Includes an interest in land; 'interest' in land means (a) a legal or equitable estate or interest in the land; or (b) an easement, right, power, or privilege in, under, over, affecting or in connection with, the land; or (c) native title in the land.	Not defined.
Tasmania	<i>Land Acquisition Act 1967</i>	Means messuages, tenements, hereditaments, buildings attached to the land and any estate in the land. 'Estate', in relation to land, includes any estate, interest, easement, right, title, claim, demand, charge, lien or encumbrance in, over, to or in respect of that land.	Means purchase or take. 'Purchase' means purchase by agreement under the Act. 'Take' means to take by a compulsory process under the Act.
Victoria	<i>Land Acquisition and Compensation Act 1986</i>	An interest in relation to land means (a) a legal or equitable estate or interest in the land; or (b) an easement, right, charge, power or privilege in, under, over, affecting or in connexion with land.	Means to acquire an interest in land (a) by compulsory process; or (b) by agreement if the person acquiring is empowered to acquire by compulsory process.
Western Australia	<i>Land Administration Act 1997</i>	Means (a) all land within the limits of the State; (b) all marine and other waters within the limits of the State; (c) all coastal waters of the State defined by s3(1) of the <i>Coastal Waters (State Powers) Act 1980</i> of the Commonwealth; and (d) the sea-bed and subsoil beneath, and all islands and structures within, waters in (b) & (c)	Not defined. However, the Minister may acquire an estate, interest or other right in or to land in the public interest from any person in accordance with the provisions of the Act.

It is clear that the agricultural industry would be able to argue that the protection afforded by the legislation listed above should apply to the sector if a State or Territory authority sought by a means set out in the legislation to acquire ownership of land or to take possession of land held by a farmer.

In NSW, the meaning of 'interest in land' as used in the *Land Acquisition (Just Terms Compensation) Act 1991* was explored in *Hornsby Council v Roads and Traffic Authority NSW*.⁸⁴ The NSW Court of Appeal recognised that the definition of 'interest in land' as used in the Act was broad. Nevertheless, it believed that the term should be limited to proprietary or quasi-proprietary rights, such as easements or charges. The definition given by the Court of Appeal is much narrower than the definition of property adopted by the High Court for the purposes of s51(xxxi).⁸⁵ In the *Hornsby* decision, the Court of Appeal concluded that the Hornsby Council did not have an 'interest in land' and therefore it did not consider whether or not the State 'acquired' an interest in land for the purposes of the Act.

It is untested, however, whether or not the scope of the NSW legislation would extend to situations where the State or a third party acquires a benefit under other environmental or planning legislation. It is also uncertain if the term 'acquisition' as used in the legislation listed above would extend to instances where regulatory restraints result in a 'deprivation' of land rights but do not effect an 'acquisition'. In any event, as a general rule, the legislation would not prevent the State legislature from enacting other legislation which specifically authorises the taking or acquisition of land and related rights from farmers without compensation.

The way forward

It is clear that environmental regulations and other legislation have substantially altered and continue to alter the common law notion of property rights.

While the three principal attributes of ownership – a right to take possession of land, a right to exclude others from the land and a right to transfer the interest in land, continue to be recognised at law, the purposes for and manner in which rights to land may be used are subject to an ever-increasing amount of regulation.

At the Commonwealth level, there is some degree of protection for landowners in the Constitution. Where the Commonwealth enacts legislation which 'acquires' private property, acquisition must occur on 'just terms'. As we have seen, the High Court has narrowly interpreted the meaning of 'acquisition', so that only the three principal attributes of ownership are protected. 'Interference' with rights to use property will not trigger an obligation of the Commonwealth to pay just terms.

There is some support to extend the principle of ‘acquisition’ to include situations where a land owner is deprived of certain rights. Even if an environmental regulation could be shown to result in an ‘acquisition’, the High Court has developed exceptions which permit the Commonwealth to acquire property without paying just terms. It is arguable whether or not environmental legislation would fall within any of these exceptions.

At a State level, there is no constitutional protection against either the acquisition or deprivation of property rights. The courts offer property owners some protection by adopting a legal presumption that a State does not intend to interfere with property rights without payment on just terms, but this presumption applies only where the terms of relevant legislation are unclear or ambiguous.

The States have tried to redress this imbalance between government and landowners by adopting legislation which requires state agencies to acquire private property on just terms. Nevertheless, the legislation is directed at situations where states acquire one of the principal attributes of property by compulsion or by negotiated agreement. State environmental regulation which restricts rights of use does not appear to be caught by such legislation. Moreover, it would not prevent the State legislature from enacting other legislation which specifically authorises either the taking or acquisition of land and related rights from farmers.

How then are farmers and the agricultural sector to proceed?

Because of constitutional and other legal constraints, the battle for land rights will be won at a policy level before Commonwealth and State governments. This battle will require farmers and the agricultural sector to continue to focus on legislative lobbying. Members will need to develop collectively a series of policy-based arguments which centre on the:

- political and philosophical bases for non-interference with common law property rights⁸⁶
- economic rationale for a set of property rights with minimal regulatory oversight and how such rights achieve outcomes satisfactory to both environmental concerns and those of free enterprise⁸⁷
- need for regulatory intervention (if required) to be consistent with or complementary to scientific best practice and
- redistribution of the costs of environmental compliance to all parties who reap benefits from environmental initiatives.

Arguments in each of these areas are outside the scope of this paper but they will determine the nature and content of future legislation and the extent to which it affords the property rights of the farming industry any statutory protection.

Endnotes

- ¹ Copies of the submissions to the Productivity Commission's inquiry are located at www.pc.gov.au/inquiry/nativevegetation
- ² See, for example, the submissions of the Pastoralists and Graziers Association of Western Australia dated 18 July 2003 and of the Institute of Public Affairs.
- ³ Productivity Commission, *Impacts of Native Vegetation and Biodiversity Regulations: Issues Paper* (May 2003) 23.
- ⁴ Anderson, RA, "Secure Rights Needed Now", *The Land*, 28 August 2003, 13.
- ⁵ For a discussion on water rights, see generally Gardner, A, 2003, "The Legal Basis for the Emerging Value of Water Licences – Property Rights or Tenuous Permissions", 10, *Australian Property Law Journal*, 1; M Blumer, M, 2000, "In Search of the Common Bonyip: a Commonsense Approach to Water Property Right in NSW", 17, *Environmental and Planning Law Journal*, 334; Poh-Ling Tan, 1999, "Water Licences and Property Rights: the Legal Principles for Compensation in Queensland", 16, *Environmental and Planning Law Journal*, 284; Goesch, T, and Hanna, N, 2002, "Efficient Use of Water: Role of Secure Property Rights", 9, *Australian Commodities*, 372; Vanderbyl, TL, 1995, "Property Rights in Water and Other Natural Resources", Paper presented at the Australia Water and Wastewater Association Federal Convention Sydney; Brennan, D and Scoccimarro, M, 1999, "Issues in Defining Property Rights to Improve Australian Water Markets", 43, *Australian Journal of Agricultural and Resource Economics*, 69.
- ⁶ Toohey, J, and Dwyer, B, 2002, *Introduction to Property Law*, 4th ed., 15.
- ⁷ See, for example, Bright, S, "Of Estates and Interests: A Tale of Ownership and Property Rights" in Bright, S and Dewar, J (eds), 1998, *Land Law: Themes and Perspectives*, 529 and Dodds, S, "Property Rights and the Environment" in Cosgrove, L, Evans, DG and Yencken, D (eds), 1994, *Restoring the Land: Environmental Values, Knowledge and Action*, 47.
- ⁸ Toohey and Dwyer, above 3; Bradbrook, AJ, MacCallum, SV and Moore, AP, 1997, *Australian Real Property Law*, 2nd ed., 1-19.
- ⁹ Toohey and Dwyer, above 15 -22; Bradbrook et al, above 1-19, 1-23.
- ¹⁰ Toohey and Dwyer, above 3.
- ¹¹ Above 15.
- ¹² Bates, G, 2002, *Environmental Law in Australia*, 5th ed., 20.
- ¹³ Butt, P, 2001, *Land Law*, 4th ed., 8.
- ¹⁴ Above 16, and Bradbrook, MacCallum and Moore, above 13-14.
- ¹⁵ Bates, above 21.
- ¹⁶ See, for example, *Graham v K D Morris & Sons Pty Ltd* (1974) Qd R 1 and *Wandsworth District Board of Works v United Telephone Co Ltd* (1884) 13 QBD 904.
- ¹⁷ Butt, above 11-13.
- ¹⁸ Above 14-15.
- ¹⁹ Bates, above 21.
- ²⁰ Butt, above 17-22.
- ²¹ For a discussion of the limitations on the right to support at common law, see Butt, above 18.
- ²² Butt, above 20-21.
- ²³ Bonyhady, T, 1992, "Property Rights" in Tim Bonyhady (ed.), *Environmental Protection and Legal Change*, 41, 61.

