

Regional Forest Agreements, The State Vegetation Management Initiative and The Duty of Care.

For those of you who believe the jungle is confined to the area between Riverside and North Quay the following may be of little interest or significance. Practitioners who venture seriously and in depth into the woods today are in for a big surprise. Today is happening an eco-beaurocrat picnic with land use rights being the picnic fare

The twenty million hectares of privately owned native forest in Queensland produces significant economic benefit for its owners as well as a broad range of nonexclusive conservation and environmental values. (1)

The actions of private owners dealing with these forests produce “externalities” or consequences that adversely or beneficially effect the public (negative or positive externalities) Clearing or inappropriate harvesting can produce negative externalities imposed on others, e.g. soil erosion, salinity, stream sedimentation. Positive externalities include ecological services e.g. soil conservation, watershed protection, fish and wildlife habitat, nutrient cycling, microclimate control, biodiversity conservation and carbon sequestration, and social and cultural functions, e.g. recreation aesthetics and spiritual significance.

Society increasingly regards the consumption of positive externalities without making payment as entitlement. Landholders forced to absorb and internalise the cost of production of these positive externalities by regulation may well regard the regulations as a taking or resumption of private property without compensation as they may no longer use the land. One view is that all forests are community property.

In the US, the leading case challenging forest practices regulation as a taking of private property rights is said to be *State vs Dexter* (2)

It found that forests practice laws were in principle legitimate exercises of uncompensable police power. Justice Matthew Hill said “Rights of property like all other social and conventional rights are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious and to such reasonable restraints and regulation established by law as the legislature under the governing and controlling power vested in them by the constitution, may think necessary or expedient” .

In Queensland “*Herbert v Chief Executive, Department of Natural Resources*“ (3) an appeal against the V.G. Valuation for rating purposes demonstrates some consequences of the capture of positive externalities. In this case the appellant acquired seven hectares of rainforest land containing a relatively undisturbed closed palm forest at Byfield with the express purpose of entering into a conservation agreement pursuant to the Nature Conservation Act .(4) This agreement limited use rights preventing clearing and future subdivision . The appellants contended successfully that the unimproved value of the land

should be reduced. The land use rights voluntarily surrendered caused a drop in unimproved value from \$79 000 to \$60 000.

The State Government is currently taking action to prevent negative and acquire positive externalities in two separate but related processes. The Regional Forest Agreement process deals with forest use and management in the South East Queensland bioregion. The State vegetation management initiative concerns clearing statewide.

The Regional Forest Agreement Process arose out of value differences expressed by in forest conflicts between greens and loggers and the log truck blockade of parliament That conflict resulted in the National Forest Policy Statement. (5) This statement of a common vision for Australia's Forests agreed to by all state governments and all political parties was intended to resolve or defuse that conflict. The Regional Forest Agreement process is an attempt by Commonwealth and State Governments to implement that policy and vision.

Aims and objectives of the RFA process are expressed in a scoping agreement between State and Commonwealth. After completion of the activities outlined in the scoping agreement (assessments, studies, etc) an intergovernmental agreement (Regional Forest Agreement) outlines a joint position on the management and use of forests in the area for a twenty-five year period and details funding for its implementation

. In Queensland the process at January 31, 2000 had reached the point where the Queensland Government had announced its position in a Stakeholder Agreement. This agreement is between the State, Conservation Bodies and the Queensland Timber Board The Regional Forest Agreement was still being negotiated between State and Commonwealth.

In the South East Queensland Regional Forest Agreement Area there is an estimated 1.2 million hectares of privately owned native forest and about 800000 has of public native forest. The stakeholder agreement foreshadows the acquisition of some private forests to complement the proposed CARR. (Comprehensive Adequate Representative Reserve) system. and retires half the public forests from wood production immediately and the balance over 25 years. Implementation of Codes of Forest Practice for private lands is being foreshadowed. No cost estimates of this process have been published

The sharp focus on forest issues generated by this process has resulted in The State Vegetation Management Initiative and the Vegetation Management Act. (6)

