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SUBMISSION TO SENATE FINANCE AND PUBLIC ADMINISTRATION COMMITTEE

Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures Inquiry

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Contents

1 Summary

1.1 Legal

The interplay between the native vegetation laws, greenhouse gas abatement and climate change in Queensland has placed an inequitable burden on rural communities and needs to be rectified as part of a nationwide scheme.

This scheme must recognise the common law right of land owners (beneficial title) to the trees, vegetation and soil in which carbon is temporally sequestrated.

If it does not recognise common-law right the sovereign risk (later government legislation taking away rights without acquisition) will deter confidence in any market created.

If it does not recognise the common law right there will be limited capacity to enable landowners to be equitably compensated for the carbon temporaly sequestrated in the trees, vegetation and soil of their land as a result of regulation and prohibition of clearing native vegetation.

If it does not recognise common-law right then when cap and trade schemes are established the base level of allowable emissions will have taken into account the carbon sequestration deliberately gained through State government legislation driven by Commonwealth government funding which prevented the clearing of native vegetation. That gain will be a windfall to the industrialists and will not be available for offsets against ongoing rural operations if and when they are included in a cap and trade scheme.

There should be a consistent national scheme in which carbon sequestration dealt with under a torrens system of title (run by each state and territory) is recorded on title supported by a national certification process established under the *Environment Protection and Biodiversity Conservation Act 2004* (Commonwealth).

1.2 Social

In 2004 the public inquiry into the impacts of native vegetation and biodiversity regulations was finalised[1]. The Commission ...

> "concluded that the current heavy reliance on regulating the clearance of native vegetation on private rural land, typically without compensating landholders, has imposed substantial costs on many landholders "[2]

[1] *Impacts of Native Vegetation and Biodiversity Regulations* Productivity Commission Inquiry Report No. 29, 8 April 2004
[2] Ibid at XXIII

"Around 150 landholders and over 30 organisations representing landholders gave evidence to the Commission detailing a range of impacts (almost uniformly negative) on them as a result of the restrictions imposed by native vegetation and biodiversity regulations (see appendixes B–J). Available information indicates that many similarly affected landholders have not made submissions[3]. In addition, submissions have been received from 20 local government bodies, most broadly supporting many of the impacts noted by landholders."[4]

The impacts concerned matters adversely affected such as:

- Farm management
- Farm productivity
- Sustainability
- Land values
- Capacity to generate returns
- Financial investment in the rural sector by landholders
- The attitude of financial institutions

Since the inquiry vegetation management in Queensland has been subjected to a new framework. This framework includes the following additional 'features':

- Broadscale clearing was phased out in Queensland and stopped from 31 December 2006;
- The reach of the regime was extended from freehold land to include leasehold land for agricultural and grazing purposes and indigenous land that had not been cleared since 31 December 1989;
- The purpose of the legislation was expanded to include: the conservation of remnant vegetation that is "an of concern regional ecosystem"[5] or "a least concern regional ecosystem"[6] and "reduces green house gas emissions"[7];
- Tightening of the definitions of endangered, of concern and least concern regional ecosystems;

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[3] For example, Rod Young (trans., p. 945) of Coonabarabran in New South Wales, noted there were close to 40 people negatively affected by the regulations who he had encouraged to make a submission, but who had not done so. He commented that 'there are many hundreds of cases of victimisation and discrimination out there that you will never be made aware of for several reasons'. The submission by Peter Pacers (sub. 93) of Lower Gellibrand in Victoria was endorsed by a further 51 landholders, while Geoff Sebire (sub. DR319) of Strathbogie Shire in Victoria noted that many landholders supported his submission but did not feel confident to prepare a submission of their own. The South Australian Farmers' Federation (trans., p. 487) considered that because the regulations in that State were over a decade old, even those who had lost considerable potential production were resigned to the new situation. The Western Australian Farmers Federation (sub. 94) submitted that it had numerous members adversely affected by environmental regulations but they were very reluctant to be used as case studies.

[4] *Impacts of Native Vegetation and Biodiversity Regulations* Productivity Commission Inquiry Report No. 29, 8 April 2004 pp 121-122

[5] *Vegetation Management Act 1999* s3(1)(a)(ii)

[6] *Vegetation Management Act 1999* s3(1)(a)(iii)

[7] *Vegetation Management Act 1999* s3(1)(g)

- Retrospectivity; and,
- The normal rights to exercise review in relation to property maps of assessable vegetation under the *Judicial Review Act 1991* were removed for the retrospective period.

The scope, scale and extent of these additional measures exacerbate the impacts on landholders and the rural and regional communities in Queensland.

Clearly the impacts previously reported remain.

The greatest impact which has not previously been addressed relates to the interest in land itself.

Land tenure is of fundamental importance to Australians and the wellbeing of a society.

The consequences of the erosion of common law rights of land ownership are potentially devastating not only to landholders outside urban areas but to the stability of Australia.

Without a change to the approach that is being adopted by Government to achieve its objectives the following impacts are likely:

- Increasing loss of equity in property;
- Lack of certainty increasingly undermining investment confidence in the sector – not only by the landholders themselves but by financial institutions and business in the community generally;
- Declining local access to suppliers and support services;
- Reduced options in terms of succession planning, intergenerational succession and retirement plans;
- A worsening of the trends that are seeing young people leave the rural sectors; the farm workforce aging; loss of skills and experience to the sector and so on;
- There will be large enterprises along with smaller enterprises exiting the sector. Previously it had largely been the smaller enterprises that lacked the capacity to adjust. The larger enterprises will leave because of lack of viability;
- Lack of acceptance of a carbon sequestration scheme.

These outcomes would be signficiant to Australia in terms of:

- Cultural heritage;
- Food security;
- Biosecurity; and,
- Biodiversity and capacity to manage the environment

Without a vibrant healthy sustainable rural and regional sector Australia has a bleaker future.

It is evident from the current debate and indeed the demand and need for this inquiry that the Commonwealth, State and Territory governments have not succeeded in working with the landholders.

We note that:

> "A crucial thrust of the Commission's recommendations is that policies that fail to engage the cooperation of landholders will themselves ultimately fail. In addition, greater transparency about the cost–benefit trade-offs involved in providing desired environmental services would facilitate better policy choices."[8]

It is crucial to the future of Australia that confidence in land tenure be re-established and that landholders be engaged in the way forward to equitably distribute the benefit and burdens associated with carbon sequestration.

2 Common-law right of land owners

2.1 Beneficial title & profit a prende

In considering the Mabo decision and title system currently in Australia, MA Stephenson said:

> *"....the High Court found that the Crown must be invested with such a title to land as would invest the sovereign with the character of paramount lord. Therefore the Court found that in Australia the Crown was attributed with a title adapted from feudal theory, which was called a radical, ultimate or final title. This is a bare title to land. The radical title does not confer on the Crown an absolute beneficial ownership of the land. The radical title underlies the Crown's fundamental right to administer the country."* [9]

It is the beneficial title with which we are here concerned. It is the beneficial title from which common law rights arise.

> "At common law there are very few restrictions imposed on a landowner regarding the right to use her or his land. Provided the landowner does not cause a nuisance or damage to others, the landowner is generally free to carry out any lawful activity on her or his land and use the land for whatever purpose he or she desires. In modern times, however, governments of all levels have passed laws which restrict or regulate the activities and uses that may be carried out on privately owned land."[10]

Though the *Commonwealth Constitution* section 51 (xxxi) requires just compensation to be paid for acquisition of property by the Commonwealth. There is no such provision in the Queensland Constitution.

The Commonwealth and the State of Queensland have introduced land acquisition provisions which require the Commonwealth and the State of Queensland respectively to pay for an acquisition of an interest in land.[11]

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[8] *Impacts of Native Vegetation and Biodiversity Regulations* Productivity Commission Inquiry Report No. 29, 8 April 2004 p XLVI
[9] Per M. A. Stephenson p102
[10] *Real Property Law in Queensland*, Carmel MacDonald, Les McCrimmon, & Anne Wallace, p120
[11] *Lands Acquisition Act 1989* (Cth) sections 41, 42 & 55; *Acquisition of Land Act 1967* (Qld) Part 2 & Part 4.

Ownership of land includes ownership of the soil and vegetation growing on the land. The exact nature of that common-law interest in land in relation to trees, vegetation and soil has been the subject of judicial consideration where the nature of a profit a prendre, easement and covenant had been considered.[12]

The class of profit a prendre is not limited to historically recognised common-law rights but can include new classes.[13]

A profit a prendre usually requires the physical taking of something from the land and consequently its use in relation to carbon sequestration has received some criticism.[14] Even with that criticism there is a recognition that "In a fundamental sense carbon sequestration has always existed as a natural and pertinent right to land ownership"[15] and "In this respect, the profit is probably the most flexible and accommodating common-law servitude, and therefore *if* common-law validation is to be endorsed, it arguably has the greatest potential to evolve in response to the carbon right."[16]

These common law interests in land have been taken away without just compensation under the guise of regulation on the premise that no property has been transferred to government and therefore no acquisition has occurred.

2.2 Carbon Rights Legislation

There is now recognition of a property right known as carbon rights. Trees, vegetation and soil sequester carbon. The carbon right is a right to take the sequestrated carbon. The concept was founded in the notion of carbon trading and has advanced rapidly following the Kyoto Agreement in 1997.

In Queensland the legislative regimes associated with this property right are embedded in the *Forestry Act 1959* , *Land Act 1994* and *Land Title Act 1994*

- The Forestry Act is "...an Act to provide for forest reservations, the management, silvicultural treatment and protection of State forests, and the sale and disposal of forest products and quarry material, the property of the Crown on State forests, timber reserves and on other lands; and for other purposes"[17] (emphasis added)

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[12] *Permanent Trustee Australia Ltd v Shand* (1992) 27 NSWLR 426; *David Richardson v Roads and Traffic Authority of New South Wales* (1996) NSW LEC 117; *McCauley v Federal Commissioner of Taxation* 69 CLR 235; *Australian Softwood Forests Pty Ltd & Others v Atty Gen (NSW) Ex Re Corporate Affairs Commission* 148 CLR 121; see also *Carbon Rights As New Property: the benefits of statutory verification* by Samantha Hepburn Sydney Law Review, volume 31 pp 239-271

[13] *Permanent Trustee Limited v Shand* (1992) 27 NSWLR 426 at 434 -5; see also *Conveyancing and Property* by Peter Butt Australian Law Journal Vol 73 p235.

[14] *Carbon Rights As New Property: the benefits of statutory verification* by Samantha Hepburn Sydney Law Review, volume 31 pp 239-271

[15] Ibid @ 261

[16] Ibid @262

[17] *Forestry Act 1959* – Long Title

In Queensland the carbon right is given a limiting definition that excludes possibility of considering the recognition of carbon sequestration in mediums such as soils.[18]

The sale of natural resource products, including vegetation, is permitted. Specifically the legislation allows the sale of natural resource products by means of a profit a prendre. [19]

> "Without limiting subsection (1), the chief executive may enter into a profit a prendre giving FPQ the right to deal with natural resource products on State plantation forests."[20]

Carbon rights are identified as a natural resource product.[21]

The Act goes on to prescribe the requirements relating to agreements regarding a natural resource product. Importantly it provides separately for agreements where the land is owned under the *Land Act*[22] and for where the land is owned under the *Land Titles Act*[23].

As the *Forest Act*[24] is generally considered to relate to forests and to land owned under the *Land Act*[25] this capacity to provide for land owned under the *Land Title Act* [26]appears to be based in the purpose of *the Act*[27] as described in the long title "...and for other purposes"[28]. It also makes owner for the purposes of leasehold property under the *Land Act*[29] the lessee and applies to both agricultural and forestry natural resource products only if they are owned by the lessee as an improvement. The relevant section is set out below.