- 24 (1992) 175 CLR.
- 25 Where the Commonwealth seeks to procure land or an interest in land through compulsory acquisition, by negotiated agreement or purchase of property available in the open market from landowners, it must also comply with its obligations set out in the Lands Acquisition Act 1989 (Commonwealth). Regulatory interference does not fall within any of the three modes of acquisition in that Act.
- 26 Section 109 states: “When a law of the State is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”.
- 27 S51(i) of the Constitution.
- 28 S51(xxix) of the Constitution.
- 29 S51(xx) of the Constitution.
- 30 S51(ii) of the Constitution.
- 31 Bates, above 58.
- 32 See, for example, *Murphyores v Commonwealth* (1976) 136 CLR 1 and *ACF v Commonwealth* (1980) 28 ALR 257.
- 33 *Cole v Whitfield* (1988) 78 ALR 42; Bates, above 58.
- 34 *Commonwealth v Tasmania* (1983) 46 ALR 625.
- 35 Above 695; Bates, above 60.
- 36 *Commonwealth v Tasmania*, above 670, 729, 782.
- 37 Above 627.
- 38 Bates, above 64. See also *Richardson v Forestry Commission* (1988) 77 ALR 237.
- 39 Bates, above 65.
- 40 Above. See also *Commonwealth v Tasmania*, above.
- 41 Hanks, P, *Constitutional Law in Australia*, 1996, 2nd ed., 359.
- 42 Above 364; Bates, above 65-66.
- 43 Allen, T, 2000, *The Right to Property in Commonwealth Constitutions*, 98; *Cole v Whitfield* (1988) 78 ALR 42, 44.
- 44 Evans, S, 2001, “Property and the Drafting of the Australian Constitution”, 29, *Federal Law Review*, 6.
- 45 *Minister of State for The Army v Dalziel* (1944) 68 CLR 1 261, 290.
- 46 Above.
- 47 *Georgiadis v Australian and Overseas Telecommunications Commission* (1994) 119 629.
- 48 *Health Insurance Commission v Peverill* (1994) 119 ALR 675.
- 49 *Minister for Primary Industry and Energy v Davey* (1993) 119 ALR 108.
- 50 *Commonwealth v Western Mining Corp Ltd* (1996) 136 ALR 353.
- 51 *Toohey, Re; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 342.
- 52 Allen, above 135.
- 53 Above 175.
- 54 Forbes, J, 1995, “Taking Without Paying: Interpreting Property Rights in Australia’s Constitution”, Agenda 313, 315. Also Pape, B, “Taking Farmers’ Property Rights Seriously and Just Compensation for Their Taking”, Paper presented to Fourth Annual Global Conference on Environmental Taxation Issues, Experience and Potential, Sydney 5-7 June 2003.
- 55 Above 316.

- ⁵⁶ Hanks, above 500.
- ⁵⁷ (1979) 142 CLR 397, 506, 415.
- ⁵⁸ For an interesting analysis of this case, see Walker G de Q, 1982, "The Constitutional Protection of Property Rights: Economic and Legal Aspects" in *The Constitutional Challenge*, 135.
- ⁵⁹ Commonwealth v Tasmania, above.
- ⁶⁰ Australian Capital Television Pty Ltd v Commonwealth (1992) 108 ALR 577.
- ⁶¹ (1997) 147 ALR 42.
- ⁶² Sperling, K, 1997, "Going Down the Takings Path: Private Property Rights and Public Interest in Land Use Decision-Making", 14, *Environmental and Planning Journal*, 427, 431.
- ⁶³ Above.
- ⁶⁴ See Commonwealth of Australia v WMC Resources Ltd (formerly Western Mining Corporation Ltd) (1998) 152 ALR 1 and Smith v ANL Ltd (2000) 176 ALR 449.
- ⁶⁵ Hanks, above 508-9.
- ⁶⁶ Allen, above 40.
- ⁶⁷ Re Director of Public Prosecutions; Ex Parte Lawler (1994) 119 ALR 655; WSGAL Pty Ltd v Trade Practices Commission (1992) 111 ALR 126.
- ⁶⁸ Mutual Pools and Staff Pty Ltd v Commonwealth of Australia, (1994) 119 ALR 577, 586.
- ⁶⁹ Above.
- ⁷⁰ Above.
- ⁷¹ Above 587.
- ⁷² See, for example, Health Insurance Commission v Peveril, (1994) 119 ALR 675; Georgiadis v Australian and Overseas Telecommunications Corporation, (1994) 119 ALR 629; Nintendo Co Ltd v Centronics Systems Pty Ltd (1994) 121 ALR 577.
- ⁷³ Health Insurance Commission v Peveril, above 680.
- ⁷⁴ Mutual Pools and Staff Pty Ltd v Commonwealth, above, 601.
- ⁷⁵ Airlines Australia v Canadian Airlines International (1999) 167 ALR 392.
- ⁷⁶ Allen, above 240.
- ⁷⁷ Georgiadis v AOTC, above 638.
- ⁷⁸ Hanks, above 512.
- ⁷⁹ Castan, M and Joseph, S, 2001, *Federal Constitutional Law: A Contemporary View*, 301.
- ⁸⁰ Dyson, M, 2002, "Research Report on Using Existing Legislation to recover and Protect Environmental Flows in the River Murray", in *Land & Water Australia, Property: Rights and Responsibilities: Current Australian Thinking*, 73, 77.
- ⁸¹ Bonyhady, above 70.
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- ⁸⁷ See: Preston, BJ, 1996, "The Role of Property Rights and Intellectual Property Rights in the Conservation of Biological Diversity", in Boer, B, Fowler, R and Gunningham, N (eds), *Environmental Outlook No 2: Law and Policy*; Bromley, DW, 1991, *Environment and Economy*; Bennett, J and Block, W (eds), 1991, *Reconciling economics and the environment*; Knetsch, JL, 1983, *Property Rights and Compensation: Compulsory Acquisition and Other Losses*.

Market power, wheat exports, law and cases

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Australia is the third largest exporter of wheat. Approximately 80% of Australia's total wheat production is exported, accounting for between 15% and 20% of all wheat traded in the world market. With (pre-drought) export earnings close to \$3.5 billion in 1999-2000,¹ wheat is an important commodity to the Australian economy.

However, Australia is a small producer by world standards, accounting for only 3% to 4% of total world production. The export orientation of the Australian wheat industry means that its performance is affected by prevailing world wheat market conditions, including various forms of government intervention in the domestic and international wheat markets.

The marketing of Australian wheat was totally in the hands of the Australian Wheat Board (AWB) for over half a century until 1989. That year, the domestic wheat market was deregulated allowing other companies, as well as the AWB, to trade grain within Australia. The 'single desk' for exporting all Australian wheat continued with the AWB (now AWB Limited) against some opposition but generally with strong farmer support.

Debate over the single desk itself and AWB's holding of the desk power has continued into 2004. Supporters argue that the wheat single desk may, to some extent, either reduce vulnerability to the vagaries of the world marketplace, or increase the AWB's influence on the world wheat market.

In 1999 (after National Competition Policy started in 1995), the AWB was 'privatised' as a grower owned and controlled unlisted public company. The Explanatory Memorandum to the *Wheat Marketing Legislation Amendment Act 1998* (Commonwealth), which amended the *Wheat Marketing Act 1989* summarised the Government reasoning:

- The AWB was established in 1939 to control the marketing of wheat in Australia. It has operated under various Commonwealth statutes with details of wheat

marketing changing over time, including deregulation of the domestic market in 1989. [Under the] *Wheat Marketing Act 1989* ... the AWB has the sole right to export wheat. It also has responsibility for the commercial aspects of wheat marketing through operating wheat pools.

