The making and implementation of environmental laws in Queensland: the *Vegetation Management Act 1999* (Qld) and the *Land Act 1994* (Qld)

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The agent of retribution in the land of sunshine and progress may well be the land itself so long exploited, demuded and abused.

Ross Fitzgerald
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# Table of contents

Acknowledgements .............................................................................................................. iv  
Table of contents ................................................................................................................... v  
Abstract ................................................................................................................................ ix  
List of Figures ....................................................................................................................... xi  
Publications from the thesis ............................................................................................... xii  

**Chapter One: Introduction to the thesis** .............................................................................. 1  
Introduction ................................................................................................................. 1  
Origins and scope of the research topic ........................................................................ 2  
Research methodology ................................................................................................. 4  
Research problem and the significance of and justification for the thesis ............ 11  
Research questions ..................................................................................................... 16  
The structure of the thesis ............................................................................................. 19  

**Chapter Two: Land tenure – basic principles and the evolution, advantages and prevalence of leasehold tenure in Queensland** ........................................................................ 23  
Introduction ................................................................................................................ 23  
Tenure and the traditional foundations of Australian land law ............................... 25  
The evolution of leasehold tenure ............................................................................. 29  
Tenure and conservative government: the Payne Commission ......................... 30  
The *Land Act Amendment Act 1986 (Qld)* .......................................................... 32  
Tenure and Labor government: the Wolfe Review ................................................. 35  
The *Land Act 1994 (Qld)* ...................................................................................... 38  
A conservative interlude: 1996 to 1998 .................................................................. 38  
The utility of leasehold tenure .................................................................................. 40  
Property rights and tenure ......................................................................................... 42  
Acquisitions, restrictions and calls for compensation ........................................... 46  
The prevalence of leasehold tenure in Queensland ............................................ 51  
Conclusion .................................................................................................................... 54  

**Chapter Three: Agriculture and environmental legislation** .............................................. 57  
Introduction ................................................................................................................ 57  
The environmental impact of agriculture ............................................................... 59  
Inherent problems of regulating agriculture .......................................................... 62  
Facilitating regulation: the role of rural organisations ......................................... 64  
The emergence and volume of environmental legislation .................................... 68  
The *Vegetation Management Act 1999 (Qld)* ...................................................... 69  
The *Land Act 1994 (Qld)* ...................................................................................... 70  
The *Environmental Protection Act 1994 (Qld)* .................................................... 72
<table>
<thead>
<tr>
<th>Chapter Four: Environmental law making in Queensland – the Vegetation Management Act 1999 (Qld)</th>
<th>94</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>94</td>
</tr>
<tr>
<td>The beginnings of vegetation management in Queensland</td>
<td>94</td>
</tr>
<tr>
<td>The Vegetation Management Advisory Committee</td>
<td>95</td>
</tr>
<tr>
<td>Environmental law making in the Queensland parliamentary process</td>
<td>98</td>
</tr>
<tr>
<td>A controversial introduction – The Vegetation Management Act 1999 (Qld)</td>
<td>104</td>
</tr>
<tr>
<td>The introduction of the VMA generated a peak period in land clearing</td>
<td>107</td>
</tr>
<tr>
<td>A moratorium on land clearing applications – The Vegetation (Application for Clearing) Act 2003</td>
<td>108</td>
</tr>
<tr>
<td>Further legislation and a State financial commitment – The Vegetation Management and other Legislation Amendment Act 2004 (Qld)</td>
<td>110</td>
</tr>
<tr>
<td>Further retrospective amendments – The Vegetation Management Amendment Act 2008 (Qld)</td>
<td>116</td>
</tr>
<tr>
<td>The political context of the VMA</td>
<td>117</td>
</tr>
<tr>
<td>Conclusion</td>
<td>120</td>
</tr>
</tbody>
</table>

| Chapter Five: Vegetation management legislation in 2009                                           | 122 |
| Introduction                                                                                     | 122 |
| Historical background leading to a change in the electoral system                                | 123 |
| Reform of the electoral system – optional preferential voting                                    | 124 |
| Trends in optional preferential voting in Queensland                                              | 128 |
| Environmental lobbying and the influence of the Queensland Greens in party politics in 2009     | 129 |
| A pre-election preference deal                                                                    | 132 |
| The Vegetation Management (Regrowth Clearing Moratorium) Act 2009 (Qld)                          | 134 |
| The impact of the implementation of the 2009 amendments to the Vegetation Management Act 1999 (Qld) | 137 |
| Vegetation Management and Other Legislation Amendment Act 2009 (Qld)                            | 141 |
| Rural landholders and the Queensland government in 2009                                           | 146 |
| Queensland politics in 2009                                                                      | 148 |
Conclusion ............................................................................................................. 149

Chapter Six: Compliance and enforcement under the vegetation management regulations ............................................................................................................. 151

Introduction ............................................................................................................ 151
Environmental crime .................................................................................................. 153
Criminal responsibility ............................................................................................... 156
A complex legislative structure for vegetation clearing offences ....................... 161
Amendments to investigatory and prosecution powers of the regulators: the Natural Resources and Other Legislation Amendment Act 2003 (Qld) ............. 165
Removal of the defence of honest and reasonable mistake ........................................ 169
Extension of powers to issue a compliance notice .............................................. 170
Extension of powers to enter private property ..................................................... 172
Extension of powers to obtain criminal history reports of landholders .............. 174
Extension of procedural time limits...................................................................... 175
Reversal of the onus of proof in respect of regulatory evidence ......................... 175
Denial of the privilege against self-incrimination............................................... 177
Conclusion............................................................................................................ 186

Chapter Seven: The litigation of land clearing cases ....................................................... 188

Introduction........................................................................................................... 188
The complexities of compliance .......................................................................... 189
Establishing a list of land clearing cases ............................................................. 190
Sentencing of land clearing cases ........................................................................ 196
Litigation challenges – Bone v Mothershaw, a Queensland precedent .......... 200
Litigation challenges – a misguided journey....................................................... 201
Litigation challenges – a regulatory case withdrawn and a compliance order quashed ........................................................................................................... 204
The inherent difficulties of successful prosecution: the cases of Ashley McKay, Nicholas Daniel Van Reit, Richard Tudor Knights and Harvey Scott Simpson .210
Some success for the regulators: the cases of Graham Acton, Russell Winks, Bruce Henderson and Reginald Edward Draper ................................................... 219
Procedural fairness in land clearing cases .......................................................... 224
Conclusion.............................................................................................................. 228

Chapter Eight: The making and implementation of the Rural Leasehold Land Strategy 231

Introduction............................................................................................................. 231
The Rural Leasehold Land Strategy: initial discussion paper and draft strategy 233
The Land and Other Legislation Amendment Act 2007 (Qld)............................. 236
The Rural Leasehold Land Strategy becomes the Delbessie Agreement .......... 238
The State Rural Leasehold Land Ministerial Advisory Committee ................. 240
Abstract

Land policy and law are fundamental to the development of the State of Queensland; and instrumental in wreaking disastrous environmental consequences on privately held rural land. Such policy and laws have been indelibly shaped by prolonged political cycles and ideologies of successive State administrations. In the second half of the 1950s, a non-Labor government took office and held power for 32 years. This era encouraged, and often legally required, unsustainable land management practices. The demise of this conservative regime came in 1989: Queensland Labor took office and enacted a raft of environmental laws as part of a general shift towards biodiversity conservation. This research was undertaken primarily during this latest Queensland Labor administration. Two environmental statutes were examined. The *Vegetation Management Act 1999* (Qld) (VMA) was a new statute enacted to redress the effects of broadscale land clearing on freehold land. The *Land Act 1994* (Qld) (LA) was an existing statute upon which requirements for sustainable management on leasehold land were grafted.

The aim of this thesis has been to advance understanding of natural resource legislation and contribute to the body of knowledge on State environmental laws. Each law is examined in the traditional doctrinal manner, adopting a conventional positivist approach and accompanied by socio-legal research. This methodology brings an insight into environmental law and the reality of the Queensland legislature and legal practice. This is achieved by analysing the circumstances which led to the creation of each law, including the political and parliamentary setting within which the laws were made; and by exploring the process of implementation. To assist the focus of this study, the thesis explores a series of research questions. Each designed to elicit an understanding of the making and implementation of environmental laws and to effectively link each component of the thesis to provide an integrated work.

Both environmental laws aimed to rectify the degradation of rural land caused by unsustainable policy and law. Notwithstanding this common environmental endeavour, the making and implementation of each statute differed. The VMA has been one of the
most controversial pieces of legislation to be made and implemented in the last decade of the Queensland parliament; conversely, amendments to the LA, never reached the same level of controversy. This thesis ultimately asks why the statutes differed and advances a range of explanatory reasons. By exploring this question, the thesis aims to show that the public environmental good, and long-term sustainability of rural land, can be more readily achieved with leasehold title. The concern, as discussed in the concluding chapter, is that leasehold tenure might be facing its own expiry in Queensland.
List of Figures

Figure 2.1: The extent of leasehold tenure within Queensland Page 52
Figure 2.2: How land is divided within Queensland Page 54
Figure 2.3: Leasehold tenures as a percentage of the State Page 54
Figure 3.1: Trends in referrals and decisions made in agriculture and forestry category under the EPBC Act 1999 (Cth) Page 77
Figure 3.2: Trends in decisions made in agriculture and forestry category under the EPBC Act 1999 (Cth) Page 78
Figure 5.1: Trends in optional preferential voting in recent Queensland elections Page 129
Figure 5.2: A comparison of the votes allocated to the Australian Labor Party (ALP), the Liberal National Party and the Green parties in the 14 seats in which the Greens directed preferences to the ALP in the 2009 State election Page 134
Figure 6.1: Number of compliance notices issued by region Page 171
Figure 7.1: Finalised prosecutions by the Department of Environment and Resource Management Page 193
Figure 8.1: Land condition assessments Page 264
Figure 8.2: Regional breakdown of land condition assessments Page 265
Figure 8.3: Regional breakdown of land in good or not in good condition Page 266
Figure 8.4: Finalised land management agreements Page 267
Figure 8.5: Number of leases renewed Page 267
Figure 8.6: Terms granted for renewed leases Page 268
Publications from the thesis

Parts of the following chapters have been published as follows:


Chapter One: Introduction to the thesis

**Introduction**

Early land policy and law in Queensland may well have failed the environment, but it reflected the ideology of incumbent governments and the preoccupation of the times. The State has been characterised by long periods of conservative or Labor Party dominance. During these periods, fundamental and far reaching changes in rural land policy and law have been engendered. In the second half of the 1950s, a conservative administration returned to power following a 25 year hiatus. For the next 32 years a range of National and Liberal Party coalitions ruled the State. Rural freeholders generally engaged with an empathetic government and had the benefit of unfettered property rights. Rural leaseholders were regarded as land owners: their property rights were extended and entrenched. The overarching goal for Queensland during this period was development and land policy and law played a pivotal role. But the drive for growth, coupled with white settler yeomanry, fostered policy and laws which in due course proved devastating in a harsh and variable climate. Promotion of detrimental and unsustainable land management practices, not least the misguided closer settlement policy, ultimately left a legacy of degraded rural land.

In 1989 the power base shifted, Queensland Labor returned to govern and embarked upon a prolonged period of administration. Land policy and law were reviewed and revised amid a plethora of statutory change. Acknowledging the devastating environmental consequences of land degradation meant that recognition was at last given to the importance of sustainable land management. For Crown leasehold title new legislation was introduced that included a duty of care for rural land. Any further environmental legislation was stymied, however, by the abrupt demise of the Labor government in 1996. Dominance by the Queensland Labor Party was interrupted by a two year conservative coalition government. This period witnessed the introduction of a Broadscale Tree Clearing policy for leasehold land but it did little to curb clearing. Rural landholders with freehold tenure remained unaffected by legislative restrictions until Queensland Labor returned to govern which, aside from a two year period, was from 1989 to 2012.
This thesis aims to analyse the making and implementation of environmental legislation during this latest Labor administration. To do this two laws are examined in traditional doctrinal fashion, accompanied by socio-legal research. This approach enhances understanding of environmental laws, the Queensland legislature and legal practice. This is achieved by analysing the circumstances which led to the creation of each law, including the political setting and parliamentary processes within which the laws were made; and by exploring the process of implementation. The catalyst for each statute was widespread degradation of rural land. There was a manifest need for significant change and a suite of environmental laws were enacted by the Queensland Labor Party as part of a general move towards biodiversity conservation on privately held rural land. The *Vegetation Management Act 1999* (Qld) (VMA) introduced the first vegetation management regulations on freehold land in 1999. The regulatory system for leasehold land was changed substantially by amendments to the *Land Act 1994* (Qld) (LA), which put into practice the Rural Leasehold Land Strategy in 2008. The VMA proved to be one of the most controversial statutes to be made and implemented in the last decade of the Queensland parliament. Conversely, amendments to the LA never reached the same level of controversy. As environmental laws, both the VMA and the LA have the potential to promote the conservation of biodiversity on rural land, yet despite this commonality there is much divergence between these statutes. There are a range of reasons for the variance between the Acts, investigated throughout this thesis and brought together in its final part. This introductory chapter begins by establishing the origins and scope of this thesis and then sets down the methodology employed. The research problem is identified and a series of research questions are introduced. The chapter concludes with an outline of the structure of this study.

**Origins and scope of the research topic**

The impetus for this research came from coursework undertaken in the Master of Laws specializing in environmental law at the Australian National University (ANU) and, more particularly, the topic undertaken for the Graduate Research Unit. This unit examined voluntary agreements that are the result of direct bargaining between private landholders and public government agencies in Queensland.¹ Voluntary agreements can

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¹ This research unit led to a conference paper: Kehoe J, 'Utilisation of voluntary conservation agreements in Australia: a perspective on Queensland' paper presented to 5th Environmental Justice and Global Citizenship Conference, Mansfield College, Oxford, 3rd - 6th July, 2006; and subsequent publication: Kehoe J, ‘Voluntary
encompass various types of arrangements: the most extensive being a covenant in perpetuity registered on the land title, the least extensive being a one-off payment to a landholder for a particular task such as fencing. In between this broad range lie various contractual and non-contractual arrangements, including combinations of both covenants and contracts. For example, a covenant might run in perpetuity alongside a contractual management plan for a five-year period with annual payments. Sustainable natural resource management evidently requires long-term solutions which, in terms of voluntary agreements, are best suited to perpetual statutory covenants. The advantage of a covenant compared to a contract, is that covenants run with the land and bind successors in title. Such instruments however have tended to include very limiting land use restrictions and are less likely to be taken up by rural landholders. Research on the implementation of the Vegetation Incentive Program (VIP) administered by the Department of Environment and Resource Management (DERM) found that the proposed strict covenant contributed to a low participation rate.\(^2\)

There are also limitations with contractual agreements: because of the doctrine of privity, a contract only binds the original parties. Agreements may contain provision for the landholder to encourage a successor in title to take over the contract; but the drawback of this type of contractual arrangement is that it is directly linked to the current owner of the land. On the transfer of land, the contract ends and any environmental benefit may potentially end. As both covenants and contracts therefore have intrinsic problems, a long-term and potentially more widespread solution would be to incorporate sustainable land management practices into legislation such as the VMA and the LA.

The scope of this thesis primarily includes an analysis of the two Acts during the latest Labor administration. This includes: the introduction of the LA in 1994; the amendments in 2007 that brought in the Rural Leasehold Land Strategy; and the introduction of the VMA in 1999 including the many amendments this Act has agreements in Queensland Australia: contributing factors and current incentive schemes', in S Wilkes (ed) Seeking Environmental Justice, (Rodopi, Amsterdam – New York, 2008).

\(^2\) Commerford E & Binney J, 'Lessons learned to date from the Queensland Vegetation Incentives Program in moving from a conceptual ideal to practical reality,' paper presented to the Sustainable Agriculture State Level Investment Program, Resource Economics Workshop, Department of Primary Industries, Rockhampton, Queensland 28 October 2005. As noted in Chapter Three. Agforce, in promoting voluntary environmental programs support their parent body, the National Farmers Federation. As examined in Chapter Eight, since 2007 Agforce have been in receipt of State government funding and have actively promoted the Nature Refuge program - as a result the number of refuges within the State has grown.
undergone. The time period for this research concludes with the end of the Labor administration in Queensland in March 2012. For the purposes of completeness and context however, and to exemplify the divergence in policy and law between different administrations, the thesis includes detail on government changes and the implications for policy and law on rural land. Chapter Two examines land policy and law from the start of conservative government in 1957 when a non-Labor government took office and embarked upon significant change. Chapter Nine incorporates detail on the 2012 Liberal National Party (LNP) shift in government and proposed changes to the VMA and the LA. A timeline of the thesis including: significant dates for legislation and policy, a brief summary of the change made, and the attendant government and leader is provided.

Research methodology

The doctrinal method adopted follows the conventional positivist approach and reflects the long standing influence of jurists closely associated with utilitarian theory, such as Jeremy Bentham and John Austin, in which a distinct separation is perceived between law and morality. Austin regarded law as a command given by a superior or sovereign power and, being enforced by sanctions, the bulk of society is in the habit of obedience. In effect, command and control legislation familiar to environmental law. Positivism promotes a legal theory which centres on ‘posited law’ as laid down by the institutions of parliament and the courts. Positivist legal theory explains what the law is; but this analysis alone would not realize the aim of this thesis, indeed:

The view that the law is an independent, objective and coherent system of state-sanctioned rules hardly captures the complexity of law in action within modern society as a form of administrative governance and device for exercising political power.

The traditional doctrinal use of case law and legislation is expanded and accompanied by a modified case study to provide a perspective on what was happening in practice.

The research aim is to provide a general understanding of the making and

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3 In Appendix One: Timeline.
implementation of two pieces of environmental legislation in Queensland. Insight into the social context of these laws is imperative to an understanding of how they operate within a given situation, and to acknowledge laws do not operate in ‘an objective doctrinal vacuum’. A purely doctrinal study would disregard the lower courts, in which the more mundane fact-finding and fact-disputing activities are pivotal, and where elaborate points of law are rarely central. Yet, as discussed in Chapter Seven, it is within the lower courts that much of the land clearing litigation is undertaken.

Case study research is typically used within the social sciences. In this sphere of study research primarily divides into quantitative and qualitative methods. Quantitative methods concentrate on facts and the production of statistics and operate within very defined and rigid parameters. At times throughout this study quantitative research was appropriate: particularly in answering the research questions that asked how each piece of legislation was implemented. For example, regulatory statistics were analysed to: determine trends in compliance notices in Chapter Six; examine finalised prosecutions in Chapter Seven; and assess implementation of the Rural Leasehold Land Strategy in Chapter Eight.

Qualitative methods take an in-depth look at situations and consider examples rather than samples. This type of methodology is suited to asking qualitative ‘how’ questions rather than quantitative ‘how many’ questions. Though case studies may be based on any combination of quantitative and qualitative data, this thesis is suited, for the most part, to a qualitative approach. Utilising qualitative data with a modified case study as a research strategy facilitates the overarching aim, which is to ‘illuminate the general by looking at the particular’ and, as such, lends more readily to small-scale and in-depth

8 Hutchinson T, Researching and Writing in Law. (Lawbook Co, Australia, 2002) 85.
10 Indeed case study research is ‘the preferred strategy when “how” or “why” questions are being posed, when the investigator has little control over events and when the focus is on contemporary phenomenon within some real-life context’ Yin R K, Case Study Research (Sage Publications, 1984) 13; and also Silverman D, Doing Qualitative Research (Sage Publications, 2010) 118. Case study research is not sampling research but lends more readily to qualitative method, see further: Stake R E, The Art of Case Study Research, (Sage Publications, 1995) 4; and Stake R E, ‘Case Studies’ in Denzin N and Lincoln Y, ed) Strategies of Qualitative Inquiry (Sage Publications, 2003) 134-164. This type of research is ‘inherently multi-method in focus, this use of multiple methods, or triangulation, reflects an attempt to secure an in-depth understanding of the phenomenon in question’. Denzin N and Lincoln Y, The Sage Handbook of Qualitative Research (Sage Publications, 2005) 5. Because qualitative study seeks to describe in detail what is happening to a particular group or community this can then be utilised to generate further quantitative research to establish further issues or themes, Bouma G D The Research Process (Oxford University Press, 2000) 173. For example, following this qualitative study one of the recommended areas for future research included in Chapter Nine is a longitudinal quantitative study.
investigations in a pre-existing situation." The advantage of using a case study as a research strategy therefore is that it generates analysis and promotes "a contextual approach to the situation especially in regard to "time slices" — situations can be viewed before and after major events or changes." The "time slices" to be explored in this thesis are centered on the significant changes to vegetation management law evidenced by the introduction of the VMA and subsequent amendments; together with major change in leasehold tenure with the Rural Leasehold Land Strategy and attendant amendments to the LA.

All research methods have disadvantages. Case study methodology is criticised for a "lack of rigor", which is related to the "problem of bias" and "lack of representativeness," critiques familiar to most types of qualitative research. The very essence of the qualitative research process acknowledges that "every researcher speaks from within a distinct interpretative community" that "incorporates its own historical research traditions into a distinct point of view". The disadvantages of the case study method therefore presuppose that it is not possible to generalise from one set of circumstances; and there are "strict limits on what can be generalised". Moreover analysis of a "few cases are poor representation of a population of cases and questionable grounds for advancing grand generalisation"; that being said the purpose of a case study is "not to represent the world, but to represent the case".

In utilising a modified case study, this thesis operates within the domain of socio-legal research. Socio-legal study does not have a universal definition, but is aptly described as legal research that is:

... distinguished from doctrinal research through the deployment of one or more research methodologies drawn largely but not exclusively from the social sciences.

These methodologies are applied to a wider range of materials that provide

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12 Hutchinson T, Researching and Writing in Law. (Lawbook Co, Australia, 2002) 100.
This type of research distinguishes between law in books and law in action. It facilitates novel combinations of methodologies and approaches to the subject matter of a thesis. Environmental law was one of the original topics of socio-legal study, an initial focus being regulation at a local level and particularly from the perspective of enforcement. The work undertaken here includes State regulation to understand the political processes ‘that bring law about and shape its form and content’. Queensland has received little academic attention in this area. It is the aim of this thesis to fill this gap.

Case study research may be supported by other research strategies, such as interviews and discussions with individuals involved in the area to be explored. Establishing a rapport with regulatory employees was imperative. This was not a straightforward task, it was hampered by the usual vagaries of working life - some employees left the department or moved to other divisions. The regulatory department was frequently re-organised. At the beginning of this research the relevant regulatory department was Natural Resources and Mines, but for the bulk of this thesis it was the Department of

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17 Salter M & Mason J, Writing law dissertations: An introduction and guide to the conduct of legal research, (Pearson, Longman, UK, 2007) 132. Socio-legal research has evolved in some academic institutions and is now named empirical legal research; essentially each type of research has the common aim of incorporating law with social science research methods. Some research centers have retained the socio-legal label, for example, the University of Oxford Centre for Socio-Legal Studies which was established in 1972, available at: http://www.csls.ox.ac.uk/ (viewed 10 January 2012); and the Socio-legal Research Centre at Griffith University, available at: http://www.griffith.edu.au/criminology-law/socio-legal-research-centre (viewed 10 January 2012). Others, following the American example, have changed to adopt the title empirical legal studies, for example, the University College London Centre for Empirical Legal Studies evolved from the Centre for Socio-Legal studies in 2007. Available at: http://www.ucl.ac.uk/laws/socio-legal/ (viewed 10 January 2012). One of the prime journals in this field is the Journal of Empirical Legal Study established in 2004 by the Society for Empirical Legal Studies, based at Cornell University Law School. Because ‘many legal and policy debates hinge on assumptions about the operation of the legal system’ this Journal seeks to analytically test these assumptions and address the ‘gap in legal and social science literature that has often left scholars, lawyers and policymakers without basic knowledge of legal systems or with false or distorted impressions. Even simple descriptive data about the functioning of courts and the legal systems are often lacking’. Cornell University Law School, available at: http://www.law.cornell.edu/SELS/ (viewed 10 January 2012) and the Journal of Empirical Legal Study available at: http://onlinelibrary.wiley.com/journal/10.1111/1740-461X/homepage/ProductInformation.html (viewed 10 January 2012).


21 Hutter B M, n 20, 4.

22 Denscombe M, The Good Research Guide for Small-Scale Social Research Projects (Open University Press, Buckingham, UK, 1998) 31. Prior to the start of this research, and in an attempt to establish a viable research topic, preliminary informal discussions were conducted with regulatory staff in Rockhampton, Emerald and Brisbane. Contact was made with key individuals such as managers and senior policy officers, compliance officers and lawyers within the litigation unit.
Environment and Resource Management (DERM). For simplicity this latter description will be employed.23 Ultimately, following discussion with regulatory employees in Rockhampton and Emerald, contact was maintained with the Brisbane office as this housed senior management and has remained the centre of operations. Communication with regulatory staff though courteous was extremely guarded, as evidenced by the examination of compliance and enforcement in Chapter Seven; and the implementation of the Rural Leasehold Land Strategy in Chapter Eight.

A form of snowball or referral sampling was employed. In this way individuals were interviewed and asked to refer to others who might have relevant experience within the regulatory environment or, in the case of rural landholders, who had been affected by the compliance and enforcement provisions of the vegetation management regulations. This method of sampling is claimed to 'generate a unique type of social knowledge'.24 It is particularly useful in situations where individuals, such as rural landholders, may be difficult to locate; and in locating individuals, such as lawyers, with expertise in the relevant area: for example in land clearing litigation.25 A strict adherence to snowball sampling multiplies the referrals at each interview. This was not practical for the purposes of this thesis in which referrals were requested in an attempt to place the laws within a social context and as a means of connecting with the relevant individuals or organisations. The initial research began with contacts already known.26 In keeping with the snowball sampling technique, not all referrals, or information elicited following an interview, were used.

An obvious problem with snowball or referral sampling is bias.27 Snowball sampling might exclude individuals and has the potential for personal involvement of the

23 Following the Queensland State election and shift to an LNP government in March 2012 the Department of Natural Resources and Mines (DNRM) was established, this comprises the former Department of Environment and Resource Management (DERM) and the former Department of Employment Economic Development and Innovation (DEEDI).
26 In this regard I am grateful to my local supervisor Prof John Rolf: it was at his instigation that I was introduced to regulatory staff at DERM's Rockhampton and Emerald offices and also the Chairman of Property Rights Australia at the time Ron Bahnisch. The chairman then introduced me to their lawyer who had acted in a number of land clearing cases. In addition, contact I already had within the local legal profession proved an invaluable source of information and led on to interviews with lawyers who had acted in land clearing investigations and litigation and their respective clients.
researcher’s own social networks.²⁸ It is likely for example that the referrals from and within Property Rights Australia (PRA) would draw out individuals with similar attitudes, values and beliefs. Whilst recognizing these possible limitations, contact with rural landholders was nonetheless limited to individuals who had been investigated or prosecuted. Moreover the researcher’s own social network was utilised in order to interview lawyers, but this was again limited to lawyers who had acted in land clearing cases and included lawyers previously unknown to the researcher.

The litigation of land clearing cases will be considered in Chapter Seven. The regulator’s prosecution record has been variable and the conduct of DERM employees, following the case of Ashley McKay, was subject to investigation by the Crime and Misconduct Commission. As noted in this chapter, the regulators also announced that an independent investigator would be appointed to examine the conduct of some employees but the outcome of this investigation was never released. Obtaining statistics and a detailed insight into regulatory compliance policy proved to be a challenging and time consuming exercise which is documented in Chapter Seven. There was a regulatory commitment to transparency, included in DERM’s compliance strategy, but this was not evident in practice. The vegetation clearing cases examined were identified not by the list of finalized prosecutions provided by DERM, as this list had removed the names of all relevant parties. Rather the land clearing cases included in this thesis were identified from the rural media, and during interviews with rural bodies such as PRA, which in turn led on to contact with investigated and prosecuted rural landholders and their representing lawyers.