> "(1) The owner of land may enter into an agreement with another person (the benefited person) about a natural resource product on the land.
>
> (1A) However, if the land is land held under the Land Act 1994, the owner may enter into an agreement only if the natural resource product is owned by the owner as an improvement, within the meaning of that Act, on the land.
>
> (2) If the land is mortgaged, the owner may only enter into the agreement with the mortgagee's consent.
>
> (3) The agreement may do 1 or more of the following--

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[18] *Forestry Act 1959* – Schedule 3
[19] *Forestry Act 1959* s46
[20] *Forestry Act 1959* s46(1AA)
[21] *Forestry Act 1959*– Schedule 3
[22] 1994
[23] 1994
[24] 1959
[25] 1994
[26] 1994
[27] *Forestry Act 1959*
[28] *Forestry Act 1959* – Long Title
[29] 1994

(a) vest all or part of the natural resource product in the benefited person;

(b) grant the benefited person the right to enter the land to do either or both of the following--

(i) establish, maintain or harvest the natural resource product;

(ii) carry out works or activities for the natural resource product;

(c) grant the benefited person the right to deal with the natural resource product.

(4) Despite subsection (3)(a), the vesting of natural resource product under the agreement does not create an interest in land under the Land Act 1994 or the Land Title Act 1994.

(5) The benefited person's rights to the natural resource product under the agreement are a profit a prendre for the Land Act 1994 or the Land Title Act 1994.

(6) This section does not limit the owner's power to enter into an agreement about the natural resource product.

(7) In this section--

land means--

(a) land held under the Land Act 1994 under a lease that allows the land to be used for agricultural or timber plantation purposes; or

(b) land held under the Land Title Act 1994.

natural resource means a tree or vegetation.

owner means--

(a) for land held under the Land Act 1994--the lessee of the land; or

(b) for land held under the Land Title Act 1994--the registered owner of the land." [30]

The following sections are extracted from the *Land Act 1994* and provide for recognition of and process in relation to the registration of a profit a prendre relating to leasehold or both leasehold and freehold land.

"373E Application of div 8B
This division applies to a profit a prendre relating to a natural resource--
(a) on land subject to a lease; and

[30] *Forestry Act 1959* s61j

(b) owned by the lessee of the land as an improvement.

373F Definitions for div 8B
In this division--
lease means a lease that allows the land held under the lease to be used for agricultural or timber plantation purposes.
natural resource means a tree or vegetation other than a tree planted to comply with a compliance notice given for a tree clearing offence under this Act as in force immediately before the commencement of the Vegetation Management and Other Legislation Act 2004, section 3.

373G Profit a prendre by registration
With the Minister's written approval, a lease may be made the subject of a profit a prendre by registering the document creating the profit a prendre over the lease.

373H Profit a prendre affecting freehold land and a lease
(1) This section applies if a document creating a profit a prendre is registered under section 373G in relation to a lease and the profit a prendre also--
(a) benefits another lease; or
(b) benefits freehold land; or
(c) burdens another lease; or
(d) burdens freehold land; or
(e) has effect in any combination of paragraphs (a) to (d).
(2) The document must be registered in the appropriate registers.
(3) Further dealings affecting the profit a prendre must also be registered in the appropriate registers.

373I Requirements of document creating profit a prendre
(1) A document creating a profit a prendre must--
(a) be validly executed; and
(b) include a description sufficient to identify the lease the subject of the profit a prendre; and
(c) include a description of the profit a prendre to which the lease is subject, including the period for which the profit a prendre is to be enjoyed.
(2) Subsection (1) does not limit the matters that the appropriate form for a document creating a profit a prendre may require to be included in the document.
(3) The period mentioned in subsection (1)(c) must not be longer than the term of the lease.

373J Particulars to be registered
When a document creating a profit a prendre is registered, the following particulars must be recorded in the appropriate registers--
(a) the lease burdened by the profit a prendre;
(b) any lease benefited by the profit a prendre;
(c) any freehold land benefited or burdened by the profit a prendre.

373K Profit a prendre benefiting and burdening same person's lease or freehold land. A document creating a profit a prendre may be registered even if--
(a) the lease or freehold land benefited and the lease burdened by the profit a prendre are owned by the same person; or
(b) the lessee of the lease, or registered owner of the freehold land, benefited by the profit a prendre holds an interest in the

lease burdened by the profit a prendre.

373L Same person becoming lessee of benefited and burdened leases
If the same person becomes the lessee of the lease benefited and the lease burdened by a profit a prendre, the profit a prendre is extinguished only if--
(a) the lessee asks the chief executive to extinguish the profit a prendre; or
(b) the leases are amalgamated under division 6.

373M Owner of benefited lease acquiring interest in burdened lease
If a lease is benefited by a profit a prendre, the profit a prendre is not extinguished only because the lessee of the lease acquires an interest, or a greater interest, in the lease burdened by the profit a prendre.

373N Amending a profit a prendre
(1) A profit a prendre may be amended by registering a document amending the profit a prendre.
(2) However, the document must not--
(a) increase or decrease the area of land the subject of the profit a prendre; or
(b) add or remove a party to the profit a prendre.

373O Releasing or removing a profit a prendre
(1) On lodgment of a document releasing a profit a prendre to which a lease is subject, the chief executive may register the release to the extent shown in the document.
(2) On registration of the document, the profit a prendre is discharged, and the lease is released from the profit a prendre, to the extent shown in the document.
(3) Also, the chief executive may remove a profit a prendre from a lease if a request to remove the profit a prendre is lodged, and the request clearly establishes that--
(a) the period of time for which the profit a prendre was intended to subsist has ended; or
(b) the event upon which the profit a prendre was intended to end has happened.

373P Effect of surrender of lease on profit a prendre
(1) If a lease subject to a profit a prendre is surrendered, other than absolutely, the profit a prendre is an interest in the lease that continues under section 331(1).
(2) If a lease subject to a profit a prendre is surrendered absolutely, the profit a prendre is an interest that, under section 331(2), is extinguished from the day the surrender is registered.

373Q Dealing with a profit a prendre
(1) A profit a prendre over a lease may be sold, mortgaged, given to another person or pass by will or intestacy to a beneficiary.
(2) Divisions 1 and 4 and sections 377 to 380 apply, with necessary changes, to a dealing with a profit a prendre under subsection (1) as if the profit a prendre were a lease.
(3) Without limiting subsection (2), for applying the provisions mentioned to a profit a prendre, a reference to a lessee is a reference to the holder of the benefit of a profit a prendre."[31]

The necessary link is provided back to the *Land Title Act 1994* to allow this interest to be registered[32].

[31] *Land Act 1994* ss373E-373Q
[32] *Land Title Act* 1994 s 97E

The explanatory notes to the *Forestry and Land Title Amendment Bill 2001* explains that the legislation seeks to clarify legal ownership and property rights of land owners and other parties in carbon on freehold land in Queensland. The explanatory note goes on to say:

> **"Why the Proposed Legislation is Necessary**
> The Kyoto Protocol to the United Nations Framework Convention on Climate Change, to which Australia is a signatory, envisages an emissions trading scheme that incorporates carbon credit trading for offsetting emissions. This has initiated significant global interest in forestry plantations to potentially generate carbon credits from carbon sequestered in timber plantations, forests and other vegetation.
>
> Even though the Commonwealth recognises the benefits that may be gained from the economic value of Australia's forests, it has indicated that legislative recognition of rights to carbon commodities is the responsibility of State and Territory authorities.
>
> International investors continue to investigate the commercial viability of plantation investments in Queensland and opportunities to generate carbon sequestration conditional on a legislative mechanism to recognise ownership of rights. It is understood that some investors may be awaiting passage of legislation to recognise property rights in carbon, prior to investing. Investments have occurred involving the separation and transfer of rights to carbon in New South Wales and also in Queensland between the Queensland Department of Primary Industries (Forestry) and Greenfield Resource Options (GRO). Heightened investor interest indicates that action should be taken to position Queensland to take full advantage of forestry investment in the event that a possible emissions trading scheme is established.
>
> The *Forestry and Land Title Amendment Bill 2001* principally defines natural resource products, carbon stored and sequestered by trees and vegetation. It permits landowners and other interested parties to enter in to contracts about the ownership, use and economic benefits of natural resource products (which includes carbon commodities, trees and vegetation) on freehold land in Queensland. The contracts may include a common law mechanism ("profit a prendre") enabling separation of ownership and/or interests in the natural resource product and subsequent registration on the indefeasible land title as per the *Land Title Act 1994*."[33] (Emphasis added)

A brief perusal of the treatment of this new property right across the Australian jurisdictions reveals significant divergence and inconsistency in how it is being recognised in terms of what it is, who owns it and how it is dealt with. For example, in Queensland the possibility for the recognition of carbon sequestrated in soil is precluded.

[33] Explanatory notes to the *Forestry and Land Title Amendment Bill 2001* pp1-2

This divergent national framework is too cumbersome. It is in substance embedded in legislation that serves to 'muddy' rather than clarify rights and responsibilities associated with carbon sequestration.

Consistent well drafted legislation with respect to this new property right is of the utmost importance for Australia in terms of capacity to participate in local, national and global commercial market places.

The Western Australian framework avoids many of the difficulties encountered in the Queensland framework by incorporating the structure in one complete piece of legislation rather than interspersing it through several. It recognises the rights clearly in statutory terms and identifies clearly to who the rights accrue and are dealt with, provides a broad definition for carbon sequestration to include the storage of carbon in the land or anything in the land rather than limit it to trees and vegetation. However its failure to treat the right as a common law right fails to address a fundamental requirement for a successful carbon trading scheme.

2.3 Improving on the Administration of Land and Property Rights

A National Summit on Improving the Administration of Land and Property Rights and Restrictions was held in Brisbane on 16 November 2004. Government (including the Registrars from the majority of the Australian States and Territories and the Pacific Rim) and non-Government providers and users of information on land and property rights and restrictions in Australia attended the Summit to consider ways to improve the supply of that information.

"The Summit NOTED:

1. The valuable contribution that has been made by the Torrens System of land registration and administration to the social and economic development of Australia
2. The large increase in the types and impacts of rights, obligations and restrictions affecting land and property in Australia
3. The increasing difficulty being experienced in every State in providing comprehensive information on all rights, obligations and restrictions affecting the use/ownership of land and property
4. The increasing costs/risks attached to the supply of information supporting transactions in the formal land and property market in Australia
5. The absence of any standard method of defining rights, obligations and restrictions affecting land and property in Australia
6. The national commitment to pursue economic efficiency in all systems/jurisdictions/institutions
7. The valuable contribution of the Standing Committee on Land Administration[34] in identifying the need for and convening the Summit to discuss ways to improve the Administration of Land and Property Rights and Restrictions

[34] Established by the Australian and New Zealand Land Information Council

The Summit RESOLVED:

To establish a framework for co-operation between jurisdictions, and between providers and users of land and property information, to identify and pursue a program for improving the efficiency of supplying information needed to efficiently sustain land/property markets in Australia by:

8. Establishing, recommending and maintaining national standards (uniformity) and best practice in the creation and administration of rights, obligations and restrictions
9. Encouraging a more efficient discovery and supply of comprehensive information on rights, obligations and restrictions affecting land/property within/between producing Agencies and jurisdictions, and with consumers
10. Developing action plans targeting short, medium and long term reform issues
11. Undertaking the necessary supporting research and reform
12. Inviting the Standing Committee on Land Administration to host the framework and to consult with stakeholders in identifying and establishing priorities and a program of reform for publication to stakeholders by 1 July 2005
13. Forming an interim committee from among non- Standing Committee on Land Administration stakeholders present at the Summit to support the Standing Committee on Land Administration in the task and to investigate an appropriate industry association." (Emphasis added)

The common law right in relation to carbon sequestration can be considered as one of the rights obligations and restrictions of title. There was a clear recognition from the Summit that certain matters that affect the title and the value of the title should be recorded on title.

