

**SUBMISSION**

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**Environmental reservations – some very uncomfortable truths!**

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**Abstract**

Paper mentions debt-for-nature swaps, and raises legal issues regarding possible trading by government in property and nature rights belonging to private landowners.

## Environmental reservations – some very uncomfortable truths!

### 1.0 International nature trading and ‘uncomfortable truths’

Wilderness has financial value. The taskforce will likely make decisions and recommendations that will lead to natural resources including water, land and trees being set aside for environmental purposes. Governments might be tempted to use such nature-assets in debt-for-nature-swap transactions to covertly reduce foreign debt, and their accountability to electorates. Any nature-assets ought to be reserved such that rights to them remain within Australia. Such rights should not be used as collateral for securities that could be traded outside Australia to offset foreign polluters’ ‘green tax’ penalties. Water trading, for example, should only be available to water-users within relevant catchment areas.

Local agriculture and industry does achieve net benefit when water securities are sold overseas. If Australians sell then later wish to purchase back rights to enable them to use their water, they would likely need to pay the world market’s highest prices - not simply including the cost of the water as water but water underlying a security instrument that offsets a pollution fine. This regime allows polluters with the deepest pockets to continue production and pollution whilst out-competing those less financially endowed participants who sell out their resources.

### 2.0 Private Property

The committee should act cautiously when making decisions regarding citizens’ property. Many land owners reasonably believe in light of Australia’s supposed political system that their legal rights are those defined according to the Latin maxim, “*cuius est solum eius est usque ad coelum et ad inferos*” (Latimer 2001, p.120), that is, “where one owns the ground, one’s ownership extends up to the heavens and down to the infernal regions.” Australians can own freehold property that does not belong to a State or Territory. Australia is not a socialist country of a type where governments own every thing or every person, which can assert that a person who has more than another must have stolen it from the State. Australians have however encountered governments bearing a contrary persuasion (unendorsed by uninformed electors), which have gradually deprived landowners of rights to water, flora, fauna and minerals under native vegetation acts and similar regulations, often substantially devaluing landowners property without compensation – a ‘Comedy of the Commons’, making the landowner minority liable for the errors of the rest of society.

Public-spirited landowners, who might willingly accept environmental duties and restrictions to enhance biodiversity, 'save the planet', and prevent the sky from falling, could justly feel aggrieved if others claim financial rights related to their nature-assets.

Legal issues arise where a government deprives landowners of water or trees, for example, and then claims and trades in that water or carbon-trading rights to those trees for its own purposes (E.g. to pay out its debts, 'Robbing Peter to pay Paul' (See Sanders (1987) regarding debt-for-nature swaps; Renwick (2005)). As Minister for Water Resources Malcolm Turnbull acknowledges,

“...water allocations, water entitlements are property, you can't go around confiscating people's property. “ (Turnbull 2007)

The aforementioned circumstance appears to contravene section 160 of the *Crimes Act 1900* (Austlii 2007), especially if deprived landowners are not fully compensated:

**Embezzlement, &c., by persons in the Public Service**

160. Whosoever, being employed in the Public Service, fraudulently embezzles any property, or part thereof, so entrusted to him, or taken into his possession, or being in his custody, or under his control, or fraudulently secretes, removes, or in any manner fraudulently applies, or disposes of, the same, or any part thereof, shall be deemed to have stolen the same, and shall be liable for penal servitude for ten years.

[See also sec 161 - It is not necessary to prove exactly how much was embezzled, only that is was embezzled.]

Latimer (2001, p.1185) defines embezzlement as:

“ The felony which consisted of the conversion to his own use by a clerk or servant <sup>1</sup> of property received by him on behalf of his master.”

Although it might prove difficult to prosecute a government, It could be possible to prosecute persons who induce a government to commit embezzlement.

The implication is that 'nature-asset' transactions must be fully disclosed to landowners (not “fraudulently secreted”), and landowners must receive full compensation.

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1. Government Ministers are servants [Latin: minister –ri *m.*, ra –*rae* *f.* English: 'attendant, servant, agent, ... tool (Collins 1969, p.205)]

### 3.0 Fiduciary duty and conflicts

Governments have a fiduciary duty to inform citizens/landowners of government transactions that deprive them of property, and to disclose the financial extent of such transactions - profiting from such transactions clearly constitutes a conflict of interest against a government's employer-landowners.

### 4.0 Compensation and remedy

Governments must also ensure full market value compensation; Landowners of property zoned for forestry, for example, ought to be compensated at market value for loss of the use of trees due to government regulation. Trees are not simply carbon sinks valued according to carbon extraction efficiency. They have different values in terms of their use in building, cabinet-making, fencing and so on, and this is the appropriate value for just compensation.

Sec 25-45 of ITAA97 appears to provide a remedy for landowners by allowing taxation deductions of monetary losses caused by "theft, stealing, embezzlement, larceny, defalcation, and misappropriation by your employee or agent [my emphasis]" (see footnote 1., p.2).

### References

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