PHILLIP SHERIDAN

Senator Helen Polley
Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator

Re: Senate Inquiry – Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures.

1. I am a barrister of the Supreme Court of Queensland and the High Court of Australia. I have been involved in a number of matters in respect of vegetation legislation in the Magistrates, District and Supreme Courts, the Land Court, the Court of Appeal and the High Court over a seven year period. I have also acted for clients in New South Wales in respect of vegetation matters in that state.

2. I make the following submissions to the inquiry. I do not seek to supplement these submissions with oral evidence.

Legislative History - The *Vegetation Management Act* 1999 – The VMA

3. In 1999 the Beattie Government introduced the VMA to control clearing of vegetation on freehold land. In his Second Reading Speech on 8 December 1999 the then Minister Welford commended the Bill to the House and said the Bill:

> "will provide a flexible and balanced framework for sustainable land management into the future."

4. He also noted that stakeholders had been consulted widely and thanked them for conducting themselves with good will. But as a foretaste of what was to come he went on:

> "Land clearing has long been recognised by the scientific community as a significant factor in land degradation, the loss of biodiversity and accelerated greenhouse gas emissions."

5. The VMA gave rise to the definition of vegetation categories as "Non Remnant" and "Remnant", broadly defined as land that had previously been cleared and that which had not.

6. Remnant Vegetation was then divided into three categories of Regional Ecosystems ("RE"); Endangered RE, Of Concern RE and Not of Concern RE, categorised by reference to the percentage of that Ecosystem remaining in the relevant bioregion. Minister Welford told the Parliament that the core purpose of the legislation was to protect remnant vegetation in either Endangered or Of Concern RE.

7. Before the commencement of the VMA, negotiations between the Queensland and Commonwealth Governments in respect of compensation broke down, with the Commonwealth Government refusing to provide money to Queensland to compensate landholders affected by the legislation.

8. On 6 March 2000, the Beattie Government held a Country Cabinet Meeting in Roma. ABC Radio's John Taylor reported on AM :

> "It was the biggest demonstration of anti government sentiment in the bush in Labor's time in office. A recent government report showed Queensland cleared trees from 340,000ha of land each year between 1995 and 1997. The government believed that was unsustainable and introduced for the first time freehold tree clearing laws. After the Commonwealth Government rejected a bid to pay $103m to compensate affected landholders, Queensland slashed its laws. Instead of covering three and a half million hectares it will now cover just 925,000ha of land containing Endangered Ecosystems. But landholders still want laws scrapped and negotiations started over. Premier Beattie told the packed hall the government wasn't changing its laws any further. In fact landholders have had a huge win. The vast bulk of land will now only have voluntary tree clearing controls."
>
> **Taylor**: And once that system's in place, no more laws.
> **Premier Beattie**: We are never going to revisit this again.
> **Taylor**: But this issue is unlikely to go away any time soon. Landholders remain unconvinced.

9. For what followed that Roma meeting and subsequent public announcements, Premier Beattie should be commended. All day every day politicians make promises that are never meant to be kept, prophecies that are never to come to pass and give explanations designed purely to confuse and mystify. Premier Beattie went back to the Parliament actually did what he said he would do. Or so it was understood.

The *Vegetation Management Amendment Act* (VMAA) – August 2000

10. True to the promise at Roma, the Beattie government introduced the *Vegetation Management Amendment Bill* on 24 August 2000. By this time the Commonwealth Government had finally refused to provide compensation to affected landholders and the Queensland Government moved to amend the VMA before it commenced operation.

