

Vegetation Management in Queensland

A Case of Constitutional Vandalism

SURI RATNAPALA

AUSTRALIA is called the Lucky Country, but luck has played only a small part in the country's success. The conversion of resources into wealth requires capital, technology, enterprise and hard work. People do not invest in wealth-creating activity when the risks are too high and the returns too low. Risks increase when the law is unpredictable and property rights are insecure. The success of Australia's primary industry sector owes much to the relative stability of property rights and contractual certainty secured by what the great Scottish philosopher David Hume called the 'three fundamental laws concerning the stability of possessions, translation by consent and the performance of promises'. These laws are maintained by the strength of the constitution and the eternal vigilance of the people. Environmental regulation driven by Green politics threatens the rule of law and property rights. The flawed processes by which environmental policies are determined and enforced not only subvert constitutional principles but also admit bad science.

This article examines the nature of the Green threat to the rule of law and hence property rights. It is impossible to survey within a brief exposition the complex and ever-growing environmental regulatory regime in Australia. Hence, I will focus my attention on one piece of legislation that typifies all that is wrong and dangerous about recent trends in environmental protection law in this country. The legislation

I examine is Queensland's *Vegetation Management Act 1999* (VMA) which applies to all freehold and non-freehold lands in Queensland. This law reflects a regulatory model that may become standard in Australia.

UNDEMOCRATIC LAW-MAKING

The VMA establishes an utterly undemocratic form of law-making affecting property rights in the State. In fact the Act does not make the law but leaves legislative power in the hands of the Minister and executive officers to be exercised outside the parliamentary process. The Act requires the minister to prepare and the Governor in Council to Gazette a vegetation management policy for the State. This is not policy in the ordinary sense, but is a legislative instrument that controls the other powers under the Act, in particular the preparation of regional vegetation management codes (s.11(2)). Despite its binding effect, it is deemed not to be subordinate legislation (s.10(7)). Similarly, declarations (and interim declarations) of holdings as areas of 'high nature conservation value' or areas 'vulnerable to land degradation' and the codes governing vegetation clearing in those areas are deemed not to be subordinate legislation (ss.17(6) and 18(4)). Since subordinate legislation requires parliamentary approval, the sole purpose of these exclusions is to remove these instruments from parliamentary scrutiny and hence public debate. (Under s. 49 of the *Statutory Instruments Act 1992*,

subordinate legislation must be tabled in parliament, and under s. 50 they may be disallowed.) Given their legislative nature, these instruments are not generally subject to judicial review. Instead of the usual legislative practice, the Act establishes a consultative process including review by the Minister's own advisory committee. Although landowners and the public may present their views, the law ultimately is what the Minister wills. This is a classic instance of the process open to capture by those who engineer it, in this instance the Green lobby. The process is structurally biased and insulated from the glare of public debate. There is no appeal from this law to parliament or to the courts.

COST OF COMPLIANCE

The effects of these instruments are far reaching and costly to property owners. Freehold and leasehold occupiers of land that become the subject of area declarations cannot manage or use their properties as they judge, but must do so in conformity with the 'declared area code'. Owners require the authority of clearing permits even to maintain the productivity of their lands. At the very least, the declaration increases the landowner's transaction costs in managing the property. It may reduce the productivity of the land resulting in loss of income. It is more than likely that a declaration will diminish the market value of the property. I will return to the important question of compensation presently, but first the compliance cost deserves a closer look.

A property owner will be required to read and construe the legal effect of the 'declared area code'. This may be simple enough for the most part, but as owners have discovered, often it is not. Tree clearance permits may give rise to similar problems. More serious is the problem of impracticality and even impossibility of compliance. A permit that allows some species to be cleared but not others may be a virtual prohibition if selective clearance is not practical or possible given the nature of the forest. It is a basic principle of all civilized legal systems and a rule of common law that the law must not ask the impossible. (*Lex non cogit ad impossibilia.*) An enactment that requires the impossible is not a law but a directly punitive act.

NEGATION OF PROCEDURAL JUSTICE

The enforcement provisions of the VMA violate the most fundamental requirements of criminal justice and should concern every civil libertarian. The intrusive investigatory powers, the coercive extraction of evidence, the conferment of judicial powers on executive officers, the reversal of the burden of proof, the various presumptions favouring prosecutors and the use of criminal history combine to create a regime more reminiscent of a police state than of a liberal democracy. A detailed analysis is not possible, hence I will discuss the most pernicious provisions.

The guilt of a person accused of a vegetation clearing offence under the VMA is determined not by a court but by an official. (The judicial trials mandated by Division 3 have no application to vegetation clearing offences under the VMA). If an authorized officer issues a compliance notice, a failure to comply without a reasonable excuse results in an automatic penalty. (Maximum of 1665 penalty units or \$ 116,550—s.55.) The innocuous term 'compliance notice' masks what is actually a straightforward conviction and sentence without trial. The Act allows a limited appeal to a magistrate within 20 days against the decision to issue a

compliance notice, but not on the existence of a reasonable excuse or on the penalty (s.62). Contrast this with infringement notices under other laws. A speeding ticket or parking ticket is not a judgment of my guilt. If I ignore it, the police must charge me and have me convicted by court after a fair trial. The VMA installs the kind of process that the High Court in *Brandy's Case* (183 CLR 245) condemned for offending the separation of powers in the Australian Constitution. The fact that State constitutions have no explicit separation of powers does not make this scheme any less reprehensible.

Division 2 of the Act, which deals with evidence, effects a total reversal of the burden of proof in trials concerning tree clearance. Section 65 makes

The VMA establishes an utterly undemocratic form of law-making affecting property rights in the State

it unnecessary to prove that official acts are done within the authority of the Act. A certificate issued under section 66B is deemed sufficient evidence of the accuracy of remotely sensed images, the official conclusions drawn from them and even the very fact that unlawful clearing has taken place. In short, the certificate makes it unnecessary for the prosecution to prove its case but necessary for the landowner to disprove it. This is a negation of due process in criminal and civil matters that is fundamental to civil liberty. Not content with this arsenal of prosecutorial weapons, the perpetrators of the VMA have even removed from landowners the defence of mistake of fact (s. 67B). These provisions cumulatively deny landowners the basic safeguards of procedural justice available even to persons accused of the most heinous crimes.

TAKING PROPERTY WITHOUT COMPENSATION

The VMA and other related legislation fail to provide compensation for the loss of property value that results from the imposition of vegetation management codes. Under the VMA, the State is not intervening to prevent private or public nuisances, in which event no compensation is owed. On the contrary, property values diminish because the State is limiting its use and enjoyment to serve what it considers to be the public interest in conservation. The State thus converts private property to public use and hence should compensate the owner. The duty to compensate owners for property taken for public purposes is a principle of justice. The cost of the public benefit must be met by the public and not by individual owners whose property is taken.

The denial of compensation also eliminates the discipline that the price mechanism brings to decision making. A government that need not compensate owners has less reason to 'get it right' than a government that must. The uncoupling of power and financial responsibility allows governments to seek short-term political dividends. It promotes politics and ideology over facts and science.

CONCLUSION

The VMA was enacted to combat environmental vandalism, but its provisions have vandalized Australia's cherished constitutional principles. The principles that have been sacrificed are not merely principles of justice but also of good governance. Parliamentary scrutiny and public discussion, procedural fairness, evidentiary precautions, and compensation for government takings militate against arbitrary and erratic government. The public interest calls for an urgent review and exposure of this dangerous regulatory trend.

Suri Ratnapala is Professor of Law and Director, Centre for Public, International and Comparative Law, T C Beirne School of Law, University of Queensland.

I P A