- Following lengthy discussion, Government and industry have agreed that from 1 July 1999 responsibility for all commercial aspects of wheat marketing will be taken over by a new grower owned and controlled Corporations Law company structure. ... the only ongoing Government involvement (and therefore regulatory impact) in wheat marketing will be in relation to the export monopoly on wheat which will be managed ... by a small independent statutory body.
- The international market for wheat is distorted by the interventionist policies of other grain producing countries such as the US and EU which use varying forms of domestic support and export subsidy programs. Aggressive use of these programs can substantially reduce international wheat prices.
- The export monopoly, therefore, provides a tool to conduct the export marketing of Australian wheat to maximise the net returns to growers. It is also considered that the export monopoly provides a net benefit to the wider Australian community. (emphasis added)
- The most appropriate option is to legislate the export monopoly on wheat to an independent statutory body to be known as the Wheat Export Authority (WEA). For an initial period of five years the legislation will provide that the new grower company (AWB) pool subsidiary has an automatic right to export wheat. Requests to export wheat from other than the grower company (as currently happens) would be managed by the WEA to separate regulatory and commercial functions. ... The WEA would monitor and assess the pool subsidiary's use of its wheat export rights to ensure that the company was using them in accordance with the intentions of Parliament.

In August 2001, AWB listed on the Australian Stock Exchange as AWB Limited.

The AWB Board's listing Prospectus summarised business operations and aspirations:²

"AWB is Australia's major national grain marketing organisation and is one of the world's largest wheat management and marketing companies. Its core activities are the pooling, marketing, financing and risk management of Australian wheat. Through its wholly owned subsidiary, AWB (International) Limited, AWB is the

nation's exclusive bulk wheat exporter. AWB earns a pool management fee for the provision of services needed to perform this role.

"AWB is also a domestic trader of wheat and other grains. AWB enjoys a unique position in the Australian wheat industry. It has significant expertise in global wheat and domestic grain markets and a well recognised and highly regarded brand name. These factors have underpinned its strong financial performance, with forecast operating profit after tax for [2001] of \$79.4 million, an increase of 25% over the previous year.

"To ensure its continued strong performance, AWB has developed a business growth strategy, which is based around consolidating its core activities while diversifying and increasing its market share and customer base across the grain value chain. In particular, AWB plans to offer additional financing and risk management products to its existing grower customer base, expand the product offering to growers of non-wheat grain and strategically invest in the supply chain in order to reduce overall costs to growers and enhance the competitiveness of Australian grain in export markets".

There has been continuing pressure, domestically and from overseas, for the AWB to be totally deregulated, ie to lose the long-held monopoly selling rights of Australian wheat exports. In addition, to the National Competition Policy Review in 2000 of the *Wheat Marketing Act* and the lurking second round review in 2004, during 2002 and 2003 a number of reports criticising the single desk arrangement were pitched into public debate. These were often dismissed as 'vested interest' but reflect the bubbling pressures for removal of artificial influences in the marketplace. Similarly, the US Embassy, on the eve of the start of free trade talks in March 2003, confirmed that 'elimination of single desk wheat exports' would be a key item on the agenda for the proposed free trade agreement between Australia and the USA.³

AWB justifies the existence and its holding of the wheat export monopoly in a number of ways, but mainly by arguing that the single desk gives AWB 'market power' that allows it to gain a higher price in the export markets and provide better returns to growers. Opponents of the AWB dispute all of the alleged advantages of the monopoly selling rights that were put forward by the AWB (see next page).

This paper considers, in particular, the market power hypothesis by examining factors that influence the export price of Australian wheat, particularly the amount of Australian wheat exports, based on an econometric model using data from 1961 to 2000. This paper also relates the economic findings to the AWB and single desk principles and policy set

down in the legislation, marketplace practices and tested in court cases, though the following sections:

- an overview of the Australian wheat industry
- changes in wheat marketing in Australia, reviews and arguments for and against the single desk selling system are outlined
- an empirical model is then introduced, followed by estimated results
- concluding remarks including consideration of developments since the 2000 review.

Table 1. World wheat production, trade and stocks (in million tonnes)

Country	92/93	93/94	94/95	95/96	96/97	97/98	98/99	99/00	00/01	01/02
Production										
China	100.5	106.4	101	102.2	110.6	123.3	109.7	113.9	102	98
EC ²	84.8	81.1	85.5	87.7	100	94.7	103.8	96.9	104.4	95
CIS	88.7	82.7	59.6	59.5	63.5	79.4	55.5	64.6	62.7	74.7
India	55.7	56.8	59	65.8	62.6	69.3	65.9	70.8	75.6	68
USA	66.9	65.4	63.2	59.5	62	67.5	69.4	62.7	60.5	53.5
Canada	29.9	27.2	23.2	25	29.8	24.3	24.1	26.9	26.8	24
Australia	16.2	16.9	9	17	23.7	19.4	22.1	25	21.2	20.5
Pakistan	15.7	16.2	15.2	17	16.9	16.7	18.7	17.9	21.1	18.7
Turkey	17.3	16.8	14.7	15.5	16.2	16.2	18.5	16.5	17.5	16
Argentina	9.7	9.2	11.3	9.5	15.9	14.8	11.5	15.3	16	17.8
Others	76	79.4	82.6	82.1	81.2	84.2	87.3	73.9	73.5	81.1
World Total	561.4	558.1	524.3	540.6	582.4	609.8	586.5	584.4	581.3	567.3
Exports										
USA	37.1	32.9	32.4	33.6	26.5	28	29.8	29.8	28.5	28.5
Canada	21.6	18.2	21.3	17	17.9	21.2	14	18.4	17	17
Australia	9.5	12.8	7.9	12.1	17.9	15	16.1	17.3	16.5	16.5
EC ²	22.7	19.1	16.1	12.6	17	13.1	13.7	16.7	14.5	12.5
Argentina	7.3	4.5	7.9	4.4	10.3	9.6	8.9	10.8	11.5	12.5
Imports										
Egypt	6.2	5.9	6.2	6.1	6.9	7.2	7.4	6.2	6	6.1
Japan	5.9	6	5.7	5.9	6	5.7	5.7	6	5.8	5.8
Brazil	NA	NA	6.5	5.5	5.9	5.9	7.3	7.1	7.5	7
Iran	NA	NA	3.3	2.8	7.1	3.6	2.5	7.2	7	6
Pakistan	NA	NA	2	1.9	3.1	3.6	3.1	1.8	0.1	0.5
Indonesia	NA	NA	3.3	3.5	4.2	3.7	3.2	3.8	3.8	4
S. Korea	NA	NA	4.1	2.4	3.4	3.6	5	3.8	3.5	3.7
CIS	18.5	6.2	3.8	3.6	2.5	2.2	4.5	9	5.3	4.7
China	6.7	4.5	10.1	12.6	8	1.9	0.8	1	0.4	2
Stocks										
World Total	55	47.4	34.4	34.2	36.2	41	56.6	51.5	50.9	39

Source: International Grains Council, 1998.

The Australian Wheat Market

The Australian wheat industry, involving 36,000 wheat-growing farms contributes \$3.5 billion per annum in exports and directly affects more than \$6 billion in grain handling infrastructure within Australia.⁴ However on a world scale Australia is a small producer of wheat, accounting for about 3% of total world production. On the other hand, due to our relatively small population, 80% of Australian wheat is exported. The relative size of Australia wheat industry is shown in Table 1.

Australian wheat production has been on an upward trend since 1960 but has been erratic, with several large peaks and troughs. These changes in production are due to changes in weather conditions and prices. Up until 1973, wheat prices were fairly stable, but since then they have become rather volatile. The structural change was the result of the oil crisis, grain embargos and the formation of the European Union in the early 1970s.