11. In his second reading speech Minister Welford told the House[1]:

> "Amendments are required to ensure the burden for doing the right thing – for protecting important vegetation communities and managing land sustainably – does not fall unfairly on a few landholders. The principal change made by the *Vegetation Management Amendment Bill* 2000 is to remove provisions that provide for the protection of "Of Concern" or vulnerable regional ecosystems. These are ecosystems where between 70% and 90% of the original vegetation type has been cleared.
>
> With no Commonwealth funding support, we regrettably have no choice but to remove mandatory protection for these areas before the *Vegetation Management Act* is proclaimed. This action honours a commitment the Premier made at a Community Cabinet Meeting in Roma.
>
> This amendment means that on freehold land, we will protect "Endangered" regional ecosystems – that is, those with 10% or less of their original vegetation remaining – but rely on the regional planning process and regional vegetation planning committees to voluntarily extend protection, through a local planning process, beyond this level.
>
> In addition to the removal of "Of Concern" regional ecosystems from the *Vegetation Management Act*, the *Vegetation Management Amendment Bill* provides an opportunity to make a number of other minor changes."

12. The intention of the Queensland Parliament to remove "Of Concern" regional ecosystems from mandatory protection under the VMA is repeated in the Explanatory Notes to the Bill:

> **Reasons for the Bill**
> The Premier and Minister made a commitment at public forums to remove references to Of Concern regional ecosystems from the *Vegetation Management Act* 1999 unless financial assistance was forthcoming from the Commonwealth. The Commonwealth has not made any commitment to a financial assistance package. As a consequence, the Queensland Government has moved to honour the Premier's commitment.
> **Ways in Which the Policy Objective is to be Achieved**
> The policy objectives will be achieved by removing the preservation of "Of Concern" regional ecosystems from the purposes of the Act.

13. The *Vegetation Management Act* 1999 (as amended) commenced on 15 September 2000.

***Vegetation Management and Other Legislation Amendment Bill* 2004.**

14. Prior to the 2004 State Election, the Government pledged to phase out broadscale clearing of Remnant Vegetation by 31 December 2006. Relevant passages of the Explanatory Notes to the Bill are set out below:

> **Objectives of the Bill**
>
> "The purpose of the Bill is to phase out broadscale clearing of remnant vegetation in Queensland by 31 December 2006 under a transitional clearing cap, and to protect "Of Concern" regional

[1] See: Hansard –2000- page 2784

> ecosystems, whilst allowing clearing for necessary ongoing purposes and management activities.
>
> **Reasons for the Bill**
> "A package of measures to phase out broadscale clearing of remnant vegetation by December 2006 was a key election commitment made by the Government. Major elements of this commitment include; the protection of "Of Concern" vegetation on freehold land and to reduce greenhouse gas emissions by 20-25 mega tonnes per annum.

15. "Not of Concern" RE were not mentioned in the Explanatory Notes, but were necessarily included in the purposes of the VMA to ensure a total ban of clearing remnant vegetation.

16. From 1999 to 2009, the VMA was amended every year (apart from 2001) and sometimes up to three times a year[2].

17. In 2008 the VMA[3] was amended retrospectively, with that retrospectivity having force for both civil and criminal matters. In 2009 the VMA[4] was further amended. Among those amendments 184 were retrospective.

18. In 2005, in respect of previous retrospective amendments, Professor Suri Ratnapala, Professor of Public Law, University of Queensland, wrote[5]:

> "In making retrospective punishment possible, the VMA violates a principle accepted by all civilised nations and declared by Article 15(1) of the United Nations *Covenant on Civil and Political Rights*, that innocent acts must not be made crimes with retrospective effect.."

Administration of the VMA

19. In respect of the enforcement provisions of the VMA, Professor Ratnapala wrote[6]:

> "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 histories, combine to create a regime more reminiscent of a police state rather than that of a liberal democracy.
>
> The guilt of a person accused of a vegetation clearing offence under the VMA need not be determined by a court but may be conclusively established by an authorised officer, a functionary under the control of the Minister and his department."

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[2] See: Kehoe, J. *Environmental law making in Queensland:* The *Vegetation Management Act* 1999 (Qld) (2009) EPLJ 392at 393.
[3] See: *Vegetation Management Amendment Act* 2008 (Act No. 8 of 2008).
[4] See: *Vegetation Management and Other Legislation Amendment Act* 2009 (Act No. 43 of 2009).
[5] See: Ratnapala, Professor Suri. *Constitutional Vandalism Under Green Cover* [2005] Samuel Griffith Society: Volume 17: Chapter Two at p9.
[6] Ibid

20. With these points in mind, some relevant case examples are set out below that illustrate the administration of the VMA.