Instances occurred during the research, for example in Chapters Seven and Eight, when a request for access to information could have been pursued under the Freedom of Information Act 1992 (Qld) (FOI).²⁹ In Chapter Seven the regulators were reluctant to provide a comprehensive picture of vegetation management investigations and cases. A decision was made not to pursue FOI: the information eventually provided by the regulators involved a delay approaching 18 months and a great deal of persistence. An FOI application, with its attendant procedures, costs and inevitable delays, would have impeded the completion of this thesis. Ultimately the compliance and enforcement

²⁹ Freedom of Information Act 1992 (Qld), Part 3 covers access to government documents.
chapters provide an insight into the implementation of the vegetation management regulation on some rural landholders throughout the research period.30

Chapter Eight examines the Rural Leasehold Land Strategy, in this instance (and to ascertain if such an approach would make a difference) an FOI application was submitted following reluctance of the regulators to produce, for example, the submissions made by interested parties as part of the consultation phase. An account is provided in Chapter Eight of a meeting with the State Land Asset manager and two senior policy officers; and subsequent dealings with regulatory staff to obtain statistics on implementation of the strategy.31 Ultimately regulatory statistics were supplied but the submissions were not produced. As negotiations with the regulators had taken the better part a year, the FOI application was not pursued further for the same reasons as elucidated above.

Ethical clearance was obtained from the Human Research Ethics Committee at the ANU.32 Approaches to potential interviewees were generally instigated by e-mail and included a description and explanation of the purposes of the research along with an information sheet and consent form. An adequate time period was given for the individual to absorb the contents of the research information sheet and consent form before arranging a suitable appointment that was convenient for the interviewee. A response was not forthcoming from all requests.33 Depending on the wishes of the individual, discussions were conducted face-to-face, by telephone or e-mail and sometimes by a combination of all three.34 Interviews with rural landholders and their lawyers and bodies such as PRA were primarily undertaken for the compliance and enforcement chapters, being Chapters Six and Seven.35

31 Regulatory statistics were ultimately supplied and, in fairness to the regulators, my requests for these spanned several months because of other work commitments.
33 For example of the five Members of the Queensland Parliament contacted, only two responded. Equally it became increasingly difficult to elicit contact with or get a response from Agforce toward the end of the research period. At the beginning of this study contact with Agforce staff was straightforward as their contact details were easily acquired from the organization's web site. More recently it is only possible to gain contact with most Agforce staff by being a member of Agforce.
34 A particularly insightful interview took place when a prosecuted landholder had provided a mobile phone number and asked to be contacted at a particular time, it transpired he was driving a tractor and welcomed the break. This was Gary Dore (for example Dore & Ors v Penny [2004] QDC 364 and other cases).
35 Some handwritten notes of each interview were taken and securely filed. It was not felt necessary to record discussions. Rather the preferred course was to follow an unstructured and informal format. Direct quotes included in this thesis were not taken from the unstructured interview, rather individuals were asked to clarify information in their own words in a follow up e-mail. Generally this approach proved successful, only one landholder was not ultimately interviewed. In addition to regulatory personnel of the Queensland government, interviews were conducted
Case study research may also be supported by documentary analysis. An examination of DERM materials within the public domain was made, this included annual reports, policy documents, information material and application forms - for example on the mechanics of applying for a property map of assessable vegetation or a lease renewal. Access to information not within the public domain was, as mentioned earlier, problematic. Some of the lawyers interviewed were prepared to disclose file details. Such disclosure was always with client consent, observing lawyer-client privilege and adhering to the obligations to respect confidentiality within the ambit of the human research protocol. Sometimes complete files were obtained, such as those collated by the Chairman of the Vegetation Management Advisory Committee (discussed in Chapter Four), or counsel’s file on the case of Christopher Holmes (discussed in Chapter Seven).

Documentary analysis for the doctrinal aspects of this research included statutes and accompanying explanatory notes. Examination of the making of the VMA and the LA took in all relevant parliamentary stages recorded in Queensland Parliamentary Hansard, together with the Scrutiny of Legislation Committee (SLC) Alert Digest reports and other primary source data available on the Queensland government web site. Cases include those which were reported and also, in Chapter Seven, transcripts of vegetation management hearings from the District and Magistrates Courts.

Research problem and the significance of and justification for the thesis

The research problem in this thesis concerns the need for and the legal mechanisms by which environmentally sustainable land management practices have been implemented on privately held rural land in Queensland. Land management practices fostered by earlier government policy and law encouraged broadscale land clearing with devastating consequences for the environment. The detrimental impacts of such clearing include the loss of biodiversity, destruction of habitat and native species, together with significant

with: rural landholders who had been investigated or prosecuted under the vegetation management regulations and their representative bodies such as Property Rights Australia; spokespersons for the Green Party and conservation groups such as Queensland Conservation, the Wildlife Preservation Society of Queensland and Greening Australia; Local Rockhampton and Brisbane based lawyers, who had acted for rural landholders, generously provided an invaluable insight into investigations and prosecutions under the vegetation management regulatory scheme.

impacts on salinity, acidity, and greenhouse gases.\textsuperscript{37} Environmentally sustainable natural resources require land management practices which meet the needs of society both now and in the future. As noted by Bates:

\textit{...the management of land is crucial to its ability to sustain long-term productive activity as well as protect natural ecosystems. For example, a farm is used for agricultural and pastoral purposes, but the way in which it is used will have a significant effect not only on productivity but also on the environment. The clearing of native vegetation, use of chemical fertilisers, application of pesticide and herbicides, and failure to attend to erosion and salinity problems may all have a marked environmental effect on that property, on watercourses which flow through it, and on the biodiversity that inhabits it, as well as on neighbouring land.}\textsuperscript{38}

As agriculture and regional Queensland remain inextricably linked, there was a manifest need for fundamental and far-reaching change.

The initial research question was deliberately broad since the purpose of this question was to guide an examination of both statutes. This question asked how the VMA and the LA were made and implemented in Queensland. The significance of the research which flows from this question is that it illuminates the history of Queensland land regulation in general and two key legislative regimes in particular. There are implications for the long-term sustainability of the environment in addressing this initial question. For example, with regard to the implementation of laws, Chapter Two argues that legislative restrictions such as those contained in the LA, are less contentious and more readily imposed on leasehold tenure. It is possible with leasehold, as compared to freehold, to impose legislative restrictions with less resistance and less controversy and without calls for compensation. This thesis looks at the old issue of State held leasehold land in a new way, by explaining it is tenure within Queensland that has proved to be flexible rather than the statutory lease instruments that derive from it. Rural lease tenure has witnessed static lease covenants and conditions and changing regulations.


Regulatory variation has been imposed from outside and not within the lease instrument.

In seeking to address long term conservation issues with legislation, Queensland and other comparable jurisdictions should draw upon accumulated knowledge and experience. The significance of this thesis is that it provides the historical analysis to support this process. Environmental laws have the potential to promote the progress of sustainable land management. The environmental value of improving management practices on rural land is augmented by the substantial extent and range of agricultural land within Queensland. The greater part of this land is privately held and has significant implications for the environment within the State, within Australia and globally. The current division of land by tenure is introduced in Chapter Two and expanded upon in Chapter Three in which the environmental consequences of agriculture are examined and it is contended that the VMA and the LA are part of the solution to widespread land degradation. Each statute has played a part in the move towards biodiversity conservation, but this shift in policy - especially that generated by the VMA - came at considerable cost to the relationship between the regulators and the regulated.

Detailed research into the making of environmental laws is justified not least by the dearth of other socio-legal research in this area. This offers the opportunity to make a valuable contribution to the literature. As the research topic unfolded it became apparent that the VMA, in particular, did not follow an archetypal parliamentary route. This was apparent in both the legislative process and the frequency of retrospectivity. There are underlying assumptions that laws are fashioned in a manner that adheres to a standard process, in effect a positivist legal approach that accepts the legitimacy of a law. Martin et al cite Queensland as a good example of sound regulatory principles and parliamentary procedure in law making. Yet this thesis demonstrates a significant gap between the requirements of statutory instruments (such as the *Legislative Standards Act 1992* (Qld)) and parliamentary drafting requirements (such as the Queensland Legislation Handbook) and the process by which controversial laws, such as the VMA, have been made within Queensland. Similarly, an account of this State’s environmental

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regulation by Maguire and Philips, maintains such legislation is able ‘to promote transparency of procedures, accountability of authorities, and public participation’.40 Chapters Seven and Eight demonstrate however that while there is transparency in parliamentary procedure in the making of laws, transparency and accountability of regulatory authorities throughout the period of research was considerably lacking. As for public participation, Chapter Four notes the consultation process under the Vegetation Management Advisory Committee, and the extensive work of many regional committees, was thwarted and discarded by the hasty introduction of the VMA.

The conventional course for law making was further abandoned as a consequence of the Queensland Labor government’s propensity to create retrospective amendments to the VMA. The extent and particular characteristics of these retrospective amendments is examined in Chapters Four and Five. Under the doctrine of parliamentary sovereignty, parliaments within Australia have a general power to make retrospective legislation. There is a long-established legal presumption, however, that laws should be prospective not retrospective.41 In Maxwell v Murphy (1957) 96 CLR 261 Dixon CJ clarified the rule

...that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.42

This legal presumption is not relevant to the VMA retrospective amendments: the intention of the Queensland Labor government to make retrospective laws was clear and certain.

Together with Palmer, Sampford undertook an examination of retrospective legislation within Australian parliaments and concluded such statues are ‘relatively common’ and


42 Maxwell v Murphy (1957) 96 CLR 261 at 267.
'usually deservedly uncontroversial'.\textsuperscript{43} In support of this argument Sampford divided retrospective legislation into a number of categories to illustrate the various forms retrospective law might take. These included less controversial laws, such as curative legislation or routine revision and extended to more controversial laws, such as retrospective criminal and taxation law and 'legislation by press release'.\textsuperscript{44} This thesis details instances of controversial retrospective amendments to the VMA including, for example in Chapter Five, legislative change being backdated to the date of a ministerial media release and announced two weeks before a new parliamentary session. The VMA might well be what Sampford would describe as an 'unrepresentative archetype'.\textsuperscript{45} However, in the absence of comparison with other environmental laws within Queensland, it is impossible to conclude that the VMA was representative of other environmental laws. It is possible however to compare the two statutes relevant to this thesis and conclude that the VMA was frequently controversial, and often amended retrospectively, prompting the condemnation which often accompanied the amendments; the LA, conversely, did not reach the same level of controversy and was not amended retrospectively.

The readiness of legal practitioners to work with retrospective legislation is apparent in this thesis. Yet Martin and Gunningham warn that lawyers need to remember our 'commitment to social justice' within the law and the importance of being more than 'technical functionaries implementing policies'.\textsuperscript{46} Operating as 'technical functionaries' nonetheless reflects the reality, demands and requirements of the law within private practice.\textsuperscript{47} The opportunity to analyse the specific making and implementation of two


\textsuperscript{44} Sampford C, Retrospectivity and the Rule of Law, (Oxford University Press, 2006) 103-104. Sampford observed the growth in retrospective legislation since the 1970s, with the most frequent use of press release being made in taxation law. He lists a series of objections to legislation by press release to include: a lack of precision; the undermining of parliament, respect for the law and the rule of law and excessive delay. 156 -158.

\textsuperscript{45} Sampford C, Retrospectivity and the Rule of Law, (Oxford University Press, 2006) 257.


\textsuperscript{47} There are perspectives on vegetation management regulations that encompass practicing and academic lawyers. From the practicing lawyers the VMA and amendments are presented by explaining what the law is. For example: in 2009, following further retrospective amendments to the Act, a seminar for lawyers was held by the Queensland Environmental Law Association in Brisbane. Two papers were presented outlining the latest legislative changes: Simmonds M, ‘Recent Amendments to the Vegetation Management Act 1999 (Qld) and Devlin R, ‘Vegetation Clearing Offences under Integrated Planning Act 2009 (Qld)” (2009). This paper was presented prior to the passing of the Sustainable Planning Act (Qld) 2009. This seminar is indicative of the reality of private practice: keeping abreast of the many changes in vegetation management law was an all encompassing and continuous task. A further paper was written by a practicing solicitor: Bredhauer J, ‘Can’t See the Scrub for the Trees’ Environmental and Planning Law Journal, (2004) 21, and an academic perspective provided in: McGrath C, ‘End of broadscale land clearing in Queensland’ (2007) 24 (1) Environmental and Planning Law Journal and Bell J, ‘Tree clearing, hunger strikes and Kyoto targets – the need for a middle ground’ (2011) 28 Environmental and Planning Law Journal. None of these
environmental laws lends more readily to an academic setting and forms the basis of this thesis.

**Research questions**

In examining State legislative responses to rural land degradation, further questions emerged. The answers to these questions form the foundation of this thesis and align with the research methodology employed.\(^4\) These questions have not previously been asked and the research undertaken is the first attempt to provide answers. The initial question, explored in Chapter Four, asked: *how was the VMA made, implemented and amended from the introduction of the legislation in 1999 to 2008?* In December 1999, Premier Peter Beattie, adhered to a pre-election promise and introduced legislation to bring an end to broadscale land clearing. As an environmental law, the VMA became an electoral asset utilised as required to meet the Queensland Labor Party’s desire for a further term in office. Controversial laws are much more than a procedural implementation and legislative exercise - they are a consequence of the political context and reality of the parliamentary processes in which they are made. This prompted a further research question: *what were the parliamentary processes of the Queensland parliament and the political context under which the VMA was made and implemented?* The making of the VMA paid little heed to parliamentary due process or the requirements of statutory guidelines or drafting procedures. Scrutiny of legislation is a fundamental function of government and the Queensland Labor Party demonstrated a manifest failure to perform its legislative role. Chapter Four ends in 2008, prior to the 2009 State election, an election that engendered a controversial and retrospective amendment to vegetation management regulations.

The VMA was characterised by pre-election promises from Queensland Labor followed by post election changes to the law. This was the case in 1999 and 2004, as examined in Chapter Four, and again in 2009 as examined in Chapter Five. This prompted a further research question: *how the VMA was made and implemented in 2009 and what were the*
parliamentary processes of the Queensland parliament and the political context within which the amendments were made? The Queensland electoral system was, in 2009, pivotal to a pre-election political deal which led to the VMA amendments in that year. Optional preferential voting, the method adopted within the State, has the potential to generate dominant single party government as evidenced in Queensland; and pre-election horse-trading for preferences as witnessed in this election. As noted in Chapter Five, in utilising a preference strategy at a time of electoral weakness, Queensland Labor adopted a similar tactic to that employed by Federal Labor in the 1990 election. The ability of minority parties to influence and shape law prompted the following question: which groups influenced the political processes and the law that was ultimately made? It transpired the Green Party had the ear of government in 2009 and, under the optional preferential voting system, worked with a moribund Labor Government reliant on preference votes. In this State election year Labor’s power was in decline and needed support from the Queensland Greens.

Chapters Six and Seven include both the VMA and the LA as both Acts were amended in 2003 for the purposes of compliance and enforcement. The amending legislation was again contentious and Chapter Six provides an investigation of environmental crime, criminal law and criminal responsibility as a background from which to consider the legislative scheme for compliance and enforcement of vegetation management. The following question was pertinent: how were the enforcement and compliance provisions of the VMA made and what were the parliamentary processes of the Queensland parliament within which the amendments were made?[^49] The compliance and enforcement amendments were especially controversial and far-reaching. They included: the removal of the defence of honest and reasonable mistake; an extension of regulatory powers to issue a compliance notice, enter private property, and obtain a criminal history; together with further regulatory advantages in an extension of statutory time limits, a reversal of the onus of proof and denial of the privilege against self-incrimination. Parliamentary process followed the customary law making course for a contentious statute in Queensland. A further Labor Party tactic was to assign Stephen Robertson as Minister. Robertson was a long-serving parliamentarian customarily appointed during the more controversial periods of the VMA, for example the 2004 and 2009 VMA amendments.

[^49]: Political processes have typically been considered together with political context in this thesis but this was examined in Chapter Four.
An essential part of regulatory compliance lies in the decision to prosecute. The following question was accordingly explored: *how did the regulators decide to prosecute?* Lack of enforcement is a familiar criticism of environmental laws. Yet effective laws require an effective deterrent. This chapter argues that deterrence should be just and fair. Much of the contention surrounding the VMA emanated from the vigorous prosecutorial stance taken at times by DERM. Regulatory claims to transparency were not evident in practice: DERM was not prepared to divulge information beyond the general compliance strategy and enforcement guidelines available within the public domain.

This lack of regulatory transparency remained apparent in Chapter Seven. The focus of this chapter is land clearing litigation, the research question examined: *how were the compliance and enforcement provisions of the vegetation management regulations implemented?* This thesis documents the impenetrable nature of DERM’s compliance and enforcement procedure and the difficulty in determining a comprehensive list of illegal land clearing investigations and cases. There are fundamental and ubiquitous failings in all criminal justice systems but some of the cases examined bring to the fore particular inequities of land clearing litigation in Queensland. This gave rise to a further question: *what wider issues did the compliance and enforcement provisions raise in terms of procedural fairness and access to justice?* Regulatory agencies should act and be seen to act with reason and fairness in the implementation of laws. They should adhere to their compliance strategy and enforcement guidelines and adopt a consistent and proportionate response. This chapter contends that the basic objects of environmental law are often far removed from the minutiae of litigation. The objects of the VMA include the conservation of remnant vegetation but, as evidenced in the case transcripts, this statutory purpose is unlikely to be achieved if a case is dismissed because of evidential deficiencies and legal technicalities.

The thesis then moves to address the same question of the LA that has been asked of the VMA: *how were the LA and the Rural Leasehold Land Strategy made and implemented and what were the parliamentary processes of the Queensland parliament within which the amendments were made?* The strategy was made following a prolonged consultation phase which began with a discussion paper in 2001 and a draft strategy in 2003. The law was amended in 2007 and included clarification of the statutory duty of care.
provision. Implementation of the lease renewal process began in 2008 and comprises a comprehensive and extensive land condition assessment and, on the basis of this assessment, a complex and lengthy land management agreement and a renewed lease. Land management agreements are contractual and take effect once registered, along with the other title documents, at the Land Registry. The length of the renewed lease is determined by the condition of the land. Under the strategy, regulators now have more extensive duties on lease renewal. Equally the regulated undergo a more protracted process and ultimately have more widespread duties and obligations to meet the conditions of their lease and land management agreement.

The structure of the thesis

Literature is reviewed at appropriate stages in each chapter and the thesis is developed in the following way:

Chapter One establishes the thesis methodology, which has utilised a broad approach incorporating traditional doctrinal study with socio-legal research. The origins and scope of research are set down and justification is provided for the thesis. The research problem is introduced along with the research questions to be addressed. The structure of the research is set down by a delineation and summary of each chapter.

In Chapter Two the significance of land tenure is explained and the basic principles of tenure are set down. The chapter also examines the evolution, advantages and prevalence of leasehold land within Queensland. Because of the extent of leasehold tenure, there is a utility in this land which has the potential to enhance general environmental values and biodiversity conservation.

Chapter Three examines the environmental impact of agriculture, the inherent problems of regulating the agricultural community and the critical role of rural organisations in facilitating the transition to ever-increasing legislation during the Labor period of government. The two pieces of legislation central to this thesis, the VMA and the LA, are introduced and placed within the context of State and Commonwealth laws which make provision for the management of rural land. Consideration is given to regulatory
evaluation and assessment criteria in respect of environmental laws in Queensland generally; and specifically for the two pertinent Acts.

In Chapter Four the making and implementation of the VMA is explored, from the time the Act was introduced to the 2008 amendments. The Queensland Labor government persistently assured rural landholders that the VMA would bring certainty and protect the unique biodiversity of the State. This chapter reveals that the political manoeuvring underlying the VMA led to extensive uncertainty; and perversely, delay in proclaiming the VMA, caused a peak phase of land clearing. Parliamentary processes attendant upon this controversial law are examined and found deficient.

The making and implementation of the vegetation management regrowth provisions to the VMA are examined in Chapter Five. The year was 2009, an election year and the last time Labor secured office in the State. Controversial retrospective amendments brought about a six-month moratorium on clearing regrowth vegetation. The moratorium began in April with the Vegetation Management (Regrowth Clearing Moratorium) Act 2009 (Qld) and ended in October with the Vegetation Management and Other Legislation Amendment Act 2009 (Qld). The regrowth amendments brought uncertainty, disruption and marginalisation to affected landholders. This was exacerbated during the moratorium period by inaccuracies in the mapping system and the potential effects of a loss of productivity and fall in rural land values.

Chapter Six centres on the making of compliance and enforcement provisions under the vegetation management regulations, and includes the widespread and contentious amendments to investigatory and prosecution powers of the regulators. This and the following chapter include both the VMA and the LA as the Acts were aligned for the purposes of compliance and enforcement in 2003. Parliamentary procedure followed the practice established in previous chapters. Many of the difficulties inherent to environmental crime persisted and are further complicated by the particular circumstances of Queensland. For rural landholders, conduct which was once legal, and for leasehold title a covenanted requirement, is now illegal and an environmental crime. Equally, clearing is generally undertaken within a rural landholder's home environment, inevitably bringing into play issues of property rights and resentment at regulatory
intrusion. The legislative arrangement for compliance and enforcement remained multifaceted and contentious during the Labor period of government.

The implementation of the compliance and enforcement provisions of the VMA is explored in Chapter Seven. This begins with discussion of regulatory transparency and the difficulties of establishing a comprehensive list of investigations and prosecutions. An analysis of sentencing is undertaken; and the statutory procedural guidelines relied upon by the courts in implementing the Act are examined. Cases are categorized into: a withdrawn action, a quashed compliance order, a bundle of cases that highlight the difficulties inherent to successful implementation; and a further bundle of cases which proved more successful for the regulators. Some of the cases explored draw attention to particular inequities of the land clearing litigation investigated.

In Chapter Eight it is noted that a policy change to advance biodiversity conservation on State leasehold land was only to be expected: rural land had endured widespread and prolonged degradation and pastoral lease terms were nearing expiry. This chapter examines the making and implementation of the necessary amendments to the LA to implement the Rural Leasehold Land Strategy. The aim of the strategy was to establish a link between security of tenure and sustainable land management practices - additional lease periods would be granted on top of the basic 30 years as an incentive for environmental performance. The revised legislation did not generate the intense controversy experienced with the VMA. The law was made in a single amending statute, prospective not retrospective and following proper parliamentary procedure – it was unopposed and praised by the opposition.

The concluding chapter returns to the research questions and consolidates the main findings of the thesis. An additional question examines why the making and implementation of the two Acts differ despite a shared environmental goal. Recommendations for changes in policy and law are included and followed by suggestions for further research. The chapter ends with an analysis of the shift to a Liberal National Party government in March 2012. As with previous changes of government, there is set to be a fundamental change in policy and law. The most recent change in power has witnessed a return to conservative ideology and values: the more
contentious provisions of the VMA are set to be amended and land tenure on rural land is the subject of an inquiry into its continued relevance.
Chapter Two: Land tenure – basic principles and the evolution, advantages and prevalence of leasehold tenure in Queensland

Introduction

The fundamental research problem in this thesis concerns the need for, and the legal mechanisms by which, sustainable land management practices have been implemented on privately held rural land in Queensland. One means of addressing this problem is by environmental legislation such as the *Vegetation Management Act 1999* (Qld) (VMA), which initially impacted upon freeholders; and the *Land Act 1994* (Qld) (LA) which applies just to leaseholders. Because the State government retains control over rural leasehold land, it is less controversial and more straightforward to introduce and implement environmental laws on leasehold as opposed to freehold land. Land tenure has been shaped in differing ways by the political cycles and ideologies of successive State governments: fundamental changes in land policy and law have accompanied each State administration. Land tenure and the title held by a rural landholder are significant for this thesis. This chapter therefore begins with an examination of the conventional foundations of the doctrine of tenure within Australian land law: it is a law shaped by a long established allegiance to inherited English law that has retained relevance by adapting to conditions in Australia and Queensland. The chapter also examines the evolution of tenure during the most recent and extensive periods of conservative and Labor rule.

A major phase of change began in the second half of the 1950s when a non-Labor government took office in Queensland. At the outset of this prolonged conservative period a review of land policy was undertaken and an era of closer settlement and development was fostered. Freeholders had unfettered property rights and leaseholders were regarded and treated like owners. The Bjelke-Petersen government dominated this period and, during the pinnacle of its power, most 30-year pastoral leases gained an automatic 20-year extension. There was no impetus or knowledge to adapt rural land policy and law to take account of the environment. Rather, the overriding drive to develop and clear land generated flawed policy and land management practices which ultimately proved difficult to reconcile in a harsh and variable climate. This protracted
conservative period of government left a legacy of degraded rural land. Change in land policy and law did not occur until 1990, along with the shift in power to Labor and the Goss government. A review of land policy and law once again followed a new government. This time the importance of sustainable land management practices on rural land and concern for the environment emerged. A statutory duty of care for leasehold land was introduced and recommendations from a policy review were to simplify and retain leasehold tenure. Further progress however was stalled by the abrupt demise of the Goss government. There followed a brief two year conservative coalition administration during which time a Broadscale Tree Clearing policy on leasehold land was introduced. This policy remained until 2004 when clearing on leasehold land was transferred to the VMA. This Act brought in the first legislative clearing controls on freehold land when Labor returned to power in 1999. The controversy surrounding the initial implementation years of vegetation management legislation on freehold tenure required more detailed consideration - this is provided in Chapter Four.

The VMA has been one of the most controversial pieces of legislation to be made and implemented in the last decade of the Queensland parliament. But amendments to the LA, made to implement the Rural Leasehold Land Strategy, never reached the same level of controversy. Part of the reason for this difference lies in land tenure and the expectations of title holders as lessees, and the requirements of government as lessor. Retention of control by the government and the corresponding ability to impose legislative restrictions with minimal opposition lies at the heart of the utility of leasehold tenure. Lease instruments are typically held out as having the capacity to adapt to prevailing societal and environmental needs. The reality for Queensland however, is that rural leases have undergone very little change: when leases are renewed under the Rural Leasehold Land Strategy their conditions will have stayed the same for 50 years. Rural lease tenure in Queensland is characterised by static covenants and conditions and shifting regulations. Regulatory variation has been imposed from outside and not within the lease instrument. It is leasehold tenure that has smoothed the progress of such change in the recent past and will enable change in the future, when leases are renewed following amendments to the LA and consequent changes to lease conditions.

Leasehold tenure offers further advantages that have potential to create far-reaching and sustainable environmental change in Queensland. For example, the law attaches more
restricted property rights to this land title. As a result, environmental legislative restrictions can be imposed on leaseholders with much less resistance than comparable regulations on freehold land. Unlike legislative restrictions on leasehold land, those on freehold land have tended to generate calls for compensation and challenges to the validity of the law. Political expediency rather than legal requirement obliged the Queensland Labor government to make financial adjustment payments to rural freeholders following some of the more extensive amendments to the Act. A further advantage of leasehold tenure lies in the sheer extent of this area of land. Most rural land in the State is privately held under freehold or leasehold tenure, but the principal tenure is leasehold and the predominant lease is pastoral. In order to establish the significant degree of rural leasehold land within Queensland the chapter concludes with a detailed account on the current division of land by tenure within the State.

Tenure and the traditional foundations of Australian land law

In 1788, as Australia was deemed to be a settled colony, the English brought and applied their laws as far as they were applicable to local circumstances. Two essential land law doctrines, the doctrine of tenure and the doctrine of estates, gradually became relevant as the early colonists settled land. Under the doctrine of tenure all land is vested in the Crown and under the doctrine of estates an individual may not own land but merely an estate in it for a period of time. Tenure therefore describes the title held—such as freehold or leasehold—and estate describes the period of time for which it is held.