The increased volatility of world wheat prices post 1973 has meant that the Australian farmer and other wheat growers around the world face a greater price risk. Australian wheat farmers have generally relied upon the AWB national pool to manage the price risk. Post 1973, the 'pool price' and the 'export price' seem to move together, but are not as similar. Post 1973, the export price tends to be higher than the pool price.

The closing stocks of Australian wheat each year have also been very erratic over the last 40 years. Despite the drastic changes in stocks from year to year, the stock to usage ratio for world wheat has been on a downward trend since 1960. There is no longer as much wheat held in stock in the world relative to the amount being consumed, and this also contributes to price instability. Stocks of any storable commodity tend to stabilise prices.⁵

Australia exports some 80% of wheat production. Major importing countries of Australian wheat are Indonesia, Japan, Korea, Malaysia, Pakistan, Iran, Iraq and Egypt (Table 2).

Australia has a notably diversified market portfolio and does not rely on a particular country for our exports. This is assisted by Australia's logistical (distance) advantage over its major exporting competitors when selling wheat to Asia and the Middle East.

Table 2. Importers of Australian wheat (in ' 000 tonnes)

	92/93	93/94	94/95	95/96	96/97	97/98	98/99	99/00
Africa								
Egypt	1320	1358	0	739	1665	735	1503	1124
Ethiopia	19	24	10	35	6	41	33	20
South Africa	32	0	0	412	349	161	234	239
Asia								
Bangladesh	61	96	73	174	231	254	372	343
China	583	1338	584	2229	156	204	165	107
India	1050	0	0	0	1632	2189	296	173
Indonesia	974	1187	1162	1959	2369	2424	1414	2059
Japan	1114	1179	1254	1148	1256	1108	1147	1195
Korea	975	1246	629	703	687	768	1212	1181
Malaysia	647	687	588	798	631	671	874	800
Pakistan	217	43	72	233	1308	1039	1102	1187
Singapore	144	149	149	88	59	86	107	92
Sri Lanka	9	61	5	326	263	80	189	155
Thailand	82	176	105	243	255	315	308	251
Middle East								
Bahrain	18	0	13	27	67	37	21	23
Iran	1119	2593	524	1879	3349	579	1663	1860
Iraq	105	335	102	50	815	1388	1269	2517
Kuwait	0	0	0	144	202	177	219	132
Oman	151	187	153	193	287	282	248	300
Qatar	44	44	39	40	64	36	61	22
UAE	229	232	188	226	457	289	0	462
Yemen	233	322	0	254	633	527	644	544
Oceania								
Fiji	58	89	71	55	67	66	73	88
New Zealand	194	221	173	158	146	84	94	182
PNG	116	116	125	95	119	109	131	137
Total	9534	12910	7892	12056	18348	15245	16384	17274

Source: Australian Commodity Statistics, 2000.

Another important statistic when examining trading partners is the percentage of the market that Australia supplies. In 1998-99, Australia provided approximately 17% of the wheat to the world market. By comparison, USA, Canada, EU and Argentina have 31, 20, 16 and 8% of market shares, respectively.⁶ Also in this period, 49.2% of the wheat traded to the Iraqi market and 48% traded to Indonesia was provided by Australia. Similarly, Australia also provided close to 25% of the wheat to South Korea and Yemen that year.⁷

- So, although Australia has an insignificant share of the world wheat market we still have a major share of some segments of the world market.
- Those markets may be somewhat dependent on Australia to provide wheat. Consequently, AWB may be able to take advantage of its dominant market position in these markets, for example, by strategically pricing to market.

Australian Wheat Marketing

The Australian wheat marketing system has been evolving since establishment of a crop acquisition scheme and the AWB at the start of the Second World War to help stabilise wheat prices and production.⁸

At the outbreak of the war in 1939, a Wheat Board was set up to stabilise prices, and during the war wheatgrowers received a guaranteed minimum price for their output. In 1948, the Board was made permanent and reconstituted for peace-time purposes. The guaranteed minimum price continued [and production expanded].⁹

There were various arguments over the decades, some reaching the High Court,¹⁰ about operation of the Wheat Stabilisation Scheme and more recent versions of statutory wheat marketing (as well as similar schemes for most other grains). Even so, the most significant changes occurred a full 50 years later in 1989 when the domestic wheat market was deregulated allowing private grain traders to trade within Australia.

The AWB continued as the 'export single desk seller', or as described frequently in the media, "Australia's monopoly wheat exporter". The single desk authority means the AWB Limited – now a listed company – controls export of all the wheat. This arrangement was established through the *Wheat Marketing Act 1989*, as amended in 1998, with strong support from most wheat growers.

Central to the wheat industry is the retention of the Single Desk. So what is the Single Desk and why is it important? The Single Desk system is a marketing tool that Australian growers wanted and which we will continue to operate on their behalf. As I said, it is enshrined in legislation and we are confident that the [NCP] review of this system will be positive.

*AWB Chief Executive 1999*¹¹

Although there are now several grower-owned and private grain companies that trade domestically and may also export wheat in containers or bags, with WEA permission, not much wheat is exported this way. As could be foretold, this is due to higher costs of exporting in containers/bags compared to bulk shiploads, and transaction costs and time delay in applying for a WEA permit (which includes achieving agreement from AWB – see below).

As a result, AWB Limited through its subsidiary AWB International Limited, has a legislated and effective monopoly over Australian wheat exports.

In 2000, the *Wheat Marketing Act 1989* was reviewed under National Competition Policy (NCP) to determine whether the single desk status of the AWB has resulted in net public benefits. This NCP review was high-profile and formal. In addition to commissioned independent studies of economic and social impacts,¹² the Review Committee received many submissions from industries and businesses associated with wheat production and trade.¹³

Even before the Review it did appear generally accepted that the single desk for export wheat is an artificial monopoly arising from government regulatory arrangements and that it operates anti-competitively. 'Community benefits' are the issue.

The government is committed to the principles of national competition policy. Continuation of these arrangements for the export monopoly for the full five-year period will be subject to the outcome of a comprehensive and independent national competition policy review in 1999-2000. *Minister 1998*¹⁴

National Competition Policy – to remove regulations that restrict competition unless there is clear public benefit

In 1995, the Council of Australian Governments (COAG) agreed to implement the 1993 Hilmer Committee Report recommendations on National Competition Policy.¹⁵ NCP Reform Package and Competition Principles Agreement were to be applied by each government to all their laws. NCP objectives, as stated by the National Competition Council (NCC), are to benefit the Australian community by extending anti-competitive conduct laws in the Trade Practices Act to almost all businesses; improving the performance of essential infrastructure and of government businesses through structural reform, and reviewing and where needed reforming all laws that restrict competition to ensure any restrictions provide a net public benefit.¹⁶

*The NCP required rigorous reviews. Foundation points for reviews as stated in 1999 NCC Guidelines include:*¹⁷

Regulations that restrict competition should be removed

In all likelihood restrictions to competition impose large net costs on the community. Restrictions to competition:

- impose costs through higher prices
- reduce consumer and business choice
- cross-subsidise inefficient business at the expense of efficient business, and
- remove the spur for innovation and efficiency.

Unless there is a clear public benefit proven

The NCP presumes that restrictions will be removed unless proven beneficial, noting that there 'is a small chance that restrictive regulation may provide some community wide benefit, but that benefits exceed costs. This must be clearly shown by the supporters of the law, rule or regulatory system (they have the onus of proof).

The AWB submission to the Review claimed that the single desk allowed AWB the ability to price discriminate and restrict supply, and therefore to obtain price premiums.¹⁸ Those opposed to the single desk argued (and reiterated¹⁹) that:

1. price differences should not to be confused with real price premiums
2. price premiums, if they exist, do not necessarily reflect market power. Instead, other factors such as seasonal advantage from Australia's location in the Southern Hemisphere, transport advantages, quality differences and customer services are more important than merely being a single desk.

Other issues arising in submissions included distorting effects on domestic grain markets, the inefficiency (and so competitiveness reduction and market loss) of needing to obtain a series of approvals, and the principle of passing a 'grant of public power to a private sector company.

Wheat Marketing Act – mechanics of the issue in 2000

From NCP and marketplace perspectives, the *Wheat Marketing Act* restricts competition directly through its wording and operation. Part 2 establishes the Wheat Export Authority (WEA) as a continuation of the former Australian Wheat Board and sets its powers and functions.