3 Commonwealth and State government benefit

The benefit that has accrued to the Queensland Government and thus to the Commonwealth as a direct result of the vegetation management reforms can be expressed in terms of the reduction in emissions of carbon dioxide as the reduction in level of emissions correlates with the reduction in clearing rates. The table[35] below sets out a summary of the woody vegetation clearing rates, carbon dioxide emissions and the Vegetation Management reforms.

[35] *Analysis of vegetation clearing rates in Queensland* Department of Environment and Resources Management January 2010 at 2

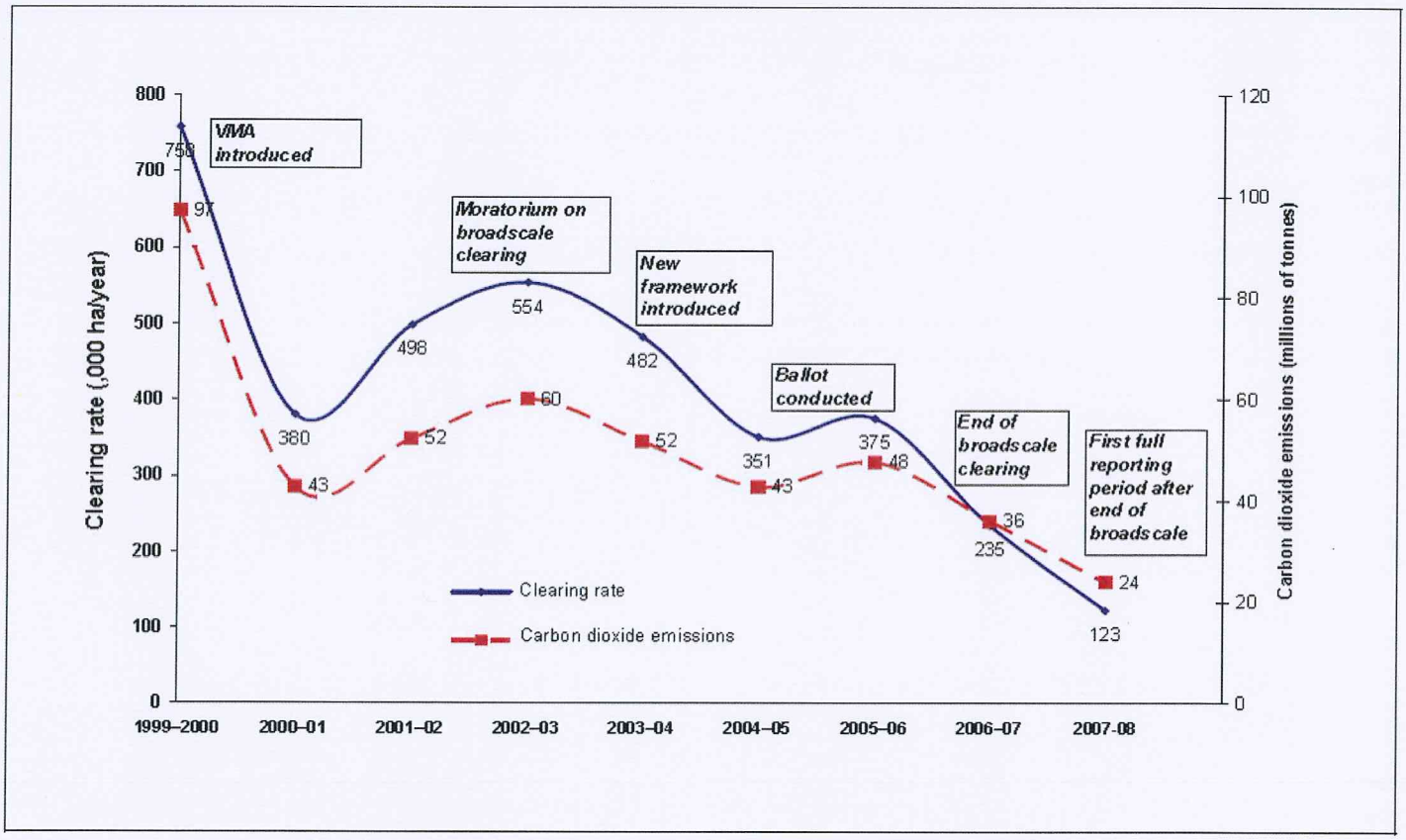

Figure 1: Summary of woody vegetation clearing rates and VMA legislation reforms

It can be seen that the carbon emissions have decreased from 97 million tonnes in 1999/2000 to 24 million tonnes in 2007/2008.

Queensland does not have a reporting system that captures measurement of removals by carbon sinks. The Commonwealth through the Department of Climate Change has developed a national carbon accounting system. This will be used to track Australia's national greenhouse accounts.

As a consequence of the introduction of vegetation clearing laws the Commonwealth and State governments have included on their balance sheets for the purposes of addressing the Kyoto protocols the carbon sequestered as part of the common-law rights of rural land owners.

4 Inequitable burden of native vegetation laws

4.1 Impediments to dealing with land

Land ownership and the ability to deal with land is fundamental to a stable community. The introduction of the *Vegetation Management Act 2004* by the Queensland government sponsored by the Commonwealth government is part of a trend of legislative enactment undermining the stability of land ownership in Queensland.

> *"In Queensland at least 188 separate pieces of legislation that define land related Property Rights or impact on the administration/management while Federal legislation (about another 19 acts) could also have an important impact. There are 24 major pieces of legislation affecting Property Rights in Queensland. However it is in the detail in the other 164 pieces of legislation, the myriad of Regulations under the various Acts, and the range of "Directions" issued by "registering" Authorities and the like, that contain most of the fine details, exceptions et cetera. The current system is enormously complex, is increasing in complexity, and this trend is likely to continue. No one (not even the experts) understands the system(s) completely and can easily identify with any degree of certainty, the Property Rights affecting areas of land. Mr & Mrs Average probably have little idea of the Property Rights that can and do "sit above" their land parcel, control its use, and affect the value and resale."*[36]

4.2 Complex Mosaic

In Queensland there is a complex mosaic of environmental laws dealing with vegetation clearing. It is common in giving advice in relation to vegetation clearing to consider four or five separate pieces of legislation and the different assessment criteria, application procedures and underlying base information as to the location and conservation status of vegetation. Frequently consideration will be given to the *Environment Protection Biodiversity Conservation Act*[37] and *Nature Conservation Act* [38] in relation to listed plant species, the *Vegetation Management Act*[39] in relation to remnant vegetation, planning schemes which identify vegetation to be protected and local laws which also identified on separate maps vegetation to be protected.

Outside of these frequently used pieces of legislation the potential to inadvertently breach vegetation clearing laws is not more evident than in a decision of the Planning and Environment Court in relation to a continuing forestry operation. The court confirmed that the farmer had been conducting forestry activity on the land over a number of years and that it was a lawful activity. The court, however, found that there had been an intensification in the scale of the clearing in a particular year. Because of the definition of material change of use in the *Integrated Planning Act 1997*, the court found that a development permit was required for the clearing. As no development permit had been obtained an

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[36] *The Case for Refocusing & Re-engineering Land Administration to Better Meet Contemporary and Future Needs in Property Rights and Markets* Lyons, Cottrell & Davies, paper delivered to joint AURISA and Institution of Surveyors Conference , page 3-4

[37] 1999 (Cth)

[38] 1992 (Qld)

[39] 1999 (Qld)

offence had been committed and the court further found that as the clearing had been unlawfully done that material environmental harm had been done under the *Environmental Protection Act 1994* and an offence had also been committed against that *Act*.[40]

With this mosaic of legislation it is not possible, within the context of this submission, to provide a complete overview of vegetation law in Queensland. This submission will focus on the impacts of *Vegetation Management Act 2001* but it should be understood that other pieces of legislation also have a similar impact. In that regard please see appendix 1 being extracts from a decision of *Bone v Mothershaw*[41].

4.3 Vegetation Management Act 1999 History

Following the Kyoto conference in 1997 tree clearing became the focus of a funding political arm wrestle between the Queensland State government and the Commonwealth government.

Within the framework of that political agenda the Queensland government indicated that it would only preserve "endangered regional ecosystems" under the *Vegetation Management Act 1999* but would not preserve "of concern regional ecosystems". "Not of concern regional ecosystems" were not intended to be preserved.

Following agreement with the Commonwealth government, the State government amended its legislation such that from 21 May 2004 remnant endangered regional ecosystems, remnant of concern regional ecosystems and remnant not of concern regional ecosystems were to be conserved.

The *Vegetation Management Act 1999*, commenced 15 September 2000. Sections 1 & 2 commenced on the date of assent, 21 December 1999, proclamation for the commencement of the balance of *the Act*[42] did not occur until 15 September 2000 when the *Vegetation Management Amendment Act 2000* commenced. The 1999 Act prior to the amendment identified its purposes as follows:

> ***(1)*** *The purposes of this Act are to regulate the clearing of vegetation on freehold land to-*
>
> *(a) preserve the following-*
>
> *(i) remnant endangered regional ecosystems;*
>
> *(ii) remnant of concern regional ecosystems;(NOTE: this sub section was deleted by the Vegetation Management Amendment Act 2000)*
>
> *(iii) vegetation in areas of high nature conservation value and areas vulnerable to land degradation; and*

[40] *Barnes v Maroochy Shire Council* [2002] QPELR 116; [2001] QCA 273
[41] [2002] QCA 120
[42] *Vegetation Management Act 1999*

(b) ensure that the clearing does not cause land degradation; and

(c) maintain or increase biodiversity; and

(d) maintain ecological processes; and

(e) allow for ecologically sustainable land use.

***(2)** The purposes are achieved mainly by providing for-*

(a) codes for the Integrated Planning Act 1997 relating to the clearing of vegetation that are applicable codes for the assessment of development applications under IDAS; and

(b) the enforcement of vegetation clearing provisions."[43] *(Emphasis added)*

The Explanatory Notes that accompanied the 1999 Bill when this legislation was introduced to parliament indicated:

"Reasons for the Bill
The most recent national assessment of land clearing (undertaken by the Commonwealth Bureau of Rural Sciences) reported that, during the 1991-95 period, Queensland accounted for 81 percent of all native vegetation clearing that took place in Australia. The most recent state assessment of land clearing (undertaken by the Statewide Landcover and Trees Study (SLATS) in the Department of Natural Resources) shows that clearing rates during the 1995 -1997 period were 18 percent higher than those during the 1991-1995 period. Based on satellite monitoring data, clearing rates during the 1991-95 period have been estimated at 289,000 ha a year and 340,000 ha a year during the 1995-97 period.

The introduction of tighter clearing controls on leasehold land during 1995 has had some impact. Clearing rates on freehold land increased by 55% after 1995, whereas clearing on leasehold land fell by 12%. Scientific evidence indicates that clearing is contributing to long term loss of biodiversity, particularly where existing vegetation cover drops below 30% of original extent. There is also a growing body of evidence that clearing contributes to loss of water quality, salinity problems and soil erosion. Through the associated release of stored carbon, excessive clearing also makes a contribution to greenhouse gas emissions. Under the Kyoto Protocol, clearing may be an issue for Australia in meeting its international greenhouse gas abatement obligations.