Nick, Fran, Jack and Elena Van Reit – Ekari Park - Mitchell

21. On 20 October 2005, Complaints[7] against Nick Van Reit and the family company were sworn by Peter Robert Witheyman, a Department of Natural Resources (currently the Department of Environment and Resource Management, "DERM") investigator. On the face of the Complaint he swore that "Knowledge of the offence came to him on 22 October 2004."

22. The date is important, as DERM has 12 months from the "date of knowledge of an offence" to swear a complaint. On the face of the Complaint, it was sworn 2 days inside 12 months. But that is not the end of it. If a complaint is sworn out of time and Court considers it "just and equitable" the Court can extend that time[8].

23. Witheyman he was asked by the Van Reit's solicitor as to the basis for his "reasonable belief that an offence had been committed". Witheyman responded in writing on 22 September 2004 as follows:

> "The reasonable belief the Department has, has come from a study of satellite imagery, a field inspection of the property and collection of other information. The Department has verified that vegetation has been disturbed and therefore has a reasonable belief that an offence has been committed. Please note this is an alleged offence."

24. Magistrate Costello, sitting at Roma, dismissed the Complaints as being out of time, refused to extend time and made the following findings and observations:

> "The complainant had, in my view, prima facie proof of all the elements of the subject offences by 22 of September 2004. I reject completely the complainant's explanation as not being credible in all the circumstances. It seems to me that inaction and unnecessary delay is at the heart of things."
>
> "No defendant should be left wondering for an excessive or unreasonable period of time, beyond that prescribed by law, whether or not he she or it is to be prosecuted. The point has its basis, in my view, in the Magna Carta.
>
> Some may be a little bemused at this reference. The complainant is armed not only with satellite technology, it also has all necessary financial support along with legislation that requires the defendants to submit to lengthy, and in some ways, repetitive interrogation. There seems such an imbalance in capacity, but that is the legislation."
>
> "I do not think it is just and equitable to extend time to the benefit of the complainant, having regard to the legislation, the *Justices Act* 1886, the purposes of the subject legislation in all the circumstances of the case. Difference cases may, of course, have different outcomes."

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[7] See: MAG-00192264/05(7).
[8] See: Section 68 of the VMA.

25. Chastened not by the decision of the Magistrate and the findings of inaction, delay and incredible explanations surrounding his averment, Witheyman appealed the decision of Costello SM to the District Court.

26. The decision of the Magistrate to dismiss the complaints was upheld by McGill DCJ SC on Appeal in the District Court[9]. His Honour made, among others, the following findings:

> "The Magistrate referred to technological and financial support available to the complainant and noted that no defendant should be left wondering for an excessive or unreasonable period of time beyond that prescribed by law whether or not there is to be a prosecution. Ultimately he decided that it was not just and equitable to extend time, having regard to the legislation, the *Justices Act* 1886, the purposes of the legislation and all the circumstances of the case. Although he did not repeat the point at this stage, obviously one important circumstance was the view that he had taken that there had been unreasonable delay in the pursuit of the prosecution.
>
> It seems to me that the chronology referred to earlier provides ample justification for such conclusion, even apart from the fact that it seems to have taken five months before anything useful was done, by way of an investigation into the original report. Overall, it seems to me that the conduct of this prosecution was decidedly tardy. Accordingly, in my opinion no basis has been shown on which, consistent with the approach in *House v The King*, I could interfere with the Magistrates' exercise of discretion. In any case, if the discretion did fall to me, I would exercise it in the same way, in view of the extent of the delay and in the absence of any proper explanation, much less excuse, for the delay."