- s5 (1) The Authority has the following functions:
- (a) to control the export of wheat from Australia

(b) to monitor nominated company B's performance in relation to the export of wheat and examine and report on the benefits to growers that result from that performance.

- Where Company B is AWB International Limited (AWBI).
- The WEA is a separate statutory authority but is not structured as a neutral regulator. Of five WEA members, one is a government representative, two are nominated by the Grains Council.

WMA Part 4 covers the Control of Wheat Exports.

s57(1) A person shall not export wheat unless:

- (a) the Authority has given its written consent ... and
 - (b) the export of the wheat is in accordance with the terms of that consent.
- The requirement that the WEA must consent to all wheat exports is a restrictive provision but depending on reasons for it and the manner in which it is applied, this regulation might not be anti-competitive (eg if blanket rules applied to all interested exporters).

S57 (1A) The prohibition in subsection (1) does not apply to nominated company B.

- (2) An offence against subs. (1) is an indictable offence.
 - (3) The Authority's consent to the export of wheat may be limited to the export of the wheat in specified circumstances, in accordance with specified requirements ...
- Exemption of AWBI from needing WEA export consent and from having conditions placed on its exports, is a restriction on competition. AWBI may export freely, but its competitors and potential competitors cannot.
 - In addition through s3A and s3B, AWB (International) is accorded degrees of power up to 'absolute veto' (in the case of bulk shipments) over export plans of its trading competitors, which could include wheatgrowers.

(3A) Before giving a consent, the Authority must consult nominated company B.

(3B) The Authority must not give a bulk-export consent without the prior approval in writing of nominated company B. For this purpose a consent is a bulk-export consent unless it is limited to export in bags or containers.

After considering submissions from parties for and against the single desk (and some between), the Committee concluded on the 'public benefits test' it:

had not been presented with, nor could it find, clear, credible, and unambiguous evidence that the current arrangements for the marketing of export wheat are of net benefit to the Australian community.

The Committee also concluded or indicated that:

- there was not a clear separation between regulatory and commercial functions of the WEA and AWB
- estimating the impact of deregulation is a complex and imprecise exercise
- there may be price premiums but likely small
- the scheme probably did interfere with innovation in marketing and efficiencies in grain handling
- on balance more competition would likely benefit wheat growers and the community more than keeping the current regulations
- the single desk could (and recommended should) continue for a 'few years' in slightly modified form to see if benefits became clearer – only 'if a compelling case can be made by the time of the 2004 review that there is a net public benefit, then the "single desk" should continue with ongoing regular WEA reviews of AWBI's performance in managing the "single desk", and if necessary, a further NCP review in 2010'.²⁰

Despite the recommendations from the Review Committee (plus a further round of submissions), the Federal Government decided to retain the single desk essentially as it was, with the possibility of the second round review by the WEA in 2004.²¹ Although substantial changes to the legislation did not occur, there is a view that public inquiries such as the 2000 Review, do pressure AWB to become more commercial and operationally efficient (refer footnote 20, p. 34).

Nevertheless, domestic de-regulation since 1989, reinforced by National Competition Policy review of many longstanding regulatory schemes, plus new competitive pressures, have changed grain industries significantly over a decade, including:²²

- deregulation of the domestic market for wheat and all feedgrains
- removal of nearly all legislation restraining access and price setting for 100% of country based storage and 90% of export handling facilities
- new storage, with 3.334m tonnes of capacity built in the period from 1999 to 2002 and a major rationalisation of storage sites of the traditional operators has occurred
- progressive corporatisation and then privatisation of the government authorities and co-operatives that manage logistics and marketing arrangements

- privatisation of almost all rail freight companies and the transfer of ownership to specialist logistics companies rather than grain companies
- changes in some state export arrangements such as barley in Victoria and Queensland, and sorghum in Queensland
- consolidation of grower companies/co-operatives, through mergers and acquisitions, from 15 to six in 2002, with pressures continuing.

Another source of pressure for removal of the single desk comes from overseas. At conclusion of the Uruguay Round trade talks the world supply of wheat remained heavily distorted by government subsidies as well as trade distorting single desks. Trade negotiations under the WTO rules have important implications for market support and subsidies in the USA and EU, as well as the single desk selling systems in Australia and Canada.²³

Further trade liberalisation and reductions in government support to US and EU growers as trade talks continue mean that any single desk selling power would be even harder to justify.

Export single desk – arguments for and against

Countering 'interventionist policies of other grain producing countries such as the US and EU' so to 'maximise net returns to growers' and achieve 'net community benefits' was, as seen above, put forward by the Federal Government in 1998 as the policy foundation to the single desk.

The main reason for a single desk, argued by AWB and wheat grower groups, is that the high levels of government intervention in other countries have heavily distorted the world wheat market. AWB claims that because of these market distortions the world wheat market is not a level playing field, nor is it truly competitive. AWB believes that the single desk has enabled it to remain competitive in this imperfect market.

AWB also argues that the single desk vested effectively in AWB Limited benefits growers and the community by guaranteeing access for all growers to international markets; capturing significant economics of scale in product development, logistics, storage and handling; and obtaining a price premium for Australian wheat.²⁴

Internationally, government interventions in the wheat market have been prolific since the Second World War, based initially on perceived need for food security. The government regulations that are most recognised and visible are price support programs and export subsidies in the USA and EU. However, these are not the only supports.

Wheat growers in the other parts of the world, including Canada and Australia, also receive government assistance. These supports can be measured in terms of the

percentage of income that are provided by government subsidies. The percentages are 46, 58, 11 and 11 for USA, EU, Canada and Australia, respectively. This means that on average a wheat farmer in the USA receives 46% of his or her income from the government rather than markets, compared to an Australian wheat farmer who receives 11% of income from government via arrangements.

Such figures highlight the enormity of government support in the US and EU. All of these government supports have the effect of increasing world production and therefore depressing world prices. It is also important to note that 80% of the world wheat market is controlled by a limited numbers of multinational companies, including ADM, Andre, Bunge, Cargill, ConAgra, Glencore and Louis Dreyfus.²⁵

Given the relatively small size of the Australian market, the single desk provides some leverage to compete with these massive multinationals.

Other arguments 'for' the single desk are:

- price discrimination through market power allows AWB to charge higher prices for grain
- ability to run an effective price pooling system that offers farmers a form of risk management
- developing new markets through investing money into research and development
- opportunity to negotiate on a level playing field with single desk buyers
- taking advantage of economies of scale in handling and marketing of grain
- preventing weak selling or undercutting by other Australian exporters.

Of these, only the market power argument has economical validity as it is argued by the opponents that private traders could supply the other potential benefits just as easily.

As such, proof of 'market power' as indicated by influence on the marketplace and prices, has been a focus of NCP and other Reviews.

Arguments against the single desk, put forward in the studies commissioned by the NCP Review Committee in 2000, plus submissions and in reports since, include loss of efficiency in the marketing system and re-distribution of incomes between market participants.²⁶

- Single desk selling, as well as being the sole buyer for national pools, restricts competition and decreases incentives for market innovation, which result in inefficiencies and lower returns to growers and higher prices for domestic users and consumers.²⁷ Grainco Australia estimated that up to \$360m could have been saved if AWB had less control over the system.²⁸

- The single desk restricts grower's choice of whom they sell their grains to, who handles their grains and who provides them with price risk management and other marketing services. That Australia does not have a liquid futures market means that wheat prices on the Sydney futures exchange are heavily influenced by the AWB pool estimates. This means that Australia is lacking a true domestic pricing mechanism.