The Vegetation Management Act is expected to seriously affect between 10 and 20 000 properties and all properties containing remnant vegetation. Restrictions on "clearing" will affect grazing values and commercial timber values The Act Uses the Integrated Planning Act removing use rights (capturing positive externalities) by ministerial declaration. In the SEQ. RFA area, private forests contain 65% of the vulnerable and endangered regional forest ecosystems (7)

The instruments by which ecological services are to be consumed include, A state Policy, Regional Vegetation Management Plans, and declarations as to areas of high conservation value and areas vulnerable to land degradation. Areas of high conservation values can include, wildlife refugium, centers of endemism, or of high biodiversity as the minister sees fit. The ongoing business of forestry is to be judged by a code of forest practice. In policy debate much is made of the “precautionary principle” (The absence of scientific certainty does not justify failure to act to protect the environment.) but forgotten is the test of significance that precedes the principles application. (A proper examination of matters significantly affecting the environment and ensuring that measures are cost effective and not disproportionate to the significance of the environmental problems being addressed.)(8)

Figures of \$100 million and \$500 million for compensation were mentioned in the limited debate and publicity surrounding the introduction of the act.

The Legislative Standards Act 1992 provides some benchmarks against which the Vegetation Management Act might be measured

Fundamental Principles include requiring that legislation has sufficient regard to the rights and liberties of individuals (section 4{1} and {2}) The tests as to sufficient regard include whether the legislation: -

4 (3) (a) makes rights and liberties or obligations dependant on administrative power only if the power is sufficiently defined and subject to appropriate review and

4(3) (i) provides for the compulsory acquisition of property only with fair compensation.

The legislation seems to totally ignore those principles.

No process seems available to review the “policy” which takes effect as a code under the Integrated Planning Act nor the assumptions associated with the Regional Vegetation Management plans and the other instruments. One proposal for inclusion in the draft policy was “a duty of care for continuous improvement”

As to compensation, whilst much has been spoken about compensation, no provision exists in the legislation for any such.

People affected by the VMA may include those farmers who in the course of freeholding leasehold lands have recently paid as required by section 170 (5) of The Land Act

“The market value of commercial timber calculated

- a) if the value is not appealed the day the conversion application is received or
- b) If the value is appealed – the day the appeal is decided.

If the farmer’s bankers have advanced money to assist the acquisition at market value of commercial timber, they may well wish to review their security.

The comfort previously derived by bankers from the power incident to their mortgagee estate pursuant to Property Law Act section 83 (d) viz., whilst in possession to cut and sell timber and other trees ripe for cutting.... Or to contract for any such cutting or sale to be completed within twelve months from making the contract” may be cold comfort indeed.

The Act reflects a strong biocentric, zoo mentality outlawing processes known to increase biodiversity and productivity.

Analysis of natural resource management legislation (9) concludes that the mandatory regulatory approach is the least effective and most expensive. The highly coercive punishment oriented approach “command and control” is contrasted with the more effective and cheaper “education and incentives “ approach. With penalties of \$125000 per ha or part thereof for inappropriate clearing the VMA is classic command and control.

In a paper delivered to a recent international forest policy symposium (10) Mr. Detmar Schwichtenberg discussed why the command and control approach is ineffective but preferred.

Punishment based motivational systems require constant supervision to ensure compliance, alienate those being motivated, focus attention on what is wrong rather than what is right and channel human creativity into how to circumvent rules and avoid punishment.

Reward based systems require less supervision, foster cooperation, focus on what is right, and promote innovation and creativity.

Politicians prefer command and control because they can create a perception that the government is doing something “getting tough” cost can be well hidden in general government expenditure and new public sector jobs are created

The US Department of Agriculture, incentives based conservation and reserves program involves 270000 farms, 400000 contracts and 12 million has of environmentally sensitive land voluntarily retired and cooperatively managed. The Cooloola (Gympie) shires conservation and farm forestry rate rebate scheme provides evidence of community valuation of ecological services. It provides a blueprint for an education and incentives program. Ratepayers approved an environment levy and set priorities for its use. Landowners sign a 25-year management agreement and get a rebate of \$900 over three years. Farm Foresters have the council’s agreement not to impede harvest.

Given the proposal to include a duty of care for continuous improvement in the ”policy” which is to be a code under IPA some comments on that duty may be appropriate.