The most extensive form of ownership in land is a freehold estate or fee simple. With this tenure the period of ownership is indefinite and landholders may, subject to statutory requirements and restrictions on title, deal with the land as they choose. It is possible to carve a leasehold interest, a lesser form of tenure, out of a freehold estate: the owner of the freehold interest would be the lessor and the owner of the leasehold interest the lessee. The essential elements of a lease are that the lessee has the right to exclusive possession of the land for the term or duration of the lease and the

commencement and duration of the lease must be certain or capable of being certain.\textsuperscript{3} A freehold estate, therefore, is potentially a perpetual interest; whereas a leasehold estate is limited by time for the term of years granted. The doctrine of tenure may place limits particularly on a leaseholder; and the law may place additional legislative restrictions on both freehold and leasehold land that determine what can or cannot be done on the land.

At common law land includes the surface and what lies above and below the surface.\textsuperscript{4} Above the surface landowners are entitled to such airspace as necessary for the reasonable use and enjoyment of the land.\textsuperscript{5} Ownership of land below the surface is historically more complex and is dependent upon the legal instrument under which the land was conveyed and on statute: for example, a lease is likely to contain a reservation of rights to coal and minerals on or below the surface of the land. By the end of the 19th century all states had legislation reserving the right to minerals in the Crown.\textsuperscript{6} There are statutory definitions of what constitutes land which follow the common law and typically include hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein.\textsuperscript{7} Over time ownership of land has faced increasing legislative restrictions.\textsuperscript{8}

Australia has traditionally adopted the feudal doctrine of tenure in which land is held of the Crown. The English brought to Australia principles of land law they had acquired.\textsuperscript{9}

\textsuperscript{4} According to Butt P, \textit{Land Law} (5th edition, Lawbook Co, 2006, Australia) 10 the maxim \textit{cuius est solum eius est usque ad coelum et ad infernos} means the landowner owns land from the heavens above to the centre of the earth below.
\textsuperscript{5} Established in \textit{Bernstein v Skyviews & General Ltd} [1978] QB 479 and developed in \textit{UP Investments Pty Ltd v Howard Chia Investments Pty Ltd} (1989) 24 NSWLR 490.
\textsuperscript{6} For example, in Queensland the \textit{Mineral Resources Act 1989} (Qld) s 8 provides for the Crown’s property in minerals, under s 8 (1) gold on or below the surface is the property of the Crown. Under s 8 (2) (a) and (b) coal on or below the surface is the property of the Crown though there are exceptions depending on when the land was alienated. Under s 8 (3) all minerals on or below the surface are the property of the Crown but again there are exceptions depending on when the land was alienated.
\textsuperscript{7} The definition of land is provided in \textit{Acts Interpretation Act 1901} (Cth) s 22 (1) (c) and \textit{Acts Interpretation Act 1954} (Qld) s 36. Tan P L, Webb E, Wright D, \textit{Land Law} (2nd edition, Butterworths, Australia, 2002) note that corporeal hereditaments include physical and permanent objects such as trees on the surface of the land together with mines and minerals lying beneath the land; and incorporeal hereditaments include intangible rights that may be enjoyed over the land such as a right of way easement 14.
\textsuperscript{8} For example State reservations include geothermal energy on or below the surface of the land \textit{Geothermal Exploration Act 2010} (Qld) s 11 (3) provides: This section applies despite any other Act, grant, title or other document. This legislation applies if the land is ‘freehold or other land.’ The meaning of ‘other land’ is not defined but a landholder includes the owner of land and those with a right to occupy (which would include lessees) and native titleholders.
\textsuperscript{9} Blackstone W, \textit{Commentaries on the Laws of England} (Cavendish Publishing Limited, London, 2001) Vol 11. 37-41 noted the difficulty of pinpointing the precise introduction of feudal tenure within England, but contended that the doctrine: became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, ‘that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man
By 1788, when the First Fleet landed on Australian shores, feudal administration within England had long ceased; and though it was conceivable that the Australian land law system would adapt to the prevailing circumstances it would take many years for this to occur. The first challenge to the feudal doctrine of tenure within Australia came with the *Attorney General v Brown* (1847) 1 Legge at 318. The significance of this case for tenure in Australia was the defence challenge to the application of the doctrine to a remote colonial outback and the enduring legacy of Stephen C J’s ruling:

if the feudal system of tenures be, as we take it to be, part of the universal law of the parent state, on what shall it be said not to be the law in New South Wales? At the moment of its settlement the colonists brought the common law of England with them.10

Such reasoning found resonance in subsequent cases and firmly embedded the doctrine of tenure within Australian land law. A Privy Council decision, *Cooper v Stuart* (1889) 14 AC 286, further confirmed acceptance of the doctrine which was followed in later cases.11 In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 the Federal Court reaffirmed the position of the Crown as the source of title to land so that on colonisation ‘every square inch of territory in the colony became the property of the Crown.’12

Property of the Crown was regarded as *terra nullius* or vacant land until *Mabo v Queensland* (No 2) (1992) 175 CLR 1(*Mabo*). The English legacy of land tenure was considered in *Mabo* and, of the doctrine of tenure, Brennan J stated:

does or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services’...42.


11 For example: *Randwick Corporation v Rutledge* (1959) 102 CLR 54; and *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177.

12 Per Blackburn J at 245 which subsequently became authority for later cases such as: *New South Wales v Commonwealth* (1975) 135 CLR 337.
...it is a doctrine which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency. It is derived from feudal origins. The feudal basis of the proposition of absolute Crown ownership.\textsuperscript{13}

The significance of \textit{Mabo} was that it established the Crown had radical, ultimate or final title rather than beneficial or complete ownership. This decision reflected a salient shift in established and inherited legal principles in Australian land law. The doctrine of tenure would continue and be adapted to Australian conditions. The common law would now give recognition to native title that, unlike freehold or leasehold title, did not derive from a Crown grant. Native title was held to survive both the Crown’s acquisition of sovereignty and radical title.\textsuperscript{14} The assumption of radical title following from \textit{Mabo} has enabled the doctrine of tenure to be modified: it has allowed what some regard as the ‘legal tangle created by settlement’\textsuperscript{15} or the ‘mythological foundations of law’\textsuperscript{16} to continue.

\textit{Mabo} gave rise to many issues regarding land tenure in Australia; and many of these issues were not resolved by the Commonwealth legislative response in the \textit{Native Title Act 1993} (Cth).\textsuperscript{17} For example, the Act did not clarify the position in respect of all types of leasehold estate. Had it done so in respect of pastoral leases, \textit{The Wik Peoples v The State of Queensland} (1996) 187 CLR 1 (\textit{Wik}) would not have been obliged to continue. The Holroyd and Mitchellton pastoral leases in \textit{Wik} were granted under the \textit{Land Act 1910} (Qld) as amended.\textsuperscript{18} The majority judgements each considered the pastoral leases in question, within the historical context of the particular conditions of early settlement of New South Wales and subsequently the State of Queensland.\textsuperscript{19} Emphasis was placed on the role of the deriving legislation. Toohey J described the leases in question as ‘creatures of statute’ and noted:

To approach the matter by reference to legislation is not to turn one’s back on centuries of history nor is it to impugn basic principles of property law. Rather, it is

\begin{footnotesize}
\begin{enumerate}
\item \textit{Mabo v. Queensland} (No 2) [1992] HCA 23 at [47].
\item \textit{Mabo} (No 2), [1992] HCA 23 at [83].
\item In 1998, the subsequent Howard government passed further amendments to the \textit{Native Title Act 1993} (Cth). These legislative amendments severely eroded much of the land rights gains provided for in the 1993 Act.
\item The composition of the High Court had changed since \textit{Mabo}: it was now headed by Brennan C J, who this time was one of the three dissenting judges along with Dawson and McHugh J J. The four judges forming the majority delivered separate judgements. Being Toohey, Quadron, Gummow and Kirby J J.
\end{enumerate}
\end{footnotesize}
to recognise historical development, the changes in law over centuries and the need
for property law to accommodate the very different situation in this country.  

This is especially so for the particular circumstances of Queensland with its vast tracks
of arid and semi-arid land and the overriding drive, particularly of early State
governments, to develop and populate the State. The impact of *Wik* for leasehold tenure
in Australia was the majority opinion that pastoral leases were a distinctive entity of
legislation. One of the essential elements of a common law lease is the right to exclusive
possession, but the High Court found this not to be a fundamental part of a pastoral
lease. *Wik* may have turned on the construction of the pastoral leases in question, but
has far-reaching implications for pastoral leases generally, because of the standard
nature of this type of lease instrument and because of the prevalence of pastoral leases
within Queensland.

**The evolution of leasehold tenure**

As creatures of statute, State leases are generally regarded as having evolved from the
1847 Order-in-Council passed by the New South Wales legislature. When Queensland
became a separate colony from New South Wales in 1859, this evolution continued and
what emerged for Queensland in the early days of settlement and beyond was a
complicated web of tenure in which, 'the complexity and multiplicity...beggars
comparison unless we go back to the early medieval period of English land law.' This
complex web of tenure inevitably mirrored the development of the State and the
physical and geographical character of the land.

The roots of present-day State leases may be traced back to colonial settlement when
leases, such as grazing leases, were issued as a means to control the use and settlement
of land. As leases have evolved, their terms and conditions have likewise evolved to
reflect prevailing social, economic and environmental trends: in the early pioneering
times the prime directive was development. Past rural land policy in Queensland caused

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21 As Kirby J observed, in comparing a common law lease with a pastoral lease, talk of exclusive possession had 'an
23 Fry T P, n 22, 29.
ruinous consequences for the environment but it reflected the concerns of the period.

For much of the twentieth century
governments in Queensland were battling to maintain the State as a viable entity, administering what was in all important essentials a frontier society and one dependent entirely on the fruits of primary production for its economic prosperity.
The State was underdeveloped and thinly populated, yet covering vast geographical areas. It lacked sufficient capital investment to shield the economy from the ill effects of droughts, floods and rural recessions...24

**Tenure and conservative government: the Payne Commission**

The drive for growth continued unabated throughout the early years of Queensland's history. Land policy and law were pivotal to this development. A period which saw fundamental change began in 1957 when a non-Labor government returned to power. The Country-Liberal Party was led by Frank Nicklin, a former rural landholder. Nicklin appointed William Payne as a consultant and advisor on land matters; Payne had held the position of President of the Land Court since 1937. The new government was dedicated to legislative change, not least in land policy and law 'which was designed to usher in a new era of rural progress'.25 In 1959, Payne’s review of land policy promoted the ‘populate or perish’ strategy.26 At that time the policy of closer settlement was a key aim; it was a policy described by Payne as ‘the division of land in economically sound areas so that it may be worked prudently and intensively and developed to the utmost’.27 It was not envisaged that such an extensive exercise would lead ultimately to widespread land degradation; rather Payne regarded such development as being beneficial for the land which he advocated should be ‘cared for, protected and preserved so that it may remain a storehouse of wealth for future generations’.28 Inter-generational equity, though a concept yet to be articulated, was a common thread within the Payne Report. Provision for future generations however was misplaced: the outcome from the closer settlement policy and drive for development was a legacy of degraded land.

27 Payne W L, n 26, 5.
The Payne Commission prompted the *Land Act 1962* (Qld) which included a raft of different land tenures and maintained the focus of developing Queensland. This Act made provision for clearing or, as it was then expressed, the destruction of trees; and prohibited such destruction without a prior written permit. To clear therefore a landholder was obliged to make an application to the Commissioner to destroy trees, even if the lease contained a condition that clearing should take place within a specified period of time. The application had to identify both the species of tree and the relevant area of land. If granted, the clearing permit would last for a given period and specify the manner in which destruction should take place. Each permit had further standard conditions and these included that the permit only applied to the specified trees and to the applicant, not transferees. The Commissioner had discretion to cancel the permit in the event the permit was not complied with. Failing to obtain a permit or destroying trees otherwise than in accordance with the permit, amounted to an offence under the Act; and landholders found guilty of such an offence faced a fine between twenty-five and two hundred pounds.

A key component of the *Land Act 1962* (Qld) was the Brigalow Lease – a far-reaching tenure with considerable long-term repercussions for the environment – emerged to ‘encourage and secure development’. At the time, two-thirds of the extensive Brigalow Belt was estimated as being undeveloped, and such leases were therefore subject to conditions to clear the whole or part of the land. In acknowledging the prevalence of leasehold tenure within Queensland, Payne adopted the accepted view of the era which stressed the necessity to ‘inculcate something akin to a sense of ownership’ in leaseholders such that they would ‘use and consider the land as their very own’. Rural leaseholders were given a statutory right to seek renewal in the final period of the lease

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29 Destruction was defined in the *Land Act 1962* (Qld) as: cutting down, felling, ringbarking, pushing over, poisoning or destroying by any means whatsoever.
30 *Land Act 1962* (Qld) s 250 (1).
31 *Land Act 1962* (Qld) s 250 (8).
32 *Land Act 1962* (Qld) s 250 (2).
33 *Land Act 1962* (Qld) s 250 (4).
34 *Land Act 1962* (Qld) s 250 (5).
35 *Land Act 1962* (Qld) s 250 (6).
36 *Land Act 1962* (Qld) s 250 (9).
38 Lack C, n 37, 559.
term, for example in the final 10 years of a pastoral lease. This security of tenure, in Payne’s opinion, alleviated the ‘menace of expiring leases’.40

The dominance of various forms of National and Liberal Party coalitions and a prolonged conservative period within Queensland lasted for 32 years, from 1957 to 1989. One of the longest serving premiers within the State, Sir Joh Bjelke-Petersen, epitomized the fixation with development. Prior to entering parliament Bjelke-Petersen owned and operated a land clearing business. He claimed to have pioneered the method of using two bulldozers with a chain stretched between them; a technique that, in those early days of broadscale clearing, meant up to one hundred acres per day could be cleared by two machines.41 In time as his business grew, more and larger machines were bought and increasingly larger areas of land cleared, Bjelke-Petersen recalled:

We cleared huge tracts of brigalow country in south-western and central Queensland, around places such as Meandarra, Tara, Glenmorgan, Surat, Biloela, and Thangool. By doing so, we created hundreds of thousands of acres of good pastoral land out of what had been useless timber country.42

Bjelke-Petersen continued to operate this business until the mid 1950s when the demands of parliamentary life apparently made it impossible to continue.43

The Land Act Amendment Act 1986 (Qld)

During this protracted conservative period the rural lobby was politically dominant and strong – rural freeholders had unfettered property rights and leaseholders were regarded as land owners. A significant event occurred for leasehold land during the latter part of this conservative phase. The Land Act Amendment Act 1986 (Qld) gave most pastoral leases an automatic 20-year extension;44 before this, the typical term for most

41 Bjelke-Petersen J, Don’t you worry about that: the Joh Bjelke-Petersen Memoirs (Collins/ Angus & Robertson, Australia, 1990) 33-36.
42 Bjelke-Petersen J, Don’t you worry about that: the Joh Bjelke-Petersen Memoirs (Collins/ Angus & Robertson, Australia, 1990) 37.
43 Bjelke-Petersen J, n 41, 38.
44 Land Act Amendment Act 1986 (Qld) amended s 53 of the principal 1962 Act in providing an extension of the usual 30 years to 50 years for every pastoral holding, preferential pastoral holding or pastoral development holding. The 1986 Act was primarily concerned with lease terms and attendant amendments it did not amend the original s 250 of the 1962 Act.
Queensland pastoral leases had been 30 years.\footnote{Queensland government, Department of Environment and Resource Management, Terms of leases for Agriculture, Grazing or Pastoral Purposes, Policy Document PUX/901/338, version 2. In the scheme of Bjelke – Petersen’s political career granting leasehold title holders an additional 20 year term did not merit inclusion in either his own biography or biographical accounts written about him by others. For example: Bjelke-Petersen J, Don’t you worry about that: the Joh Bjelke-Petersen Memoirs (Collins/ Angus & Robertson, Australia, 1990); Lunn H, Joh: the Life and Political Adventures of Johannes Bjelke- Petersen (University of Queensland Press, 1987); Murphy D, Joyce R and Cribb M, (eds) The Premiers of Queensland, (University of Queensland Press, 1990.); Evans R, A History of Queensland (Cambridge University Press, 2007); Fitzgerald R, Megarrity L and Symons D, Made in Queensland: A New History (University of Queensland Press, 2009).} Introducing the legislation into parliament, the Minister at the time, Bill Glasson, declared that the new laws consolidated the government’s ‘stated aim since 1957 of gradually giving greater security of tenure’\footnote{Queensland government, Second Reading, Land Act Amendment Bill, 20 March 1986, 4529 per W H Glasson. Available at: http://www.parliament.qld.gov.au/documents/hansard/1986/1986_03_20.pdf (viewed 10 January 2008).} to rural landholders. There was no explanation by the Minister as to why it had taken 29 years to reach the stated aim. It might be assumed that by the mid-1980s many pastoral leases were near expiry and accordingly the lease renewal process required attention. The solution was to increase the maximum term for most pastoral holdings from 30 to 50 years. It may have been that the National Party foresaw their demise from office but in any event the opposition supported the legislation. There was agreement from both sides of the Legislative Assembly that a lease extension would facilitate greater security of tenure and borrowing capacity.

Parliamentary debate on the \textit{Land Act Amendment Act 1986 (Qld)} was measured. This was not a controversial piece of legislation. Environmental awareness had not permeated the Queensland Parliament: there was only one mention, from a Liberal Party member, as to the legacy of detrimental past land management practices such as land clearing.\footnote{Queensland government, Second Reading, Land Act Amendment Bill, 20 March 1986, 204 per Lickiss. Available at: http://www.parliament.qld.gov.au/documents/hansard/1986/1986_03_20.pdf (viewed 10 January 2008).} It was generally accepted that a 50-year pastoral lease was ‘in accord with modern day thinking’.\footnote{Queensland government, Second Reading, Land Act Amendment Bill, 20 March 1986, 217 per W H Glasson. Available at: http://www.parliament.qld.gov.au/documents/hansard/1986/1986_03_20.pdf (viewed 10 January 2008).} The amending legislation extended some lease terms but, according to the Minister, there was no change to lease conditions.\footnote{Queensland government, Second Reading, Land Act Amendment Bill, 20 March 1986, 219 per W H Glasson. Available at: http://www.parliament.qld.gov.au/documents/hansard/1986/1986_03_20.pdf (viewed 10 January 2008).} There was further confirmation that lease conditions did stay the same by the regulators when they confirmed: ‘As far as we are aware lease conditions stayed the same’.\footnote{E-mail correspondence in reply from a senior Department of Environment and Resource Management (DERM) policy officer, dated 29 May 2012.} Equally, a solicitor practicing at the time recalled:

\ldots the lease instruments were endorsed with a stamp which stated that the term of the lease was extended for the term of 20 years. This stamp was the same process as was used at that time to record transfers, mortgages and sub leases. The stamp
was I presume endorsed on the instrument of lease as an administrative act once the Act extending the lease terms had been passed. Generally it was done when the instrument itself was lodged in the Land Administration Commission to register a dealing.51

The opportunity to review and amend lease conditions was not addressed. There was no recognition in the mid 1980s – from either side of the Legislative Assembly – of the need to take steps to rectify past land management practices by adapting and changing lease conditions. Significant change to lease conditions did not emerge until the Rural Leasehold Land Strategy in 2007.52

The implications of this general lease extension meant there was no impetus to adapt land policy: the additional term marked a period of inertia and a preservation of the status quo. The 20 year period had been granted prior to the 1986 State election – leaseholders had security of tenure and favourable rents, a combination which arguably fostered and contributed to conservative electoral support. Joh Bjelke-Petersen returned to power in December 1986, this was his seventh consecutive term as leader. The year also marked the 11th consecutive term for conservative party rule within the State. It was a time of considerable power for Bjelke-Petersen who engineered malapportioned electoral districts to his advantage and achieved one-party government for the National Party in the 1983 and 1986 State elections. Bjelke-Petersen did not take part in parliamentary debate on the Land Act Amendment Act 1986 (Qld) – his contribution was a single quote related by the Minister:

I think it is high time that we moved positively in this area, because the people who hold the pastoral leases, especially in isolated areas, have expressed concern that the government has not recognised their entitlement.53

Under a National Party government, the property rights of leaseholders were extended and entrenched. This was set to last until Queensland Labor returned to power in 1989.

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51 E-mail correspondence in reply from Andrew Palmer, Senior Partner, Rees R & Sydney Jones solicitors, Rockhampton, dated 27 July 2012.
52 The Rural Leasehold Land Strategy is examined in detail in Chapter Eight.
Tenure and Labor government: the Wolfe Review

The change in government generated momentum for statutory change: more than 500 pieces of legislation were passed primarily in Labor's first two years of office. In 1990, under the Goss government, a review of land policy and law was undertaken. This was the Wolfe Review, which recommended the simplification of the many tenure types and recognised the problem of land degradation within the State. Concerns about the environment and the importance of sustainable land management practices were beginning to emerge. Recommendations from the Wolfe Review were 'intended to promote efficiency and fairness and to stimulate land care'. It was acknowledged State land was vulnerable to degradation and the advice was not to freehold but to retain leasehold tenure. Following on from the Wolfe Review, changes were made to the Land Act 1962 (Qld) in 1991, 1992 and 1993.

The sustainable management of rural land was apparent in some of the amendments to the Land Act 1962 (Qld) in the early 1990s. The main amendments in respect of sustainable land management were passed in 1992. In particular, provision was made for further controls on tree clearing on leasehold land. The revised legislation added the term 'critical area' which was defined as land which was highly vulnerable to land degradation or of high nature conservation value. When applying for a tree clearing permit the landholder may have been asked to submit a tree management plan. This plan identified, inter alia, the major vegetation types and critical areas. The decision to grant a clearing permit now fell to the chief executive who was obliged to consider the following factors: the species of tree, the existence and extent of other trees in the area, the effect of clearing on the nature conservation value of the land, the extent of proposed clearing, the vulnerability to land degradation and any other matters considered relevant or in the tree management plan. Amendments to the Act in 1992 provided for general exemptions on the need to obtain a tree clearing permit for routine

56 Wolfe PM, Murphy DG, Wright RG, n 55, i.
57 This was an amendment to s 250 Land Act 1962 (Qld).
58 Land Legislation Amendment Act (Qld) 1992 s7 (a) to (h).
rural land maintenance: an opposition amendment previously rejected in the 1991 parliamentary debate.

The penalties for illegal clearing by an individual were increased considerably from $400 to $24,000. This rise in penalty prompted consternation from the opposition but, for the most part, parliamentary debate on the amendments was concerned with other issues generated by the Wolfe Review, such as the freeholding of State land and the determination of rents. Parliamentary process to pass the amendments was adhered to, in that debate spanned several sittings and included a full committee stage. This was consistent with the law making process in respect of the Rural Leasehold Land Strategy and in contrast to controversial laws restricting rights on freehold land.

Before this change was introduced, the clearing rates for the period from mid-1988 to mid-1991 in the Statewide Landcover and Trees Study (SLATS) amounted to 730,000 ha/year. But from the second part of 1991 to mid-1995 clearing rates went down to an average rate of 289,000 ha/year. This fall in clearing rates, based on the SLATS data, is not explained by parliamentary documents or debate, or even the SLATS report. It might be speculated that regulatory policy, influenced by the Wolfe review, would have been to deny applications to clear. But, as mentioned above, the concerns of the day for leasehold land focused on the transition of tenure to freehold and the issue of rents.

Clarification of policy was sought from the Queensland Department of Environment

63 The difference in the law making process is examined further in Chapter Four for the Vegetation Management Act 1999 (Qld) and Chapter Eight for the Land Act 1994 (Qld).
and Resource Management (DERM). The Director of State Land Asset Management responded: ‘I do not know the answer to your question and I don’t think the corporate memory still exists in the department but probably exists on archived files’. A request to see the archived files was not made in light of the difficulties encountered in other requests for information.

The fall in land clearing rates between 1991 and 1995 was, according to Macintosh, due to factors other than legislation. He has identified three reasons for the declining trend in clearing rates during this period. Firstly, the declining availability of uncleared land reduced the prospects for profitable rural development. Secondly, a long-term deterioration in terms of trade for rural landholders meant investment in areas other than land clearing. Thirdly, the above average rainfall and high commodity prices of the late 1980s and early 1990s gave way to drought and global recession. In short cattle prices fell and there was a prolonged drought. These aggregated factors would account for the sustained fall in clearing during 1991 to 1995. The apparent abrupt fall in clearing rates in 1991, as depicted in Figure 1 in all the SLATS reports, represents the average annual clearing rate, as such this decline is likely to be more gradual than it appears. It might be speculated that climatic factors generated the onset of this period. The Bureau of Metrology has recorded extensive and major flooding in both coastal and inland regions of Queensland from January through to March 1991.

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66 E-mail correspondence in reply from Director of State land Asset Management, DERM, dated 24 April 2012.
69 Macintosh A, n 67, 7-8.
70 Personal communication with John Rolfe dated 15 July 2013.
71 This fall from over 730,000 ha/year to the average rate of 289,000 ha/year is depicted in Figure 1 in all the SLATS reports. See for example the latest report, Queensland government, Department of Science, Information Technology, Innovation and the Arts ‘Land Cover Change in Queensland 2009-2010’, 1. Available at: http://www.nrm.qld.gov.au/slats/reports-spatial-products.html (viewed 12 July 2013).
72 As this abrupt fall is not explained in any of the SLATS reports a query was sent to the principal scientist seeking an explanation. The reply stated: ‘One thing to point out is the clearing is shown as an average annual rate from 1991 to 1995, as imagery was only purchased for 1991 and 1995. It could well be that the clearing rate for 1991-92 was approaching the levels indicated for 1988-91 (again, these clearing figures are averaged across this period as imagery only purchased for 1988 and 1991). The clearing rate probably gradually declined over this period (1991-1995) due to drought/economic hardship, as you mention. Similarly, from 1988-1991, there could have been a gradual decline’. E-mail correspondence in reply from SLATS principal scientist dated 25 July 2013.
The *Land Act 1994* (Qld)

The *Land Act 1994* (Qld) was part of a suite of new statutes introduced into parliament. For land policy, the Minister described the period as marking:

...a new era in land administration in Queensland, with a move away from the pioneering, closer settlement days appropriate to past years, to an era of consolidation, with the focus firmly placed on land sustainability.74

This Act brought in a statutory duty of care for leasehold land. All leaseholders would now be subject to this obligation.75 Duty of care was not defined in the 1994 Act but described in the Explanatory Notes as 'good land management practices and the prevention, where possible, of degradation and other damage to the land caused by the action or inaction of the land holder'.76 In 1995, during the Goss Labor government, the Draft State Guidelines for Broadscale Tree Clearing on Leasehold and Other State Lands in Queensland were produced. These guidelines failed to reduce land clearing and were widely criticized.77 Subsequently the guidelines were revised into a Preliminary Tree Clearing Policy. This policy gained little momentum: the Labor government ended with the resignation of Wayne Goss in February 1996.78

A conservative interlude: 1996 to 1998

Between 1996 and 1998, Rob Borbidge from the National Party and Joan Sheldon from the Liberal Party formed a coalition government in Queensland. During this brief

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75 *Land Act 1994* (Qld) s 199.
78 The Goss government had narrowly won the 1995 election; in part the demise of this government was brought about by dissatisfaction with an allegedly draconian administrative approach which included an approval for a tollway connecting the Gold Coast and Brisbane. The proposed route would have impacted upon a koala sanctuary. Conservationists and residents potentially affected opposed the tollway which was subsequently abandoned. A by-election in Mundingburra left Labor and the coalition with an equal 44 seats. Independent member for Gladstone Liz Cunningham joined forces with the coalition. Rob Borbidge became Premier and Peter Beattie leader of the opposition. See for example: Fitzgerald R, Megarrity L and Symons D, *Made in Queensland: A New History* (University of Queensland Press, Queensland, Australia, 2009) 209-213 and Evans R, *A History of Queensland* (Cambridge University Press, 2007) 252-255.
coalition period a Broadscale Tree Clearing Policy was introduced and adapted from the previous Goss Labor government. Now in opposition, the Labor Party did not contest the policy but made much of the irony of such a plan being championed by a National Party premier. This policy amended the *Land Act 1994* (Qld) and brought in tree management provisions for clearing on leasehold land. But there was no reduction in clearing: in fact, from the start of the policy in 1995, and throughout the coalition years, the rate of clearing increased. The SLATS report for 1995 to 1997 recorded annual clearing at 340,000 ha/year, 18% higher than the 1991 to 1995 period. For the 1997 to 1999 period SLATS recorded the average clearing rate at 425,000 ha/year, 45% higher than the 1991 to 1995 period. The failure of this policy was, according to Macintosh, due primarily to two factors: clearing on freehold tenure was mostly unregulated and the leasehold regulatory regime held many exemptions. Indeed fundamental change in land policy and law was unlikely: the Borbidge and Sheldon administration were a minority, interim and inexperienced government, beset with problems from the outset. Conservative ideology would not encompass either the imposition of regulation on those with freehold title, or a rigorous regime on those with leasehold title. Conservation of rural land was confined to an agreement between the Commonwealth Liberal National Party government and the State of Queensland.

