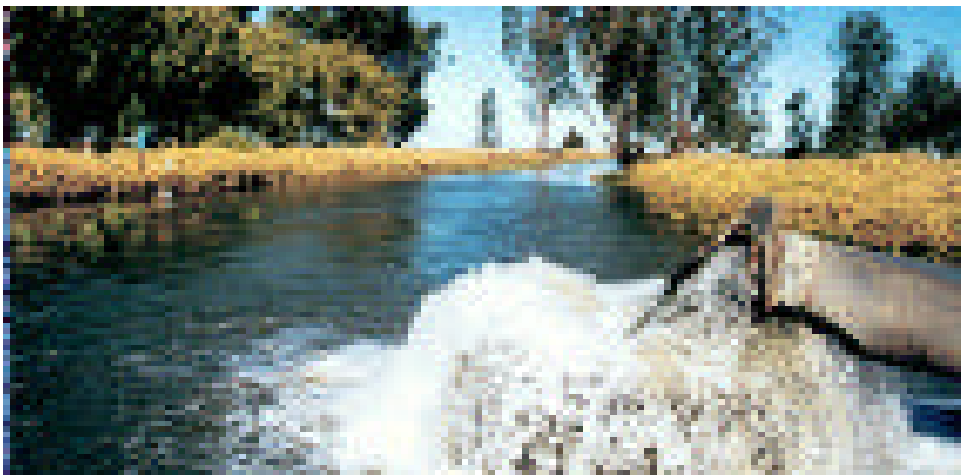


Water Reform — An Update

Gazettals of the Minister's Water Sharing Plans were due to commence in the near future. Unconfirmed whispers have it that the dates for the gazettals may be deferred and that the Plans differ in a number of respects from the draft plans. It is only when the Plans have been gazetted that the issue of the validity of the plans can be determined. Cotton Australia has instructed us to advise on validity following the gazettals.

- The issue of property rights in water remains unresolved. The Deputy Prime Minister, John Anderson, in recent statements, has made it clear that property rights is a major issue as far as the Commonwealth is concerned and that the Commonwealth may have to revisit what it required of the States under the National Competition Policy. It is likely that property rights in water will be on the agenda for some years to come. We have, for Cotton Australia, prepared a Submission on the issue of property rights in water, suggesting a form of property rights which would provide the security for holders of water rights which is missing under the NSW Government's proposals. This Submission will be circulated for consideration by those involved in the next meeting of CoAG which is expected to take place in December.
- We have, again on behalf of Cotton Australia, prepared a Submission for consideration at the December CoAG meeting and beyond, on issues relating to compensation for loss of water allocations. This is not directed towards enforcement of legal rights for such compensation; rather the argument is based on what is morally right given the New South Wales Government's management of water rights, including over allocation, and the actions it has taken to claw back entitlement from irrigators. Again, this issue is one which John Anderson has indicated will be considered by the Commonwealth in the NCP Reform Process.



KEMP STRANG
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Rural Newsletter



Landowner's Liability to Lessee

In August last year the High Court of New Zealand in the case of *Campbell v Speers* held that a landowner was liable in negligence for damage suffered by a lessee when the lessee's crop failed as a result of the presence in the soil of a poison contained in a commercial spray which the landowner had used on the land to control Bathurst Burr shortly before the commencement of the lease.

The landowner had taken advice on the appropriate spray to use, but that advice did not take into account the future cropping program for the land.

The Court found that:

- the landlord did not think to tell the lessee that the chemical had been applied to the land and the lessee did not think to ask
- if the lessee had been told of the spraying he would have taken steps to check for possible adverse consequences
- the landlord should have been aware of the probable consequences of the spraying to future crops

- there was a warning on the label of the chemical to the effect that residues in soil could affect susceptible plants.

In rejecting the landlord's appeal against the finding of the Court of first instance on the question of negligence, the High Court found that there was a breach of duty on the part of the landlord in not disclosing to the lessee the spraying history.

The landlord argued (and the Court accepted) that the lessee contributed to his loss by not making appropriate enquiries concerning the chemical history of the land and reduced the damages awarded against the landowner by the Court of first instance by 50%.



GST and the Renovation of Farm Manager's Residence

A decision recently released by the Australian Taxation Office considers whether an entity operating a farm located in a remote area is entitled to input tax credits for acquisitions made to renovate the farm manager's residence. The decision indicates that no input tax credits are allowable because the acquisitions relate to the provision of a residence for the farm manager which constitutes the making of an input taxed supply for which input tax credits are not available.

There was no lease or hire because the farm manager did not pay rent, but the farm manager had a licence to occupy the premises which meant that the input tax rule applied.

Native Title and Western Lands Leases

A very significant case for the farming and grazing community is the case of *Wilson v Anderson*. The case came before the High Court in August this year as an application for special leave to appeal from a decision of the Full Court of the Federal Court.

An application had been made for determination of native title in respect of land in the Western Division of New South Wales. The land was the subject of a perpetual lease under the Western Lands Act 1901. The lessee claimed that the grant of the lease extinguished native title and, for that reason, the application must fail.