The Environmental Protection Act radically expanded forest owners duties from one owed to a neighbor not by unreasonable user to cause damage in excess of that suffered by the whole world to a duty to the whole world (the environment). This duty is expressed in sections 16 and 17 as an obligation not to do environmental harm or damage

The discussion paper for developing a national policy “Managing Natural Resources in Rural Australia for a Sustainable Future” had this to say about the duty of care:

“A duty of care is established in law in relation to people not causing damage to the land or property of another person or adversely affecting their income producing capacity. It is however not feasible to establish a statutory duty of care in relation to the management of natural resources. Current scientific knowledge does not enable us to precisely determine cause and effect in relation to diffuse soil and water degradation. This is especially so given the time lags involved in natural system processes, the natural system’s resilience to short-term shocks, and the relative impact of management actions, climate variability, and so on, on production and ecosystem health.” (11)

Global warming a diffuse or non point source environmental degradation is contributed to by carbon dioxide emitted by coal fired power stations in the generation of electorate. Equitably consideration should be given to ameliorating this harm by imposing a duty of care for continuous improvement upon consumers in private freehold homes e.g. regulating air conditioning or electric blanket use by reference to ambient temperature. Legislation might also provide penalties of \$125000 per degree or part thereof for exceeding the temperature prescribed.

Problems of the valuation of ecological services in the absence of a market reacting to diminishing supply may be solved in part as carbon accounting becomes more widespread in conduction with trading in carbon sink futures commencing on the Sydney stock exchange in July 2000. Speculative figures or influence values concerning carbon start with carbon sequestered in plantations on previously cleared agricultural lands at an accepted \$25 per tonne. The zoo or locked up native forest is in carbon equilibrium, decay emissions equaling sequestration. Wood utilization from such forests shows a carbon advantage in -.

1. Extended carbon lock up in wood products, houses furniture etc.
2. Product substitution e.g. wood vs aluminium which because of energy use in manufacture is very carbon expensive
3. Fuelwood for energy generation vs coal or petroleum
4. Enterprise reduction costs of carbon emission (engineering solutions) \$130 per tonne vs \$25 per tonne sequestered in sinks.

Practitioners will have to look at the profit a` prendre system introduced into the Land Title Act in 1997 to secure separate tree title to see if it can underpin the trading instruments necessary to deal in carbon.

Rural practitioners are no doubt preparing themselves for some 10 to 20 thousand appeals against valuation when the VMA takes effect. Those serving in local government facing a diminished rate base should resist upping the rate in the dollar for the affected rural lands and rate differentially. The adventurous may contemplate class actions on behalf of groups affected in catchments or forest ecosystems.

It is to be hoped that the VMA in its present form is not proclaimed. Urgent action is required for salinity control in limited areas but annual clearing of less than a quarter of 1% of forested lands does not justify the widespread removal of use rights in pursuit of an emotive agenda of appeal to the urban voter.

Acts such as the VMA are recognised as “perverse incentives’ causing the disappearance of the vulnerable and endangered because of the adverse consequences of their presence

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NOTES

1. An overview of the Queensland Forest Industry, State of Queensland Department of Primary Industry, 1998
2. State v Dexter 32 Wn 2d 551 1949
3. Herbert v Chief Executive Department of Natural Resources, Land Court Brisbane, Unreported AV 98-288
- 4 Nature Conservation Act 1992
- 5 National Forest Policy Statement 1992
- 6 Vegetation Management Act 1999
- 7 Towards a South East Queensland Regional Forest Agreement: A Directions Report, Cwlth of Australia, Qld Government, 1999
- 8 Intergovernmental Agreement on the Environment, 1992 Secs 3.4(ii) (iii) & 3.5
- 9 Regulation of Private Forestry Practices, Ellefson Cheng & Moulton, Station Bulletin 605-1995 Minnesota Agricultural Experiment Station
10. Using Incentives to Promote Stewardship on Private Forest Land in British Colombia, Detmar Schwichtenberg. 1999
11. Managing Natural Resources in Rural Australia: A discussion paper for developing a national policy. 1999 Commonwealth Department of Agriculture, Fisheries, and Forestry Canberra