27. Chastened not by the decision of Judge McGill SC, Witheyman appealed to the Court of Appeal. The Court of Appeal dismissed the Appeal and made the following findings, per Fraser JA QC:

> "It was submitted that the finding that the conduct of the prosecution was tardy was not justified. In my respectful opinion the facts on which the finding was based which were not themselves in issue, justified the finding.
>
> I would add that the judge acted on a view that was generous to the applicant [Witheyman] when his Honour put to one side the fact that it took five months before anything was usefully done by way of investigation into the original report of the offence"

Richard and Maureen Knights – Acme Downs - Bollon

28. Complaints alleging unlawful clearing were made against Richard and Maureen Knights in September 2005 by Victor Elliot, a DERM compliance officer. The trial was held at Dalby over 4 days in 2006[10].

29. By way of background, Richard and Maureen had made an application to clear areas on Acme Downs and that application had been refused. As part of that application

[9] [2007] QDC 342.

DERM officer Baumgartner inspected the property. He gave evidence for the prosecution at trial.

30. As to Baumgartner's evidence at trial, Magistrate Cornack made the following findings:

> "He inspected the property at least twice –in March 2003 and in June 2003 –however, he was unable in his evidence to say what he really did in June 2003 as he didn't take very good notes of that visit.
>
> Baumgartner noted: "On the western side the country has been pulled." Several other sites he notes that the timber has been rung. When he was questioned in the Court under cross examination he said "he had no idea that there had been illegal clearing as he was of the view that all the clearing he saw could have been explained by the land owner."
>
> Her Honour went on:
> "a large proportion of the area alleged to have been unlawfully cleared in each of these charges in this case is included in the area shown as disturbed which was marked as Remnant. This is what Mr Baumgartner said, that those areas had been described in the maps as disturbed but they were marked as remnant. So on the Regional Ecosystem Maps, according to Mr Baumgartner, what was marked as remnant, was in fact disturbed."
>
> Her Honour continued:
> "Information supplied by the Toowoomba Compliance Unit suggested that the assessment could continue as the area in question was not associated with the development proposal. This notation on the file was somewhat surprising as it is completely at odds with the submission of Counsel for the Prosecution who argued that this case was a serious one as the alleged unlawful clearing happened in the area where the proposed development was to be carried out despite the defendant knowing that the application had not been approved."

31. As to the satellite imagery and evidence of Jeremy Anderson, a DERM remote sensing expert, her Honour made the following findings:

> "Jeremy Anderson, who provided the certificate, gave evidence that the remotely sensed imagery can only provide evidence of a change in vegetation. Whether the change occurs from natural factors, such as fire, drought, flood, storm or wind or some other act of God, cannot be determined by comparison of remotely sensed images."

32. Her Honour dismissed the complaint and awarded costs in amount triple the usual amount and noted that:

> "No order that I can make today can properly compensate, really, Mr Knights, because he has been put to a huge expense in defending himself in these proceedings."

33. Chastened not by the decision of the Magistrate and the findings of fact made by her, Elliot appealed to the District Court and Richard and Maureen Knights bore the costs

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[10] MAG – 00183067/05(2).

of preparation for the Appeal. The Appeal was set down for hearing on a Monday. On the Friday prior, DERM withdrew the Appeal. This matter is now at an end.

Scott and Anne Simpson – Tara - Hebel

34. On 27 October 2005, Peter Robert Witheyman swore Complaints against Scott Simpson, alleging unlawful clearing on freehold land, unlawful clearing on a road reserve, growing wheat on a road reserve and building a grain shed on a road reserve. The trial was held in Dalby over three days and a further day in Brisbane[11].

35. Her Honour Cornack SM dismissed the Complaints and made the following findings:

> "Evidence may be derived from the comparison of remotely sensed images which can prove a change in vegetation cover. The remotely sensed images cannot provide proof of the nature of the vegetation on the land. These images cannot show whether vegetation is remnant or non remnant. Nor can they prove whether the change occurred from natural factors such as fire, drought, flood, storm or wind or by mechanical clearing or some other form of human intervention."
>
> The property was subject to a site inspection by Peter Witheyman and Craig Elliot. These officers were vague in their evidence about which regional ecosystem map they used in their investigation on the site.
>
> Peter Witheyman agreed that there are various versions of the Regional Ecosystem maps which is very confusing for everyone. It was rather concerning during his evidence to consider the emails which reported that the remotely sensed images used by the Prosecution to prove clearing of the land did not show a very large shed which is actually on the property. The area around the shed simply looked like pasture in the images.
>
> A computerised set of information concerning property boundaries is used by the Department. This is the Digital Cadastral Data Base (DCDB). Linda Lawrence moved the DCDB approximately 100 metres to the southwest for the purpose of assessing the area of alleged clearing on the road reserve. She did this only for the purposes of the prosecution. The permanent records of the department were not also altered. Linda Lawrence amended her calculations several times, the last being on the morning of the trial. At page 240 of the transcript she appears to agree that there was no clearing on the road reserve." (my emphasis)[12].