The Australian 'wheat expert monopoly' is not the only single desk in the world wheat market. The Canadian Wheat Board (CWB) plays a similar role for Western Canadian wheat and barley growers in Canada. It too has single desk selling, pooling and government connections. In 2001, the CWB had annual revenues of CDN \$4 to \$6 billion and was the largest exporter of wheat and barley.²⁹

Like the AWB desk, supporters believe the CWB desk gains benefits for wheat producers using their ability to price discriminate in international markets. And like the AWB, it is under increasing pressure to be dismantled. Similar arguments have been and are being put forward either to support or contest its single desk selling power.³⁰ As far back as 1992, the US General Accounting Office investigated the AWB and CWB and found both to be non-competitive sellers due to 'unfair pricing, pooling and government underwriting'.³¹

In Australia, a series of reports in 2002 and 2003 (likely anticipating, after the 2001 NCP, some form of a single desk review in 2004) have further contended that Australia's current supply chain and marketing arrangements do not maximise benefits for wheat growers. Key issues are: these reports indicate variously, high costs, barriers to competition, efficiency and marketplace innovation, unbalanced commercial growth, conflicts of interest and need for the WEA to manage export licences and regulate the industry more effectively.³²

Some legislative changes were to be made during 2002 to strengthen WEA regulatory focus. These were also the subject of substantial debate through Senate inquiry. The Committee identified a 'general view that the Bill does not address' issues of WEA performance and that the WEA is unduly influenced by AWB Ltd. 'These concerns highlight issues regarding accountability and transparency and the nature of the relationship between the WEA and AWBI.'³³

At 2004, critics of the export monopoly and restrictions include some groups of grain growers, as well as grain industry trading and service sectors. Other key grower associations, plus the Federal Government still strongly support the single desk and the market power they consider it gives Australian wheat growers.

Assessing Market Power

Market power in the case of AWB would be defined to be the ability to price discriminate (or price-to-market) to increase total revenue. This means AWB could differentiate its sale prices for wheat with comparable quality between different markets according to a country's price sensitivity.

Market power, if it exists, will enable the AWB to charge more in markets that have less elastic demand, and hence earn a price premium. The amount by which price can be increased (ie the price premium) in a particular market depends on the market share of the supplier, in addition to demand elasticity, in that market.³⁴ That is, the higher the Australian market share, the higher the price premium, other things being equal, and the less elastic the demand, the higher the price premium, other things being equal.

The NCP Review of the *Wheat Marketing Act* 1989 was based mainly on determining whether price premiums exist in some export markets. This was so because the existence of a price premium is a necessary condition for increasing revenue for growers, which is, in turn, a necessary condition for providing net benefits to the general community.

AWB Market power – analysis 1

Various analytical frameworks were used in the submissions to the NCP Review, including hedonic pricing models,³⁵ comparisons of export prices with some benchmarks,³⁶ and simulations.³⁷

Because of the complexity of issues, deployment of a wide variety of methodology is necessary to test the robustness and validity of the findings.³⁸ In other studies, co-integration techniques,³⁹ conjectural variation models,⁴⁰ and the pricing to market test analysis,⁴¹ have also been used to test the market power hypothesis in the grains market in Australia.

Another simple definition of market power is that the supplier is facing a downward sloping demand curve. This means a firm has the ability to influence price it receives by varying quantity of supply.

In this study, an attempt was made to test the market power of the AWB by determining whether it faces a downward sloping demand curve in the export market. The basic idea is that if the demand curve for Australian wheat in the international market is downward sloping, then as Australian exports increase, the export price will decrease. We examine factors that influence the price of Australian

wheat exports and the linkages between export quantities and export prices of Australian wheat based on a multiple regression analysis.

Following Gardner,⁴² the empirical model is specified as set out and discussed in Annex A.

“Total world wheat production appears to be the most influential factor in determining export prices of Australian wheat, followed by the level of the stocks”.

The aim was to test the AWB’s market power hypothesis by estimating the relationship between the quantity of Australia wheat exports and the export prices. Proponents of the single desk argue that AWB can price discriminate because of its size and associated market power that allows it to gain overall price premiums for wheat sold.

Even if this is so, there is still a question over whether this is beneficial to the farmer and the general public. The full premium must be returned to the grower and it cannot be at the expense of the general public, which includes consumers and other grain traders in Australia.

Rather than examining the price premium issues associated with the single desk as had been done by AWB and the Allen Consulting Group for the NCP Review, this analysis (Annex A) examines the ability of the AWB to influence export price by varying the amount of exports. The analysis was conducted based on an econometric model using annual data from the last 40 years relating to the Australian and world wheat markets.

The results showed that there is not enough evidence to suggest that an increase in Australian exports would cause any changes to Australian export prices. Therefore, the conclusions are:

- Total world wheat production appears to be the most influential factor in determining export prices of Australian wheat, followed by the level of the stocks
- AWB does not have the market power or the ability to influence prices in the world wheat market.

That said, a limitation is the aggregate nature of the data used in the econometric analysis. Specifically, the data do not take into account differences in the quality of wheat and marketing conditions in the importing countries.

If data were available for different wheat grades destined for different markets, it may be possible to show more clearly whether AWB has some market power in certain markets where Australia has major market shares and unique products.

Another limitation to the study is that the market power, with associated price premiums, is one of several arguments put forward for a single desk selling system. So, this analysis provides a limited perspective into a complex issue. Nevertheless, the methodology here provides an alternative approach to the existing models and offers some additional insights and contribute to the on-going debate on the single desk selling system.

Is it important that the export single desk achieves the promised benefits? Some thoughts 'in law'.

Although seemingly logical from a citizen's viewpoint, it is likely contentious from a legal angle to suggest that legislation enacted to achieve a purpose might be challenged 'in law' if that purpose is not being attained, and that external policy statements and commitments might provide context to and strengthen such a dispute.

The 103 years since Federation have seen marked expansion of Federal Government powers through a combination of Parliamentary initiative with both analytical and practical support from High Court benches at strategic times. Many of the turning point cases involved agricultural fact situations, and their unfolding itself tells an intriguing story (see AgLaw Paper 1 – *High Court chews the Grass!*).

The scope of Federal power is not, however, unlimited. The challenges to 'constitutionality' of a Federal law (an Act, regulation or regulatory decision) over decades have generally sought High Court adjudication on whether the Federal action is 'ultra vires' or 'beyond the power' granted by the people through The Constitution of Australia.

Famous matters (criticised, applauded or both today) in which the High Court declared a Federal law or action that set out to achieve policy purposes was beyond power because of its actual effect, include:

- *Barger's Case* in 1908 which dealt "a great blow to Deakin and the Labor Party and put an end to the ingenious New Protection" device.⁴³ This was 'an Act to regulate the conditions of manufacture of agricultural implements and not an exercise of the power of taxation'⁴⁴
- *Bank Nationalisation Case* 1948. Federal Government not empowered to centralise banking⁴⁵
- *Cross-vesting Case* 1999. State legal jurisdiction cannot be vested in a Federal Court, even when aiming for 'co-operative Federalism'.⁴⁶

Equally well-known, and debated, matters in which the High Court of the time did not consider a Federal action was ‘beyond power’, or that a State law did not conflict with a Federal counterpart (so putting the State law ‘beyond power’ to the extent of the conflict), include (among many): *Engineers* in 1920,⁴⁷ *The Tasmanian Dam Case* 1983,⁴⁸ and *Cole v Whitfield (The Crayfish Case)* in 1988.⁴⁹

The Crayfish Case is notable for overturning an full body of Constitutional Law and putting a pragmatic stop (so far) to the long string of disputes based on Constitution s92 (Freedom of Interstate Trade).⁵⁰ But for legal analysts a key advance was the High Court’s new willingness (seven judges together) to make use of ‘extraneous materials’ alongside the formal words in interpreting The Constitution.⁵¹

The unified judgement in *Whitfield* looked into a substantial selection of books on history and economics, analyses of the Constitution, media reports of events leading up to Federation, and formal inquiries, studies, speeches and debates. The Court explained their intention in accessing these external or ‘extraneous’ materials:

Reference to the history of s.92 may be made ... for the purpose of identifying the *contemporary meaning* of language used, *the subject* to which that language was directed and *the nature and objectives of the movement* towards federation from which the compact of the Constitution finally emerged.

Full Court in Cole v Whitfield (italics added)

The concept of an action, or a regulation or a law being beyond power, and therefore invalid, is not confined to constitutional questions. In principle, such an issue could arise wherever there is a grant of power by a government or any form of authority, and in part, it seems, the question of ‘outside power’ could arise when an law or rule is not working to achieve the objects set out for it.