The aim of this partnership agreement, entered into between the Borbidge government and the Howard government, was to 'reverse the long-term decline in the quality and extent of Australia's native vegetation cover'. In 1997 this resulted in funding from the Natural Heritage Trust fund of $30 million in furtherance of the National Vegetation Initiative. The tree management provisions for clearing on leasehold land lasted until 2004 when they were repealed by the Labor government, who transferred the management of vegetation under both freehold and leasehold land to the Vegetation

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Management Act 1999 (Qld). The management of vegetation became what regulators and rural agricultural bodies now describe as tenure blind: meaning legislation that applies to landholders regardless of tenure. In 1999 Labor returned to power in Queensland with Peter Beattie as Premier. This period marked one of considerable controversy and change for vegetation management regulations which is dealt with in detail in Chapter Four.

The utility of leasehold tenure

A significant advantage of leasehold tenure lies in control: by alienating the land as leasehold the government retains control. The State has statutory authority under the Constitution Act 1867 (Qld) to issue a lease of unallocated land. As lessor, the government may impose covenants and conditions, regulate, receive rents and, as holder of the reversionary interest, may decide on renewal and terms of renewal at the expiry of the lease. The potential utility of rural leasehold land tenure therefore lies in the capacity for change and the ability of the lease instrument to adapt to prevailing social, economic and environmental requirements. Rural leaseholders, their representative bodies and parliamentarians appear more accepting of change than rural freeholders. Amendments to the lease renewal process under the Rural Leasehold Land Strategy, as evidenced in this thesis, were not controversial.

Leasehold tenure has received intermittent academic attention and very little consideration in recent times. Holmes has provided the most insightful and extensive academic analysis, particularly within Queensland in the 1990s. Together with Knight, he postulated that the mid-1990s was a period of ‘escalating revival of public interest’ in lease tenures as policy instruments. Leasehold – especially a reformed system including an emphasis on sustainable land management – was advocated as preferable to freehold tenure reinforced by regulation. Young had argued that covenants and conditions within a lease were more cost effective than regulation because they tended to be specific to the land. In 1997 Holmes reiterated his argument that a lease

85 This period is examined in Chapter Four.
86 Constitution Act 1867 (Qld) s 30.
87 The Rural Leasehold Land Strategy is examined in Chapter Eight.
90 Young M D, 'Pastoral Land Tenure Options in Australia'(1985) 7 (1) Rangeland Journal 43.
instrument presented an ideal mechanism for the delivery of land policy and as a means of achieving sustainable land management practices, in a paper presented to a conference held by the then Centre for Conservation Biology at the University of Queensland. The conference theme and subsequent book of proceedings centered on biodiversity conservation beyond nature reserves and 'explored the potential for conservation outside the traditional reserve system by examining approaches to land use that could enable sustainable primary production and nature conservation to be combined'. Participants included rural landholders, academics, community groups and representatives from regional and national regulatory bodies. In Queensland this appears to be the last time attention was directed towards biodiversity conservation on private land outside of a regulatory sphere.

Holmes has consistently argued that the advantage of leasehold tenure lies in its flexibility. Leases have the capability to be flexible instruments; however, prior to the Rural Leasehold Land Strategy being introduced in 2007, pastoral leases in Queensland witnessed very little change since the 1950s. There is not a straightforward distinction between freehold tenure and regulation and leasehold tenure with covenants and conditions. Rather, for many years in Queensland, leasehold tenure has had covenants, conditions and regulations. Writing of comparable legislation in Western Australia in 1999, Baston noted lease 'conditions seem only to be able to be imposed at the beginning of the lease term'. This is true but they can also be reviewed during the lease term – the opportunity to review was not taken by the Queensland government. In the event of a change in policy the government has imposed regulatory controls which override lease conditions during the lease term. This is evidenced, for example, by the 1994 amendments to the Land Act 1994 (Qld). This amending legislation prevented tree clearing without a permit. At this time many leases would still have contained a standard condition to clear land. As a basic principle of statutory interpretation the latest legislation would apply, but the 1994 Act provided: 'even if a condition of a lease

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92 Hale P and Lamb D (ed) Conservation Outside Nature Reserves, Centre for Conservation Biology (The University of Queensland, 1997).
requires clearing or destruction of trees, the lessee must still obtain a tree clearing permit before complying with the condition*.95

There may have been a renewed interest in leasehold tenure in the 1990s but there was no necessity to implement policy changes to the lease renewal process at that time. The need to implement such changes began in the following decade when pastoral leases would begin to expire: in the 20 year period from 2001 to 2021 almost half of the pastoral holdings within the State would be due for renewal.96 Accordingly in 2001 the Queensland government introduced the first discussion paper on the Rural Leasehold Land Strategy. The change was, as Dovers would describe, a ‘predictable policy window’.97

Property rights and tenure

The meaning of tenure has been established earlier in this chapter. Provision of a meaning for property is problematic and much discussed.98 Property is traditionally classified as real or personal. Real property includes land and things attached to or embedded in land. All property not classified as real property is personal property. Classification of property may change: a tree growing on land would be real property but personal property once felled. Personal property is subdivided into chattels real and chattels personal. Freehold and leasehold tenure are classified differently. Leasehold tenure is land but classified as chattels real – a lease is therefore classed as personal and not real property.99 As described by Riddall:

...it was recognised that a lease was a special form of chattel; and for this reason it was termed a “chattel real”; that is, a chattel, but a chattel which, since it relates to land, has affinities with real property.100

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95 Land Act 1994 (Qld) s 258.
96 Queensland government, Department of Natural Resources and Mines, Managing State Rural Leasehold Land; A discussion paper, 2001, 2.
Property may be regarded as an object or thing that is capable of being owned and, within law, the property rights to that object or thing. Gray and Gray argue 'that property is not a thing but rather a relationship which one has with a thing' and that the term property is a description of 'particular concentrations of power over things and resources'. In *Yanner v Eaton* (1999) HCA 53 the High Court held property 'refers to a degree of power that is recognised in law as power permissibly exercised over the thing'.

Property has long been depicted as a bundle of rights. Aligned with this assumption the essence of property is described by Bates:

...by the rights it confers; rights to enjoy, use, protect and transfer land and its natural resources; exclude or restrict access to that property; and grant access rights that are either proprietary in nature, for example, leases and profits a prendre (rights to take resources); or non-proprietary, that is, of a personal nature, such as licenses or 'permissive ' rights.

Property rights are therefore legal rights which the law protects: the right to exclude is protected by the law of trespass. As the law provides legitimacy and a procedural framework within which property rights operate and exist, it protects the rights over things and resources and acknowledges the right to control. The High Court in *Yanner v Eaton* observed that the bundle of rights concept of property might 'have its limits as an analytical tool or accurate description'. The problem, as elaborated by Hepburn, is that it treats ownership, particularly land ownership, in an abstract way not taking into account the 'social and ecological' communities which that land or resource is attached to. It defines land according to its constituent parts and thereby isolates it from the larger community.

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102 As per Gleeson CJ, Gaudron, Kirby and Hayne J J at [17].
105 *Yanner v Eaton* [1999] HCA 53 as per Gleeson CJ, Gaudron, Kirby and Hayne J J at [17].
Yet property is a ‘social as well as a legal institution’. Balancing public and private interests is complex. But legislation, such as the VMA and the LA, typically places priority on public over private interests. The purpose of the VMA is, inter alia, to regulate the clearing of vegetation in a way that conserves remnant vegetation, prevents the loss of biodiversity and maintains ecological processes. Equally, the objects of the LA require land to ‘be managed for the benefit of the people of Queensland’ having regard to sustainability. The immediate and long term purpose of each Act is therefore towards the public good. As explained by Bonyhady, this balance ‘between competing individual and collective goals, the private and the public interest’ is at the crux of understanding what is meant by property. This balance will never reach equilibrium: a law favourable to one group will be detrimental to another group. And tensions between public and private interests will be greater when there is little political and ideological alignment between private rural interests and government law makers. Rural landholders may never return to the level of influence they once enjoyed during prolonged conservative power in Queensland. Nevertheless the 2012 change to a conservative State government has tipped the scales a little towards the rural community and signals the potential for change in land tenure.

Our understanding of property is variable. As explained by Bonyhady:

The broader the concept of ownership and property - the more they are seen as involving rights without responsibilities - the more difficult it is for government to create new land use regimes without the consent of the landowner. Conversely, the more ownership and property are seen as limited rights, involving no more than the autonomy which society can afford individuals in particular contexts, the easier it is for government to constrain individuals for larger social ends such as environmental protection.

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108 Vegetation Management Act 1999 (Qld) s 3(1) (a) to (e).
109 Land Act 1994 (Qld) s4.
111 The Liberal National Party Inquiry into the Future and Continued Relevance of Government Land Tenure across Queensland is included in Chapter Nine.
Though part of an analysis on the ‘competing understandings of property,’ this dichotomy provides an apt description of the basic distinction between freehold and leasehold tenure. The Queensland government faced immense challenges in making and implementing new land management practices on freehold land. As the most extensive form of land tenure freehold is often perceived as absolute ownership, legislative restrictions on such tenure therefore have the potential to unleash considerable opposition and resentment. This is particularly the case within rural Queensland, as observed by Wilcox J:

There is no doubt in my mind that many Australians, especially those outside the major cities, draw a distinction between freehold and leasehold land which is quite unjustified in terms of law.114

This distinction might be legally unfounded but it remains apparent in rural Queensland and is evident in the process in which laws are made and implemented. There are advantages and disadvantages in this: the advantage is that it is possible to make and implement environmental laws on leasehold land with minimal opposition; the disadvantage is that it is very difficult to make and implement environmental laws on freehold land. This is exacerbated in Queensland because rural freeholders had generally unregulated property rights during the protracted conservative period. To then withdraw those rights, as with the initial vegetation regulations on freehold land, ‘is much more difficult to implement where the postulated public good does not readily coincide with the interest of title holders, and particularly if it involves some real or potential loss in capital or income values’.115 This loss in value of land is a constant contention of rural representative bodies in Queensland such as Agforce, the Queensland Farmers Federation and Property Rights Australia.116 Loss in land value was an issue which prompted calls for compensation.


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Acquisitions, restrictions and calls for compensation

Under Commonwealth legislation compensation is payable if property is acquired. The Commonwealth of Australia Constitution Act (1977) (Cth) s 51(xxxi) makes provision for the legislative powers of the Commonwealth Parliament to make laws, inter alia, providing for the acquisition of property on just terms, that is, with compensation. In Commonwealth v Tasmania (1983) 46 ALR 625 (Tasmanian Dam) the State Liberal government in Tasmania challenged the validity of the Commonwealth Labor government’s legislation that prevented the construction of a dam on the Gordon River. A majority of the High Court held that sterilisation of land use in preventing the dam was not an acquisition and therefore compensation was not payable.

Subsequently in Newcrest Mining (WA) Ltd v Commonwealth (1997) 147 ALR 42 (Newcrest), the High Court considered if property in a number of Newcrest mining leases had been acquired otherwise than on just terms in breach of s 51 (xxxii). After the mining leases had been granted to Newcrest, an amendment to the National Parks and Wildlife Conservation Act 1987 (Cth) extended Kakadu National Park to include the land subject to the mining leases with a further amendment prohibiting mining in Kakadu. A central issue in the case was the question of whether the Commonwealth government had acquired the property of the mining company. The majority of the High Court held that the Commonwealth had made an acquisition of property in terminating the mining rights. This case may be distinguished from the Tasmanian Dam case: in Newcrest, there was no other form of land use available to the plaintiffs whereas preventing the dam on the Gordon River did not prevent other forms of land use. In their analysis of the implications of ICM Agriculture Pty Ltd v The Commonwealth (2009) 240 CLR 140 (ICM), Macintosh and Cunliffe clarified the position of the High Court following Newcrest and other similar cases, they note:

117 The origin of which goes back to the Magna Carta 1215, Art 52 which made provision for individuals deprived of property. The crux of this argument was used by David Walter a non-legal agent who acted for litigants in some of the land clearing cases considered in Chapter Seven.
118 Commonwealth v Tasmania (1983) 46 ALR 625.
119 Kirby J in Newcrest Mining (WA) Ltd v Commonwealth [1997] HCA 38 at 79 noted the influence of the Universal Declaration of Human Rights (1948) on legal development within Australia. The Universal Declaration (1948) provides in Article 17 that everyone has the right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of their property.
120 Newcrest Mining (WA) Ltd v Commonwealth (1997) 147 ALR 42.
...for a law to give rise to an acquisition, it must result in either the Commonwealth (or a third party) obtaining possession and control of the plaintiff’s property, or a "correlative benefit" where the plaintiff's interest is effectively sterilised.\textsuperscript{122}

As noted by Macintosh and Cunliffe,\textsuperscript{123} uncertainty in the application of s 51(xxxi), has led to challenges by landholders following legislative restrictions imposed by environmental laws such as the VMA. The challenge to the validity of vegetation management laws in Queensland came with Bone \textit{v} Mothershaw [2002] QCA 120. This case affirmed the law in holding that a landholder is not entitled to monetary compensation following legislative restrictions. After an unsuccessful appeal in the Queensland Supreme Court the landholder made a further application for special leave to appeal to the High Court, the application was denied and this Queensland precedent remains.\textsuperscript{124}

A comparable challenge was made in New South Wales. In 2007 rural property owner Peter Spencer commenced proceedings against the Commonwealth government because of restrictions imposed on clearing vegetation on his land by virtue of the \textit{Native Vegetation Act 2003} (NSW). The essence of the claim was that the legislative restrictions amounted to an acquisition of property other than on just terms; and that the acquisition was made in furtherance of intergovernmental agreements between New South Wales and the Commonwealth.\textsuperscript{125} It was further alleged that the Commonwealth laws which authorised the agreements, being the \textit{Natural Resources Management (Financial Assistance) Act 1992} (Cth) and the \textit{Natural Heritage Trust of Australia Act 1997} (Cth), were made for the purpose of acquiring property other than on just terms and were invalid by reason of s 51 (xxxii) \textit{Commonwealth of Australia Constitution Act 1977} (Cth).\textsuperscript{126}

Before Emmet J, in the Federal Court, Peter Spencer’s case had been summarily dismissed on the basis that he had no reasonable prospect of successfully prosecuting

\begin{itemize}
\item \textsuperscript{122} Macintosh A and Cunliffe J, ‘The significance of ICM in the evolution of s 51(xxxi)’ (2012) 29 \textit{Environmental Planning and Law Journal} 314.
\item \textsuperscript{123} Macintosh A and Cunliffe J, n 122, 314.
\item \textsuperscript{124} Bone \textit{v} Mothershaw [2002] QCA 120, at the end of this case is an editor’s note which provides that the High Court refused special leave to appeal on the 25\textsuperscript{th} June 2003.
\item \textsuperscript{125} Peter Spencer \textit{v} Commonwealth of Australia [2010] HCA 28 (1 September 2010) [1].
\item \textsuperscript{126} Peter Spencer \textit{v} Commonwealth of Australia [2010] HCA 28 (1 September 2010) [1].
\end{itemize}
the proceedings under s 31A *Federal Court of Australia Act 1976* (Cth). The Full Court of the Federal Court upheld this decision. Peter Spencer applied for and was granted special leave to appeal to the High Court. His application was referred by order of Gummow, Heydon and Bell J J to the Full Court of the High Court. In the leading joint judgment of French C J and Gummow J, it was held that the proceedings in the Federal Court were not appropriate for summary dismissal.

It was apparent in the Spencer proceedings that the pleadings submitted, in particular the statement of claim, had many amendments. According to French C J and Gummow J, the statement of claim raised questions of fact about the existence of an arrangement between the Commonwealth and State of New South Wales which could be addressed within usual interlocutory proceedings such as discovery. The significance of those questions of fact were apparent to the High Court in the case of *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140, a decision which had not been delivered when the primary judge and the Full Federal Court decided the earlier hearings. In *ICM* the joint judgment of French CJ, Gummow and Crennan J J left open the question of whether a Commonwealth law may exist in an ‘informal fashion, falling short of an intergovernmental agreement’. The Court suggested that the practical operation of negotiations and funding arrangements between the Commonwealth and the State of New South Wales was not particularised, and could be invoked by Peter Spencer by further documentary discovery. The conclusion was:

> That is not to say that, even on the proposed further amended statement of claim, he has a strong case. It is sufficient to say that it is not fanciful, and therefore not a case which he has no reasonable prospect of successfully prosecuting.

The appeal was allowed with costs. The Australian Farmers’ Fighting Fund provided financial assistance in the Spencer litigation.

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127 Per Emmet J, *Peter Spencer v Commonwealth of Australia* [2008] FCA 1256 (26 August 2008) [211] - [216], s 31 A (1) *Federal Court of Australia Act 1976* (Cth) makes provision for summary judgment by providing that the court may give judgment for one party if satisfied that the other party has no reasonable prospect of success.


129 *Peter Spencer v Commonwealth of Australia* [2010] HCA 28 (1 September 2010) [4].

130 *Peter Spencer v Commonwealth of Australia* [2010] HCA 28 (1 September 2010) [4].

131 *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51 [38].

132 *Peter Spencer v Commonwealth of Australia* [2010] HCA 28 (1 September 2010) [31].

133 *Peter Spencer v Commonwealth of Australia* [2010] HCA 28 (1 September 2010) [31].

Some states have paid compensation for legislative restrictions. Yet there are strong arguments against such payments. Macintosh and Denniss contend such calls for compensation:

...are excessive and need to be balanced against the needs of the broader community. The rights to compensation in the Constitution are adequate and, in some respects, may exceed what is necessary to maximise social welfare. Expanding the rights to compensation to protect farmers' interests in land will result in a large transfer of resources from taxpayers to farmers without any notable improvement in agricultural activity.\textsuperscript{135}

The provision of pecuniary recompense following legislative restrictions has a chequered history. There remain inconsistencies and variations both between and within jurisdictions, characterised by often haphazard and political approaches to legislative change.\textsuperscript{136} Most States have avoided compensation for land use restrictions although Western Australia in the 1970s and South Australia in the 1980s made compensation payments to landowners.\textsuperscript{137} As noted by Bonyhady, Queensland was the only State to pass legislation which made provision for full compensation under the \textit{Soil Conservation Act 1986} (Qld) if a conservation plan required a landholder to implement soil conservation measures.\textsuperscript{138} This Act was made during Queensland's prolonged conservative period and marked the height of the Bjelke-Petersen reign. Provision for compensation to an 'owner' included a freeholder and also 'the holder of a lease, licence or permit'.\textsuperscript{139} As such, the Act was in keeping with other legislation of that era in treating leaseholders as owners. This statute survived the Labor period of government with little amendment.\textsuperscript{140}

\textsuperscript{135} Macintosh A and Denniss R, 'Property Rights and the Environment: Should Farmers have a Right to Compensation?' (Australia Institute, 2004) 56.
\textsuperscript{136} Bonyhady T, 'Property Rights' in Bonyhady T (ed) \textit{Environmental Protection and Legal Change} (Federation Press, Sydney, 1992) 76-78.
\textsuperscript{138} Bonyhady T, 'Property Rights' in Bonyhady T (ed) \textit{Environmental Protection and Legal Change} (Federation Press, Sydney, 1992) 60. Under the \textit{Soil Conservation Act 1986} (Qld) s 17 the Chief Executive may serve a soil conservation order requiring a landholder to take steps to improve soil conservation including preventing or mitigating erosion see further s 17 (1) (a) to (d). The Act in s 28 (1) to (3) makes provision for compensation to be payable to a person whose estate or interest in land is injuriously affected by a soil conservation plan.
\textsuperscript{139} The \textit{Soil Conservation Act 1986} (Qld) s 6 defines an owner as the person other than the Crown or a person representing the Crown who for the time being is entitled to receive the rents or profits of the land in connection with which the word is used, and includes a statutory authority and a person who is the holder of a lease, licence or permit from the Crown or a person deriving title thereunder.
\textsuperscript{140} It is beyond the scope of this thesis to investigate if any soil conservation plans have been made or compensation paid.
The just terms requirements of s 51 (xxxi) do not apply to State laws such as the VMA.\(^{141}\) The *Constitution of Queensland Act 2001* (Qld), in keeping with other State Constitutions, has no just terms provisions. The only possibility of compensation will be if policy or law make such provision. This may be a political if not a legal necessity,\(^{142}\) and may be influenced by pressure for compensation. The VMA prompted calls for compensation; the amendments to the LA, which brought about the Rural Leasehold Land Strategy, did not generate any demand for compensation from rural landholders, their representative bodies or within parliamentary debate when the amending laws were made. Because the law attaches different and more restricted property rights to leasehold tenure there is no expectation of compensation.

The VMA was passed in 1999 following the resurgence of the Queensland Labor government. The Act contained no provision for compensation. Queensland was slower than other jurisdictions to introduce vegetation management legislation and even slower to come up with any financial recompense for affected landholders. The VMA was assented in 1999, but a fiscal commitment to rural landholders did not emerge from the Queensland government coffers until 2004 when it was consistently referred to as a financial package – there was no mention of compensation. Limited and varying forms of financial assistance have accompanied some of the amendments to the VMA, the most extensive being $150 million in 2004 when political expediency dictated a newly elected government meet a pre-election promise.\(^{143}\)

In 2009, another Queensland State election year, controversial regrowth amendments came with a sum of $2 million for rural representative bodies to implement training and information on the new regulations.\(^{144}\) Beyond this sum there was no government promise of compensation or reference to schemes for financial assistance. It appeared no longer necessary for Queensland Labor to make such promises or for rural representative bodies or the opposition to demand them. This thesis demonstrates that pressure from rural landholders and their representative bodies for financial recompense following vegetation management restrictions was heightened in the initial transitory

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\(^{141}\) *Bone v Mothershaw* [2002] QCA, 120, inter alia, reaffirmed the law in holding that a landholder is not entitled to compensation following legislative restrictions this case is discussed at p201. *Burns v State of Queensland* [2004] QSC 434 followed *Bone* and is examined at p 203.


\(^{143}\) An examination of what Queensland Labor described as a financial commitment to rural landholders is provided in Chapter Four.

\(^{144}\) An examination of the 2009 amendments to the VMA is provided in Chapter Five.
stages of the legislation; and on the introduction of far reaching restrictions, such as the 2004 amendments, which brought about the end of broadscale land clearing. By 2009 the regrowth amendments were contentious but calls for monetary compensation or financial schemes were not at the forefront of debate. Political pragmatism no longer required a significant fiscal commitment. Queensland Labor secured yet another term of office in 2009, it was now ten years since the VMA had been introduced and rural landholders settled into an acknowledgment of the law that the process of time appears to foster.

The prevalence of leasehold tenure in Queensland

The potential utility of leasehold tenure to promote sustainable rural land management is enhanced by the extent of land held under this type of tenure. Leasehold land has remained the dominant form of rural land holding in Queensland. As noted by Payne in 1959, Queensland has remained ‘wedded to a policy of leasehold tenure of large areas for the protection and benefit of future generations’.

Moreover this large proportion of land held in State ownership can be linked to the predominance of regions with sparse populations, harsh climate and marginal land use. This is apparent in the map provided in Figure 2.1 below.

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Figure 2.1: The extent of leasehold tenure within Queensland

147 Copyright in this map is owned by the Queensland government, Department of Natural Resources and Mines. Permission to reproduce the map is available under a creative commons licence provided the source is attributed to the Department and the use is for non-commercial purposes such as this thesis. E-mail confirmation of this was provided by the IP/Copyright officer at the Department on the 20 August 2013. Delbessie Leases are Rural Leasehold Land Strategy leases; this name change is explained in Chapter Nine.
The graph in Figure 2.2 shows the percentage of the State that is leasehold, which is just over 66% including freeholding leases.\textsuperscript{148} Freeholding leases are unique to Queensland. Such leases are granted typically to a lessee who has elected to pay the purchase price for the land over several years. The lease will be granted for a specified purpose such as agriculture. On payment of the final installment, a deed of grant converts the lease to freehold provided the landholder has complied with the lease conditions.\textsuperscript{149} The deed of grant will be subject to all encumbrances to which the lease was subject.\textsuperscript{150} Only a small proportion of leasehold tenure is now made up of freeholding leases. Figure 2.3 provides a breakdown of leasehold tenure as a percentage of the State. This shows that freeholding leases amount to 2% of the State and most of this is made up of Grazing HomesteadFreeholding leases.\textsuperscript{151} The majority of leasehold titles, just under 45%, are Pastoral Holdings; Grazing Homestead Perpetual Leases amount to 11% and Term Leases 6%. The amount of remaining land devoted to other types of lease and licence represent a small section of the State, for example Perpetual Leases cover 0.08% of land.

Freehold tenure amounts to 24% of the State.\textsuperscript{152} In terms of the total area of land, leasehold land covers 115,247,774 hectares and freehold land 42,541,313 hectares.\textsuperscript{153} Figure 2.2 shows the small percentage of the State devoted to protected areas and State forests: being 11,843,193 hectares or 7% of land. Freehold and leasehold tenure thus account for 90% of land within the State. What happens on this vast area of privately held land has significant implications for the environment within the State, within Australia and globally.

\textsuperscript{148} Figures 2.1 and 2.2 have been compiled from Queensland government, Department of Environment and Resource Management, Land tenure statistical information. The data is noted to be accurate as at 1 August 2011. Available at http://www.derm.qld.gov.au/land_state/pdf/tenure_stats_01082011.pdf (viewed 20 December 2012).

\textsuperscript{149} Under the \textit{Land Act 1994} (Qld) provision is made for pre and post-Wolfe freeholding leases, under ss 457 and 462.

\textsuperscript{150} \textit{Land Act 1994} (Qld) ss 458 (2) and 463(2).

\textsuperscript{151} \textit{Land Act 1994} (Qld) ss 464 to 467.


Conclusion

Tenure is not a fixed doctrine rather it has emulated judicial development within the common law and the values of consecutive State administrations within the legislature. The dominant tenure in Queensland is leasehold and there is an underlying utility in this type of tenure which might prove critical for the long term sustainability of rural land. Retention of control on this vast area of State land has allowed the government to
impose legislative restrictions with little resistance from landholders. Lease instruments are characteristically regarded as flexible, but the legacy of the Bjelke-Petersen government has rendered them inert for many years in Queensland. Legislative restrictions have been introduced which have overridden lease terms. It is leasehold tenure that has proved to be adaptable rather than the instruments that stem from it.

For the two pieces of legislation central to this thesis it has proved to be less contentious and less complicated to make and implement environmental legislation on leasehold land. In part this is because the law attaches more limited property rights to leasehold tenure. It has been established in this chapter that property works within a wider and often opposing community of public and private interests. The balance between public and private rights and interests is more readily achieved with leasehold as compared to freehold tenure. With the VMA, the balance between public and private interests was considerably out of alignment, because legislative restrictions were imposed upon freehold tenure and because there was little ideological parity between private rural interests and public decision makers. An additional complication with freeholders was the expectation of and pressure for compensation following the VMA; leaseholders on the other hand made no demands for compensation following amendments to the LA. Both laws examined in this thesis aimed to address the public environmental good provided by the performance of sustainable land management practices on rural land. As demonstrated in Chapters Four and Five the making and implementation of the VMA was a complex and controversial process. Conversely, as demonstrated in Chapter Eight, the making and implementation of the Rural Leasehold Land Strategy under the LA was a relatively straightforward process.