Way in which policy objective is to be achieved
The policy objectives will be achieved by
• Giving the State the power to regulate clearing of vegetation on freehold land.
• Requiring the development of a State vegetation management policy, approved by the Governor in Council, which will include criteria for assessing development applications involving clearing.
• Providing for the development of Regional Vegetation Management Plans, to be approved by the Minister following public consultation, which set out detailed assessment criteria for each region.
• Establishing penalties for illegal clearing (up to $125,000 plus the power for courts to order restoration of damage caused by the illegal clearing)

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[43] *Vegetation Management Act* 1999 s3

• *Establishing provisions for enforcement and compliance.*
Processes established under the State's Integrated Planning Act 1997 will be used to assess applications for clearing and development applications which involve clearing. This will ensure that clearing which is the consequence of other forms of development is assessed efficiently.
Administrative cost to government of implementation
There are two major costs to government that relate to administration and potential financial assistance to landholders. It is intended that the Queensland Government meets the administrative cost. Financial assistance arrangements for land holders are being discussed with the Commonwealth"[44] (emphasis added)

Conspicuous by its absence is a reference to " remnant not of concern regional ecosystems".

It is important to understand that the *Vegetation Management Act 1999* only applied to native vegetation on freehold land.[45]

Specifically, the *Vegetation Management Act 1999* maintained the ability of a local government to make a local law in relation to vegetation management and include provisions in a local planning instrument under the *Integrated Planning Act 1997* in relation to vegetation management.[46]

The *Vegetation Amendment Act 2000* commenced on 15 September 2000.

This amendment flowed from the funding dispute between the Commonwealth and the State as indicated in the Explanatory Notes to the *Vegetation Management Amendment Bill 2000*:

"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."[47]

The Explanatory Notes advise how the Bill intended to achieve its objective;

"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 purpose of the Act. Other policy objectives will be met by providing transitional arrangements for local

[44] *Vegetation Management Bill 1999* Explanatory Notes p1-2
[45] *Vegetation Management Act 1999* s7(1)
[46] *Vegetation Management Act 1999* s7(2) & (5)
[47] *Vegetation Management Bill 2000* Explanatory Notes p1

governments that allow time to adapt to the new regulations, and clarifying a number of procedural arrangements."[48]

The amendment referred to in the Bill was to:

"Amendment of s 3 (Purposes of Act)

Clause 3 amends Section 3, the Purposes of the Act by deleting the preservation of 'of concern' regional ecosystems from the purposes, and renumbering the subsequent clause."[49]

On 15 September 2000 reprint 1A of the *Vegetation Management Act 1999* amended the purposes as follows:

"3 Purposes of Act

(1) *The purposes of this Act are to regulate the clearing of vegetation on freehold land to-*

(a) preserve the following-

(i) remnant endangered regional ecosystems;

(ii) vegetation in areas of high nature conservation value and areas vulnerable to land degradation; and

(b) ensure that the clearing does not cause land degradation; and

(c) maintain or increase biodiversity; and

(d) maintain ecological processes; and

(e) allow for ecologically sustainable land use.

(2) *The purposes are achieved mainly by providing for-*

(a) codes for the Integrated Planning Act 1997 relating to the

clearing of vegetation that are applicable codes for the assessment of development applications under IDAS; and

(b) the enforcement of vegetation clearing provisions." (Emphasis added)

Conspicuous by its specific exclusion is a reference to "remnant of concern regional ecosystems".

"Remnant not of concern regional ecosystems" were not included.

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[48] *Vegetation Management Bill 2000* Explanatory Notes p2
[49] *Vegetation Management Bill 2000* Explanatory Notes p3

On 16 May 2003 the then Premier Peter Beattie and Minister for Natural Resources Stephen Robertson announced an immediate halt to accepting any land clearing applications. This action was taken to avoid a rush of applications while further negotiations were held with the Commonwealth Government. This action by the State was supported by the then Prime Minister John Howard.

> "The premier has welcomed the Prime Minister's letter as an indication of the significant progress that the two governments are making in negotiating a joint package of measures to address the problem of high rates of land clearing in Queensland."[50]

The *Vegetation Management and Other Legislation Amendment Act 2004* commenced on 21 May 2004.

The Explanatory Notes to the Bill summarised the major changes:

> *"The Bill provides for the amendment of the Vegetation Management Act 1999 to enable assessment of the clearing of remnant vegetation on freehold and State land under the one Act. The tree clearing provisions in the Land Act 1994 are repealed. Amendments to the vegetation clearing provisions in the Integrated Planning Act 1997 are also made."*[51]

Thus, on 21 May 2004 the *Vegetation Management Act* 1999 was amended to extend its application to the clearing of all vegetation in Queensland, whether on freehold or leasehold land.[52]

The Explanatory Notes refer to the changed purposes of the *Vegetation Management Act*:

> *"Clause 6 replaces section 3, and revises the purposes of the Act. The purposes are amended to include conserving remnant of concern and remnant not of concern regional ecosystems, and reducing greenhouse gas emissions. The new purposes also allow the Act to be applied to freehold land and tenures previously regulated under the tree clearing provisions of the Land Act 1994. The Bill allows regulation of clearing to also manage the environmental effects of clearing. The clause provides a definition of "environment" taken from the Integrated Planning Act 1994.*
>
> *The replacement of the word 'preserve' in section 3(1)(a) in the current Act with 'conserve' allows for clearing to be approved in limited circumstances. The purpose to maintain or increase biodiversity has been replaced with a purpose to prevent loss of biodiversity to make the purpose more achievable."*[53] (emphasis added)

Importantly, the purposes of the *Vegetation Management Act* 1999 were amended and provided:

> ***3 Purpose of Act***
>
> ***(1)*** *The purpose of this Act is to regulate the clearing of vegetation in a way that-*

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[50] Department of Natural Resources and Mines *Land Clearing Announcement by Queensland State Government* 16 May 2003
[51] *Vegetation Management and Other Legislation Amendment Bill 2004* Explanatory Notes p1
[52] *Vegetation Management Act 1999* s7(1)
[53] *Vegetation Management and Other Legislation Amendment Bill 2004* Explanatory Notes p4

(a) conserves the following-

(i) remnant endangered regional ecosystems;

(ii) remnant of concern regional ecosystems;

(iii) remnant not of concern regional ecosystems; and

(b) conserves vegetation in declared areas;1 and

(c) ensures the clearing does not cause land degradation; and

(d) prevents the loss of biodiversity; and

(e) maintains ecological processes; and

(f) manages the environmental effects of the clearing to achieve the warned matters mentioned in paragraphs (a) to (e); and

(g) reduces greenhouse gas emissions.

***(2)** The purpose is achieved mainly by providing for-*

(a) codes for the Planning Act relating to the clearing of vegetation that are applicable codes for the assessment of vegetation clearing applications under IDAS; and

(b) the enforcement of vegetation clearing provisions; and

(c) declared areas; and

(d) a framework for decision making that, in achieving this Act's purpose in relation to subsection (1)(a) to (e), applies the precautionary principle that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment if there are threats of serious or irreversible environmental damage; and

(e) the phasing out of broadscale clearing of remnant vegetation by 31 December 2006.

***(3)** In this section-*

***"environment"** includes-*

(a) ecosystems and their constituent parts including people and communities; and

(b) all natural and physical resources; and

(c) those qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and

(d) the social, economic, aesthetic and cultural conditions affecting the matters in paragraphs (a) to (c) or affected by those matters. (Emphasis added)

It should be noted that the purposes of the *Vegetation Management Act 1999* includes from 21 May 2004 conserving remnant endangered regional ecosystems, remnant of concern regional ecosystems, remnant not of concern regional ecosystems and reduces greenhouse gas emissions.

It continued the ability of vegetation clearing to be regulated by local laws and local planning instruments.[54]

When the 2004 Bill was read in the Queensland Parliament for the second time, the Hon Stephen Robertson stated:

> *"In May 2003, when I announced the immediate moratorium on accepting new tree clearing applications, it was with the agreement of the Federal Government. It was the Federal Coalition government that demanded Queensland provide 20 to 25 megatons of carbon emissions savings to allow the Commonwealth to fulfil its greenhouse commitments under its clayton's version of Kyoto protocol. They wanted 'of concern' regional ecosystems to be protected in return for financial assistance for affected landholders and refused to sign the Natural Heritage Trust II bilateral agreement worth nearly $300 million to regional Queensland until the Beattie Government agreed."*[55] *(Emphasis added)*

The Vegetation Management Amendment Act 2008 made further changes providing for declarations in a regulation relating to ecosystems protected by *the Act*[56]. Clause 5 of *Vegetation Management Amendment Act 2008* imposed retrospective effects.

The explanatory notes to *the Bill*[57] provide justification for the changes and advise that no consultation with community or industry stakeholders was undertaken due to the sensitivity of the issues.

> ***"General Outline***
> ***Policy Objectives***
> *The objectives of the Bill are to amend the Vegetation Management Act 1999 (the VM Act) to:*
> *• Clarify the definitions of an endangered, of concern and not of concern regional ecosystem in the VM Act.*
> *• Validate retrospectively all past vegetation related decisions affected by the definition of an endangered, of concern and not of concern regional ecosystem in the VM Act.*
>
> ***Reason for the Policy Objectives***
> *The amendments clarify the definitions of endangered, of concern and not of concern regional ecosystems, clarify the methodology used to determine regional ecosystem status as endangered, of concern or not of*

[54] *Vegetation Management Act 1999* s7(2)&(5)
[55] Second Reading *Vegetation Management and Other Legislation Amendment Bill 2004* Queensland Parliament Hansard 18 March 2004 at 11.33am
[56] *Vegetation Management Act 1999*
[57] *Vegetation Management Amendment Bill 2008*

concern and retrospectively validate that the Vegetation Management Regulation 2000 solely determines the status of the regional ecosystem despite what the legislation said at the time. The existing definitions are open to interpretations that are not consistent with the intent of the legislation to conserve remnant endangered, of concern and not of concern regional ecosystems and are not consistent with the practice of the department in determining status based on the known remnant extent of regional ecosystems remaining. The amendments ensure that the established methodology and previous decisions are clearly valid.

How the Policy Objectives will be achieved

The policy is to be achieved by amending the VM Act to clarify that the current methodology and procedures used for determining regional ecosystem status are consistent with the definitions and related provisions in the legislation and retrospectively providing that the regulation the class of a regional ecosystem.

Consistency with Fundamental Legislative Principles

The amendments to the VM Act with retrospective operation confirm the methodology used to determine regional ecosystem status and validate affected past decisions to minimise the risks of future legal challenge.

The retrospective application of criminal liability is justified because the accepted view within the Government and the community involved with the VM Act was that these were endangered, of concern, and not of concern regional ecosystems at the time, determined using clearly articulated methods, mapped on certified vegetation mapping, and prescribed in the regulation as endangered, of concern, and not of concern regional ecosystems.

Consultation

Community and industry stakeholders

Community consultation regarding the VM Act changes has not been undertaken due to the sensitivity of the issues."[58] (Emphasis added)

The amendments creating retrospective civil and criminal liability cannot be sanctioned. The effect of the amendments is that a rural land holder could clear land and on the date that the land is cleared there was no offence known to law. By legislating retrospectively the clearing which was lawful may now become unlawful. The amendments take out reference to science in the assessment of vegetation and soil types within each of the bioregions. As explained later in this submission it is fundamental to an ongoing carbon sequestration scheme that the science supporting it is open to scrutiny and can be justified. The amendments take away the ability to consider the underlying science in a challenge to an offence. There are examples where prosecutions have been conducted contrary to the "clearly articulated methods" for mapping set out in the Neldner report. The Neldner report is not followed by the Department although it is the department's own document.