35. Her Honour also found that prior to April 2004; after consideration of the relevant extrinsic materials (reproduced above), the intention of Parliament was to protect by legislation only "Remnant Endangered" RE.

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[11] MAG- 492/05

[12] This matter was brought to the attention of the Queensland Parliament by Mr Ray Hopper, Member for Darling Downs, on 28 February 2008 (see Hansard at page 551). He told the House *"It is arguable that the evidence in respect of the location of the shed was manufactured by Lawrence at the behest of Witheyman"*. Mr Hopper tabled the decision of the Court and the emails tendered as evidence at trial that record the directions of Witheyman to Lawrence to produce the maps and images. Despite these documents being tabled in the Queensland Parliament constituting *prima facie* evidence of indictable offences including perjury, manufacturing evidence and pervert justice, no investigation has been carried out by the relevant department, the Crime and Misconduct Commission or the Director of Public Prosecutions.

36. Costs were awarded to Scott against DERM again at triple the usual amount, given the unusual circumstances of the case and the conduct of the prosecution by DERM.

37. Between the first three days and the last day of hearing and prior to the decision of the Magistrate dismissing the Complaints, Witheyman gave Scott a Compliance Notice over the area subject to the charges. This Notice has since been withdrawn.

38. Witheyman appealed this decision to the District Court. On 20 March 2009, Judge Botting QC dismissed the Appeal. His Honour made the following finding in respect of the question of law:

> "In my view, I should accept the respondent's (Simpson's) submission that, on its proper construction, at the time of the offence alleged against the Respondent, regional ecosystems other than Remnant Endangered Regional Ecosystems were not intended to be protected by the two Acts.
>
> It follows that her Honour was correct, on the findings of fact made by her, in her conclusion that the first complaint should be dismissed."

39. DERM appealed the decision of Botting DCJ to the Court of Appeal. The Court of Appeal allowed the Appeal and overturned the decision of Botting DCJ and ordered that the matter be retried in the Magistrates Court.

40. The decision of the Court of Appeal is subject to an application for special leave to appeal in the High Court[13]. The application for special leave is yet to be heard.

Compliance Notices - Bob Wild – Whyenbirra – Bollon

41. Upon a reasonable belief that an offence has been committed, an authorised officer of DERM can give a landowner a Compliance Notice[14]. There is no need for a trial or a finding of guilt. The prevailing attitude of DERM is that these Notices can be imposed even following a dismissal of Complaints after trial by a Court[15].

42. The power to give these notices is triggered by a reasonable belief in the mind of an authorised DERM officer, the onus of proof is reversed, the standard of proof is lowered and a Notice can order the "effective lock up" of land for up to 50 years.

43. Prior to the commencement of the VMA, Bob Wild inspected a property near Bollon with a view to purchase.

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[13] HCA – No B3 of 2010
[14] See: Section 55 of the VMA
[15] In the matter of Scott Simpson, a Compliance Notice was issued over the land during the course of the trial. Nick van Reit was also issued with a Compliance Notice after that matter was dismissed by the Court of Appeal. That Notice has also now been withdrawn after submissions by his legal team.

44. He had with him some very rudimentary hand drawn vegetation maps, provided by DERM. He formed a view that the maps did not accurately reflect the vegetation on the ground. He called in DERM to verify the map. Two DERM officers inspected the block and formed the view that the map was in error and told Bob that they would pass on the information to the Environmental Protection Authority[16] ("EPA") in order that the map be amended. No amendment ever took place.