The majority of the Full Court had held that it was not possible to say whether native title rights were extinguished or suspended by the grant of the

lease. The landholder then applied for special leave to appeal to the High Court and the matter was fully argued before the High Court as an appeal.

A majority of the High Court was of the opinion that the lease conferred upon the lessee a right of exclusive possession over land and therefore, by operation of the Native Title Act 1993 (Cth) and of the Native Title (New South Wales) Act 1994 (NSW), the grant of the lease extinguished any native title in relation to the land.

Native Vegetation — Stop Work Order

In the case of the *Director-General of the Department of Land and Water Conservation v Prime Grain Pty Limited and Others*, the New South Wales Land and Environment Court had to consider the question of whether a Stop Work Order issued pursuant to Section 46 of the Native Vegetation Conservation Act prohibited all clearing of native vegetation on the land described in the Order, within the period of time specified in the Order, including any clearing that might be carried out in accordance with the exemptions referred to in the Act.

In arguing that the Order does prohibit all clearing, (including clearing in accordance with the exemptions), the Director-General emphasised that the nature of such an order is that it should take effect immediately in emergency situations and he

relied on statutory interpretation to suggest that the Act gives greater weight to the preservation of native vegetation than to the rights of the individual landholders.

Prime Grain asserted that the Act is clear in that development consent is not required if the clearing is being done in accordance with the exceptions. Accordingly, no Stop Work Order could be issued to prevent clearing carried out in accordance with the exemptions.

The Court preferred Prime Grain's reasoning and said that if clearing is exempt, and therefore permissible, it could not fall within the category of "inappropriate clearing of vegetation" and therefore could not be the subject of a Stop Work Order.



Securities Over Access Licences – Will Farm Debt Mediation Act Apply?

The Farm Debt Mediation Act 1994 ("FDMA"), Section 3, states that the object of the Act *"is to provide for mediation concerning farm debts before a creditor can take possession of property or other enforcement action under a farm mortgage"*.

The Water Management Act 2000 ("WMA") provides for access licences to be held by any person including someone who is not the occupier or owner of a farming property. It is likely that investors will seek to acquire access licences and to lease them to farmers for a period of years. In acquiring an access licence, such a person may seek finance and accordingly the access licence may be subject to a security to the lender. Further, farmers themselves will hold access licences and may seek to mortgage them (without the land) to secure finance. In either of these circumstances, will the provisions of the FDMA apply?

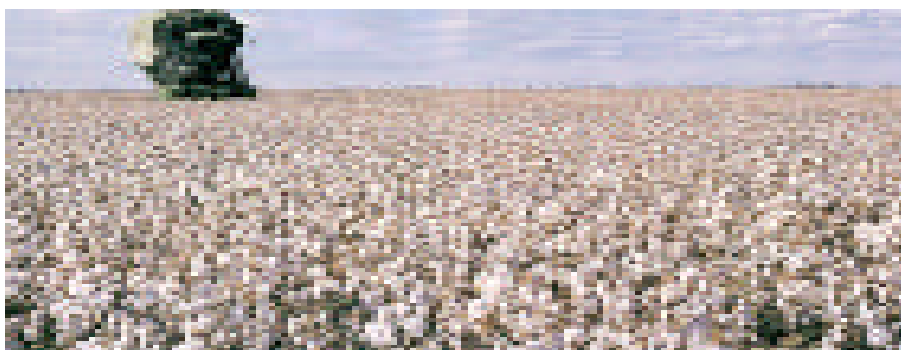
For a loan to be caught by the FDMA there needs to be a farm debt and that requires a farmer engaged in a farming operation. Such a person needs to be solely or principally engaged in a farming, pastoral, horticultural or grazing operation – and it could not be said that someone who merely acquires an access licence and leases it to a farmer is involved in a farming operation.

Even if this view is incorrect, it is necessary for the farm debt to be secured by a farm mortgage over farm property. The definition of farm property does not include access licences but is restricted to a farm itself and farm machinery.

It seems quite clear, therefore, that a security over an access licence given by a person who acquires an access licence to lease to farmers is not covered by the FDMA.

Using similar reasoning it seems that a security granted by a farmer over an access licence to raise funds to conduct his farming operation is likewise not subject to the FDMA because an access licence is not "farm property". It had previously been held (before the FDMA was amended to exclude stock crop and wool liens from the definition of "farm mortgage") that a mortgage of stock was not a farm mortgage as it did not relate to land or machinery *Underwood and Others v Commonwealth Bank of Australia and Others* – Federal Court, 2 March 1995). Accordingly, a similar argument should hold for the mortgage of an access licence.

Of course, it would be a simple matter for Parliament to include an access licence in the definition of farm property in which event the FDMA would apply where a farmer mortgages an access licence to raise funds for the conduct of his farming operations.



Point of Interest

The Federal Court in May of this year in the case *Morris v Commissioner of Taxation* overruled the decision of the Commissioner of Taxation to refuse a deduction to the manager of a farm for the cost of sunglasses, sun hats and sunscreen. The Court said that the relevant issue is that the manager is obliged to work in the open air and to expose himself to the rays of the sun for sustained periods in order to fulfil his duties and to derive an assessable income.

Seems clear and sensible doesn't it – which may be why the Commissioner of Taxation disallowed the claim.

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