[58] *Vegetation Management Amendment Bill 2008* Explanatory Notes p1-2

A recent letter from the President of the Bar Association of Queensland to the Queensland Premier Richard Douglas SC said in relation to the retrospectivity of the *Valuation of Land and Other Legislation Amendment Bill 2010* :

> *"A fair legal system has at its core that the law on any given day should govern the actions of citizens. Those citizens are entitled to organise their affairs (domestic and commercial) on the statute law as enacted from time-to-time.*
>
> *There is well enshrined principle that legislation when introduced should address future, not past, conduct. The basis of this principle agaist retrospectivity 'is no more than simple fairness, which ought to be the basis of every legal rule' (L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486 at 525, cited in Bennion on Statutory Interpretatons, 5th ed at 316)."*[59]

In 2009 further amendments were made to the *Vegetation Management Act 1999*. The amendments were preceded by the *Vegetation Management (Regrowth Clearing Moratorium) Act 2009* which provided for retrospectivity to the 8 April 2009 (Note: the Bill was introduced to Parliament 22 April 2009)

The explanation Notes for the moratorium provide the following policy objectives:

> *"The objectives of the Bill are to:*
> *• introduce a moratorium on the clearing of:*
> *• all native vegetation within 50 metres of a watercourse in priority reef catchments of the Wet Tropics, Burdekin and Mackay Whitsunday regions; and*
> *• endangered regrowth vegetation in rural areas across the state on freehold and agricultural and grazing State leasehold land.*
>
> ***Reason for the Policy Objectives***
> *This delivers on Government commitments to protect endangered regrowth vegetation and landscapes that badly need trees to perform their ecological function and address tree clearing impacting on the Great Barrier Reef. It is generally accepted that retention of vegetation either side of a watercourse on riparian areas can assist with improving bank stability and reduce pollutants within a water system. A vegetation buffer of 50 metres of native vegetation either side of a watercourse provides for improved bank stability and reduced pollutants, as well as enhanced biodiversity benefits. Endangered vegetation has been the most affected by past broadscale clearing practices and is most in need of efforts that encourage recovery.*
>
> ***How the Policy Objectives will be achieved***
> *The policy is to be achieved by:*
> *• restricting clearing of regrowth vegetation for a period of at least 3 months with a possible extension for up to another 3 months.*
> *• The State consulting with stakeholders about the optimum way to regulate clearing of regrowth vegetation under the Vegetation Management Act 1999 (VMA)."*[60]

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[59] 2 March 2010
[60] *Vegetation Management (Regrowth Clearing Moratorium) Bill 2009* Explanatory Notes p1-2

The *Vegetation Management and Other Legislation Amendment Act 2009* introduced further changes to the purposes of *the Act*[61]. Following its commencement on 8 October 2009 of that particular provision the purpose of *the Act*[62] is now:

> *"(1) The purpose of this Act is to regulate the clearing of vegetation in a way that-*
> *(a) conserves remnant vegetation that is-*
> *(i) an endangered regional ecosystem; or*
> *(ii) an of concern regional ecosystem; or*
> *(iii) a least concern regional ecosystem; and*
> *(b) conserves vegetation in declared areas; and*
> *(c) ensures the clearing does not cause land degradation; and*
> *(d) prevents the loss of biodiversity; and*
> *(e) maintains ecological processes; and*
> *(f) manages the environmental effects of the clearing to achieve the matters mentioned in paragraphs (a) to (e); and*
> *(g) reduces greenhouse gas emissions.*
> *(2) The purpose is achieved mainly by providing for-*
> *(a) codes for the Planning Act relating to the clearing of vegetation that are applicable codes for the assessment of vegetation clearing applications under IDAS; and*
> *(b) the enforcement of vegetation clearing provisions; and*
> *(c) declared areas; and*
> *(d) a framework for decision making that, in achieving this Act's purpose in relation to subsection (1)(a) to (e),applies the precautionary principle that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment if there are threats of serious or irreversible environmental damage; and*
> *(e) the phasing out of broadscale clearing of remnant vegetation by 31 December 2006; and*
> *(f) the regulation of particular regrowth vegetation.*
> *(3) In this section-*
> ***environment** includes-*
> *(a) ecosystems and their constituent parts including people and communities; and*
> *(b) all natural and physical resources; and*
> *(c) those qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and*
> *(d) the social, economic, aesthetic and cultural conditions affecting the matters in paragraphs (a) to (c) or affected by those matters."*[63] (Emphasis added)

The explanatory Notes to the Bill:

> ***"Policy Objectives***

[61] *Vegetation Management Act 1999*
[62] *Vegetation Management Act 1999*
[63] *Vegetation Management Act 1999* s3

The main purpose of the Bill is to amend the Vegetation Management Act 1999 (VMA) and Integrated Planning Act 1997 (the Planning Act) to provide a new legislative framework for the protection of important regrowth vegetation. This legislation has arisen from an election commitment on 15 March 2009 by the Premier which included a temporary moratorium on clearing of endangered regrowth vegetation and regrowth vegetation adjacent to priority Great Barrier Reef watercourses while the State Government consulted with stakeholders about the best way to manage clearing of regrowth vegetation under the VMA. As a result of consultation, this Bill will protect mature regrowth vegetation that has not been cleared since 31 December 1989 on leasehold land for agricultural and grazing purposes, freehold land and indigenous land. This is the regrowth with the highest biodiversity value and that is least likely to occur on productive lands. The Bill also maintains the protection of regrowth vegetation adjacent to watercourses in the priority Great Barrier Reef catchments of the Burdekin, Mackay-Whitsundays and the Wet Tropics. Protection of these watercourses will assist in protecting Queensland's iconic Great Barrier Reef.

.....

Reason for the Policy Objectives

The new regrowth vegetation legislative framework delivers on Government commitments to protect regrowth vegetation and landscapes that badly need trees to perform their ecological function and address tree clearing impacts on the Great Barrier Reef. The protection of regrowth vegetation was in response to the level of regrowth clearing in the 2006/07 Statewide Landcover and Tree Study (SLATS) Report, as well as the need to protect Queensland's Great Barrier Reef. The protection of mature regrowth ensures that threatened ecosystems will be protected and will assist in protecting sensitive areas such as steep slopes, wetlands, watercourses and habitat for threatened species. This Bill strikes the balance of assisting to achieve the purpose of the VMA while maintaining productive land.

The retention of vegetation either side of watercourses in priority reef catchments can assist with improving bank stability and reduce pollutants within a water system. A vegetation buffer of 50 metres of native vegetation either side of priority reef catchment watercourses will provide for improved bank stability and reduce the level of pollutants such as sediments and chemicals entering the reef, as well as enhanced biodiversity benefits. The protection of regrowth watercourse vegetation under this Bill will improve the quality of water entering the Great Barrier Reef and will assist in delivering the Government's commitment to reduce the level of pesticides and fertilisers reaching the reef by 50 per cent within four years.

.....

How the Policy Objectives will be achieved

The policy objectives will be achieved by:

- *Repealing the Vegetation Management (Regrowth Clearing Moratorium) Act 2009 and providing for the long-term regulation of regrowth vegetation on agricultural and grazing leasehold land and non-urban freehold and indigenous land through a performance based compliance code. The code specifies the minimum clearing requirements which must be met and voluntary best management practice criteria for landholders willing to apply a higher standard of regrowth vegetation management.*
- *Commencing the parts of the Bill covering new regrowth vegetation regulations retrospectively from the end of the moratorium, to prevent pre-emptive clearing. Criminal liability will not apply during the period of retrospectivity, although landholders who commit an offence may be required to let vegetation regrow to ensure that the regrowth vegetation regulation objectives are not undermined.*
- *Mapping and regulating areas of regrowth vegetation which are woody vegetation that is of forest quality (a minimum of 11 percent foliage projective cover), has not been re-cleared since 31 December 1989 (i.e. is at least 20 years old) and is either an endangered, of concern or least concern, (previously known as not of concern) regional ecosystem; and regulating native vegetation 50 metres either side of regrowth watercourses in the Burdekin, Mackay-Whitsunday and Wet Tropics priority reef catchments.The classes of regional ecosystem are explained in the schedule (Dictionary).*

• *Excluding regulation of regrowth vegetation less than 20 years old, to avoid impact on the most productive primary production lands, while at the same time protecting regrowth vegetation that is likely to be a functioning ecosystem.*

.....

Consistency with Fundamental Legislative Principles

.....

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively-Legislative Standards Act 1992, section 4(3)(g).

The regrowth vegetation clearing provisions in the Bill will commence retrospectively from 8 October 2009, the day after the moratorium on regrowth vegetation clearing ends. The proposed Bill may adversely impact on the right to clear particular vegetation within the period between 8 October 2009 and the date of assent for the legislation. A person clearing particular vegetation in the retrospective period is not subject to criminal liability but may be given a restoration notice which may require the person to prepare and implement a restoration plan. Failure to comply with the restoration notice attracts a penalty under the new provisions. Further, land that has been subject to a restoration notice will be shown as category A on a property map of assessable vegetation (PMAV) which means that the area will be subject to the greatest restrictions with regard to clearing under the amended VMA.

The retrospective application of the Bill arguably offends section 4(3)(g) of the Legislative Standards Act 1992 which requires that legislation has sufficient regard to the rights and liberties of individuals and consequently not adversely affect rights and liberties, or impose obligations, retrospectively.

In this instance, retrospectivity is justified. The introduction of the regrowth vegetation regulations ahead of the legislation is necessary to ensure that high value regrowth vegetation and native vegetation adjacent to regrowth watercourses is not cleared pre-emptively while the Bill is considered by Parliament.

The effects of the retrospective application of the Bill have been mitigated as much as possible by:

• *the Government announcing the introduction of this Bill prior to its introduction , the reasons for the regulations, the impact of the Bill on landholders and where further information could be obtained;*

• *keeping the period of retrospectivity as short as possible; and*

• *excluding criminal liability during the retrospective period for clearing regrowth vegetation protected under the new laws.*

While retrospective legislation which disadvantages individuals is a breach of fundamental legislative principles and generally objectionable it has been accepted that retrospectivity is justified where the interests of the public as a whole outweigh the interests of an individual. There may be some detrimental effect on individual rights however individual rights are outweighed by the public interest in ensuring that high value regrowth vegetation and regrowth watercourse vegetation are protected.

Does the legislation provide for the compulsory acquisition of property only with fair compensation-Legislative Standards Act 1992, section 4(4)(b).

Clause 46 of the Bill provides that vegetation planted on leasehold land to comply with a restoration notice, a Land Act notice given for a tree clearing offence or a trespass notice under the Land Act is not and never has been a natural resource owned by the lessee as an improvement. While it is generally acknowledged that compulsory acquisition of property may be made only with compensation, in this circumstance it would be inappropriate for a person who has committed an offence to enrich themselves as a result.

.....

Clause 16 (20AB) - What is the regrowth vegetation map

.....

The regrowth vegetation map was developed using rigorous scientific methodologies as well as satellite imagery used by the Queensland Herbarium and in the SLATS reports. Measurements of foliage projective cover have been used to identify regrowth vegetation as being of a type likely to have the qualities of a functioning ecosystem and able to make a significant contribution to biodiversity and recovery of regional ecosystems. The standard for foliage projective cover used for the regrowth vegetation map is equivalent to

the standards used in the Australia National Forestry Inventory to define a forest, and the National Carbon Accounting System, and would likely align with Kyoto carbon accounting principles. Although the mapping will identify some areas that are not native vegetation, like woody weeds, clearing in these areas is generally exempt from the effects of the Bill.

Does the legislation make rights and liberties, or obligations,dependent on administrative power only if subject to appropriate review- Legislative Standards Act 1992, section 4(3)(a)(second limb).

Clause 43 (68CB) - Non-application of Judicial Review Act 1991

Clause 43 prevents a person exercising a right of review under the Judicial Review Act 1991 in relation to:
(a) applications for a property map of assessable vegetation (PMAV) that are not decided during the retrospective period between 8 October 2009 and the Assent of the Bill; or
(b) certification or amendment of the regional ecosystem, remnant and regrowth vegetation maps by the chief executive.
The removal of normal rights of review in relation to PMAV applications is justified for the limited period of retrospectivity by the potential for these, if decided following review, to result in clearing of vegetation intended to be protected. The removal of normal rights of review for decisions related to the regrowth vegetation, regional ecosystem and remnant maps is justified because challenge to their validity may degrade the effectiveness of the vegetation management laws. To mitigate the effect of the removal of this right, amendment of the map only has effect from the day the Governor in Council approved the map through a regulation. This allows the amended map to be made publicly available.