45. Bob bought the property, cleared some of the land and was subsequently prosecuted. Faced with the cost of defending the prosecution he pleaded guilty and was fined. He was then issued with a Compliance Notice, which he appealed and was granted an order of stay by the Court[17].

46. Following the stay order, the Director General of DERM, Scott Spencer, encumbered the title to Whyenbirra with the Notice in contempt of the stay order.

47. This encumbrance on title serves two purposes; to alert prospective purchasers of the existence of the Notice and to devalue the land. The land was subsequently sold with the encumbrance on it.

48. The Notice was appealed on 12 grounds of invalidity. One ground is enough to render the Notice invalid. Her Honour found 19 grounds.

49. In allowing the Appeal against the decision to give the Notice, her Honour found the Notice was "confusing, unclear, uncertain, vague and impossible to comply with."

50. At the same time the Appeal against the Notice was heard, Bob Wild brought an application for Punishment of Contempt against the Director General of DERM, arguing that placing an encumbrance on the freehold title after the Court had ordered a stay was in contempt of the order of the Court.

51. In defending the contempt application, it was submitted by Crown Law, appearing for the Director General, that the Court did not have the power to prevent him doing as he did and in any event he was only following instructions from departmental officers.

52. The Director General was found in Contempt of Court, ordered to remove the encumbrance on the freehold title, ordered to pay over $50,000 in costs for the contempt application and the Compliance Notice appeal and ordered to apologise to the Court and to Bob Wild. Whilst the apology to the Court was swift, the apology to

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[16] At that time, EPA wwas responsible for the production of regional ecosystem maps.
[17] See: Section 63 of the VMA

Bob Wild did not come until some time later, as did the costs, in the shadow of the election. That matter is now at an end.

The *Vegetation Management (Regrowth Clearing Moratorium) Act* 2009

53. On 15 March 2009, six days before an election, the Premier announced that, if re elected, her Government would ban the clearing of "Endangered Regrowth" or "Non Remnant Endangered" vegetation.

54. At that time, such a category of vegetation did not exist but was quickly invented, given a pseudo-scientific gloss, labelled as a crisis and coupled with a solution and presented to the electorate as sound environmental policy.

55. Following the election the *Regrowth Moratorium Bill* 2009 was introduced into Parliament on 22 April 2009 and was passed the next day as an "Urgent Bill."

56. In his Second Reading Speech (page 61 Hansard 22 April 2009), Minister Robertson noted that:

> "the 2004 legislation to ban clearing of Non Remnant Vegetation had delivered the single largest reduction in greenhouse gas emissions ever in Australia and it set the framework for the delivery to the then Howard Government a 20-25 megaton reduction in the carbon emissions and the ability to claim that Australia had met its international obligations outlined in the Kyoto protocol.
>
> Specifically, the Moratorium protects **ALL NATIVE REGROWTH VEGETATION** within 50 metres of a watercourse in the priority Mackay – Whitsunday, Wet Tropics and Burdekin Reef catchments and "Endangered Regrowth" on rural lands across the state.
>
> During the recent election campaign, Labor committed to reducing the level of damaging pesticides and sediments flowing to the Great Barrier Reef. It is proposed to achieve this initially restricting a combination of damaging farm practices such as overgrazing, tree clearing along creeks and excessive use of fertilizers.
>
> It is important to note that the Moratorium will not restrict clearing where there is an existing certified PMAV. However, the continuing high rate of clearing of endangered regrowth is a threat to biodiversity and allows for the continued release of significant levels of greenhouse gas emissions. Up until 15 May 2009, the Government will seek submissions from Peak Stakeholder Groups about the long term arrangements to protect regrowth vegetation."
>
> There are two reasons why retrospectivity is justified in this Bill[18]. The first reason is that it is accepted that retrospectivity is justified where the interests of the public as a whole outweigh the interests of an individual."

[18] The tendency to utilise retrospective legislation has been a feature of the current and previous Queensland governments. The exact number of times that the government has used retrospective legislation is somewhere between 149 and 158, the exact number is subject to debate. See: Queensland Legislative Assembly, Debates, Vegetation Management Amendment Bill – Second Reading (26 February 2008) pp 336-599.