Environmental law and policy has been dominated and shaped by the protracted political cycles and ideologies of successive governments. The early dependence on primary production and preoccupation with development remains an integral part of Queensland’s history. Land policy encouraged, and for leasehold land legally required, detrimental and unsustainable land management practices. This legacy of land degradation prompted the Goss Labor government to develop a tree clearing policy on leasehold land, which was later adapted by the Borbidge conservative coalition government. Ultimately the decision to legislate to prevent clearing on freehold land fell
to the Beattie Labor government in 1999. As the following chapter shows adjusting to a regulated regime would not be easy for those on the land.
Chapter Three: Agriculture and environmental legislation

Introduction

Agriculture is an integral part of the State of Queensland. It contributes in a substantial way to the economy and, at the same time, impacts extensively and often detrimentally upon the environment. Past land management practices within Queensland promoted broadscale land clearing primarily of native vegetation. This type of land clearance has significant implications for the environment and biodiversity and for the long-term sustainability of rural land in the State. The environmental consequences of agriculture are examined in this chapter in which it is contended that the *Vegetation Management Act 1999* (Qld) (VMA), and the *Land Act 1994* (Qld) (LA), are part of the solution to widespread land degradation. There remain, however, underlying problems in regulating agriculture which were exacerbated during the Labor period of government. Under past conservative governments in Queensland the rural community held an influential position within the State. For the most part agriculture was unregulated and rural landholders operated in a cooperative climate with an empathetic government and regulators. When Labor returned to govern in 1989, and increasingly throughout the Labor years, the influence of the rural lobby diminished. The Labor period of government in Queensland marked a significant policy shift that resulted in an increase in environmental regulation for agriculture.

The many and varied pieces of environmental legislation introduced during Labor’s administration were generally regarded as excessive and an imposition by those on the land. Association between the regulators and rural landholders became increasingly strained and was far from conducive to a practical working relationship. As a consequence, rural organizations, such as Agforce and the Queensland Farmer’s Federation (QFF), undertook an essential function in facilitating the transition to an increasingly regulated environment. If legislation is to be implemented effectively the role of education and support for landholders is crucial, not least during periods of transition. For the VMA, legislative restrictions have proved complex: amendments were often hastily introduced, frequently retrospective and, in areas such as mapping, confusing. For the LA, the lease renewal process under the Rural Leasehold Land Strategy is more time consuming and complicated than was previously the case: a new
lease is no longer a simple matter of filling in a form and paying a prescribed fee. Agforce and the QFF filled the communication void between the regulators and the regulated. A further rural association, Property Rights Australia (PRA), was formed primarily in response to discontent with the regulatory environment. The function of these three rural organisations will be examined in this chapter as the position of Agforce and QFF differs from that of PRA.

The environmental laws that potentially affect a rural landholder, in relation to the management of vegetation, are examined in this chapter. There is an abundance of laws: in the event of an environmental issue there is a tendency to make and implement a law to address the issue. For Queensland, the degradation of rural land as a result of broadscale land clearing was a cause for concern. The VMA was a specific law created to address this issue, and the LA is an existing statute upon which environmental provisions for sustainable land management were grafted. The main provisions and objects of the VMA and the LA are set down in this chapter to provide a context for the remaining thesis. The chapter also includes the many State statutes on land management that might impact upon a rural landholder together with the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC). The Federal legislation regulates the clearing of vegetation if it has an impact on matters of national environmental significance, but referrals from the agricultural sector are typically low.

The chapter concludes with an analysis of regulatory evaluation and assessment criteria in respect of environmental laws in Queensland generally and specifically for the two Acts relevant to this thesis. The proliferation of environmental laws may be of little benefit to the environment if the implementation of those laws is not evaluated and assessed, and if there is no means to measure whether any positive change has been made. There is a degree of evaluation in respect of the VMA. The Queensland government is primarily concerned with statutory effectiveness and the VMA has ultimately proved effective in reducing broadscale land clearing. However, appraisal of the LA environmental amendments has been non-existent. For example, the statutory duty of care for leasehold land was introduced in 1994 but it was neither defined nor clarified until the 2007 changes to the Act, which implemented the Rural Leasehold Land Strategy. Landholders can only demonstrate compliance with the statutory duty of
care when their lease comes up for renewal and the condition of their land is assessed under the strategy. The statutory duty of care will be introduced in this chapter and examined further, along with the strategy, in Chapter Eight. The vegetation management regulations have remained a contentious issue but any further regulatory evaluation and assessment has been avoided or shelved by the Queensland government, despite the fact that the Commonwealth government has undertaken two inquiries into native vegetation legislation. The chapter concludes with detail of these inquiries; both of which highlight the failure to engage, and the lack of trust and cooperation between State regulators and rural landholders. These inquiries draw attention to the effect of the implementation of the VMA on some individual landholders, the positioning of the three rural bodies and the absence of the Queensland government.

The environmental impact of agriculture

Agriculture is one of the world's oldest industries. It is basic to human civilisation, fundamental to human survival, and a major contributor to the economy of many nations. Yet it is also one of the principal causes of environmental degradation.¹

Agriculture is important to Queensland. Compared to other Australian States, Queensland has the largest area of agricultural land, which is around 141.4 million hectares,² and the highest proportion of land dedicated to agriculture.³ In economic terms, the contribution of agriculture is significant: the total value of Queensland's primary industry commodities for 2011-2012 was forecast at $14.69 billion, with cattle being one of the highest value industries.⁴ As most agricultural land is primarily used for livestock grazing,⁵ the rural sector, particularly the rural livestock sector, is one of the

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² Australian Bureau of Statistics, Available at: http://www.abs.gov.au/Ausstats/abs@.nsf/4641bc47ae9d0c7bca2566c470025f87/F7635F387F392374BCA256DEA0053904A0?opendocument (viewed 19 August 2010).
major contributors to greenhouse gas emissions. Approximately 40 per cent of Queensland's greenhouse gas emissions come from agriculture.

Agricultural practices within Queensland mean the State has cleared, and continues to clear, more land than the rest of Australia combined. Inevitably the land has degraded. Broadscale land clearing has primarily been of native vegetation. What constitutes native vegetation varies between jurisdictions in statutory terms. The VMA defines vegetation as a native tree or plant other than grass or non-woody herbage; or plants within grassland regional ecosystems and mangroves.

The management of native vegetation by rural landholders is of critical importance to the environment. Vegetation maintains biodiversity.

It also sustains ecological processes critical to delivering the ecosystem services that provide the life support systems for our planet. These processes and services include: forming the basis of food chains; purifying air and supplying oxygen; protecting water quality and yield; supporting forestry, agriculture and aquaculture; maintaining soil fertility and stability upon which many productive enterprises rely.

Biodiversity includes the 'variability among living organisms from all sources including terrestrial, aquatic, marine and other ecosystems and the ecological complexities of which they are part'. Typically biodiversity has three levels:

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9 Australian Vegetation Act 1999 (QLD). The NSW vegetation legislation has a wider definition: s6(1) Native Vegetation Act 2003(NSW) defines native vegetation as means any of the following types of indigenous vegetation: (a) trees (including any sapling or shrub, or any scrub), (b) understorey plants, (c) groundcover (being any type of herbaceous vegetation), (d) plants occurring in a wetland. (2) Vegetation is 'indigenous' if it is of a species of vegetation, or if it comprises species of vegetation, that existed in the State before European settlement. (3) For the purposes of this Act, 'native vegetation' does not include any mangroves, sea grasses or any other type of marine vegetation to which section 205 of the Fisheries Management Act 1994 (NSW) applies. There is no definition of native vegetation in the EPBC Act but the Commonwealth government’s Native Vegetation Framework provides a definition, which again is wider than the Queensland meaning.
Genetic diversity refers to the variation in genes enabling organisms to evolve and adapt to new conditions. Species diversity refers to the number, types and distribution of species within an ecosystem. Ecosystem diversity refers to the variety of habitats and communities of different species that interact in a complex web of interdependent relationships.\(^\text{12}\)

The 2001 Commonwealth State of the Environment report observed that clearance of native vegetation continued to be the single most significant threat to terrestrial biodiversity, the next report in 2006 noted:

The most visible indicator of land condition is the extent and quality of vegetation cover. Nationally the picture is deceptive — about 87 per cent of Australia’s original native vegetation cover remains, but its condition is variable and masks an underlying issue of the decline of many ecological communities. Some ecological communities occupy less than 1 per cent of their original extent as a result of clearing for agriculture, and many others are highly fragmented.\(^\text{13}\)

Because habitats are fragmented, isolated pockets of native remnant vegetation remain. As a consequence, rare and endangered species are limited to these remaining areas of vegetation. The 2011 Commonwealth State of the Environment report found that the condition of native vegetation is deteriorating and the rate of land clearing 'is slowing, but still averaged around one million hectares each year over the decade to 2010.\(^\text{14}\) The extensive degradation of rural land within Queensland meant that regulation was inevitable and a significant means by which long-term and widespread changes to environmentally sustainable land management practices might be obtained. There are, however, inherent problems in regulating agriculture.


Inherent problems of regulating agriculture

There are potential advantages inherent to environmental regulation. For the VMA the eventual cessation of broadscale land clearing within Queensland is long-term and widespread. It took a number of years for this effect to come to fruition: the introduction of the legislation was in 1999, but broadscale clearing did not end until 2006. The effect of the LA changes to implement the Rural Leasehold Land Strategy will initially be piecemeal and impact upon leaseholders as their lease approaches renewal, at which time their land will undergo a condition assessment. The strategy therefore has the potential to address the problem of land degradation and biodiversity loss and, ultimately, the effect could be long-term and widespread.  

There remain intrinsic difficulties with environmental legislation. As noted by Gunningham et al, one of the disadvantages of command and control regulation lies in its vulnerability to political manipulation. Chapters Four and Five demonstrate political expediency on the part of the Queensland Labor Party, as evidenced by the introduction and many amendments of the VMA; and, in Chapter Two, mention is made of political pressure from rural landholders and their rural organisations for compensation and schemes for financial assistance, particularly in the initial and more far reaching stages of regulatory control. This in turn raises the issue of the availability of public funds to meet financial adjustment costs; and ultimately leads into issues of social justice insofar as regulation inevitably places a burden on those regulated. Moreover:

Solving the inequity problem for one group would mean either reducing resources applied to other needs of society, or the community accepting the need for an increase in overall taxes to achieve social justice and environmental protection goals.

Tensions are inevitable when the price is perceived by the rural community to be borne by their sector for the benefit of society generally; and a public benefit perceived to be borne by a private cost.

15 The land condition assessment and requirements of the Rural Leasehold Land Strategy will be examined in Chapter Eight.
These tensions are exacerbated within the realms of agriculture, not least because traditionally the regulation
... of agriculture has been informal, based upon the provision of information and persuasion by government authorities, whose fundamental role has been not to police agricultural producers, but to assist them to do the right thing. 18

And further, as noted by Martin and Gunningham, it is arguable that the regulation of agriculture remains distinct with the result that:
... in Australia, as elsewhere, political power and the tyranny of distance have ensured that agricultural enterprises have rarely been subject to the same degree of detailed regulatory scrutiny and control as have come to be accepted for other large-scale resource-consuming or polluting industries. 19

The history of the agricultural community within Queensland has a unique set of circumstances and political power was at the crux of tensions between the rural community and the Queensland Labor government’s decision to regulate vegetation management.

In the past, under successive conservative governments, the rural community in Queensland had considerable political power and an influential role within the State. Under a Labor government the rural community became a marginalised group and struggled to find a voice and a place in policy decision-making on rural land. Agricultural land policy has been dominated and shaped by the protracted political cycles and ideologies of successive governments. The political environment in Queensland has been characterised by long periods of dominant one party government. For 32 years, the State had various combinations of conservative Liberal and National Party administrations. During this time rural landholders engaged with an empathetic power whose interests by and large aligned with their own. This was a period relatively unfettered by regulatory control on rural land. The Queensland Labor Party returned to power in 1989 and, aside from a two-year interlude, held office until March 2012. This Labor period marked a significant shift and increase in regulation for agriculture.

Facilitating regulation: the role of rural organisations

As noted by Martin and Gunningham, natural resource management legislation is 'fundamentally behavioural' and as such requires, in addition to the imposition of controls, a wider and 'comprehensive approach involving communication and education'.20 Facilitating the transition to regulation requires a sound working relationship between the regulated community and the regulators. As the relationship between the agricultural community and government regulators has been problematic – particularly for the management of vegetation – the role of rural bodies has been critical.

Agforce is the primary rural organisation within Queensland and is one of the many State and territory rural bodies which collectively make up the National Farmers Federation (NFF). Agforce was formed in 1997 by an amalgamation of the Cattleman’s Union of Australia, the Queensland Graingrowers’ Association and the United Grazier’s Association. Members of these three bodies supported the need for a unifying representative voice on matters of most concern to rural landholders; such matters were expressed to include, inter alia, resource management, land tenure and environmental issues.21

The management of vegetation on rural land is recognised by Agforce as a significant policy issue. According to this organisation, long-term certainty in natural resource management is necessary, but they generally do not support regulation. Rather they advocate voluntary measures.22 Agforce has played, and continues to play, an important role in assisting rural landholders to understand vegetation management legislation. It has been assisted financially by the Queensland government to undertake this work. The Agforce workshops include advice to landholders on rights and responsibilities under the regulatory scheme, the advantages of applying for a Property Map of Assessable Vegetation (PMAV) and disputing incorrectly mapped areas.23 The fact that there is an

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20 Martin P and Gunningham N, n 19, 144.
on-going need for such workshops is indicative of the continuing complexity of the legislation, and the number of times the law has changed.

Agforce also provides assistance to rural landholders affected by the Rural Leasehold Land Strategy. Government investment in the strategy began in 2006 with $19 million being allocated over a four-year period to 2010 and a further $5 million in ongoing funds. The assistance provided by Agforce ranges from one-to-one guidance to the opportunity to attend a field day. These initiatives are available to all rural landholders but if they are not members of Agforce, it seems unlikely they would attend.

As noted, Agforce receives significant financial governmental assistance. In addition to the monies provided for vegetation management workshops, the State government in 2005 founded a Blueprint for the Bush project. The Blueprint was described as a 10-year plan for the government and landholders to work in partnership. The first stage gathered input from the agricultural community. It was estimated around eight hundred people attended in various rural centres around the State. After these meetings, the then president of Agforce said:

The overwhelming message we heard from the bush from Hughenden to Emerald, from Nebo to Dalby was resounding – the bush believes the government does not trust them and is favouring a big stick approach to legislative compliance over extension and advice.

There were indications of a willingness to rectify this as the president subsequently noted. Despite being mistrustful of the government, landowners:

...appreciate that a resolution to many of the issues facing rural Queensland will require a genuine partnership and a rebuilding of the trust which seems to have been lost on both sides.

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26 Agforce did not respond to a request for clarification regarding the status of those who attended such days.
30 Kenny P, n 29, 2.
The period which saw the introduction of the Blueprint for the Bush was controversial in terms of vegetation management: in 2004, amendments to the legislation marked the phasing out of broadscale land clearing. A subsequent controversial period followed in 2009 with the regrowth amendments. In 2010 the Queensland government adopted a further model for engagement with rural and regional Queensland known as ‘Tomorrow’s regions: the Queensland government’s partnership with regional communities’. The ten-year aim for the Blueprint for the Bush was not reached but it has now been surpassed by this more recent proposal, which brings together the Blueprint for the Bush program with Regional Development Australia. The Blueprint goal of sustainability remains and is said to include the Rural Leasehold Land Strategy and environmental partnership schemes. This latter scheme is described as the Department of Environment and Resource Management’s (DERM) market-based incentive Nature Assist and Nature Refuge program. There was no mention of the Vegetation Incentive Program (VIP), in which the State government allocated $12 million as part of the 2004 VMA financial package. The VIP was discarded and merged with the Nature Assist program.

The Queensland Farmers Federation (QFF) is a relatively small organisation compared to Agforce. This body represents intensive agriculture in Queensland such as dairy, cotton, grains and horticulture. The members predominantly own freehold land. Of the 14 listed priorities for the QFF, one is the management of native vegetation. Like Agforce, the QFF conducts workshops and seminars on vegetation management legislation in addition to providing a vegetation hotline and property visits. It works collaboratively with Agforce on some workshops and receives funding from the State government. It also works alongside Agforce and the regulators in promoting education and communication on vegetation management regulations. The question was asked of QFF if the degree of support had lessened over time. The reply said: ‘no not really, we are still providing the same level of support, however it is getting harder to

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33 The Vegetation Incentive Program and a detailed account of the financial scheme is accounted for in Chapter Four.
34 Queensland Farmers Federation, Submission to the Productivity Commission 2004, 6.
36 Email correspondence in reply from the Project Officer, Vegetation Management, Queensland Farmers Federation, dated 23 May 2012.
get some farmers or farm groups to attend due to the daily pressures on-farm. It appears the legislation remains complex and that landholders may experience difficulties in devoting sufficient time to regulatory requirements.

Property Rights Australia (PRA) was formed in 2003 in response to increasing natural resource management legislation. PRA’s primary role is to assist landholders involved in land clearing litigation. This organisation is a non-profit group of rural landholders, that operates at the smaller end of agricultural production in representing individual and family operated businesses rather than larger pastoral companies. According to PRA the alliance

...was formed to seek recognition and protection of the right of private property owners in the development, introduction and administration of policies and legislation relating to the management of land, water and other natural resources.

PRA originated with a fighting fund to support the prosecuted Central Queensland grazier Ashley McKay. The majority of PRA members are Queensland based, but membership does extend beyond the State. During the period of research for this thesis the management of vegetation has remained an issue, but there have been other equally pressing concerns for rural landholders such as the advance of mining and coal seam gas companies on rural land. The implication of this for PRA is that monetary support from members is not as substantial as when the organisation was initially formed. PRA emerged because of increasing regulation and the enforcement of that regulation; its existence suggests that Agforce does not meet the representational needs of all rural landholders. Supporting members in litigation proceedings remains the domain of the Australian Farmers’ Fighting Fund and the National Farmers Federation (NFF).

As rural organisations, Agforce, QFF and PRA occupy different roles: Agforce and QFF are larger, more financially secure bodies; and government funding facilitates their communication and education role in assisting rural landholders to understand and

37 Queensland Farmers Federation, n 36.
38 Property Rights Australia, Why was PRA set up? Available at: http://www.propertyrightsaustralia.org/about/about-us/ (viewed 5 October 2012).
40 Email correspondence in reply from Joanne Rae the current Chairman of PRA dated 27 November 2012.
41 Personal communication with Joanne Rae Chairman of PRA on 14 October 2011.
42 The role of PRA in litigation proceedings is explored further in Chapter Seven. An example of the NFF supporting a NSW rural landholder from their fighting fund is the case of Peter Spencer v Commonwealth of Australia [2010] HCA 28 (1 September 2010), this case is included in Chapter Two.
comply with regulatory requirements. PRA does not appear to have sufficient funding to take on an educative role and it is unlikely it would chose to do so, being steadfastly opposed to what it regards as regulatory intrusion. Unlike the other rural bodies, PRA does not work alongside the regulators. Agforce reluctantly tolerates legislation, lobbies against some aspects of it and continues to take government funding. The instructional and communication role of Agforce and the QFF has remained significant throughout the period of this research because of the volume of environmental legislation.

The emergence and volume of environmental legislation

Most jurisdictions in Australia draft a new piece of legislation for every environmental issue. Queensland adopted this approach during the last Labor administration. The VMA and the LA are typical of environmental legislation generally in being a ‘product of crisis’. In this instance, the crisis concerned the widespread extent of land clearing and resultant devastation of rural land. The irony is that it was earlier government policy which brought about this degradation of land; in the past, governments encouraged land clearing as part of basic land management practices. Landholders who cleared were rewarded with taxation incentives. For rural freeholders, a freehold title generally meant an unfettered title to clear; for rural leaseholders, past lease conditions required the leaseholder to obtain a permit to destroy trees. Typically a lease would require the leaseholder to clear trees and sow pasture within a given period of the lease commencing.

The most marked effect of the introduction of the VMA was the imposition of legislative clearing controls on the owners of freehold land; this was a new and significant legal restriction to apply to such landholders in Queensland. Before the

45 See, for example, the standard lease condition M 80, employed by then Department of Natural Resources and Mines in the mid seventies which required: The lessee shall within five years from the date of commencement of the lease, and to the satisfaction of the Minister, develop an area of not less than. (the number of hectares would be applicable to the area of the leased land) hectares of brigalow, gidyea and associated scrubs on the holding by: a) destroying by ringbarking or otherwise in accordance with a permit granted by the Land Commissioner, such scrub in equal proportions during each year of such period and thereafter maintaining such area free from all regrowth, suckers and undergrowth; and b) burning all scarb destroyed in performance of this condition as soon as it shall be practicable and prudent to do so; and c) sowing such cleared areas to improve pasture with such grass or grasses as may be approved by the Minister. The lessee shall, within one month from the commencement of the term of the lease, apply to the Land Commissioner for a permit to destroy trees on the holding so that the performance of this condition can be undertaken.

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VMA, legislative clearing restrictions on freehold land were piecemeal and limited to very specific types of land, for example: under the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld);\(^4\) or on State watercourses which potentially required statutory approval under the *Water Act 2000* (Qld). Rural freeholders in Queensland were unused to statutory controls on what they could do on their land: a freehold title had generally meant an unregulated title. For rural leaseholders, initial and limited controls on land clearing emerged in the early 1990s and increased as the decade wore on.

**The Vegetation Management Act 1999 (Qld)**

The VMA was enacted in December 1999 but remained unproclaimed until September 2000. The purposes of the legislation changed before the law was proclaimed and the areas of protected vegetation were reduced to those classified as endangered. In 2004, other categories of vegetation came into play, and in 2009 some regrowth vegetation was introduced and protected. As with most statutes the VMA has, with the passage of time, increased in volume; during the period of study for this thesis the legislation has more than doubled in size, progressing from the Act’s inception to the latest amendments. The VMA has had 17 reprints, 23 amending Acts, and 497 amendments of which 179 have been retrospective.

In the following chapters the amendments to the VMA will be considered as they are relevant, for example the retrospective amendments of 2009 are considered in Chapter Five; and the difficulties which emanated from the inclusion, removal and subsequent reinstatement of a particular purpose of the Act will be examined in Chapter Seven as this is relevant to one of the land clearing cases considered. In order to establish the relevant provisions of the VMA, as pertinent to this thesis, the law that is set out here is the current version.\(^4\)

The VMA is the major statute that applies to the clearing of vegetation within Queensland. The exceptions are vegetation on a forest reserve or protected area under

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\(^4\) *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) s 56 (1) prohibits acts such as the destruction of a forest product (defined as a native plant) without a licence or permit.

\(^4\) *Vegetation Management Act 1999* (Qld), the latest version of the legislation is November 2011.
the Nature Conservation Act 1992 (Qld); an area declared as a State forest or timber reserve under the Forestry Act 1959 (Qld); or a forest entitlement under the Land Act 1994 (Qld). The purpose of the VMA is to regulate the clearing of vegetation in such a way that conserves remnant vegetation, that is: an endangered regional ecosystem or an of concern regional ecosystem, or a least concern regional ecosystem; and conserves vegetation in declared areas; and ensures the clearing does not cause land degradation; and prevents loss of biodiversity; and maintains ecological processes; and manages the environmental effects of the clearing to achieve all these matters and, finally, reduces greenhouse gas emissions. The purposes of the legislation are to be achieved by: the provision of codes under the relevant planning legislation (currently the Sustainable Planning Act 2009 (Qld)) relating to the clearing of vegetation; the enforcement of vegetation clearing provisions; declared areas; and particular regrowth vegetation. The precautionary principle is generally to apply to the framework for decision making in achieving the purpose of the Act. The precautionary principle is further explained in this section, by stating that the 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.

For the VMA, the term ‘environment’ includes ecosystems together with people and communities; all natural and physical resources; those qualities and characteristics of locations, places that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and their social, economic, aesthetic and cultural conditions. The implementation of this legislation therefore is an integral part of the statutory framework and, at least in theory, recognises that account should be taken of the agricultural community.

The Land Act 1994 (Qld)

The Land and Other Legislation Amendment Act 2007 (Qld) provided, inter alia, the amendments to the LA to implement the Rural Leasehold Land Strategy. This

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48 Vegetation Management Act 1999 (Qld) s 7(1) (a) (b).
49 Vegetation Management Act 1999 (Qld) s 7(1) (c).
50 Vegetation Management Act 1999 (Qld) s 7(1) (d).
51 Vegetation Management Act 1999 (Qld) s 3(1) (a) to (g).
52 Vegetation Management Act 1999 (Qld) s 3(2) (a) to (c) and (f).
53 Vegetation Management Act 1999 (Qld) s 3(2) (d).
54 Vegetation Management Act 1999 (Qld) s 3(3) (a) to (d).
legislation has remained relatively stable for long periods of time and, unlike the VMA, has not been characterised by frequent and retrospective change.\textsuperscript{55} The 2007 amendments to the LA were substantial. The strategy impacted on all rural leases due to be renewed from January 2008. Sixty-five percent of State leases would be eligible for renewal during 2007-2012.\textsuperscript{56} The strategy applies to leases on rural leasehold land for terms of twenty years or more covering one hundred hectares or more.\textsuperscript{57} Generally a term lease for rural leasehold land will be issued for thirty years.\textsuperscript{58} Lessees will be required to enter into a land management agreement that will attach to the land and bind successors in title.\textsuperscript{59} If the regulators assess the land as being in good condition, the incentive is a forty-year lease. The potential for a fifty-year lease also exists if the land is in good condition and the lessee enters into an indigenous land use agreement and/or a conservation agreement or covenant.\textsuperscript{60}

The LA remains the current legislation. It had been more than thirty years since the legislation governing leasehold land had been revisited and rewritten. The potential environmental significance of the 1994 Act lay in the introduction of a statutory duty of care, which remained undefined at this stage. In addition, the concepts of sustainability and protection were introduced as statutory objects. Sustainability is defined as: ‘sustainable resource use and development to ensure existing needs are met and the State’s resources are conserved for the benefit of future generations’; and protection as the ‘protection of environmentally and culturally valuable and sensitive areas and features’.\textsuperscript{61} The objects of the Act further emphasize the importance of improving State land for the public good and for community purposes together with consultation with community groups and efficient, open and accountable administration.\textsuperscript{62}

Accompanying the Rural Leasehold Land Strategy amendments to the LA in 2007 was a clarification of the statutory duty of care.\textsuperscript{63} The move towards sustainable rural land

\textsuperscript{55} The law as set down for the thesis therefore has remained constant – the latest version of the legislation is March 2012.
\textsuperscript{57} Rural leasehold land is defined in the \textit{Land Act 1994} as land for which leases may be issued in perpetuity or for a term of years for agriculture, grazing or pastoral purposes, it does not include reserves or national parks.
\textsuperscript{58} \textit{Land Act 1994} (Qld) s155 (3).
\textsuperscript{59} The land management agreement must be registered while the lease continues s 176 U, s 279 \textit{Land Act 1994} (Qld).
\textsuperscript{60} \textit{Land Act 1994} (Qld) s155 (4), (5).
\textsuperscript{61} \textit{Land Act 1994} (Qld) s 4.
\textsuperscript{62} \textit{Land Act 1994} (Qld) s 4.
\textsuperscript{63} The implementation of the statutory duty of care and its effectiveness in terms of promoting sustainable land management is examined in Chapter Eight.
management practices is epitomized by the duty of care concept. It has taken time for
the concept to be incorporated as an integral component of the Queensland leasehold
system. Integration required introducing a statutory duty of care as a development of the
common law duty of care. Under the common law principles of the tort of negligence,
an action may be brought for negligent actions or omissions. The common law imposes
a duty of care on all individuals to exercise reasonable care, such that their actions or
omissions do not cause foreseeable harm. The standard of care is what would be
reasonable in the circumstances. As noted by Bates, it is harm to the individual and not
the environment that is actionable at common law, even though a negligent cause of
action may also cause harm to the environment.\footnote{Bates G, \textit{Environmental Law in Australia}, (Butterworths, 2006) 187.} A statutory duty of care therefore
encompasses harm to the environment.