Use of external materials in interpreting statutes and regulations is now well established.⁵² Both formally (Interpretation Acts in each jurisdiction set out reference materials) and informally through ‘judicial notice’ or ‘judicial impression’ of a wide range of factors [see AgLaw Paper 1 *High Court chews the Grass!*].

Acts Interpretation Act 1901 (Commonwealth) as at July 2003

General provisions ...

15AA Regard to be had to purpose or object of Act

(1) In the interpretation of a provision of an Act, a construction that would promote *the purpose or object underlying the Act (whether that purpose or object is*

expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

15AB Use of extrinsic material in ... interpretation of an Act

- (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in [ascertaining] the meaning of the provision, consideration may be given to that material:
 - (a) to confirm that the meaning ... is the ordinary meaning conveyed by the text ... taking into account its context in the Act and *the purpose or object* underlying the Act; or
 - (b) to determine the meaning of the provision when [ambiguous or obscure; or manifestly absurd or is unreasonable].
- (2) Without limiting the generality of subsection (1), the material that may be considered ... [includes all parts of the Act, relevant reports of a Royal or Law Reform Commission, committee of inquiry, any treaty or international agreement referred to in the Act, any *explanatory memorandum* or any other relevant document of explanation, the speech to the Parliament, relevant Parliamentary materials, debates ...]
- (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to: (a) *the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act*; and (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

The Wheat Export Single Desk is built, as seen above, on Federal statutes with stated purposes. One significant (for agricultural industries if not legal analysts) challenge to the *Wheat Marketing Act* scheme reached the High Court in 2002. Key points in the Explanatory Memorandum 1998 were recorded by Gleeson CJ to start his judgment, including that the 'export monopoly is a tool ... to maximise net returns to growers ... and provide a net benefit to the wider community' (see beginning of this paper).

NEAT Domestic Trading Pty Limited had tried a number of times to achieve judicial support for its niche wheat market development, against AWB and the WEA refusing six bulk export permits in 1999 and 2000. With s92 (used in the past for such challenges) less available, NEAT's barristers turned to administrative law to dispute whether relevant

factors had been considered and reasonable decisions made under the *Act*, in the Federal,⁵³ and then High Courts. This led Court deliberations first to whether decisions by AWB, a company, were ‘administrative in character’. The Federal Department distilled the outcomes of the initial hearing as:

“In dismissing the application, the [Federal] court found:

- the decisions of AWBI ... were decisions ‘of an administrative character’ ...
- AWBI’s refusals to approve the bulk export of wheat by NEAT were decisions ‘made under an enactment’ and ... reviewable decisions under the ADJR Act;
- the effective reason for AWBI’s refusal to approve NEAT’s application in each case was ... AWBI’s policy against bulk permits for the export of wheat;
- this was an inflexible policy, but was in line with AWBI’s constitutional charter to maximise returns for growers who delivered wheat into its export pools – AWBI had a policy against approving the bulk export of wheat and had rejected NEAT’s applications in pursuance of this policy;
- in these circumstances, the decisions AWBI made were the only decisions it could be expected to make, given its constitutional mandate; and
- in making these decisions, AWBI did not fail to take account of relevant considerations.”⁵⁴

In the High Court, Gleeson CJ did not hesitate to make the legislative and public foundations to the AWB and AWBI roles and powers quite clear (even while rejecting NEAT’s claim in administrative law).

While AWBI is not a statutory authority, it represents and pursues the interests of a large class of primary producers. It holds what amounts, in practical effect, to a virtual or at least potential statutory monopoly in the bulk export of wheat; a monopoly which is seen as being not only in the interests of wheat growers generally, but also in the national interest. To describe it as representing purely private interests is inaccurate. It exercises an effective veto over decisions of the statutory authority established to manage the export monopoly in wheat; or, in legal terms, it has power to withhold approval which is a condition precedent to a decision in favour of an applicant for consent. Its conduct in the exercise of that power is taken outside the purview of the *Trade Practices Act*.⁵⁵

McHugh, Hayne and Callinan JJ, while referring to the complex history of wheat regulation, and to the purpose of the Act, and to points in the Explanatory Memorandum indicating “there was to be a National Competition Policy review of wheat legislation in

1999-2000 and that what it described as AWBI's 'export monopoly' would expire in 2004", were not as direct as Gleeson CJ on a public basis for AWBI. Unlike the earlier judges, these three found the AWBI veto decision was not open to judicial review.

So, NEAT's costly protest was unsuccessful. Kirby J dissented and wrote more on the (still sleeping) question of private companies being granted public/statutory roles and powers and not being subject to the Trade Practices Act and other frameworks – including those on use of market power.⁵⁶

The blanket policy of refusal adopted by AWBI amounted, in effect, to the rewriting of the legislation by the decision of a private company.

Kirby J

It is interesting how little commentary the 2003 NEAT decision sparked in legal newsletters, compared to, say, opinions and analyses floated when the Court handed down its Boral 'market power' decision four months earlier. Media cover was also light with some implied presumption of the beneficial merit of the export single desk for wheat (NCP and other reviews notwithstanding).

AWB weathered another attack on its franchise to run the single-desk wheat export program yesterday when the High Court effectively backed its right to refuse others permission to export wheat. The court dismissed an appeal by Neat Domestic Trading, a small outfit ... part of the New England Agricultural Trading group. ...

The decision protects the crucial role of AWB and its subsidiary AWB International (AWBI) as sole exporter of an average of 16 million tonnes of wheat a year over the past five years. But it delivers a blow to the hopes of the New England Agricultural Trading Group and other would-be exporters ...

The Age, 20 June 2003

However, as summarised above, concerns and splits are developing across the Australian grain industry and among wheat growers (reinforced in part by the NEAT decision). Trade and economic analysts are also concerned about the basis of the single desk. The 'bottom-line' issue, in summary, is whether the export single desk vested in AWB Limited is achieving, or can achieve, the real benefits promised by the Federal Government and projected by AWB?

The NEAT legal action did not test at all the foundation of the anti-competitive restrictions in the *Wheat Marketing Act* (outlines above) but at some point this may occur. At what stage would *not* achieving demonstrable net benefits for growers and the wider community – the aims stated in the Memorandum – possibly bring into question the exercise of public powers granted by the Act through the WEA on to AWB Limited?

Such a legal action would be a most complex exercise. It would and could likely only be pursued by an major entity or consortium (perhaps as a class action) that is economically, socially or policy-wise frustrated with not achieving attention to the issues through political channels.

While it is clear from the *Acts Interpretation Act* that a range of formal materials should be taken into account by Courts in interpreting the purpose of an Act and the meaning of its words, it would be interesting to see how many other issues might be put forward in seeking judicial determination of when a statute may be 'beyond power' because its operation is not achieving its purpose and objects.

For instance:

Might Federal and State Government commitments to National Competition Policy and reviews, including sharp implementation of these promises by the NCC with monetary effect on States, become a judicial 'policy' consideration?⁵⁷

Should Constitutional questions arise, perhaps calling into question on-going use of a Federal power when projected policy results are not being achieved, might the High Court return to early sources (as in *Whitfield*), to ascertain intentions? If so, these materials and associated analysis may reinforce the Competition Policy principles articulated nearly 100 years later.

Limited role for government generally

"Although the Australian Constitutional Convention debates of the 1890s were not permeated by the same attention to political philosophy that figured strongly in the comparable debates in the United States, the Australian founding fathers were aware nonetheless that they were adopting a constitutional model that incorporated a particular philosophical view about the role of government in society ...

"The Australian founding fathers did not accept all of the constitutional devices adopted in the USA in pursuit of this objective [of checks and balances that would limit the role of legislative organs ... to favour freedom of individuals to acquire and enjoy property and the economic freedom of enterprises] ... Even so, the objective that government, and particularly the national government, should be modest and unobtrusive was clearly evident ...

"There might be a case for pushing and prodding here, or giving a helping hand there ... But there was not the remotest perception that it might be government's duty, or responsibility, to intervene in any systematic way in the economy or society at large."