Clause 43 (68CC) - No appeals about relevant vegetation management maps and particular PMAV applications

Clause 43 provides that a person can not appeal under any Act or other law about:
(a) a delay in agreeing to make a PMAV during the retrospective period between 8 October and the Assent of the Bill; or
(b) certification or amendment of a regional ecosystem, remnant and regrowth vegetation map by the chief executive.
The removal of normal rights of review in relation to PMAV applications is justified for the limited period of restrospectivity by the potential for these, if decided following review, to result in clearing of vegetation intended to be protected.
The removal of normal rights of review for decisions related to the regrowth vegetation, regional ecosystem and remnant maps is justified for the limited period of retrospectivity because challenge to their validity may degrade the effectiveness of the vegetation management laws. To mitigate the effect of the removal of this right, amendment of the map only has effect from the day the Governor in Council approved the map through a regulation. This allows for the amended map to be made publicly available.

Consultation Community and industry stakeholders

In relation to the parts of the Bill that regulate regrowth vegetation clearing, stakeholders were invited to make written submissions before 15 May 2009. The Minister for Natural Resources, Mines and Energy and Minister for Trade held key stakeholder round table meetings on 1 April 2009 and 5 June 2009. The department also met individually with key stakeholders, such as industry and conservation groups, the extractive, forestry and urban development industries and financial institutions, to clarify concerns about the regulatory options.
In relation to the streamlining parts of the Bill, the community and stakeholders were consulted through reviews of the implementation of the administration of the VMA and feedback provided by stakeholders."[64]

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[64] *Vegetation Management and Other Legislation Amendment Bill 2009* Explanatory Notes pp1-8

From the legislative history of the VMA, it is clear that the State of Queensland "regulated" the clearing of vegetation on both freehold and leasehold land for the purpose of placing upon the Australian balance sheet carbon sequestration maintained as a result of that "regulation".

It is also clear that the State government had no qualms about retrospectively introducing legislation that significantly impacted upon the value of property rights of rural land owners throughout Queensland to the benefit of Australian carbon emitters. This is inequitable and needs to be addressed in any carbon pollution reduction scheme.

In the latest amendment it is also clear that it is discriminatory in its treatment of agricultural pursuits and indigenous land owners whose interests in land have been specifically identified and regulated differently from the balance of the community.

It is also clear that the State government does not wish to brook any consideration of the underlying classification of regional ecosystems when there have been serious questions raised as to the veracity of that mapping at a property level for the purpose of prosecutions, when the mapping itself disclaims its use in the certified legends and when the Neldner report qualifies the way in which the mapping should be used.

4.4 Regulation of Beneficial title

Under the *Sustainable Planning Act 2009* (Qld) development includes operational work which includes clearing vegetation, including vegetation to which the *Vegetation Management Act 1999* (Qld) applies.[65]

A development permit is necessary for assessable development and it is an offence to carry out assessable development without a development permit.[66]

A regulation may prescribe categories of development that require assessment[67] and the Sustainable Planning Regulation 2009 does so.

Schedule 3, part 1, column 2 of the regulation identifies assessable development.[68]

The schedule identifies operational work being the clearing of native vegetation on freehold land, indigenous land and leasehold land subject to certain exceptions.

The property rights that a person has to clear vegetation under this Act are the rights that fall into the exemptions.

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[65] *Sustainable Planning Act 2009* ss 7 & 10
[66] *Sustainable Planning Act 2009* ss 238 and 578
[67] *Sustainable Planning Act 2009* s 232
[68] *Sustainable Planning Regulation 2009* s 9

This Act provides a personal right which is the right to make applications to clear vegetation in other specified circumstances.

4.5 Compensation

There is no general provision in relation to compensation in *the Act*[69].

4.6 Unbundled Property Rights

Unbundled property rights have been separated from the land title system through numerous legislative enactments over time. A current trend in the legislation appears to be to, at least in part, reunite those property rights with land by requiring administrative notations on title or specifying that property rights attach to the land and bind successors in title. There is a need to reunite unbundled property rights with title to facilitate climate change measures.

> *"The growing enthusiasm for market creation schemes seems to be supported by two factors. First, a realisation that governments have limited resources to address environmental problems. Second, they hope that market creation will minimise the social dislocation associated with resolving environmental problems. In particular, market creation may provide new revenue streams for landholders that enable them to both change land use practices and retain a viable business."*[70]

One of the most fundamental impacts of the Vegetation Management framework legislation has been its impact on landowner's rights in terms of what a grant of interest in land now means to a landholder? What is there in terms of certainty and security in the ability to manage their land with sensible/sustainable regulation. Is this going to be continually eroded into the future? Can investment in rural enterprises be justified?

The difference in the United States in the treatment of unbundled property rights is dramatic and the US courts have concluded that regulation can amount to a taking even though there is no direct acquisition of the asset.

> *"The last three decades have seen an explosion of interest in a previously obscure clause in the Fifth Amendment of the US Constitution: "... nor shall private property be taken for public use, without just compensation." After ignoring the takings issue for more than half a century, the US Supreme Court rendered more than a dozen decisions in this area since 1978. Some of these decisions clarify when regulations go too far" and create a taking. For example, the 1992 Lucas decision determined that a*

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[69] *Vegetation Management Act 1999*

[70] *Creating Markets for Ecosystem Services*, Productivity Commission, staff research paper Greg Murtough, Barbara Aretino & Anna Matysek 2002 p 2

regulation that eliminated all economic use of the property was taking per se unless the use would have been prohibited by the states underlying property and nuisance law."

But similar clarification has not occurred for so-called "partial takings" cases in which regulations reduced value but do not eliminate all economic use."[71]

In the event that the "regulation" is either overtly or surreptitiously the "taking of an interest in land" then what is the value of what has been taken? Unfortunately the breadth of enquiry identified by the Senate does not necessarily address the following questions which are pertinent and ought to be answered. Who are the beneficiaries of that taking? What value does that carbon sequestration have to those beneficiaries? What lost opportunity costs have occurred as a result of the "regulation". What potential detriment will occur to land owners whose carbon sequestration has been "regulated".

4.7 Social Consequences of Legislation

The practical consequences of the imposition of the legislation include:

- Decreased land area available for production
- Loss of opportunity to harvest fodder
- Water points on unused land
- Potential for work flows to be interrupted due to access issues created – leading to increased production costs
- Unmanaged land parcels over time posed increasing threat in terms of:
    - Bio-security – feral animals – disease, attacks on livestock – [72]
    - flora – weeds, noxious plants multiplying and spreading. It is estimated that the annual cost in Queensland is $600mil[73]. This cost is likely to increase if land that has been quarantined for regrowth is not properly managed
    - Fire risk; (Black Saturday)
    - Fencing – stock management

[71] *Beyond Takings and Givings*, Rick Pruetz p 11

[72] *Major Economic Costs Associated with Wild Dogs in Queensland Grazing Industries* Agforce Queensland September 2009 at ii. In 2008/09 it is estimated that wild dogs cost just over $67mil. They pose a serious threat to the rural sector in terms of attacks on livestock and the spread of diseases.

[73] http://www.dpi.qld.gov.au/4790_7028.htm

- Potential to lead to foreclosure by financial institutions in the event that borrowed money is secured against the property

4.8 Compensation for the imposition of Vegetation Management Act 2004;

Federal - assistance and support[74]

- Investment in targeted research through the Climate Change Research Program with eventual roll-out of on-farm demonstrations. The research projects will focus on reducing green house gas emissions, improving soil management and determining the potential of sequestration of carbon in agricultural soils and research into alternative management practices and the development of adaptation tools and techniques with the objective of developing solutions for the rural sector;
- The Farm Ready Program which funds industry and individuals farmers. This program comprises two branches. The first, FarmReady Industry Grants of up to $80,000 each financial year for projects which increase industry self reliance and preparedness to adapt to climate change are available to: Groups of Primary Producers formed for the purpose of the project, Established Primary Producer Industry groups or organisations and natural resource management groups. Secondly, FarmReady Reimbursement which provides $1,500 per financial year to attend approved courses some additional funding is available for associated reasonable travel, accommodation and childcare expenses. The approved courses will focus on areas designed to equip primary producers with the tools to manage and adapt to the impacts of climate change;
- $2 mil will be made available over four years for projects aimed at Community Networks and Capacity Building;
- Transitional Income support will be available to eligible farmers who are in serious financial difficulty. The support was available from 16 June 2008 and finishes on 30 June 2010. It provides income support for up to a period of 12 months (a NEWSTART payment) while they adapt their farm to changing circumstances. They will be required to prepare a Climate Change Action Plan can access an advice and training grant of $5,500 to access professional advice.;
- Adjustment Assistance Grants up to $150,000 are available to eligible farmers who have considered their options and have made the decision to leave farming. Advice and training assistance up to $5,500 will be available to assist in leaving the farm. Eligible farmers with net assets of $350,000 or less after the sale of the farm and farm assets can receive the full $150,000 of the re-establishment grant. The sum of the grant reduces once a farmer's net assets reach $350,000. No grant is payable when net assets reach $575,000

Queensland – assistance and support[75]

[74] http://www.daff.gov.au/climatechange/australias-farming-future
[75] Queensland Rural Adjustment Authority

- Approximately $150mil was made available to the rural sector to help landowner affected by the changes to the Vegetation Management in 2004. This was managed by the Queensland Rural Adjustment Authority and was access by many eligible applicants. This program finishes May 2010.
- During the phase out period finishing in December 2006 a ballot was held for the clearing cap of 500,000 hectares.

Whether any of the above forms of support and/or assistance can be properly regarded as compensation is doubtful. Compensation in terms of real property is defined as:

> *"A payment of money or property made for the purpose of providing a replacement in monetary value of property or rights which have been lost or damaged, or the monetary value of injury suffered by the applicant... Where compensation is required due to court order or statute, the purpose of the payment is to ensure that the applicant for compensation is placed, as far as possible, in the same position as before the loss or injury."*[76]

The assistance that has been made available may be described as follows:

- Financial payments made due to financial hardship for which eligible applicants may have been entitled ordinarily by applying to Centrelink;
- Adjustment assistance grants have been available to the rural sector for some time[77] to assist farmers adjust when they decide to leave the land due to lack of viability. Any lump sums that may have been paid to persons who qualified do not have any reference to the extent of loss that may have been suffered/incurred because of their property rights being diminished by Government. Importantly, no grant is payable if the farmers net assets exceed $575,000 when he sells the farm and farm assets or if he does not sell at all; and
- Grants made to farmers in Queensland for purposes such as the building of fences necessitated by the Governments' restricting the use of the land. No mention has been made of ongoing grants to meet the costs that will be incurred by the farmers maintaining any such requisites.

None of the above constitutes fair compensation. None of the above payments are actual compensation for the removal of the common law property right.