Only leaseholders in Queensland are subject to the statutory duty of care. Following an
Inquiry into ecologically sustainable land management, the Industry Commission
recommended that a statutory duty of care for the environment should be included for
landholders who owned or managed their land regardless of legal title.\footnote{Industry Commission, \textit{A Full repairing Lease; inquiry into Ecologically Sustainable Land Management}, September 1997, 72. The Industry Commission became the Productivity Commission; this body has evolved from the Tariff Board founded in 1921, which became the Industries Assistance Commission in 1974 and then the Industry Commission 1980s.} It would seem
advisable, as noted by the Industry Commission, if all tenures were subject to a statutory
duty of care. The effectiveness of this statutory duty will be examined in Chapter Eight.
As the means by which landholders can demonstrate compliance is when their lease
comes up for renewal and the condition of their land is assessed under the Rural
Leasehold Land Strategy. At this point it is noteworthy that the duty has been around for
almost 20 years and, until leases are renewed and in the absence of any other evaluation,
it is impossible to determine if it has contributed to any positive change.

The \textit{Environmental Protection Act 1994 (Qld)}

All rural tenures in Queensland are subject to the provisions of the \textit{Environmental
Protection Act 1994 (Qld)}. This Act sets down a general environmental duty under
which landholders must not carry out any activity that causes, or is likely to cause,
environmental harm unless they take all reasonable and practical measures to prevent or
minimize that harm. In deciding what is reasonable and practical, regard must be had to, inter alia: the nature of the harm or potential harm; the sensitivity of the receiving environment; and the current state of knowledge for the activity. The general environmental duty is applicable to environmental harm caused, for example, by pollution.

Other State legislation

The management of vegetation on rural land is primarily dealt with under the VMA and the Sustainable Planning Act 2009 (Qld); but a host of other statutes have the potential to apply depending on the nature and geography of the land. Thus in terms of vegetation management rural land may be impacted by:

- Riparian vegetation which is protected by the Water Act 2000 (Qld). Amendments to the VMA in 2004 led to a confusing overlap in jurisdiction between the Water Act 2000 (Qld) and the VMA which necessitated further amendments to the VMA in 2005;

- Declared pests under the Land Protection (Pest and Stock Route Management) Act 2002 (Qld) which provides for the management of declared pests, which include primarily feral animals and the clearing of certain plants or weeds;

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66 Environmental Protection Act 1994 (Qld) s 319 (1). s 14 of the Act defines environmental harm as any adverse effect, or potential adverse effect on an environmental value; s 9 of the Act defines environmental value as a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or another quality of the environment identified and declared to be an environmental value under an environmental protection policy or regulation.

67 Environmental Protection Act 1994 (Qld) s 319 (2) (a) to (c).

68 Gunningham and Grabosky observe that a common feature of command and control environmental legislation has been to compartmentalize different areas such as land and water into separate regulations, see Gunningham N, Grabosky P and Sinclair D, Smart Regulation: Designing Environmental Policy (1998) 39. However, as noted by Bates, (Environmental Law in Australia (8th Edition, LexisNexis, Butterworths, 2013, 612, footnote 88) Maroochy Shire Council v Barns [2001] QCA 273 suggests for Queensland that the concept of environmental harm could be applied to activities other than pollution, such as land clearing. In Maroochy Shire Council the Council had sought an injunction to restrain Barns from felling trees on his property. Subsequently the Council sought leave to appeal against a decision of Dodds J in the District Court sitting in the Planning and Environment Court. Thomas J A accepted that the appeal was premature as a final order had not been made in the original case but nonetheless dealt with the appeal and held that Dodds J had not made an error of law. Thomas J A went on to say: 'It may well be that there could be further dispute about the form of relief that is to be granted'. To date Queensland has not adopted the Western Australian approach and included destruction or damage to native vegetation as part of the definition of environmental harm, see for example s 3A Environmental Protection Act 1986 (WA).


70 Land Protection (Pest and Stock Route Management) Act 2002 (Qld) ss 3 and 4. Declared pests are defined in Schedule 2 of the Land Protection (Pest and Stock Route Management) Regulations 2003 (Qld), Class 1 pests' list more than 40 plants and include plants such as acacias not indigenous to Australia, gorse and prickly pear; Class 2 pests include more than 12 species of animals including feral pigs, deer and goats.
• Fire management which is regulated under the *Fire and Rescue Service Act 1990* (Qld), necessary firebreak clearing is also covered in the VMA;\(^1\)
• The *Coastal Protection and Management Act 1995* (Qld) which controls clearing in coastal districts;\(^2\)
• The *Forestry Act 1959* (Qld) which regulates State forests and may apply if land adjoins a forest;
• The *Nature Conservation Act 1992* (Qld) if the land adjoins a National Park;\(^3\) or
• The *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) which protects tropical rainforests in the wet tropics of Queensland, an area of land situated along the north-east coast.\(^4\)

The many and various State laws cited above cover potentially additional aspects of vegetation management. There remain a myriad of other laws that impact upon the day-to-day organization of a rural property. The purpose of this thesis is to focus on the VMA and the LA; and note that the regulatory regime may be further complicated by the fact that rural properties can be fragmented and may encompass more than one title and tenure. Thus landholders who have a whole or part of their land under a rural lease must also take into account the VMA and the requirements of the Rural Leasehold Land Strategy. Local government regulations and Commonwealth law add to these layers of legislation. At the Federal level the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC) regulates actions likely to have a significant

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\(^1\) *Vegetation Management Act 1999* (Qld) s 22 A defines firebreak as clearing that is necessary for a relevant purpose.

\(^2\) *Coastal Protection and Management Act 1995* (Qld) s 3 defines the main objects of this Act are to (a) provide for the protection, conservation, rehabilitation and management of the coast, including its resources and biological diversity.

\(^3\) A landholder cleared an area of adjoining National Park to increase pasture and facilitate the movement of cattle between two of his properties. *In R v Vincent Thomas Boyle* (2004) unreported, Queensland District Court, Vincent Thomas Boyle was prosecuted by the Queensland Environment Protection Agency under s 62 of the *Nature Conservation Act 1992* (Qld). Following a guilty plea the case went to the District Court of Queensland for sentencing as it was a prosecution on indictment. The object of the *Nature Conservation Act 1992* (Qld) is the conservation of nature, s4. Which is to be achieved by, inter alia, dedication, declaration and management of protected areas, s 5 (a) to (l), s 5(g) provides for the cooperative involvement of landholders in the conservation of nature and s 6 that the Act is to be administered, as far as practicable, in consultation with, and having regard to the views and interests of, landholders and interested groups and persons, including Aborigines and Torres Strait Islanders.

impact on matters of national environmental significance; the objects of this Act include, inter alia, the conservation of biodiversity.\textsuperscript{75}

**Commonwealth legislation: the Environment Protection and Biodiversity Conservation Act 1999 (Cth)**

The EPBC Act has the potential to impact upon rural landholders in Queensland. In 2001, land clearing was included as a key threatening process under the Act: a key threatening process being defined as a process that ‘threatens, or may threaten the survival, abundance or evolutionary development of a native species or ecological community’.\textsuperscript{76} Under the Act, once such a process is listed the Minister decides whether to have a threat abatement plan and is advised on this by the relevant Scientific Committee or other body with appropriate expertise.\textsuperscript{77} The Threatened Species Scientific Committee considered, inter alia, the Native Vegetation Framework and State legislation, such as the VMA in Queensland, and concluded that a threat abatement plan was not a feasible, effective or efficient way to abate the process.\textsuperscript{78} The Committee advised the Minister that the Commonwealth ‘should encourage and support land management quality assurance and planning mechanisms at the appropriate scales to ensure the conservation of biodiversity, especially threatened species and ecological communities’.\textsuperscript{79}

The EPBC Act regulates the clearing of vegetation if it has an impact on matters of national environmental significance. Clearing may impact upon matters of national environmental significance such as: a Ramsar wetland, a listed threatened species, ecological community or migratory species and fall within the referral, assessment and approval process of the Act.\textsuperscript{80} A Senate Inquiry into the operation of the Act noted various submissions to expand the scope of matters of national environmental

\textsuperscript{75} Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 3 (c).
\textsuperscript{76} Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 188 (3).
\textsuperscript{77} Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 270 A (1) to (4).
\textsuperscript{80} Environment Protection and Biodiversity Conservation Act 1999 (Cth) Part 3 Div 1.
significance in the legislation, one of the most prominent being land clearing.\textsuperscript{81} To date a specific trigger has not been included.

Initial analysis of the EPBC Act by Scanlon and Dyson described it as a ‘far-reaching and ambitious reform of federal environmental law’.\textsuperscript{82} Ogle acknowledged the ‘significant change’ to Commonwealth environmental laws but questioned whether the statute could directly address issues, such as the clearing of native vegetation, in the absence of a specific land clearing trigger.\textsuperscript{83} Over time the legislation has generated both criticism and support.\textsuperscript{84} A continuing criticism of the EPBC Act has been the relatively few referrals from the agricultural sector.\textsuperscript{85} Referrals under the Act are assessed in a particular category. There are 18 such categories with a specific category for agriculture and forestry. A key finding by the Australian National Audit Office, in analysing the distribution of referrals by categories, noted that agricultural referrals were low rather than high, which was unusual ‘given the impact of land clearing on listed threatened species’.\textsuperscript{86} To ascertain if this criticism is well founded an analysis of referrals and decisions made for agriculture under the EPBC Act was made.\textsuperscript{87} Figure 3.1 demonstrates there are only minor differences between referrals made and decisions made, accordingly an analysis of trends in the number of agricultural decisions made over the duration of the Act is provided in Figure 3.2.


\textsuperscript{86} Australian government, Australian National Audit Office, Referrals, Assessment and Approvals under the Environment Protection and Biodiversity Conservation Act 1999(Cth), Performance Audit No. 38 of 2002–03, 82.

\textsuperscript{87} The statistics for Figures 3.1 and 3.2 have been compiled by combining the referrals received and decisions made in the agriculture and forestry category within the yearly Annual Reports from the initial period in 2000-2001 to the latest report being 2009-2010. Available at: http://www.environment.gov.au/epbc/publications/reports.html (viewed 15 August 2012). There is no breakdown of the distribution between agriculture and forestry.
Compared to referrals in the other 18 activity categories under the EPBC Act, agriculture and forestry, as a category, has a very low level of referral. The graph in Figure 3.2 shows the level of activity is low and from 2007 to 2010 it has been exceptionally low. There have been a total of four referrals in these three periods: two were not controlled actions, one was to be taken in a particular manner and one referral became a controlled action. Over the period from 2000 to 2010 there have been a total of 58 decisions made for the agricultural sector: of these 29% were controlled actions; 28% were actions to be taken in a particular manner and 43% were not controlled.

![Figure 3.1: Trends in referrals and decisions made in agriculture and forestry category under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)](chart)

For example in the 2009-2010 period referrals included: 4 for agriculture; 68 for mining; 49 for residential development; 22 for commercial development.

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88 For example in the 2009-2010 period referrals included: 4 for agriculture; 68 for mining; 49 for residential development; 22 for commercial development.
Figure 3.2: Trends in decisions made in agriculture and forestry category under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The low level of referral activity from the agricultural sector appears set to continue. In 2002 an environment liaison officer was seconded from the Commonwealth Department of Environment and Water Resources to the National Farmers Federation (NFF) to assist rural landholders in matters relating to the EPBC Act, particularly referral and assessment and the possible need for federal approval for new activities such as land clearing. The Commonwealth government is clearly aware of the lack of referral activity in this area: the appointment of one liaison officer to cover the whole of Australia however is hardly conducive to raising awareness. To date land clearing litigation within Queensland has been under State legislation. On the ground awareness of the potential effect of Commonwealth legislation may well be limited to flying foxes and proposed dams. These are issues of concern to the rural community and, unlike other EPBC Act matters, have typically featured in the rural press. Additionally, part of the reason for the low level of referral activity might be because the EPBC Act permits

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90 Personal communication with the environment liaison officer at the National Farmers Federation on 19 August 2011.

91 For example Booth v Bosworth [2001] FCA 1453 dealt with the issue of flying foxes and The Minister for the Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190 dealt with the proposed Nathan Dam. In a personal communication with a member of the AgForward team from Agforce in 2009 I asked if measures were taken to take into account Commonwealth legislation in the vegetation management workshops, the reply was: ‘It’s all we can do to get our heads around the State legislation’.
a lawful continuation of existing land use if that use had commenced before the statute came into force in July 2000.\textsuperscript{92}

**Regulatory evaluation and assessment criteria**

As noted by Gunningham and Grabosky, in the past there was little consensus on precisely what criteria a successful regulatory strategy should have.\textsuperscript{93} They cite the most common assessment criteria as: effectiveness, efficiency and equity, noting that their 1998 research concentrated on effectiveness and efficiency.\textsuperscript{94} Gunningham and Grabosky describe effectiveness and efficiency as ‘the two criteria most likely to yield substantial results in terms of improved environmental performance’\textsuperscript{95} and, as they note, they will be the criteria of primary concern to policy makers.

There is a large suite of environmental laws within Queensland. Only two of these environmental statutes – the *Environmental Protection Act 1994* (Qld) and the *Coastal Protection and Management Act 1995* (Qld) – have detailed and easily identifiable evaluation criteria. Both Acts were administered by the former Environmental Protection Agency and are required to meet the requirements of the Queensland State of the Environment report. The report, in respect of these two pieces of legislation, must: include an assessment of the condition of Queensland’s major environmental resources; identify significant trends in environmental values; review significant environmental programs, activities and achievements; and evaluate the efficiency and effectiveness of environmental strategies implemented to achieve the objects of both Acts.\textsuperscript{96} There are no similar evaluation provisions within either the VMA or the LA.

How then does the Queensland government evaluate these Acts? With regard to the LA the following question was put to the regulators: on what criteria has the Rural Leasehold Land Strategy been or will be evaluated? The reply stated: ‘the criteria were not and have not been determined; the only thing we have is what was published in the

\textsuperscript{92} Australian Government, Department of Sustainability, Environment, Water, Population and Communities, Farming and National Environment Law, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).


\textsuperscript{96} *Environmental Protection Act 1994* (Qld) s 547 (2) (a) to (d) and *Coastal Protection and Management Act 1995* (Qld) s 166 (2) (a) to (d).
Biodiversity Strategy’.\textsuperscript{97} In respect of the VMA the same question was put to the regulators. The response explained:

> There are two key publications that evaluate the success of the vegetation management framework in achieving the objectives of the *Vegetation Management Act 1999* (VMA). These are: Supplementary Report: An analysis of Woody Vegetation Clearing Rates in Queensland; and Land Cover Change in Queensland – Statewide Landcover and Trees Study Report.\textsuperscript{98}

This is in keeping with the Queensland government’s requirement of statutory effectiveness which is ‘assessed by how well a strategy has produced or helped to produce the intended result’.\textsuperscript{99} The intended result was to significantly reduce land clearing. The legislative means to achieve this was the phasing out of broadscale clearing of remnant vegetation.\textsuperscript{100} According to these criteria, the Queensland government has ultimately met its effectiveness standard which appears to be a foremost concern.

Meeting the effectiveness standard and reducing land clearing in Queensland has been neither straightforward nor rapid. The introduction of the VMA produced a peak period of clearing, and a classic example of panic clearing, between 1999 and 2000. This was in the period between the Act being passed and subsequently proclaimed.\textsuperscript{101} Based on the Statewide Landcover and Trees Study Report (SLATS) data, in the period initially following the Act becoming law, clearing fell but then began to increase steadily between 2002 and 2003.\textsuperscript{102} The average clearing rate for this latter period was 528,000 ha/year;\textsuperscript{103} which prompted the Labor government to make further amendments to the VMA. From then on, clearing rates have declined within the State, the exception being the 2005-2006 period, when average rates of 375,000 ha/year increased to accommodate the last of the clearing permits, prior to the end of broadscale clearing in December

\textsuperscript{97} E-mail correspondence in reply from the Director, State Land Asset Management, Department of Environment and Resource Management, dated 17 May 2012.

\textsuperscript{98} Email correspondence in reply from a Department of Environment and Resource Management (DERM) policy officer, in the vegetation management unit dated 28\textsuperscript{th} October 2011.


\textsuperscript{100} *Vegetation Management Act 1999* (Qld) s 3 (2) (e).

\textsuperscript{101} Further discussion of clearing rates is included within Chapter Four as relevant to each particular amendment of the VMA.

\textsuperscript{102} The latest graphical depiction of clearing rates is in the Queensland government, DERM, Land cover change in Queensland 2009-2010, Statewide Landcover and Trees Study Report Figure 1, 1. Available at: http://www.nrm.qld.gov.au/slats/reports-spatial-products.html (viewed 16 July 2013).

In the latest SLATS data the average clearing rate for 2009-2010 was 77,590 ha/year. As noted by Macintosh the regulatory regime introduced in 2003-2004 was effective in curbing clearing, and, over time, the legislation has proved to be a ‘primary driver’ in the phasing out of broadscale clearing.

As for regulatory efficiency, according to Martin et al, it is important to differentiate between the different types of costs associated with such efficiency. They divide costs between: public transaction costs such as administration and regulatory enforcement; private transaction costs such as compliance; and exclusion costs which, in the case of land clearing, would be prohibition. For the Queensland government the question of efficiency amounts to: ‘how well resources have been used in obtaining the intended result’. How well resources have been utilized in the implementation of vegetation management legislation or the Rural Leasehold Land Strategy is difficult to assess as this is not disclosed by the regulators. This thesis has however raised the question of regulatory efficiency in Chapter Seven as part of an analysis of compliance and enforcement. It was apparent in some of the land clearing investigations and protracted prosecutions that resources were not well used and the intended result, such as a successful prosecution, sometimes not achieved.

A review of the implementation of the VMA was mentioned briefly in the Queensland Parliament in 2007. The review was undertaken by environmental consultants and took the form of a survey. It was noted that this was the initial stage of the review which sought to compile and present the views of stakeholders in a Stakeholder Consultation.

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105 The latest graphical depiction of clearing rates is in the Queensland government, DERM. Land cover change in Queensland 2009-2010, Statewide Landcover and Trees Study Report Figure 1.1. Available at: http://www.nrm.qld.gov.au/slats/reports-spatial-products.html (viewed 16 July 2013).
108 Martin et al, n 107, 7-8.
Nothing further was heard of the review until the 2009 amendments to the VMA were debated in parliament. During deliberations a Labor member noted that changes had been made to streamline the operation of the Act that had been ‘derived from the review of the implementation’. It proved impossible to locate any other information on this review within the Queensland parliamentary web site. The environmental consultants confirmed they had undertaken the review but were ‘unable to share documents or information’. Their response included the regulatory contacts for the review, one of whom replied and included the director of vegetation management at the time, noting that the director may be able to assist with the query. A further e-mail was duly sent to the director but there was no response. As an evaluation process this review is difficult to comment on: there has been no report following the survey within the public domain.

For vegetation management legislation, the Queensland government appears primarily concerned with regulatory effectiveness and the public transaction costs associated with regulatory efficiency. There are no assessment criteria for the regulated: no account is taken of private transaction and exclusion costs. Equally there is no assessment of equity, and yet equitable concerns and issues of procedural justice have been raised in Chapter Seven in the examination of the implementation of compliance and enforcement. In 2011, Gunningham undertook research with Martin on natural resource management, and gave weight to all three criteria of effectiveness, efficiency and equity. Equity was defined as: ‘showing fairness in the burden sharing among players to which we add political acceptability (which includes factors such as liberty, transparency and accountability)’. These latter factors of transparency and accountability have found resonance throughout this thesis. The Queensland government has not undertaken any further evaluation into environmental laws; but the
Commonwealth government has undertaken two inquiries into native vegetation legislation: one in 2004 and a second in 2010.

**The Productivity Commission Inquiry 2004**

The Commission holds itself out as unique among public sector institutions in having the three core principles of: independence; transparency and a community wide focus.\(^{117}\)

Their function is described as:

> ...the Australian government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed simply, is to help governments make better policies in the long-term interest of the Australian community.\(^{118}\)

The 2004 Inquiry held ten initial public hearings in major centres across the country. For Queensland this took in Brisbane and Cairns, with subsequent hearings in regional areas such as Mackay and Toowoomba. The Queensland government neither made a submission nor participated in the Inquiry beyond an initial meeting. However, Agforce, the QFF and PRA made submissions to the Inquiry on behalf of Queensland rural landholders. Common themes emerged from the submissions provided by each of these rural organisations. The areas of greatest impact of vegetation management legislation were claimed to include: an increased administrative burden; productivity loss; capital value loss; community unrest and anxiety from uncertainty with the law and deteriorating relations with government regulators.\(^{119}\) Each of the submissions provided case study examples, many based on actual properties, which provided evidence of a loss in capital value. Agforce declared it to be ‘an absolute travesty that in the lead up to the legislation being debated and subsequent to its passing through parliament there has been no assessment of the likely social and economic impacts on individuals as well as rural and regional communities’.\(^{120}\) Both Agforce and QFF stressed the complexity and costs of compliance requirements (the private transaction costs mentioned earlier) and

\(^{117}\)Australian government, Productivity Commission *From industry assistance to productivity: 30 years of 'the Commission'*; Productivity Commission, Canberra (2003) 1.


\(^{120}\)Productivity Commission Inquiry, Agforce: Submission no 54.
the layers of legislation that a landholder may be obliged to invoke in addition to the VMA.

A further criticism from the rural representative bodies was a lack of engagement in the decision-making processes that led to the vegetation management regulations. PRA noted the regulatory regime was 'not well received by landholders, primarily due to the absence of a consultative approach'. The QFF also highlighted an absence of transparency, consultation and participation. Agforce drew attention to the many rural landholders who had voluntarily spent up to two years on regional vegetation management planning committees only to have their input discarded.

Generally the Productivity Commission concluded that regulation, which banned the clearing of native vegetation, could lead to unproductive and unjust outcomes. Nearly all submissions by rural landholders from Queensland indicated that the impacts of the VMA were significantly negative. Individual landholders and other rural representative bodies, such as Queensland Cane Growers, supported this view. Submissions were made by Landcare groups in the State, some in favour of regulation and some against it. Support for a regulatory system came from the Australian Conservation Council who stressed the importance of 'transitional assistance, market measures, incentives, community education and voluntary conservation efforts'.

Overall the Productivity Commission concluded that native vegetation legislation had 'serious design and implementation deficiencies, in many cases leading to inefficient,
ineffective and inequitable outcomes'. The criticism is borne out by research undertaken on the Queensland Vegetation Incentives Program in which a similar conclusion was reached. According to the Commission wide-ranging environmental goals such as the protection of biodiversity 'are often difficult to measure with any precision. Hence, the extent of vegetation clearance is often used as a (albeit imperfect) proxy for the achievement of these goals'. The Commission cautioned that 'policies that fail to engage the cooperation of landholders will themselves ultimately fail'.

Within Queensland there has at times been a manifest regulatory failure to engage with rural landholders. This failure to engage has been apparent at the most difficult periods of vegetation management legislation: when the laws were particularly controversial and, arguably, when engagement should have been paramount. These contentious periods included the introduction of the law, the 2004 amendments, which led to the phasing out of broadscale land clearing, and the 2009 amendments which brought in controls on some regrowth. This engendered controversy within the parliamentary process. This thesis shows that the more controversial a law is, the less likely it will go through a parliamentary process as set down in State legislation and procedure. It also shows that the implementation of vegetation management regulations, especially in compliance and enforcement, has at times led to the 'inefficient, ineffective and inequitable outcomes' noted by the Productivity Commission. This has not led, as predicted by the Commission, to policy failure. The policy became law and was implemented. Instead it has generated, in some rural landholders, irrevocable harm to the regulatory relationship, a relationship that should be based upon trust and cooperation.

128 Australian government, Productivity Commission Inquiry: Impacts of Native Vegetation and Biodiversity Regulations (2004) XLVI.
129 The Vegetation Incentives Program (VIP), which was part of the Queensland government's 2004 financial package, is examined in Chapter Four.
132 This argument is examined further in Chapter Four.
133 Australian government, Productivity Commission Inquiry: Impacts of Native Vegetation and Biodiversity Regulations (2004) XLVI.
The Senate Inquiry into Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures 2010

This Inquiry received 354 public submissions and 44 confidential submissions.\(^{134}\) Public hearings were held in New South Wales, Western Australia and Queensland.\(^{135}\) This Inquiry was less extensive than that of the Productivity Commission, in terms of hearings held and the ultimate report produced. The Queensland government, in keeping with the 2004 Inquiry, did not make a submission or take any part in the hearings.

Following the Inquiry, the Senate Committee wrote to the Queensland government noting that during the course of investigations the Committee had ‘received evidence indicating significant concerns about the poor relationship between landholders and officers implementing Queensland’s native vegetation management regime’.\(^{136}\) The Queensland government was given the opportunity to respond to these and other concerns. The reply provided by the Director-General of DERM detailed the number of regulatory staff employed to administer the vegetation management policy: 140 individuals who had over 200,000 interactions with landholders between 2004 and 2010.\(^{137}\) The response further highlighted the Queensland government’s $10 million investment into raising awareness of the legislation, noting that 4800 landholders had taken part in the Agforce workshops.\(^{138}\) The Director-General concluded the government recognised ‘that in order to achieve the important sustainability outcomes through the VMA, ongoing engagement and constructive working relationships with landholders’ was required.\(^{139}\) The number of regulatory staff employed, together with the number of interactions they had with rural landholders, may be evidence of ‘ongoing engagement’ but it remains unclear if this was positive or negative engagement and, in the absence of


\(^{135}\) I attended the public hearing in Rockhampton and made a written submission to the Senate Committee primarily based upon the research undertaken in Chapter Four.


\(^{138}\) Queensland government, Department of Environment and Resource Management, letter from the Director-General in reply to the Senate Committee on Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures (2010).

\(^{139}\) Queensland government, Department of Environment and Resource Management, letter from the Director-General in reply to the Senate Committee on Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures (2010).
an insight into the purpose of the interactions, it is likewise difficult to conclude this is evidence of a ‘constructive working relationship’.

Comparable vegetation management legislation was introduced in New South Wales with the *Native Vegetation Act 2003* (NSW).\(^{140}\) This statute has been controversial and subject to legal challenge.\(^{141}\) As part of the 2010 Senate Inquiry, regional groups, such as the NSW Regional Community Survival group, voiced similar concerns to PRA in terms of lack of recognition of property rights and lack of financial compensation.\(^{142}\) The NSW Farmer’s Association, like Agforce, is a member of the NFF. Its submission was in keeping with the other agricultural representative bodies in calling for just terms compensation and a more balanced approach to vegetation management policy and law within their State.\(^{143}\) Tensions within the regulatory relationship are therefore equally apparent in NSW but there are signs of some engagement from this State government. Unlike the Queensland government, the NSW government took an active part in the 2010 Senate Inquiry. The Department of Environment, Climate Change and Water made a submission,\(^{144}\) gave oral evidence in the public hearing and subsequently supplied further information on being requested to do so by the Senate Committee. Equally the NSW government appeared to undertake consultation with relevant parties for at least two years prior to the implementation of their vegetation management legislation.\(^{145}\) The Wentworth Group provided advice that was accepted as the basis for the vegetation management regulations.\(^{146}\) Thereafter a Native Vegetation Reform Implementation Group, chaired by Ian Sinclair, and including representatives from rural

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\(^{140}\) The Act followed the *Native Vegetation Conservation Act 1997* (NSW).