McMillan, Evans & Storey, 1983⁵⁸

Annex A. AWB Market power – analysis 2

Following Gardner,⁵⁹ the empirical model is specified as set out below.

$$(1) \text{Pausx}_t = \alpha + \beta_1 \text{Qausx}_t + \beta_2 \text{Swld}_{t-1} + \beta_3 \text{Qwld}_t + \beta_4 \text{Dum} + \beta_5 \text{Time} + \beta_6 \text{Iwld}_t + \sum_t,$$

where:

Pausx = price or unit value of Australian wheat exports

Qausx = the quantity of wheat exported from Australia

Swld = the quantity of stocks in the world market

Qwld = the quantity of wheat produced in the world

Dum = a dummy variable that takes on value 1 for years between 1960 and 1973; 0, otherwise

Time = time trend

Iwld = the value of imports of all agricultural commodities in the world and

\sum = the error term that is assumed to be distributed with mean zero and constant variance.

Equation (1) states that the export price of Australian wheat in a particular year is determined by the quantity of Australian wheat exports in that year, as well as the quantity of ending stocks in the world market in the year before, the total world wheat production and the value of total world imports in the same year. The dummy variable is used to capture the structural change in wheat prices before and after 1973 as a result of changes in international trade and policy changes. The time trend is included as a proxy to capture other factors that might have caused changes in wheat prices over time but not been included in the model, such as changes in consumer preferences away from, or towards, wheat-based products.

The main interest of the study is to test whether changes in the Australian wheat exports have an impact on prices received. In other words, we are interested in testing whether coefficient β_1 is statistically significantly different from zero. Specifically, the null hypothesis to be stated is: $H_0 : \beta_1 = 0$, against the alternative hypothesis $H_A : \beta_1 \neq 0$.

The estimated coefficient for the world ending stocks (Swld_{t-1}) is expected to be negative which means the higher the stock level the lower the price; similarly for world wheat production (Qwld).

Both estimated coefficients are expected to be negative because the Australian export price is expected to decrease as the world supply of wheat increases. The value of imports in the world (Iwld) was added to the model to serve as a proxy for the health of the world economy. The estimated coefficient for this variable is expected to be positive as one would expect as 'incomes' or 'total expenditures' for agricultural commodities

increase, the demand for wheat will increase, which, in turn, leads to an increase in the price of wheat.

In addition to testing the hypothesis that ‘changes in Australian exports may result in changes in export prices’, it is further hypothesised that the impact of Australian wheat exports on prices, if it exists, may change with Australia’s share in the world market.

This is of interest because market power is often assumed to be correlated positively with market share. As Australia’s share of the export market has changed over time, it is reasonable to expect that in some years AWB’s ability to influence prices, if it exists, may have been greater than other years.

Australia’s share of exports onto world markets and share of total world wheat production have varied considerably. Export shares range between 5.74% and 19.44% while production shares range from 1.71% to 4.47% in the past three decades (Table 3).

In this time-varying parameter framework, the β_1 coefficient in equation (1) is hypothesised to change with Australia’s export share (QR) in the world market. That is,

$$(2) \beta_1 = a + b \text{ QR},$$

where $\text{QR} = \text{Qausx}/\text{Qwldx}$; and Qwldx = the quantity of wheat that is exported in the world.

Combining equations (1) and (2), we get

$$(3) \text{Pausx}_t = \alpha + (a + b \text{ QR}) \text{Qausx}_t + \beta_2 \text{Swld}_{t-1} + \beta_3 \text{Qwld}_t + \beta_4 \text{Dum} + \beta_5 \text{Time} + \beta_6 \text{Iwld}_t + \sum_t$$

Rearranging equation (3), we get

$$(4) \text{Pausx}_t = \alpha + a \text{Qausx}_t + b (\text{QR} * \text{Qausx})_t + \beta_2 \text{Swld}_{t-1} + \beta_3 \text{Qwld}_t + \beta_4 \text{Dum} + \beta_5 \text{Time} + \beta_6 \text{Iwld}_t + \sum_t$$

In this case, we have an extra interaction term, compared to equation (1). It indicates that the price response to quantity changes is no longer constant, but varies with the export share of the Australian wheat in the world market. All the variables on the right-hand side of equation (4) are all external, including the volume of Australian exports that is presumably a policy instrument for the AWB to influence prices. As such, equation (4) is estimated using Ordinary Least Squares.

Table 3. Summary Statistics and Data Sources

Variable	Mean	Minimum	Maximum	Standard Deviation
Pausx	133.68	48	287	69.74
Qausx	10145	4137	19189	3893.40
Qwld	431.45	227	610	118.39
Swld	111.17	67	176	27.31
Iwld	0.2095E+07	0.1246E+06	0.6508E+07	0.193E+07
Qwldx	81.53	43	129	26.47
OR	12.71	3.34	19.44	3.33
QS	3.08	1.71	4.47	0.71

Because autocorrelation was detected in preliminary analysis, equation (4) was re-estimated using iterative Cochrane-Orcutt estimation procedure (AUTO) available in SHAZAM.⁶⁰ Estimated results are presented in Table 4.

The R² of the estimated equation indicates that 90% of the variation in export price of Australian wheat can be explained by the variables included in the regression. The signs for the explanatory variables were as expected except for the value of imports in the world. However, not all the estimated coefficients are statistically significant at the 5% or any acceptable level, including the key variable, the volume of Australian exports (Qausx).

Table 4. Estimated coefficients

Explanatory variable	Estimated coefficient
Intercept	278.58 (4.33)
Qausx _t	-0.0015 (-0.32)
Swld _{t-1}	-0.84 (-2.81)
Qwld _t	-0.71 (-3.32)
Dum	-43.33 (-1.86)
Time	14.50 (3.30)
(QR*Qausx) _t	0.00006 (0.36)
Iwld _t	-0.00001 (-0.88)
Adjusted R ²	0.90
Durbin-Watson	1.95

* Figures in parentheses are t-ratios.

The coefficients associated with Q_{ausx} , parameters a and b in equation (4), are both statistically insignificant, with both p -values close to 0.75. Because Q_{ausx} may be collinear with $QR * Q_{ausx}$, leading to statistically insignificant individual coefficients, a χ^2 test was performed to determine whether coefficients a and b are jointly statistically significantly different from zero.

The calculated χ^2 is 0.13 with 2 degrees of freedom, which is much smaller than the tabulated value of 3.99 at the 5% level. These results mean that the Australian export price is neither affected by the export quantity, nor by changes in the export share. These results are further confirmed when the model was re-estimated without the two variables. The estimated coefficients and other measures of model performance for both models had hardly changed. The finding here is very different from that of Gardner (1999) that showed that Canada's additional exports of 0.2 % of the world supply would drive down the world price by 6%.

Brooks and Schmitz (1999) also found that the CWB had the ability to price discriminate in the international feed barley market. These differing results may suggest that the Canadian and Australian Wheat Boards may have quite different market positions in the world grains market (Carter and Wilson, 1999).

By contrast, estimated coefficients associated with the quantities of stocks and production in the world are both statistically highly significant at the 1% level, indicating that these two variables are important determinants of Australian export prices. In flexibility terms (evaluated at sample means), they are estimated to be -0.68 and -2.27 , respectively.

This means that a 1% increase in the stock level would result in a 0.68% decrease in the price of Australian exports, other things being equal, and that a 1% increase in the quantity of world wheat production would result in a 2.27% decrease in the price of Australian wheat export, other things being equal.

Thus, total world wheat production appears to be the most influential factor in determining export prices of Australian wheat, followed by the level of the stocks.

The value of commodity imports in the world also was found not to be an important determinant of Australian export prices of wheat because the estimated coefficient is also statistically insignificant at any acceptable level.

Data and Data Sources

All of the data were obtained from the Australian Commodities Statistics (ABARE, 2000), except for the value of total imports of agricultural commodities which was obtained from the Monthly International Financial Statistics published by the International Monetary Fund. A summary of the statistics for the variables used is given in Table 3. The price and volume of Australia exports, Pausx and Qausx, are expressed in \$A/tonne and '000 metric tonnes, respectively; the quantities of world production (Qwld), world exports (Qwldx) and world stocks (Swld) are expressed in million metric tonnes; the value of international commodity imports (Iwld) is expressed in billions of US dollars; and Australia's export share (QR) and production share (QS) are expressed in percentages.

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