> Importantly, the bill contains deliberate provisions that avoid any imposition of criminal liability for clearing vegetation protected by the moratorium during the retrospective period."

57. The first paragraph of the Minister's second reading speech (reproduced in [56] above) is in my opinion a clear indication that the ban on vegetation clearing in Queensland was undertaken in order that the Commonwealth could comply with the Kyoto protocol, clearly a purpose in respect of which the Commonwealth Parliament has the power to make laws.

58. That the trees are, or the carbon contained in those trees is, "property" for the purposes of Section 51(xxxi) of the Constitution[19] may be arguable[20], but in the view of retired High Court Justice Callinan QC, it is not. In 2008, he wrote:[21]

> "It has always been the common law that the owner of freehold land owns every tree on it."
>
> "It is a legitimate question: will proper compensation be available for the consequential involuntary reduction in value to freehold owners? I rather fear it will not. Yet I have heard it suggested that financial incentives will be available for those who plant trees."

Summary and Conclusions

59. To conduct a proper inquiry into vegetation management legislation it is imperative to be informed of the underlying legal concepts of constitutional government, property rights, takings law, the manner in which the State must deal with citizens in the criminal process and the effect of environmental legislation generally upon those concepts and rights.

60. Absent an understanding of these general fundamentals it is not possible to appreciate the impact of specific legislation and any inquiry will proceed on an ill informed basis and run the risk of comparing subject legislation with other legislation of a similar ilk, rather than comparing legislation against the relevant fundamentals.

61. This wrong approach is likely to result in fundamental errors being hidden rather than exposed and problems being compounded rather than corrected.

62. It is almost a decade since legislation to control tree clearing on freehold land was introduced in Queensland. The various legislative instruments that are used to control tree clearing have been subjected to constant amendment and often those amendments have been retrospective.

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[19] *Commonwealth of Australia Constitution Act* (1900).
[20] See: *Peter James Spencer v The Commonwealth of Australia* HCA No S87 of 2009 (Application for special leave to appeal)
[21] See: Ian Callinan QC – *The buck must stop somewhere*, The Australian, January 3, 2008.

63. The effect of this constant amendment has meant that from a practical legal perspective a freehold landholder cannot develop or manage land with any certainty that what they may undertake lawfully at one point in time may be rendered unlawful at some time in the future. This represents an unacceptable sovereign risk.

64. Public pronouncements both inside and outside the Parliament by Premiers and Ministers cannot be safely relied upon without resort to legal advice as to the responsibilities imposed on a given day by legislation, the Minister or departmental officers, a state of affairs that of itself brings the Parliamentary process and the administration of the law and justice into disrepute.

65. If this situation were confined to vegetation management and further confined to Queensland, citizens would have available to them the fundamental remedy of removing a government at the ballot box.

66. However, as simple as the political process isn't, the fundamental problems of removal of property rights arbitrarily and without compensation and the removal of fundamental legal rights is not confined to Queensland, but as noted by Professor Ratnapala[22]:

> "The Vegetation Management Act (VMA) violates almost all of the basic principles of constitutionalism and good government. The VMA is not an accident or isolated instance, but a dangerous regulatory model that is spreading across the economy and society...
>
> 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."

Phillip Sheridan
Barrister at Law
Chambers
12 March 2009.

Attachments:

1. Callinan, Ian QC AC: *The buck must stop somewhere*: The Australian, January 3, 2008.
2. Gray, Kevin (2007): *Beyond Environmental Law – Can environmerntal regulation amount to a taking of common law property rights*? (2007) 24 EPLJ 161.
3. Kehoe, J (2009): *Environmental law making in Queensland: The Vegetation Management Act 1999 (Qld)* (2009) 26 EPLJ 392.
4. Ratnapala, Professor S [2005]: *Constitutional Vandalism Under Green Cover*, published by The Samuel Griffith Society [2005] Volume 7 chapter 2.

[22] Note 3, at pages 7 and 9.