



Précis Paper

Effective Law for Rural Governance

A discussion of the changing landscape of agriculture and its governance, how it is shaping the law, and what the future holds

Discussion Includes

- What is the AgLaw Centre?
- Rural and environmental governance
- Are Australia's environmental laws failing?
- What new challenges of legal governance does the Centre see arising in the near future?

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Effective Law for Rural Governance

1. In this edition of BenchTV, Professor Paul Martin (Director of the Australian Centre for Agriculture and Law, The University of New England, Armidale) and Ian Benson (Solicitor, AR Conolly & Company Lawyers) discuss the changing landscape of agriculture and its governance, how it is shaping the law, and what the future might hold.

What is the Aglaw Centre?

2. Paul is the Director of the Australian Centre for Agriculture and Law, known as the AgLaw Centre,
3. The Aglaw Centre is a very specialised research centre, based in law, but drawing upon other disciplines as well. Its focus is upon issues affecting the agricultural community in the agricultural landscape, including:
 - rural sustainability
 - indigenous agricultural interests
 - governance of agricultural technology
4. A key aspect of the Centre's operation is to engage in its work all stakeholders who might be relevantly affected or benefited by its work. For example, in an environmental project, the Centre might involve a farmers group, an environmental group, and a government group.
5. The Centre strives to achieve not only legal reform, but also institutional reform.

Rural and environmental governance

6. 'Governance' in essence pertains to systems of governing – 'governing' here meaning the act of changing, adapting, and modifying people's behaviour. Within this particular context, environmental law is only a subset of governance, because there are many other effective ways by which to modify behaviour, like for example by economic incentive, social pressure, etc.
7. The Centre's main goal is to effect systemic change in order to pave the way for better environmental outcomes to be achieved in ways that are also economically and socially efficient and fair. Very often the hardest part of this is achieving fairness.

8. Environmental lawyers tend to think of environmental law primarily as public law, and the exercise of power by government to compel people to do certain things, or change certain behaviours.
9. The Aglaw Centre sees it much more broadly than this, because here is no method of governing that does not involve the law in some important way. Administrative law is often more important in the Centre's work than is traditional policed regulation.
10. The focus of the Centre's work is upon the system involved - both the laws, and the ways in which they are implemented. For example, the Centre at the moment is focused on:
 - private rules, and industry standards and codes
 - how government is becoming less important, and less powerful economically, and how, in turn, private law is becoming increasingly important
11. Some examples of important private rules that are not part of law:
 - private arrangements of supply chains
 - industry voluntary standards & codes
12. The latter is having quite an influence, for example, upon the way in which farmers part-regulate or self-regulate. These days, there is more and more talk about partnered regulation, or hybrid governance between public and private sector.

Are Australia's environmental laws failing?

13. The *Australia State of the Environment Report 2016* paints a grim picture.
14. Our environmental laws are counterbalancing some of the harm being done, and in some areas they are making a contribution.
15. But they are simply not enough – they are simply not achieving the level of responsible use of the environment of which we are in so desperate a need. And the approaches we currently use are naive and often quite unfair.
16. An example: land clearing laws. If government does not have enough money to do the things it would probably like to pay for - like pay for environmental services for example (which is seen as the best solution from an economics point of view) - they just will not happen.
17. So then laws are created to oblige people to do things, or prohibit people from doing things. There is a point at which this starts to become coercion – coercion in order to get individuals to provide public goods for which the public should probably be paying.