\(^{141}\) For example the case of Peter Spencer considered in Chapter Two.


\(^{143}\) Australian government, Senate Committee, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (2010), submission no 236.


\(^{146}\) The Wentworth Group of concerned scientists was established in 2002, their aim being to: ‘drive innovation in the management of Australia’s land, water and marine resources; engage business, community and political leaders to find and implement solutions to the challenge of environmental stewardship facing the future of Australian society; and build capacity by mentoring and supporting young scientists, lawyers and economists to develop their skills and understanding of public policy’. Available at: [http://wentworthgroup.org/about-us](http://wentworthgroup.org/about-us) (viewed 15 April 2014).
landholders and environmental groups was formed. This group provided a report, which formed the basis of the NSW regulatory reforms.\textsuperscript{147}

By comparison the Queensland Vegetation Management Advisory Committee, established for a similar purpose by the then Premier Peter Beattie was unable to reach agreement in their recommendations to government.\textsuperscript{148} This Committee was established in March 1999. The initial VMA was introduced into parliament in December of the same year. More time may not necessarily have smoothed the progress of agreement or facilitated consensual recommendations; but it may have assuaged some of the disappointment felt by Committee members, which the hasty and politicised introduction of the VMA generated.

In addition to their submissions, both Agforce and PRA gave oral evidence to the Queensland public hearing for the 2010 Senate Inquiry. The QFF did not make a submission nor attend the hearing. Themes that had reverberated in the earlier Productivity Commission process remained relevant to both representative bodies. Agforce continued to advocate against a regulatory approach, stressed the negative impact of the regulations on productivity, the loss of property value and the extent of uncertainty caused by constantly shifting legislative regimes.\textsuperscript{149} Loss of productivity and decreasing land values were also paramount for the PRA, as too was their scepticism of the ability of the vegetation management legislation to promote sustainable land management.\textsuperscript{150} Agforce actively promoted the expansion of voluntary environmental stewardship programs, such as conservation agreements between the State government


\textsuperscript{148} The Queensland Vegetation Management Advisory Committee is considered in Chapter Four.

\textsuperscript{149} Australian government, Senate Committee, Native Vegetation Laws. Greenhouse Gas Abatement and Climate Change Measures (2010), submission no 14.

\textsuperscript{150} Australian government, Senate Committee, Native Vegetation Laws. Greenhouse Gas Abatement and Climate Change Measures (2010), submission no 7.
and rural landholders under the Queensland Nature Assist and Nature Refuge program.\(^{151}\)

In advocating voluntary environmental stewardship, Agforce aligned with their parent body, the NFF, who also support such arrangements for the conservation of native vegetation. Such stewardship programs are governed by legislation and therefore seem at odds with the anti-regulation philosophy familiar to rural representative organisations and apparent in their submissions to both the Productivity Commission and the Senate Inquiry. The difference lies in the element of choice: landholders in Queensland may choose to enter into a conservation agreement under the *Nature Conservation Act 1992 (Qld).* The VMA is a regulatory control, the *Nature Conservation Act 1992 (Qld)* a regulatory option.

**Recommendations and the potential for change**

Recommendations of the Productivity Commission in 2004 were threefold: the first was to implement regulatory best practice to include transparent processes, regulatory impact assessments and reviews of performance; the second to encourage greater private conservation effort; and the third was to clarify landholder and community environmental responsibilities.\(^{152}\) The Commission argued that landholders should bear the costs of actions that directly contribute to sustainable resource use but the wider public should bear the costs of retaining and managing native vegetation to promote ‘public-good’ environmental services such as biodiversity.\(^{153}\)

In 2010 the Senate Inquiry concluded ‘there are legitimate concerns about the impact of the current native vegetation laws upon a small group... namely landholders in rural and regional Australia’.\(^{154}\) And further that native vegetation laws remain a contested part of public policy, to the extent that there remains substantial scope to improve the operation of these laws and the lack of trust and cooperation between the regulators and the


89
This Inquiry made three recommendations: the first was for the Council of Australian governments (COAG) to re-examine native vegetation legislation; the second was for the Commonwealth to initiate, through the Natural Resource Management Ministerial Council (NRMMC), a national review to assess the impact of vegetation management regulations to include the liability of landholders for payment of rates and taxes for land no longer available for productive use; and the third was to review best practice for stewardship initiatives.

Was there any potential for change following both Inquiries? The establishment and function of the Productivity Commission is set down in the *Productivity Commission Act 1998* (Cth). Following an inquiry, a report is tabled in parliament and the Treasurer may announce the government’s decision on the report at that time or at a later date. Reports from the Commission may form the basis of future government policy, but the Commonwealth government is not obliged to act on recommendations made. The report from the Senate Inquiry, tabled in parliament in May 2010, did appear to generate some environmental initiatives. In January 2012 the Commonwealth government responded and addressed the three recommendations from the Inquiry mentioned above. The government disagreed with the first recommendation that COAG re-examine native vegetation legislation stating it had recently undertaken a review of the EPBC Act. As for the second recommendation, for a national review to assess the impact of vegetation management regulations, the Commonwealth government agreed with the policy intent of this but noted such management is ‘primarily a state and territory responsibility’. The Commonwealth government again agreed with the policy intent of the third recommendation, for a review of best practice of stewardship initiatives, noting the Caring for our Country initiative and the Environmental Stewardship Program. The utility of State vegetation management law is evident: it assists the Commonwealth government to meet its obligations under the Kyoto Protocol.

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158 Australian government, n 157, 2.
159 Australian government, n 157, 3.
160 Australian government, n 157, 4-5.

Inquiries such as that held by the Productivity Commission and the Senate must be a considerable expense on the public purse. If ultimately they do not result in significant change do they serve a purpose? According to Sloane, a former Commissioner between 1998 and 2010, the Commission has made major contributions to public policy and is preferable to ad hoc government committees particularly for contentious policy topics as it has ‘a long and consistent record of consulting, listening and receiving submissions’ and further that ‘the mere release of a well-argued and rational response to a policy problem can have an impact and stands as a permanent record’.\footnote{Sloan J, ‘How Useful is the Productivity Commission?’ (2011) 27 (1) Policy.} At best the outcomes from both investigations stands as a permanent testimony. It was apparent in the Queensland Senate hearing that those with an interest in vegetation management legislation – rural landholders, rural representative bodies and conservationists – were given a voice and the potential for local publicity for their cause. The approach to the hearing by Agforce and PRA differed and reflected the positioning of each body and those they represent. The Agforce president at the time, John Cotter, and Policy Director Andrew Wagner attended and gave evidence, but they did little to encourage their members to make a submission or attend. PRA on the other hand encouraged members to make a submission and attend the hearing. In the Queensland hearing PRA members dominated the proceedings. The then Chairman, Ron Bahnisch, gave evidence as did some of their more vocal members: Lee McNicoll, Dixie Nott and Dale Stiller. A representative from a Queensland based law firm that typically acts for rural
landholders, also gave evidence empathising with landholders the firm represent.
Capricorn Conservation Council provided the environmental voice. As noted earlier, the
Queensland government did not make a submission, nor did any representative from the
regulators attend the hearing. The Inquiry facilitated some engagement with affected
communities. But the engagement was with the Commonwealth and not the Queensland
government. It appeared those involved viewed the hearing as an appeasement: there
was little expectation that the law would change.\textsuperscript{164}

The Productivity Commission undertook its report in 2004 during the Howard Liberal
National coalition government. In Queensland at that time the Beattie Labor
government held a strong parliamentary position, and the ideological distance between
the State and federal governments was apparent. The neo-liberal anti-regulation
philosophy of the Commonwealth government and the Productivity Commission in
Canberra was clearly at odds with a State Labor Party in Queensland. Writing of the
Commission’s immediate predecessor, the Industry Commission, Hamilton has
observed:

\begin{quote}
Its views on almost every issue referred to it were formed on the basis of a well-
defined and all encompassing ideology, that of neo-classical economics and its
policy interpretation know as economic rationalism.\textsuperscript{165}
\end{quote}

The Senate Inquiry took place in the first part of 2010, at which time Labor held office
in both federal and State government. The two Labor senators on the Inquiry supported
the final recommendations, but diverted responsibility for the regulations and claimed
the Howard government had pressured the Queensland Labor government to pass native
vegetation legislation. There is some truth in this assertion, although Peter Beattie
recognised the utility of ending broadscale land clearing as a pre-election promise in
1999. The reticence of the Queensland government to play an active role in either
Inquiry was apparent.

\textsuperscript{164} This was clear in the evidence given and in personal communications with attendees at the hearing.
\textsuperscript{165} Hamilton C, ‘The Resources Assessment Commission: Lessons in the Venality of Modern Politics’ in Dovers S &
Commission has developed from the Tariff Board founded in 1921, which became the Industries Assistance
Commission in 1974 and then the Industry Commission 1980s.

92
Conclusion

Rural land management policy and practices in Queensland have led to extensive degradation of land. This has been aggravated by the extent and predominance of agriculture within the State. Environmental regulation was inevitable and a significant means by which long-term and widespread change might be obtained. However the resulting proliferation of environmental laws, and the innate and continuing complexities of regulating agriculture, challenged the Labor government, the regulators and those regulated. The move to a statutory regime has been made easier by rural organisations such as Agforce and the QFF: both bodies act as paid agents of the government to facilitate the transition to regulation. The position of these two bodies differs from that of PRA. This alliance was formed amidst a groundswell of opposition against ever-increasing legislation: it fills a void within Queensland that is not met by either Agforce or the QFF.

This chapter introduced the two pieces of environmental legislation central to this thesis: the VMA and the LA. Divergence between the Acts is apparent within the realm of change. For an Act that was promised by the Labor government to bring certainty, the VMA has been characterised for ten years by continuous amendments, many of which were retrospective, and by the removal and reintroduction of a significant purpose of the Act. The LA remained unchanged for a long period of time: a new Act was passed in 1994 following a thirty year hiatus and amended in 2007 with the Rural Leasehold Land Strategy. Both statutes were part of the many environmental laws that characterised the period of Labor government within Queensland. Evaluation of such laws is piecemeal and lacks consistency. For vegetation management legislation the government is primarily concerned with regulatory effectiveness and the public transaction costs associated with regulatory efficiency – there is no assessment of equity. For the LA, an evaluation process is yet to be determined and is currently stalled by the 2012 change in government in Queensland. A consistent, transparent and accountable evaluation framework would be beneficial to all parties and the environment. A fundamental purpose of this thesis is to examine how environmental laws are made and implemented. This chapter has set down the statutes pertinent to this research to provide a context in which to examine the introduction and many amendments to vegetation management regulations, which form the basis of the following two chapters.
Chapter Four: Environmental law making in Queensland –
the Vegetation Management Act 1999 (Qld)

Introduction

This chapter examines environmental law making in Queensland and, in so doing, concentrates on the Vegetation Management Act 1999 (Qld) (VMA). A fundamental task of this study is to examine how environmental laws are made and implemented. This chapter asks the question: how was the VMA made, implemented and amended from the introduction of the legislation in 1999 to 2008? This particular environmental law was enacted within a heightened and hurried political context. The Queensland Labor government persistently promised that the VMA would bring certainty to rural landholders and protect the unique biodiversity of the State. This chapter demonstrates, however, that the effect of the political machinations underlying the VMA contributed to considerable uncertainty amongst some landholders; and, rather than conserving the land, delay in the proclamation of the VMA generated a peak period of land clearing. A sequential examination of vegetation management legislation in Queensland is provided here and consideration is given to the more significant and controversial periods of the VMA including: the introduction of the Act in 1999; the 2003 amendments that launched a retrospective moratorium on land clearing applications; the 2004 amendments which facilitated the phasing out of broadscale land clearing and provided a financial package for rural landholders; and further retrospective amendments in 2008.1 Because of the significance of the political circumstances in which these laws were made, consideration is also given to the following question: what were the parliamentary processes of the Queensland parliament and the political context under which the VMA was made and implemented?

The beginnings of vegetation management in Queensland

An essential role of the legislature ‘is to create laws that are clear and accessible to those most affected by them’.2 As explained by the Queensland government:

1 The extensive 2003 amendments to the compliance and enforcement provisions of the legislation warranted separate analysis which is included in Chapter Six.
Well-drafted laws, which can be expected to result from an appropriate preparation period, bring other rewards to government and the community generally. They are easily understood (and so generally attract a higher level of compliance because people better understand what the law requires of them) and offer certainty in their application.3

The reality however, as evidenced by the VMA is that laws, and especially environmental laws, reflect their political nature and the preoccupations of the dominant political party. Vegetation management legislation for freehold land began in Queensland in December 1999 when the Labor Premier at the time, Peter Beattie, reminded Parliament of his pre-election promise: to introduce vegetation management legislation to protect land from unsustainable clearing and land degradation in order to ‘protect our unique biodiversity and give certainty to our farmers’.4 The election promise was to be fulfilled by the VMA. From 1999 to 2008, the VMA has been amended every year apart from 2001, and sometimes up to three times in a given year.5

The Act has been controversial from the outset, with the most significant and contentious amendments being made in May 2004. These amendments heralded the phasing out of broadscale land clearing in Queensland by December 2006. By 2008 the Labor government had resorted to passing retrospective amendments to the Act.

The Vegetation Management Advisory Committee

Prior to the passing of the VMA in March 1999, a Vegetation Management Advisory Committee (VMAC) was established by the Beattie administration. The Committee was independently chaired by John Holmes.6 Various groups were represented including: from the rural sector, Agforce and the Queensland Farmers Federation (QFF); from the environment sector, the Queensland Conservation Council and the World Wide Fund for Nature and Landcare; from local government, the Local Government Association of Queensland Parliament, The Queensland Legislation Handbook: Governing Queensland, Policy development of a government Bill, cl 2.9


6 Emeritus Professor John Holmes, Department of Geographical Sciences and Planning, University of Queensland kindly discussed his role as Chair of VMAC on 15 July 2008 and provided his extensive file of documents compiled during the existence of the committee. This section on VMAC has been written based primarily on the contents of that file.
Queensland; and, from the development sector, the Urban Development Institute of Australia. The Committee had seven meetings between March and November 1999. During this period more in-depth research was undertaken by working groups that concentrated on specific areas such as freehold tenure and incentives.

The VMAC was to advise the Minister for Environment and Heritage and Natural Resources on:

'The necessity for, and if agreed upon, the development of interim arrangements for tree clearing on freehold land to maintain productivity and sustainability of the land, and to protect and maintain environmental values of the landscape, particularly the biodiversity and conservation status of regional vegetation communities.'

Though the initial brief was to establish an interim vegetation management policy, it transpired that Premier Beattie intended to introduce a new statute before the year expired. Committee members sought expert opinions and feedback from a wide range of sources including individual landholders and national and regional environmental groups.

Divergence of views within the Committee was greatest between the environmentalists, represented by the Queensland Conservation Council, and the landholders, represented by Agforce and the QFF. The environmentalists put forward their fundamental requirements of a vegetation policy which included: the maintenance of biodiversity; sustainable land use; regional guidelines, planning and rigorously enforced penalties. For landholders the imposition of statutory regulation on freehold land was unwelcome but recognized as inevitable. Their main concerns centered on: the need for adequate data on which to base decisions; a preference for regional and self-regulatory vegetation management and compensation.

9 McGowan G, Update on the first skirmish The Grazier, (April 1999) 3. Gus McGowan was the United Graziers Association representative on VMAC.
Divergence between the environmentalists and the landholders was reflected in the final draft policy submission by the VMAC to the Minister in November 1999. Despite general agreement with much of the policy, there remained significant areas of dispute regarding proposed statutory requirements in relation to: of concern remnant regional ecosystems; not of concern remnant regional ecosystems and regrowth. There was only one area on which the Committee was unanimous on clearance and this was that no clearing should occur in areas of endangered remnant ecosystems.

As for the three issues of disagreement, the first issue was that the landholders favoured a regional policy which took account of regional circumstances in relation to of concern remnant regional ecosystems, whereas the environmentalists favoured no clearing. The second difference of opinion centered on not of concern remnant regional ecosystems. Here the environmental groups proposed an interim 80% retention moving to no clearing by 2003; whereas the landholders advocated clearing until it threatened the threshold 30% retention. The third issue concerned regrowth which was particularly divisive despite additional efforts by the Regrowth Working Group. The environmentalists wanted no clearing of high environmental value regrowth, including of concern regional ecosystems and recommended clearing on not of concern regional ecosystems be progressively reduced; the landholders did not agree to any interim

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12 For the purposes of the Tree Clearing Policy submitted to the Minister, the following definitions were employed: endangered regional ecosystems were those with less than 10% of their original extent remaining or between 10-30% original extent and less than 10000 ha in area; of concern regional ecosystems had 10% to 30% of their original extent remaining or greater than 30% but less than 10000 ha in area; not of concern regional ecosystems refers to regional ecosystems with greater than 30% of their original extent remaining. A definition of regrowth was not provided pending resolution of this as a key policy issue. For the purposes of the VMAC remnant vegetation was vegetation mapped as such by the Queensland Herbarium.
14 VMAC, (1999) Report on Interim Tree Clearing Policy for Freehold Land, Table 2 – Application of regulatory arrangements to of concern regional ecosystems. Evidence was put to the VMAC by the Queensland Herbarium that species loss accelerates as habitat falls below a 30% threshold. This was backed by significant peer support but the landholders required further corroboration, 15-16. Utilising a regional policy was consistently promoted by Agforce but never adopted in the legislation. Some clearing is still allowed under the legislation, for example clearing on Category X areas, see p 164.
15 VMAC, (1999) Report on Interim Tree Clearing Policy for Freehold Land, Table 3 – Application of regulatory arrangements to not of concern regional ecosystems. Currently the legislation refers to ‘least concern regional ecosystems’ this is defined in s22LC as remnant vegetation where more than 30% of the pre-clearing extent of the regional ecosystem and more than 1000 ha. It appears that the 30% guideline advocated by the Queensland Herbarium (noted in the footnote above) has been adopted. Section 99 of the current Act stipulates that from the 8 October 2009, a reference in an Act or document to a not of concern regional ecosystem is, if the context permits, taken to be a reference to a least concern regional ecosystem. Not of concern regional ecosystems were in the original Act, but removed when the Act was proclaimed in September 2000 and were reinstated in 2009. This is noted in the subsequent section in this thesis: Further retrospective amendments – The Vegetation Management Amendment Act 2008 (Qld). This retrospective amendment was to clarify definitions and to validate retrospectively all past decisions of the courts affected by those definitions, see p 116.
controls but were prepared to consider longer term arrangements.\textsuperscript{16} The inability to agree on proposed definitions, in particular that of high environmental value regrowth was fundamental to this area of disagreement.\textsuperscript{17}

During its short existence the VMAC operated as a central hub into which many varied and competing interests were included. The extent and diversity of interests canvassed however, necessarily meant that consensus for the Committee would be difficult to achieve. More time may not necessarily have facilitated agreement but it may have alleviated some of the frustration, on the part of those who had expended much time and effort, which the precipitous introduction of the VMA generated.\textsuperscript{18}

**Environmental law making in the Queensland parliamentary process**

The parliamentary political system inherited from England traditionally dictates an Upper and Lower House, a convention to which Queensland initially adhered. However, tensions between the two Houses occurred from time to time and came to a head early in the twentieth century.\textsuperscript{19} During this period it became commonplace for the primarily non-Labor Legislative Council or Upper House to veto the Labor government's proposed legislation and, unlike other states, no effective means of resolving deadlock between the two Houses of Parliament existed.\textsuperscript{20} The Labor government of Ted Theodore accordingly brought in new members into the Legislative Council with the purpose of ensuring its downfall, which came in 1922.\textsuperscript{21} This unique constitutional reform made Queensland the only unicameral parliament within the Australian states.\textsuperscript{22}

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\textsuperscript{16} VMAC, (1999) *Report on Interim Tree Clearing Policy for Freehold Land*, Table 4 – Application of regulatory arrangements to regrowth. Regrowth was not included in the original legislation but became controversial when it was introduced in 2009 with the *Vegetation Management (Regrowth Clearing Moratorium) Act 2009* (Qld) this is examined at p 134.

\textsuperscript{17} The environmental groups accepted the Queensland Herbarium definition of high environmental value regrowth as: regrowth that falls within the pre-clearing extent of endangered and of concern polygons; intersects with the State Land and Tree Landcover data to satisfy cover criteria; and is in an area larger than 20 ha, VMAC, (1999) *Report on Interim Tree Clearing Policy for Freehold Land*.

\textsuperscript{18} This was apparent in the interview with John Holmes and in a personal communication with Imogen Zethoven a VMAC member in July 2008. As a result of the outcome of this Committee Ms Zethoven moved into a different sphere of environmental campaigning.


\textsuperscript{21} Murphy D, n 19, 110-116.

\textsuperscript{22} Unicameral parliaments also operate in the Australian Capital Territory and the Northern Territory.
The effect of this, as illustrated by the VMA, is that a majority government may push through statutory reform without heed to divergent interests either within or beyond the confines of the Legislative Assembly. There is a long tradition in Queensland for premiers – regardless of party – to ‘have been largely able to disregard parliament’ which has resulted in the ‘decline of parliament in this State, not only in the gradual but insidious debasement of the level of rhetoric and debate but, most importantly, in parliament’s role of watchdog over the executive and its administration’.23

The role of executive government is significant within the realms of law making. There will necessarily be different forms of relationship between the executive and legislative functions of government;24 and legislatures will operate in different ways.25 But the traditional foundation of the legal system, with its adherence to the separation of powers doctrine, is all too often a remote ideal. As a model system of government put forward by Montesquieu, the three powers are distinctive and include the power to make law (by the legislature), the power to administer law (by the executive), and the power to interpret law (by the judiciary).26 This distinction is promoted in the interests and protection of basic human rights which, advocated Montesquieu, would more than likely be secure if all three powers remained separate.

The powers of government are not so neatly distinguished, the legislative and executive functions are connected and, under the accompanying doctrine of responsible government, the executive should, at least in theory, be accountable to the legislature. In practice, control lies with executive power and executive dominance continued in Queensland throughout the Labor administration. This is not unusual in a Westminster system of parliamentary government in which, according to Olson, ‘the 90 per cent rule applies, with 90 per cent of legislative activity being initiated by the executive, which gets 90 per cent of what it wants’.27 Research on legislative process in 1990 concluded that the Queensland Legislative Assembly: ‘met relatively infrequently, allocated relatively little time for scrutiny activities and continued to be dominated by executive

24 King A, ‘Modes of Executive- Legislative Relations; Great Britain, France and West Germany’ (1976) 1 Legislative Studies Quarterly, 12 to 16.
control'. In 2008 Ransley similarly observed that parliament continued to be ‘controlled and manipulated by the executive government and limited in its capacity for independent review.'

In a bicameral parliamentary system, an Upper House - if a genuine house of review - is potentially an effective means of ensuring appropriate and democratic checks and balances. In the absence of an Upper House, a means of reviewing legislation in the Queensland parliamentary process fell, during the period of research for this thesis, upon the Scrutiny of Legislation Committee (SLC). This committee was established by the Goss government in 1995 under the Parliamentary Committees Act 1995 (Qld). It was one of the statutory committees operating within the Queensland Legislative Assembly during the period of research for this thesis. Such committees were made up of seven members, four from the government and three from the opposition. The parliamentary committee system therefore in Queensland was a self-governing one. The role of the SLC provided an insight, not only into the origins and subsequent amendments of the VMA, but also into the workings of the Queensland parliament.

Martin et al note the importance of sound regulatory principles in law making and cite the regulatory process in Queensland as:

...a local example, with its ‘fundamental legislative principles’ being incorporated into the Legislative Standards Act 1992 (Qld). These establish broad principles of justice, supported by a parliamentary committee (the Scrutiny of Legislation Committee) to check draft legislation for conformity to these principles.

29 Ransley J, 'Illusions of reform: Queensland's Legislative Assembly since Fitzgerald' in Aroney N, Prasser S and Nethercote J R (ed), Restraining Elective Dictatorship: the Upper House Solution (University of Western Australia Press, 2008) 259. Influence on executive government, and the laws ultimately made, is all too frequently negotiated outside the parliamentary arena with minor political parties such as the Greens, this is discussed further in Chapter Five.
30 In 2011 this Committee was replaced with seven portfolio committees under the Parliament of Queensland (Reform and Modernisation) Act 2011 (Qld). The relevant portfolio committee for land and vegetation management would now be the Environment, Agriculture, Resources and Energy Committee. In keeping with the operation of the former SLC the new committee will examine the policy to be given effect by the legislation and the application of fundamental legislative principles. The law which governs the functions of the new committee remains the same but the focus of the Committees has become more specialised. A further change in regulatory process within Queensland was introduced by the Bligh government in 2011 with the regulatory assessment statement (RAS). Previously statements were required for significant subordinate legislation if proposed new laws imposed appreciable costs on the community or part of the community. Now all significant regulatory proposals for both primary and subordinate legislation will require an RAS to ensure costs and benefits associated with making the legislation are fully assessed. The RAS process therefore was not relevant to the period of research.
31 Parliament of Queensland Act 2001(Qld) s 81.
As this thesis shows there is a considerable gap between regulatory principles and processes as set down in legislation and parliamentary drafting guidelines and the realities of how controversial laws, such as the VMA, are made within Queensland.

In keeping with the inherited Westminster system, parliamentary procedure within Queensland requires that proposed legislation pass through first, second and third readings in the Legislative Assembly. Every Bill introduced into Parliament must be accompanied by Explanatory Notes, either when the Bill is tabled or prior to the second reading debate.\textsuperscript{33} At the close of the second reading speech the debate should be adjourned for 13 whole calendar days unless the Bill is urgent.\textsuperscript{34} During this period the SLC examined both the Bill and the Explanatory Notes.