5 Essential elements for the carbon sequestration scheme

> *"Market-based incentives allow an equitable distribution of the burden of protection of the natural environment. If the community, through government, says that a particular piece of land is too valuable for agricultural use, development or purposes other than protection of the natural environment then the burden of the protection should not fall solely on the individual landholder. The community, through*

[76] Butterworths *Australian Property Law Dictionary* 1997
[77] *Rural Adjustment Act (Cth)* 1992

government, should provide for the mechanisms to encourage the landowner to manage that land in a way that the community wants." [78]

"In 1992 the major Australian business associations argued that Australia's regulatory system required a major overhaul if the nation was to compete successfully in world markets and attract overseas investment. It suggested that the regulatory system was unnecessarily complex, generated delays, inconsistencies and additional costs for business investment, as well as inhibiting risk-taking and enterprise."[79]

Dr Alan Moran in his paper considered the importance of property rights in relation to water and identified factors that were important. He states:-

"Perhaps with these factors in mind, water property rights have formed a major feature of national competition policy. The Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ) has argued that water entitlements be clearly specified in terms of:

1. *rights and conditions of ownership tenure;*
2. *share of natural resource being allocated (including probability of occurrence);*
3. *details of agreed standards of any commercial services to be delivered;*
4. *constraints to and rules on transferability; and*
5. *constraints to restore use or access.*

ARMCAANZ also suggested that an effective market requires rights that are:

6. *limited in extent or availability;*
7. *well specified and understood by the market;*
8. *exclusive so that benefits and costs associated with the rights are attributed to the right holders;*
9. *enforceable and enforced by appropriate legal systems; and*
10. *transferable and divisible within defined limitations."*[80]

In a broader context of property rights: Dr Lyons, Davies & Cottrell identified 10 objectives of property rights and markets are as follows:-

"1. To ensure all property rights are clearly defined, secure in law and practice.
2. To support the operation of markets in the various property rights.
3. To ensure that transactions and trading in property rights can be carried out.
4. To provide legally correct composite/integrated information on all property rights that apply to, or affect any area of land.
5. To enable property right to be used as a source of capital/credit and economic development.
6. To support government revenue raising/taxation based on land.
7. To contribute to social stability.
8. To contribute to natural resource and environmental sustainability.
9. To operate effectively and efficiently, with a service philosophy, that public confidence and stringent accountability."[81]

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[78] *Legislative Tools for Proper Environmental Management*, L Manning, Queensland Environmental Law Association state conference May 2004

[79] Dr K. Lyons, K. J. Davies & EC Cottrell *On the Efficiency of Property Rights Administration in Queensland* 12 April 2002 p 62

[80] Dr Alan Moran *Property Rights to Water and Effects on Agricultural Productivity and the Environment*, IPA Backgrounder on June 2003, volume 15/3 pp 7 -- 8

The report also indicated:-

> *"The major functions that deal with property rights are:-*
> - *a policy and legal basis;*
> - *the determination of property rights, legal declaration, guidelines;*
> - *application processing for dealing, permits/licences etc;*
> - *the provision of information;*
> - *compliance checking;*
> - *appeal processes; and the*
> - *viable and orderly market trading."*[82]

Recent analyses of market-based incentives are informative in considering how to deal with the bundle of rights that are being detached from property for carbon sequestration schemes. We have listed some of the critical matters that must be addressed for market-based incentives to apply and these criteria in a large way address the broader concept of risk management for those unbundled property rights.

Murtough, Aretino & Matysek, in their paper, described seven characteristics that they have identified through their studies as being desirable characteristics for creating markets for ecosystem services, which would include carbon sequestration schemes. Those seven characteristics are repeated below as they will have direct application in relation to providing opportunities for dealing with the bundle of rights that form part of property rights: --

"1. Clearly defined	*Nature and extent of the property right is unambiguous.*
2. Verifiable	*Use of the property right can be measured at reasonable cost.*
3. Enforceable	*Ownership of the property right can be enforced at reasonable cost.*
4. Valuable	*There are parties who are willing to purchase the property right.*
5. Transferable	*Ownership of the property right can be transferred to another party at reasonable cost.*
6. Low scientific uncertainty.	*Use of the property right has a clear relationship with ecosystem services.*
7. Low sovereign risk.	*Future government decisions are likely to significantly reduce the property right's value."*[83]

[81] Dr K Lyons, KJ Davies & EC Cottrell, *On the Efficiency of Property Rights Administration in Queensland* 12 April 2002 pp 44-45
[82] Dr K Lyons, KJ Davies & EC Cottrell, *On the Efficiency of Property Rights Administration in Queensland* 12 April 2002 p 46
[83] *Creating Markets for Ecosystem Services, Productive at the Commission*, staff research paper Greg Murtagh, Barbara Aretino & and Anna Matysek 2002, p 10

Mark Sheahan in his report identified 10 essential elements of a mitigation banking system, a type of market-based incentives. These are:

> *"1. Legislation and regulation*
>
> *2. Data inventory, habitat classification, and planning*
>
> *3. Permitting, and the requirement for mitigation*
>
> *4. Valuing debits at the impact site*
>
> *5. Valuing credits at the bank site*
>
> *6. Long-term land management of the bank site*
>
> *7. Securing the conservation status of the bank site*
>
> *8. Developing an agreement between all parties*
>
> *9. Establishing systems for credit sale*
>
> *10.Monitoring and compliance."*[84]

Two other factors that need to be specifically considered in the context of carbon sequestration scheme are the relationship with "international, national, State, regional and local significance. This raises an issue of nexus in the divisibility of property rights from a given parcel of land. Also there is a need to consider the structure of proper environmental governance and the cost to government.

In addition to looking at those matters that have been considered essential elements of a market-based incentives system such as a carbon sequestration scheme it is useful to consider those factors which have caused the failure of market-based incentives systems. Scott, Kaine, Stringer & Anderson identified the following five major issues that caused failure of market-based incentives:-

- Externalities
- Under-pricing
- Lack of information
- Government policies
- No property rights

These considerations have been tabulated in Attachment 2 and a summary column covering all of the factors that are essential has been created merging the concepts of the various authors who have used different expressions to refer to similar if not the same matters. The last bullet point is fundamental.

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[84] *Credit for conservation: A report on conservation banking and mitigation banking in the USA, and its applicability to New South Wales*, report by Mark Sheehan 2001 Winston Churchill Memorial trust of Australia, Canberra

Flowing out of that table the following factors have been identified as factors that need to be addressed to enable carbon sequestration schemes to occur in the most favourable circumstances. Obviously there will be circumstances where some only of the factors have application and carbon sequestration schemes may occur despite the suboptimal circumstances.

Those factors are:-

1. Clearly defined nature and extent of the property rights;
2. Ability to deal with the property rights;
3. Market attributes must be clear and certain;
4. Information about the market must be clear and accessible;
5. Government policy must support the market;
6. There must be a low sovereign risk to the value of property rights;
7. There must be ongoing monitoring and compliance checks;
8. Governments factors have to be cost-effective;
9. International, national, State, Territory, regional and local significance must be considered; and
10. Property rights should contribute to social stability.

Each of these factors must be considered in light of the overview of relevant legislation as the risk management analysis for establishing an efficient and effective carbon sequestration scheme arising out of common law property rights.

6 Social consequences

Fundamentally, the existing common-law rights in relation to vegetation need to be clearly expressed and part of the land titling system.

If land cannot be farmed because vegetation cannot be removed then that should be expressed clearly and simply on the title to the land. This issue goes fundamentally to the beneficial title to the land. A purchaser and all other parties that have an interest in the value of the land should have easy access to this information as a matter of course in transactions.

The immediate impact on financiers seeking to finance the purchase of land or fund use opportunities on the land needs no detailed analysis. The financier cannot be ensured that they will be able to recoup from the security of the land the value of the advance.

A farmer in deciding whether to acquire a further parcel of land will need to know whether he can clear vegetation on the land, and if so what. These issues will be fundamental to all parties interested in that transaction and many parties on the periphery of that transaction.

Indigenous communities are faced with exactly the same issues when trying to advance their economic and social prosperity.

The examples are simple and practical and show why rights opportunities and restrictions should form part of the land titles system.

The unbundled property rights relate to land and are not clearly recognised as an interest in land. At best there are examples of a trend, in Queensland, for unbundled property rights obtained through an approvals process to bind successors in title and attach to the land. However, those rights cannot be described as "clearly defined".

Many of them are subject to review and change in accordance with plans, whether planning schemes, water management plans, vegetation management plans, cultural heritage mapping, or other plans. Many of these plans are periodically prepared by government and go through a public process in which members of the public, including the owner of the land, but not limited to the owner of the land, can make submissions in relation to the impact. The plans once changed may remove "existing rights" or they may maintain existing rights but limit their future modification or expansion and thereby ensure their phasing out over time.

Some rights may be removed upon conviction for an offence relating to the subject matter of the right obligation or restriction. Conviction of an offence may lead to the imposition of further conditions including restitution orders that attach long term obligations to the land.

Without the ability to deal with the beneficial title either in its entirety or segregated interests such as carbon sequestration the existing land titles system is not delivering the services that both the community and industry are seeking. This was evident at the National Summit on Improving the Administration of Land and Property Rights and Restrictions held in Brisbane on 16 November 2004. Speakers and attendees from banking and finance, insurance, agriculture, land development and government administrators resolved that a communique be drafted and presented prior to the close of the meeting In brief the communique recognised the need to have rights obligations and restrictions affecting land and property in Australia on title as part of a national titling system. The communique also provided actions to allow the prioritisation and implementation of those suggestions.

7 Allow market forces to fix valuation

There is no point in trying to fix a value for carbon sequestered as the free market ought to properly reflect its value. Provided that the requirements for market-based incentive are included in legislation then the informed market will make its own decisions as to the value of carbon sequestration. For example the value of retaining vegetation on farm land as an offset against point source pollution from an industrial use will require a consideration of the value of the opportunity lost on the farm, the growth of a crop, against the value of the end product of the industrial use, perhaps a car. In the example given, allowing free market to operate in a properly regulated environment will enable decisions to be made relating to food security as opposed to restricting the industrial use because it cannot offset its point source emissions.

8 Suggested structure for carbon sequestration scheme

Legislation should create an economic environment in which proper environmental management becomes an economically viable alternative to inappropriate land management. These restrictions will most likely have to occur within the specific legislation that deals with any particular issue.

For example, if the *Vegetation Management Act 1999* requires a certain area of land in outback Queensland to be retained with natural vegetation for carbon sequestration there may be opportunities for a trade to occur to maintain the requisite area. Some incentives for environmental management include: -

- restrictions may be imposed upon total emissions of greenhouse gas chemicals within specified catchments allowing trade of emission rights within the catchment;
- restrictions may be imposed upon areas of vegetation that can be cleared without offsets creating a market for vegetation protection;
- auctions for environmental services to achieve greater return for environmental management and simply giving grants;
- allowing development rights to be transferred from one site to another site;
- offsetting tax relief, rate relief and land tax relief against environmental management;
- providing for mitigation banks which allow a strategically located environment to be enhanced or created.

8.1 Property Right

- acknowledgment of the common law property right;
  - the current legislation relating to land law affirms common law interests in land, such as a profit a prendre, that can be emulated for other types of unbundled property right that will form the basis for a carbon sequestration scheme;
- dealing with the property right;
  - the transfer ability and registration of unbundled property rights can be dealt with in a manner similar to other land dealings with appropriate forms being created;
- valuation of the property right;
  - there are numerous methods suggested for valuation of the carbon sequestration. This is a matter that requires proper open and accountable scientific scrutiny and should include soils;
- security of the unbundled property right
  - unless government guarantees that it will not statutorily remove a property right without compensation then the value in any system will take account of that risk factor. That is likely to significantly reduce the value of any carbon sequestration scheme. If unbundled property rights are dealt with as an interest in land then compensation for the removal of an interest in land would ordinarily be dealt with under the Acquisition laws.