18. We are always going to have this problem, but the way we go about addressing it is often so inefficient in a transactional sense that even the people who *could* comply with the law end up getting caught up in the complexity of it. Everyone ends up upset.
19. We do need to continue to restrict land clearing, but we need to have more efficient, less burdensome ways in which to do so, and in some cases, we really need to consider fairness.
20. The Centre recently did some work on invasive species management, which is a legal obligation of landholders. It examined what was getting in the way of citizens doing what we want them to do by running a series of national, future scenario-based assessments.
21. The institutional problems that surfaced, upon examination, were found to be quite avoidable. As governments become more focused on their efficiency of function, they often just transfer problems and their costs to the community. So their work is not making the entire system more efficient, it is just making the government sector appear more efficient, and ends up causing problems for people who want to do the right thing.
22. So if we were, for example, to start reviewing these processes from a total system point of view (i.e. not just from a government point of view), we would arrive at quite different ways of managing things. We need to stop confining ourselves to looking at these problems from too micro a level, and start looking at the totality of how we can make our government systems work better and more fairly.
23. How can this burden be shifted in a more efficient way? What we might start seeing in Australia is a move towards 'hybrid governance' or 'co-regulation'.
24. An obvious example of this is stock markets, which are the mandate of private institutions, private agreements and private rights, but which are also controlled by very stringent and formal laws. So the system becomes one in which the government does not have to do the governing, but there is an integrity mechanism to ensure that the people doing the governing, and the people being governed, have responsibility in the system.
25. There is a lot of potential in the agricultural space for effective co-regulation. This could be a lot more efficient means of regulation than the systems we currently have in place.
26. There are a number of agricultural industries that have self-regulatory codes, some of which are quite good. The drawback is that we do not yet have the integrity mechanisms in place for the community to be able to trust that the job is being done properly.
27. The government needs to set the framework for rules of governance and the supervision of what is going on at a system-level, and then make sure that it holds the system operators accountable for underperformance, who in turn have to hold the group that they govern accountable for poor delivery against those rules and standards.

28. It is something that is quite doable – in fact, it has been done successfully in other countries. In Australia we have tended to be quite old-fashioned in our thinking about these things.
29. As the capacity for governments to govern these areas is decreasing, because of relative declines of economic power, and also increasing complexity of what is being governed, we are going to have to start turning to new approaches.

What new challenges of legal governance does the Centre see arising in the near future?

30. There is great complexity that arises over the many competing ways of doing things cheaper. The people living on the land have different needs and interests in the landscape to those who do not live there, but are otherwise interested in the same land. So there will be more and more conflict and tension over the use of land.
31. Some things that have emerged from such tensions include the proposed 'right to farm' laws, the 'Lock the Gate Alliance' protests over mining, the Murray-Darling Basin 'water thefts', etc. These things are going to lead to new rules being created, and new methods, forged.
32. Paul is concerned about the current popularity in government of trying to move to duties of care.
33. We need to remember that duties of care come from the common law, and they have gone into areas where common law had previously played a role (e.g. workers' safety). In such areas, there is a tradition of standards, rules and responsibilities, and a regulatory framework built on that.
34. Now we are entering a space where we expect a standard of responsibility of a non-human thing, and where the lawyers and the Courts do not have a tradition.
35. New technologies are proliferating, and the subsequent legal complexities that are going to arise are going to be quite new.
36. States are currently working on their right to farm policies, each with their own approach. In Australia, advocates of the right to farm chiefly argue that:
 - farmers should be protected from nuisance suits
 - planning, zoning, and local government decision making should be more protective of the interests of farmers in land use conflicts
37. More broadly, we are going to see:
 - changes to product registration
 - duties of care in the environmental and agricultural space become a big issue

- changes to property rights, and probably as a consequence, to the Torrens system too
38. Property rights are absolutely fundamental to environmental law. There has been a proliferation of private rights - like carbon rights, water rights, etc.
 39. Indigenous rights are becoming more and more important as well.
 40. Paul has seen nothing like the explosion of agricultural technology that he is seeing now.
 41. One thing is for sure: lawyers interested in matters agricultural are going to have a bounty of fascinating work with which to keep themselves busy in the future.

BIOGRAPHY

Professor Paul Martin

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Professor Paul Martin is the Director of the Australian Centre for Agriculture and Law in the School of Law at the University of New England. The Aglaw Centre researches rural governance, particularly of natural resources and the interests of rural people. In leading the Centre over the 10 years since it commenced operation, Paul has drawn on his prior career as a corporate lawyer, corporate advisor, venture capitalist and chairman of public and private companies; as well as his leadership of environmental organisations and public policy research.

Ian Benson

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Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law.