8.2 Environmental Management

- scientific justification for the carbon sequestration right;
  - as a precursor to any carbon sequestration scheme there must be sufficient scientific justification governing the management of the sequestered carbon. Without this scientific justification the trade of carbon sequestered should not occur. Whilst this issue goes directly to the creation of a carbon sequestration scheme it would be best located as part of the legislation under the *Environmental Protection Biodiversity Conservation Act* as a precursor to registration of the sequestered carbon.
- scientific establishment of the correct environmental management;
  - if benefits are to be provided for carbon sequestration then it is incumbent upon all practitioners involved, including government, to ensure that the aim is achieved. This will not occur unless sufficient scientific rigour has been applied to achieve appropriate environmental management.
- securing the environmental management;
  - the enforcement provisions that are contained in many pieces of legislation must be applicable to secure proper environmental management to retain the sequestered carbon. Just as there is a need to secure the unbundled property right, there is also a need to secure proper environmental management.
- securing ongoing funding for the environmental management;
  - a risk that has to be considered in promoting any unbundled property rights scheme is to ensure that a party is available to provide further cost of ongoing environmental management to retain the sequestered carbon where required by the scheme. In some schemes sinking funds have been required.
- monitoring of the environmental management.
  - it will be necessary to ensure that there is appropriate ongoing monitoring of the environmental management to ensure carbon is sequestered. As indicated this could impose ongoing costs on government. Provided that appropriate environmental auditing powers are granted to appropriate companies a significant proportion of this cost will be internalised by those running the schemes.

8.3 Environmental Companies

- Environmental companies;
  - where a company is established to run an carbon sequestration scheme the legislation should make it incumbent upon the company to achieve appropriate environmental management standards to secure the sequestered carbon as a first priority before the making of and distribution of profit. These companies should be encouraged to create the schemes that ensure ongoing carbon sequestration where government funding cannot be applied to achieve that result. and

- Environmental auditors
    - rather than imposing the cost of monitoring on an annual basis on companies involved in property carbon sequestrations right scheme this function could be given to accredited auditors. This frees up the amount of work required by the regulatory body. It also requires the cost of ongoing compliance and reporting to be factored into the accounts of those companies.

From a perusal of those analyses set out above it is possible to frame relevant legislation to enable the equitable re-introduction of those unbundled property rights relating to carbon sequestration back into the land tenure system, establish a framework for assessment of the carbon sequestered and ensure its long term existence.

Provided that the legislation addresses these issues fairly, then the legislation will simply be providing further opportunity to allow a range of people from agriculture, industry, land development and others to achieve their goals, whatever they are, in conjunction with proper environmental management leading to a reduction in green house gas emissions.

9 Conclusion

The burden of reducing greenhouse gas emissions has to date been unfairly placed on the back of rural landowners. The creation of a comprehensive nationwide carbon pollution reduction scheme is a way that all governments can mitigate that unfair burden and fairly compensation landowners for their common law rights at the same time as it reduces Australia' greenhouse gas emissions.

10 Hearing

I would welcome the opportunity to address the Senate Committee. My preference is to attend the hearing to be held in Rockhampton.

Lestar Manning
Partner
p&e Law

11 Appendix 1 extracts from Bone v Mothershaw

"[23] This brings me to what is really Mr Bone's fundamental complaint about the whole process of vegetation protection that has been imposed on his land under chapter 22. It is that, by the Council's action in making the order, his land has been struck with sterility in relation to the uses he can now lawfully make of it. Except with Council approval, there is practically nothing he can do with it except continue to grow vegetation and perhaps walk on it. His refusal or failure to recognise that this state of affairs now prevails has already cost him $20,000 in penalties, to say nothing of legal costs, his own as well as those of the Council. For this severe limitation on his rights as owner, he has received and will receive no compensation, although he continues to enjoy the privilege of paying the rates that the Council levies on his land. The action taken by the Council was no doubt undertaken in the public interest, as it claims, of the citizens of Brisbane; but it is not they who will bear the financial disadvantages of the action taken in their interest. It is of little consolation to him to learn that, as the Council proudly proclaims in some of its material, it is the only local authority in Australia that provides this service (or some stages of it) to a land owner who is targeted completely free of charge.

[24] The question is whether our legal system permits such prohibitory action to be taken. The applicant contends that what the Council ordinance and the protection order made under it achieves is expropriatory in character and effect, and consequently invalid. Reference was made in submissions on behalf of Mr Bone to C J Burland Pty Ltd v Metropolitan Meat Industry Board (1968) 120 CLR 409, where the High Court struck down certain regulations made by the Board that vested in it, and without compensation, the property in parts of animals submitted by their owners for slaughter at the Board's abattoirs. The Court held that regulations providing for such a taking of property were presumptively beyond the power intended to be conferred by State legislation authorising the making of delegated legislation by the Board.

[25] The present case is different. The Council has not taken any interest of Mr Bone's, so as to attract the operation of the Acquisition of Land Act 1967 or otherwise. He retains unimpaired, for what it is worth, his estate in fee simple absolute in the land. He has been stripped of virtually all the powers which make ownership of land of any practical utility or value. There is, as is attested by an affidavit from the valuer provided at the hearing, no doubt that the value of the land has been greatly reduced. But the law provides no remedy for this action or its consequences when it is the result of legislation validly passed under law-making authority that by its terms or nature authorises or permits such an outcome. Such was the conclusion of the Privy Council in Jerusalem Jaffa District Governor v Suleiman Murra [1926] AC 321, where, despite an express provision in the terms of the Mandate for Palestine safeguarding the civil rights of all inhabitants, an ordinance promulgated under the power conferred by the Foreign Jurisdiction Act 1890 (Imp) to legislate for peace, order and good government was upheld despite its failure to provide full compensation for the compulsory taking of springs of water. Viscount Cave LC said (at 328) that the article in the mandate did not mean:

"... that in every case of expropriation for public purposes full compensation shall be paid. Their Lordships agree that in such a

case, and, in the absence of exceptional circumstances, justice requires that fair provision shall be made for compensation. But this depends not on any civil right but ... upon principles of sound legislation; and it cannot be the duty of the Court to examine (at the instance of any litigant) the legislative and administrative acts of the Administration, and to consider in every case whether they are in accordance with the view held by the Court as to requirements of natural justice."

[26] The same opinion is explicit in the reasoning of the High Court in Durham Holdings Pty Ltd v State of New South Wales (2001) 75 ALJR 501, holding that a State Parliament has the legislative power to deprive a person of property without just compensation. To the objection that chapter 22 is not State legislation there are at least two answers. The first is that it was enacted under the very wide powers conferred by State legislation in the form of s 36 of the City of Brisbane Act 1924, which may be thought to have received a measure of implicit or indirect Parliamentary confirmation in ss 7(3) and 7(4) of the Vegetation Management Act 1999. The second is that it in no sense involves acquisition of Mr Bone's property in the land. Both in purpose and effect, chapter 22 resembles the legislation in the Tasmanian Dam Case (1983) 158 CLR 1, from which it may have taken some of its inspiration, in prohibiting damage to and use of the subject land, without amounting to an "acquisition", by the Commonwealth or anyone else, within the terms of s 51(xxxi) of the Constitution 158 CLR 1; 145-146 (Mason J); 181-182 (Murphy J); 247-248 (Brennan J); 281-285 (Deane J). Legislation enacted by or under Parliamentary authority may, without providing compensation, prohibit and deprive or expropriate without involving acquisition; and, in the last resort, chapter 22 is placed beyond reach of challenge on the grounds of excess of power by s 38(4) of the City of Brisbane Act 1924. See Lynch & Standon v Brisbane City Council (1961) 104 CLR 353, 365.

[27] This conclusion was questioned by the applicant on the authority of Thomas J in Kwiksnax Mobile Industrial & General Caterers Pty Ltd v Logan City Council [1994] 1 Qd R 291, 306. The effect of his Honour's decision there was to invalidate a local by-law of the Logan City Council on the ground that it was in substance an amendment to the Council's town planning ordinance and one which had not been passed in compliance with the statutory procedures imposed by the Local Government Act. The present case is not one in which any such question arises. A local law that prohibits the destruction of vegetation on specified land is not a law that directly determines the use that may be made of land. It takes the vegetation on the land exactly as it finds it, and seeks to maintain it in that condition. However much a prohibition may indirectly limit other uses to which the subject land may be put, it is not a "development" or change of use that is within the conventional or defined meaning of that word under the Integrated Planning Act or earlier legislation in that tradition. For that reason, it is not within the scope of the provisions for compensation in ss 5.4.1 to 5.4.2 of that Act, which are available only for "changes" in a planning scheme or planning scheme policy, or for erroneous planning and development certificates.

[28] Despite feeling a measure of sympathy for Mr Bone for the scant respect with which his rights as owner have been trampled on, an appeal against the decision below cannot in law succeed. The application for leave to appeal must therefore be dismissed with costs."

12 Appendix 2 Table of Requirements for Unbundled Property Right Legislation

(see over)

Dr Alan Moran	Dr Lyons, Davies & Cottrell	Dr Lyons, Davies & Cottrell Functions[1]	Murtough, Aretino & Matysek	Mark Sheahan	Additional Issues	Summary
1. rights and conditions of ownership tenure;	1. To ensure all property rights are clearly defined, secure in law and practice.	a policy and legal basis;	1. Clearly defined Nature and extent of the property right is unambiguous.	1. Legislation and regulation	Nexus-international, national, State, regional and local significance	Clearly defined nature and extent of the property right
2. share of natural resource being allocated (including probability of occurrence);	2. To support the operation of markets in the various property rights.	the determination of property rights, legal declaration, guidelines	2. Verifiable Use of the property right can be measured at reasonable cost.	2. Data inventory, habitat classification, and planning	Governance of the markets and cost to government	Ability to deal with the property right
3. details of agreed standards of any commercial services to be delivered;	3. To ensure that transactions and trading in property rights can be carried out.	application processing for dealing, permits/licences etc	3. Enforceable Ownership of the property right can be enforced at reasonable cost	3. Permitting, and the requirement for mitigation	Externalities	Market attributes must be clear and certain
4. constraints to and rules on transferability; and	4. To provide legally correct composite/integrated information on all property rights that apply to, or affect any area of land.	the provision of information;	4. Valuable There are parties who are willing to purchase the property right	4. Valuing debits at the impact site	Under pricing	Information about the market must be clear and accessible
5. constraints to restore use or access.[2] ARMCAANZ also suggested that an effective market requires rights that are:	5. To enable property right to be used as a source of capital/credit and economic development.	compliance checking;	5. Transferable Ownership of the property right can be transferred to another party at reasonable cost	5. Valuing credits at the bank site		Government policy must support the market
6. limited in extent or availability;	6. To support government revenue raising/taxation based on land.	appeal processes; and the viable and orderly market trading	6. Low scientific uncertainty. Use of the property right has a clear relationship with ecosystem services	6. Long-term land management of the bank site		Low sovereign risk to the value of the property rights
7. well specified and understood by the market;	7. To contribute to social stability.		7. Low sovereign risk. Future government decisions are likely to significantly reduce the property right's value	7. Securing the conservation status of the bank site		There must be ongoing monitoring and compliance checks
8. exclusive so that benefits and costs associated with the rights are attributed to the right holders;	8. To contribute to natural resource and environmental sustainability.			8. Developing an agreement between all parties		Governance factors have to be cost effective
9. enforceable and enforced by appropriate legal systems; and	9. To operate effectively and efficiently, with a service philosophy, that public confidence and stringent accountability			9. Establishing systems for credit sale		International, National, State, Territory, regional and local significance must be considered
10. transferable and divisible within defined limitations.				10. Monitoring and compliance."[3]		Contribute to social stability

[1] Dr K. Lyons, K. J. Davies & EC Cottrell, On the Efficiency of Property Rights Administration in Queensland, 12 April 2002

[2] ARMCANZ (1995) Water Allocations and Entitlements: A National Framework for the Implementation of Property Rights in Water, Task Force on CoAG Water Reform Occasional Paper No. 1 (Canberra: Standing Committee on Agriculture and Resource Management) (October),8.

[3] Credit for conservation: A report on conservation banking and mitigation banking in the USA, and its applicability to New South Wales, report by March Sheahan 2001 Winston Churchill Memorial trust of Australia, Canberra