There is a statutory requirement that the content of Explanatory Notes meet certain criteria.\textsuperscript{35} Thus the Notes should include a statement of policy objectives and how they will be achieved; any alternative means of achieving the policy objective; an assessment of administrative costs; an assessment of the consistency of the proposed legislation with fundamental legislative principles and reasons for any inconsistency; the extent of consultation carried out; and an explanation of the purpose of each clause and its relation to Commonwealth legislation.\textsuperscript{36} A reason for non-inclusion must be given if the Explanatory Note does not include any of this required content.\textsuperscript{37}

The purpose of the SLC was to consider the application of fundamental legislative principles and the lawfulness of proposed legislation.\textsuperscript{38} Fundamental legislative principles being defined as those principles that ‘underlie a parliamentary democracy based on the rule of law’\textsuperscript{39} and ‘include requiring that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament’.\textsuperscript{40} The Legislative Standards Act 1992 (Qld) goes on to list certain criteria in the consideration of whether the proposed new laws have sufficient regard to rights and liberties, including whether

\begin{footnotes}
\footnote{\textit{Legislative Standards Act 1992 (Qld)} s 22 (1).}
\footnote{Queensland Parliament, The Queensland Parliamentary Procedures Handbook: Governing Queensland, 2000, cl 7.7. There is no definition of an urgent Bill only recognition that the normal parliamentary procedures may be suspended to allow such a Bill to pass through the relevant stages in a given time, c 17.15.}
\footnote{\textit{Legislative Standards Act 1992 (Qld)} s 23.}
\footnote{\textit{Legislative Standards Act 1992 (Qld)} s 23 (1) (a) to (i).}
\footnote{\textit{Legislative Standards Act 1992 (Qld)} s 23 (2).}
\footnote{\textit{Parliament of Queensland Act 2001 (Qld)} s 103.}
\footnote{\textit{Legislative Standards Act 1992 (Qld)} s 4 (1).}
\footnote{\textit{Legislative Standards Act 1992 (Qld)} s (2) (a) (b).}
\end{footnotes}
the legislation ‘is consistent with the principles of natural justice’.41 It is worthy of note
that the SLC was required, as a benchmark, to have ‘sufficient regard’ to essential
legislative principles. Its role therefore, was one of recommendation to parliament.
Having analysed proposed new legislation the Committee reported back to Parliament
in a weekly Alert Digest report and any questions raised by the Committee should then
be determined by Parliament.42

The SLC noted, on the introduction of the VMA, that an urgent report ‘was considered
necessary because of the Minister’s apparent intent to have the Bill debated during the
same sitting week’.43 The report produced by the Committee, and tabled in Parliament
two days after the Bill was introduced, considered the question of whether the proposed
statute had sufficient regard to the rights and liberties of individuals and in so doing
listed many concerns.44

A prime concern of the Committee was the proposed regulation of clearing on freehold
land. The Committee acknowledged that the traditional expectations of a freeholder had
been increasingly eroded within common law countries and that rural freeholders were
subject to ever increasing regulatory controls.45 Accordingly, the Committee referred to
‘Parliament the question of whether the restrictions and liabilities which this Bill
imposes upon owners of freehold land have sufficient regard to the rights of
landholders, their neighbours, contractors and the community’.46 Other areas of concern
included the substantial increase in penalties for unauthorised clearing and, importantly,
that the Explanatory Notes did not address the issue of the Bill’s compliance with
fundamental legislative principles.47 One of the pivotal purposes therefore of the SLC –
the consideration of fundamental legislative principles – was not included in the notes
and the Labor government gave no explanation for this.48

Within the Queensland parliamentary process it is open to the relevant minister to
correspond with the SLC, who may then reply in the final part of their report. In this

41 Legislative Standards Act 1992 (Qld) s 3(a). The criteria are set down in sections (a) through to (k).
42 Queensland Parliament, Legislative Assembly of Queensland, Scrutiny of Legislation Committee, Annual Report,
45 Queensland Parliament, n 43, 2.
47 Queensland Parliament, n 43, 3.
48 Queensland Parliament, n 43, 4 - 8.
49 This is contrary to the requirements of: Legislative Standards Act 1992 (Qld), s 23 (1) (f) and s 23 (2) and
Parliament of Queensland Act 2001 (Qld) s 103.
instance there was no ministerial correspondence with the Committee.\textsuperscript{49} The statutory committees operating within the Queensland Legislative Assembly are generally entitled to a response from the relevant minister following submission of a report; the SLC was an exception however, and did not have the benefit of this statutory obligation.\textsuperscript{50}

The Beattie government seemingly gave no regard to the report on the VMA prepared by the SLC. The report was tabled in the final stages of the second reading debate and referred to by just one member of the opposition.\textsuperscript{51} Prior to the final vote on the Bill there was no response by any government members to the concerns of the Committee. In the opinion of a member of the Committee at the time: Independent member for Gladstone, Liz Cunningham:

The government just wasn’t interested in giving any credence to the concerns raised by the Committee in relation to vegetation management. They were on a political vendetta and nothing was going to stop or constrain their direction.\textsuperscript{52}

Yet the purposes of Queensland parliamentary committees are supposedly to ‘effectively enhance the democratic process by taking the Parliament to the people and giving them a role in its operation’.\textsuperscript{53}

A basic governmental function is to scrutinize new legislation; a lax attitude towards scrutiny is a shortcoming not limited to Queensland. More established and bicameral parliamentary systems appear to be equally adept at steering statutes through the parliamentary process without adequate scrutiny. In the case of the British House of Commons:

... the more important and controversial the bill, the less likely is parliament to play a creative part in its scrutiny. The result is a mass of hastily considered and badly drafted bills, which often later have to be revised.\textsuperscript{54}

\textsuperscript{49} Queensland Parliament, n 43, 8.
\textsuperscript{50} Parliament of Queensland Act 2001 (Qld) s107.
\textsuperscript{51} Queensland government, Legislative Assembly, Vegetation Management Bill, Second Reading, 10 December 1999, 6339 per Lavarch L, as Chair of the Committee tabled the Alert Digest report at 3.07 pm, voting on the Bill was guillotined at 4.43 pm. Available at: http://parlinfo.parliament.qld.gov.au/ixysquery/e9ef4009-94bd-40fd-bd1e-2bedb982b8f9/1/doc/991210b2.pdf?xml=http://parlinfo.parliament.qld.gov.au/ixysquery/e9ef4009-94bd-40fd-bd1e-2bedb982b8f9/1/hilite (viewed 1 February 2009).
\textsuperscript{52} E-mail correspondence in reply from Liz Cunningham Independent member for Gladstone, dated: 19 June 2008.
This problem may well arise because of the practical difficulties of reconciling parliamentary procedures designed in the nineteenth century with current governmental needs. In this particular instance however, the failure to perform their legislative role lies squarely with the Queensland Labor government. The SLC efficiently discharged its role insofar as limited time and a lack of crucial information allowed.

A controversial introduction – The Vegetation Management Act 1999 (Qld)

The proposed VMA generated a great deal of controversy amongst rural landholders and their representative bodies, such as Agforce, who warned of a rural backlash, not least because of the economic impact of the legislation. The then opposition leader Rob Borbidge fueled the argument at every opportunity by contending that ‘any attempt to impose limits on freehold land use was akin to declaring war on the bush’. Some landholders reacted by clearing land in anticipation of the foreshadowed legal restrictions and environmental groups, such as the Queensland Conservation Council, urged the government to legislate to end panic clearing. The Labor government duly began the statutory process. Arguments started in the media were echoed by opposition members in parliament and predominantly concerned, on behalf of landholders, the inviolability of freehold tenure and the necessity of adequate compensation for potentially devalued land. The VMA was introduced into the Queensland Parliament alongside a raft of other proposed statutes and amid allegations from the opposition of undue haste and improper usage of parliamentary procedure. Certainly the Beattie administration utilised the guillotine process and channeled through a bundle of Bills prior to the end of the 1999 December sitting. Within the last three days of the final

56 Ransley J, ‘Illusions of reform: Queensland’s Legislative Assembly since Fitzgerald’ in Aroney N, Prasser S and Nethercote J R(ed), Restraining Elective Dictatorship: the Upper House Solution (University of Western Australia Press, 2008) in which Ransley concluded that parliamentary reforms in Queensland, following the Fitzgerald report and recommendations, had failed to provide true scrutiny of government action and, as found in this thesis, the SLC did ‘perform scrutiny functions, but often to very little effect in terms of government response’ 256 and 259.
weeks sitting period, the Labor government ushered eleven Bills, including the VMA, through parliament.62

Parliamentary debate on the introduction of the VMA was vigorous, at times vitriolic and frequently emotive. Premier Beattie expressed his disappointment that the VMAC were unable to reach agreement prior to the introduction of the VMA.63 The National and Liberal Party opposition members expressed their disappointment that the VMAC report and the Department of Primary Industries (DPI) Tree Clearing Report were not made available for consideration either before or during the parliamentary debate. Premier Beattie ensured the Tree Clearing Report’s confidentiality by taking it to Cabinet as an example of agency capture, a move, according to the opposition leader at the time, which meant the far reaching impact of the laws on landholders, would remain suppressed.64 Clearly the report, produced by the government’s own department, did not align with the aims of the Labor government and taking it to Cabinet ensured it would not be subject to freedom of information requirements for thirty years.65

Opposition members also lamented, because of the use of the guillotine procedure, that time was not available for adequate debate, including any deliberation on the clauses of the proposed legislation.66 Such derision is typical of opposition parties. Nevertheless, debate within parliament and consultation with landholders was curtailed, and the ill-feeling and frustrations generated by the introduction of this legislation was generally conveyed by the opposition and summed up by one Independent member who observed that ‘no time was allowed for the Bill to be scrutinized by the very people who will be constrained by it’ nor even for those members representing rural constituents to have an opportunity to speak.67

65 Freedom of Information 1992 (Qld) s 36 (1) (a).
Uncooperative federalism prevailed and exacerbated the divisions in the inevitable clash between the Queensland Labor government and the Liberal National Coalition government in Canberra. In 1999 the Commonwealth government commissioned the Australian Bureau of Agriculture Resource Economics to assess details of the effects of tree clearing restrictions on agricultural production and greenhouse gas emissions. The Commonwealth government accused the Queensland government of failing to cooperate with this endeavour; the Queensland government accused the Commonwealth of failing to contribute to a compensatory financial package that a change in the law might require.

During the period in which the VMA was presented in parliament the Queensland government evaded a firm financial commitment for landholders affected by the VMA: there was nothing during the parliamentary debates from Premier Beattie or his Minister to indicate any monies were available in the Queensland public purse for monetary compensation. The only reference to a financial commitment on the part of the Labor government came in the Explanatory Notes for the *Vegetation Management Bill 1999* (Qld) in which the administrative cost to government of the implementation of the proposed law was summed up as follows:

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 landholders are being discussed with the Commonwealth.

It was clear at the time that such discussions were neither productive nor progressing; and, as observed by the Federal Environment Minister at the time, other states had brought in tree clearing guidelines without first seeking monetary assistance from Canberra.
As Premier Beattie’s political skirmish with the Commonwealth government continued, tensions between the Queensland government and rural landholders heightened and steps were taken to appease the agricultural community. Meetings were held in rural constituencies such as Emerald in Central Queensland and a country Cabinet meeting took place in Winton. The Premier again shifted the spotlight towards the Commonwealth government in declaring that the VMA would not be proclaimed in the absence of a Commonwealth financial contribution. Protesting graziers however were not impressed and Premier Beattie resorted to warning that planned federal legislation (the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC)) would impose even harsher vegetation restrictions. The implications of this political deadlock meant the Act remained unproclaimed.

The introduction of the VMA generated a peak period in land clearing

The VMA was assented to in December 1999, but only in respect of the title and commencement of the legislation; the bulk of statutory provisions did not commence until September 2000. The paradox of this was that the new statute had been declared by Premier Beattie as bringing certainty to landholders to enable sustainable and long-term viability of the land and to protect the unique biodiversity of the State. During 1999 and 2000, the Statewide Landcover and Trees Study (SLATS) undertaken by the regulators recorded the highest clearing rate since monitoring began when the total area cleared reached 758,000 ha/year. Of this total area 498,000 ha/year was cleared on freehold land and 252,000 on leasehold land; and this total clearing rate was 78 per cent higher than the 1997-1999 average rate of 425,000 ha/year. A spokesman for the landholders noted: ‘If clearing on freehold land has risen in recent years it has been accelerated by uncertainty about draconian measures promoted by the conservation movement as the State government moves to impose controls.’ Rather than bring certainty to rural landholders the effect of the implementation of the VMA was to...

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73 Grcber J, ‘Nationals claim rush to beat tree laws’ Courier Mail (3 February 2000) 4.
77 Queensland, Department of Natural Resources and Water, ‘Land Cover Change in Queensland 1999 -2001’, see Figure 1: Annual Clearing Rate in Queensland from 1991-2001 and also Figure 8: Trends in clearing rate by tenure type (1991-2001.) Available at: http://www.nrw.qld.gov.au/slats/report.html (viewed 1 February 2009).
78 McGowan G, ‘Balance is vital for rural landscape controls’ Courier Mail (8 September 1999).
promote uncertainty and, ironically, to generate a peak period of land clearing, particularly on freehold land.

The precision of the SLATS reporting has been challenged not only as to its accuracy but also in respect of the reporting of total annual clearing rates which do not, for example, take account of the fact that the final clearing rate includes the necessary clearing of weeds such as lantana and rubber vine. Whilst both sides of the land clearing debate are swift to accuse the other of emotive and misleading arguments, the fact remains that the initial implementation of the VMA was opposite to its fundamental intent. Yet it was predictable that landholders would clear whilst the opportunity to do so legally remained; and it was equally predictable that the government could have expected the mere passing of the Act would have the effect of a starter’s pistol. The average annual clearing rate declined following the enactment of the VMA, but by the 2002 to 2003 period rates began to increase. When the VMA was first introduced into parliament Premier Beattie had stressed there would be no moratorium on broadscale clearing applications. On 16 May 2003 however, the Premier announced a moratorium on clearing applications under the Vegetation (Application for Clearing) Act 2003 (Qld) (VACA).

A moratorium on land clearing applications – The Vegetation (Application for Clearing) Act 2003 (Qld)

The Beattie government declared the objective of this legislation was to stop the acceptance of any new applications for vegetation clearing until consultations with interested parties and the Commonwealth government were finalised. There was little time for parliamentary due process. It was acknowledged by the Labor government that

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83 Vegetation (Application for Clearing) Act 2003 (Qld.)
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the proposed statute did not comply with fundamental legislative principles in two respects: the law was to be retrospective to the date when Premier Beattie announced the moratorium in order to prevent a rush of applications; and there was no right of appeal against refusal of an application. The government justified these measures as necessary to prevent ‘the spectre of panic clearing hindering proceedings’. If a retrospective amendment is an inevitable consequence of hasty legislation then it is difficult to reconcile with the government’s own legislative statutory standards which, as mentioned earlier, require that new laws are ‘consistent with the principles of natural justice’, and ‘do not adversely affect rights and liberties, or impose obligations, retrospectively’.

The Act was an interim step and for an indefinite period. The moratorium would start from the date of Premier Beattie’s announcement on 16 May 2003 until a date to be prescribed – there was no sunset clause. The National Party did propose that the moratorium be for a fixed period of time but this amendment was not agreed to in parliament. The moratorium did exclude some types of clearing, such as that necessary to provide fodder for stock in drought declared areas and clearing of regrowth.

Time was even more of the essence for the Queensland Labor government. The Act was not considered at all by the SLC. While many landholders and other interested parties had worked on regional vegetation management committees since the start of the VMA, their potential contributions were forestalled by the commencement of the VACA. Of prime concern for the Beattie administration during the introduction of this particular

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85 Vegetation (Application for Clearing) Bill 2003 (Qld), Explanatory Notes, 2.
86 Queensland government, Legislative Assembly, Vegetation (Application for Clearing) Bill 2003 (Qld), Second Reading, 29 May 2003, 2083 per Robertson S. Available at:
87 Legislative Standards Act 1992 (Qld) s 3 (b) and (g).
88 On a vote, 19 members supported the amendment and 53 voted against it. Queensland, Legislative Assembly, Vegetation (Application for Clearing) Bill, Second Reading, 29 May 2003, 2425. Available at:
89 Vegetation (Application for Clearing) Act 2003 (Qld) s 2 (a) (iii) and 2 (b).
91 Queensland, Legislative Assembly, Vegetation (Application for Clearing) Bill, Second Reading, 29 May 2003, various members referred to the work many landholders had put into proposals for regional vegetation management plans in the period since the VMA was initially passed, e.g. Seeney J at 2376; Springborg L at 2384; Wellington at 2389; and Quinn at 2413. Available at: http://parlinfo.parliament.qld.gov.au/isyquery/133c768-1f6c-4292-b322-45e59a461a07/1/doc/030529/11/#!xml=http://parlinfo.parliament.qld.gov.au/isyquery/133c768-1f6c-4292-b322-45e59a461a07/1/hilite/ (viewed 1 February 2009).
Act was the prevention of a repeat peak rate of clearing; accordingly there was no consultation beyond that with other state agencies; nor was there the usual promises that the legislation would bring certainty to landholders. As a provisional measure this legislation brought clearing applications to an end. The more complex issues of consultation with interested parties and a possible Commonwealth and State financial package with which to compensate affected landholders were yet to be determined.

As for compensation, during the parliamentary debates on the commencement of the VMA and the introduction of the VACA opposition members reminded the government of their shelving of the DPI report on the economic impact estimate of vegetation management legislation. The Tree Clearing Report estimated that $500 million would be necessary to compensate rural landholders. The Labor government however consistently referred to a figure of $150 million and claimed that this amount was to be a jointly shared sum between the Commonwealth and the State. Monetary compensation or schemes for financial assistance were nonexistent and far from certain at this point.

Further legislation and a State financial commitment – The Vegetation Management and other Legislation Amendment Act 2004 (Qld)

Much of the uncertainty for the rural community was generated by the length of time it took the Labor government to make a financial commitment to landholders alongside the legislative changes: that is, from the time the Act was passed in 1999 until the 2004 amendments. From the very outset of the vegetation management legislation, Premier Beattie persisted in his call for a Commonwealth financial contribution and, whilst the Commonwealth appeared amenable to consultations with rural representative bodies and the State government, John Howard, the Prime Minister at the time, evaded a firm
The Commonwealth Minister for Agriculture Fisheries and Forestry did note that the federal government had been prepared to offer financial support but this was subsequently withdrawn. Failure to reach agreement rankled the Beattie administration: they argued that the restrictions on clearing imposed in Queensland would enable the Commonwealth government to meet its commitments under the Kyoto protocol, warranting a financial contribution.

The gulf between the State Labor government and the Commonwealth Coalition continued. And so it was that the Beattie government, in introducing further amended vegetation management legislation following re-election in 2004, eventually bore the brunt of a $150 million financial package without Commonwealth support. This financial package, however, was considerably less than the $500 million apparently recommended by the DPI. Delay in both proclaiming the Act and committing to a financial package did little to promote certainty or protect the environment. The 2004 amendments were nonetheless significant in that they were set to end broadscale clearing by December 2006 and, in the interim, to cap clearing at 500,000 hectares; landholders could apply to clear within this limit and applications were to be decided by a ballot.

The amending statute was the *Vegetation Management and other Legislation Amendment Act*, which commenced in May 2004. Initially the Act had applied only to clearing on freehold land. These latest amendments meant the statute would now apply to leaseholders and freeholders. The Labor government acknowledged that the land management systems in place prior to the 2004 changes were complex and that a

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94 Queensland, Legislative Assembly, Ministerial Statement, Tree Clearing, per Beattie P who tabled a letter dated 15 May 2003 from the Prime Minister. See also Landers K 'The Prime Minister Visits Queensland' *ABC Stateline* Transcript 23 May 2003 available at: [http://www.abc.net.au/stateline/qld/content/2003/s862499.htm](http://www.abc.net.au/stateline/qld/content/2003/s862499.htm) (viewed 1 February 2009).


98 This Act repealed the *Vegetation (Application for Clearing) Act 2003* (Qld).
consistent approach across all land tenures was needed.\textsuperscript{99} For practical purposes such consistency was necessary but this legislative change marked, for Queensland, a fundamental philosophical shift in the regulatory treatment of freehold and leasehold land. The management of vegetation for rural leaseholders would now be under the same regulatory requirements as rural freeholders, and the \textit{Land Act 1994} (Qld), which previously provided for leasehold land, was amended to reflect this.

Parliamentary debate on the 2004 amendments to the VMA was more extensive than when the Act was introduced. This time a committee stage was held and the amending clauses debated.\textsuperscript{100} This time the SLC prepared a report, which was tabled two days after the Bill was introduced.\textsuperscript{101} The Committee reiterated the concerns of the initial SLC report and raised two more concerns brought about by the amendments. The first was over the denial of appeal rights for landholders unsuccessful in the ballot process, and the second concern was the potential for a retrospective effect of one of the amending clauses.\textsuperscript{102} The denial of appeal rights was referred back to Parliament by the SLC to determine if it was appropriate;\textsuperscript{103} but while referred to briefly by two members opposing the legislation, the denial of a right of appeal was not deliberated by parliament during the course of debate. The denial of appeal was noted by the Minister during the introduction to the amendments and also acknowledged in the Explanatory Notes as necessary to ensure all clearing was completed by December 2006.\textsuperscript{104} An acknowledgement however is not the same as a determination by Parliament.

Premier Beattie's earlier promises of certainty for landholders and protection of Queensland's unique biodiversity were echoed, some five years later, by the Minister introducing the Bill.\textsuperscript{105} As noted earlier, the financial commitment from the Labor Party


\textsuperscript{100} Queensland, Legislative Assembly, Vegetation Management and Other Legislation Amendment Bill, Committee Stage, 317-409.

\textsuperscript{101} Queensland Parliament, Scrutiny of Legislation Committee, Alert Digest, No 1 of 2004.

\textsuperscript{102} Queensland Parliament, Scrutiny of Legislation Committee, Alert Digest, No 1 of 2004.

\textsuperscript{103} Queensland Parliament, Scrutiny of Legislation Committee, Alert Digest, No 1 of 2004.


totaled $150 million. This was to be divided as follows: $130 million for a structural adjustment package for landholders; $12 million for incentive programs and $8 million for rural industry groups, in this instance Agforce.106

The Queensland Rural Adjustment Authority (QRAA) undertook administration of the $130 million package. The QRAA described these potential payments as being to ‘reduce the impact’ of the VMA.107 Two types of financial support were made available: enterprise assistance in the form of grants up to $100,000 and exit assistance for landholders whose long-term viability was so affected by the legislative changes that they would be obliged to leave their property.108 Most landholders chose to apply for enterprise assistance and, as the scheme progressed so too did the number of applications and grants made. The Beattie administration did take steps to help landholders. As the application process for both schemes was complicated, the government increased funding to employ extra staff to assist landholders.109 Eligibility criteria for making a claim were extended in 2005, which appeared to be in response to lobbying from Agforce.110 Equally, the Labor government added an additional $20 million to ensure eligible landholders who had made an application by the February deadline could potentially receive financial assistance.111

A detailed assessment of the implementation of the financial adjustment package is difficult to make. According to QRAA, the monies received by landholders in enterprise assistance were utilised in a variety of ways including: ‘new farming systems and technology, enhancing water measures, expanding stock numbers, acquiring essential farming equipment, restructuring partnerships and succession planning’.112 From these

106 Robertson S, n 105. 65.
112 Queensland Rural Adjustment Authority (QRAA), Annual Report, 2006-2007, 30. Available at: http://www.qraa.qld.gov.au/ (viewed 1 February 2009). A Team Leader for the QRAA further described the broad categories covering the majority of applications. For example: assisting with additional property purchase; building laneways and constructing self mustering gates to aid herd management, reducing mustering costs and limiting animal stress; building new holding yards and drafting race with watering facilities; construction and/or equipping of dams and bores together with poly piping and troughs etc.; desilting and expanding the capacity of dams; fencing; implementing whole of property pasture rotational grazing management plan; purchasing additional stock after the development; purchasing farm equipment to assist with productivity projects undertaken (as above); regrowth control; seeding (including aerial seeding); solar panels for remote water pumps; stickraking and pasture improvement;
generalized descriptions it is not possible to assess the effectiveness of this structural adjustment package. The purpose of this financial assistance was described as being to ‘assist landholders significantly disadvantaged by the new vegetation management framework, with a focus on sustaining production’. The QRAA account provides the only information available on what this money was actually used for, as the management plans submitted by landholders with their applications for financial assistance are not in the public domain.

By the February 2007 deadline, 1,610 landholders applied for assistance and, as at June 2007, 1,305 had been approved and $111 million distributed. Inevitably some landholders were unsuccessful. Five properties were purchased under the exit assistance scheme costing a total of $9 million; this land was acquired for new national parks or transferred to the Queensland Trust for Nature for resale. It is not clear how many landholders applied for exit assistance.

Part of the financial commitment to landholders was $12 million to support land management incentive programs. This funding was used by the regulators for the Vegetation Incentive Program (VIP). The program, designed and implemented between 2004 and 2006, had a great deal of potential but ‘was launched against a background of widespread anger amongst rural landholders over the changes to vegetation legislation and distrust of the State government’.

developing stands of Leucaena etc; and weed control. Email correspondence in reply from a QRAA Team Leader dated: 27 October 2008.


In keeping with the hurried beginnings of the VMA and its subsequent amendments, the VIP was initiated in haste and this impacted upon the implementation, design and effectiveness of the program. Problems with its design included the initial requirement of an onerous covenant that would attach to the land title in perpetuity.\textsuperscript{118} The requirements of the covenant proved to be a deterrent and led landholders to increase their bids.\textsuperscript{119} Subsequently the program was changed and landholders were given a choice of incentive, the available options included: a covenant; a nature refuge, being an individually negotiated covenant managed by the Environmental Protection Agency; a limited term covenant which would last until the vegetation became remnant and therefore protected by the VMA; and a declaration in which the landholder declared the vegetation as remnant and so protected.\textsuperscript{120}

In practical terms the initial design time for the program proved problematic simply because it was limited to around two months. This left 'no opportunities to consult with likely participants' and 'was due to political pressure to have the funding devolved within a short period of time'.\textsuperscript{121} A program involving $12 million 'deserved greater attention to its design and management', which was unlikely when 'there was not a great deal of senior oversight ... and only limited staff resources'.\textsuperscript{122} Other problems included: equity issues because the options changed; lack of targeting of agricultural landholders more likely to be affected by the VMA changes; uncertainty on the part of landholders in the actual auction process and how much to bid. All these problems may have been alleviated if there had been adequate time.\textsuperscript{123}

According to the regulators, the environmental benefits of the VIP included the protection of 22,400 hectares of native vegetation in the State.\textsuperscript{124} This is a relatively small area of land compared to the 758,000 ha/year cleared during the peak clearing period between 1999 and 2000. The VIP was subsequently transferred to another

\textsuperscript{119} Commerford E, 'Designing more effective conservation auctions: Lessons from Queensland’s Vegetation Incentives Program.' (PhD thesis, School of Economics, The University of Queensland, 2007) 110, 257 and 261.
\textsuperscript{120} Commerford E and Binney J, 'Lessons learned to date from the Queensland Vegetation Incentives Program in moving from a conceptual ideal to practical reality' paper presented to the Sustainable Agriculture State Level Investment Program (Ag SIP), Resource Economics Workshop, Department of Primary Industries, Rockhampton, 28 October 2005.
\textsuperscript{122} Comerford E, n 121, 254.
\textsuperscript{123} Comerford E, n 121, 253-258.
\textsuperscript{124} Queensland, Department of Natural Resources and Water, Vegetation Incentives Program. Available at: \url{http://www.nrwr.qld.gov.au/vegetation/financial/vip.html} (viewed 1 February 2009).
regulatory department under the Nature Assist program. The Environmental Protection Agency (EPA), which ran the program at that time, had more experience in this area; they had a network of trained extension officers and more effective monitoring systems. It may have been more advantageous – and saved considerable time and money – to have utilised the experience of the EPA with the initial VIP.

The final part of the Labor government’s financial package amounted to $8 million provided to the rural representative body Agforce. As this money was not fully expended it was carried forward to June 2009. The money was used to establish Agforward, a program providing workshops around Queensland to assist landholders in the various aspects of the VMA which affected them, for example: reducing the risk of prosecution; regional ecosystem mapping; lodging a property map of assessable vegetation (PMAV), basic computer mapping and global positioning systems. The very fact that such workshops were necessary and that there was a continuing demand for these services in 2012 is indicative of the continuing complexities of the VMA.

Further retrospective amendments – The Vegetation Management Amendment Act 2008 (Qld)

Early in 2008 the VMA was amended once again. There had been another change in the Minister for Natural Resources and Water who echoed his predecessor in the assurance of certainty for landholders. A familiar pattern had emerged with this legislation and, once again, the Bill was dealt with as urgent, which meant little regard for due parliamentary process. The proposed amendments were not considered by the SLC. Consultation with the relevant community and industry stakeholders was not undertaken

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128 Email correspondence with the Manager of Operations at AgForward dated 8 December 2008.
The objectives of the amendments were described as being to clarify the definitions of endangered, of concern and not of concern regional ecosystems and to validate retrospectively all past decisions of the courts affected by these definitions. Whether the proposed amendments were consistent with fundamental legislative principles was addressed in the Explanatory Notes and the retrospective operation was justified as necessary to ‘minimise the risks of future legal challenge’, the retrospective application of criminal liability was also justified as necessary as the amendments were held to confirm the methodology and interpretations used to determine the differing regional ecosystems. It was not only the risks of future legal challenge that prompted these particular amendments. A landholder had already instigated proceedings challenging the definitions, which was why the definitions were clarified. The need for haste was in order to thwart that litigation.

The political context of the VMA

Environmental law in Queensland, and in particular a controversial law such as the VMA, has been shaped by the political context in which the law has been made and amended. The Queensland Labor government had a long period of political power unimpeded by a parliamentary Upper House; and by an effective and united opposition. During Labor’s reign the opposition weakened and fragmented and was often variable in its alliances. The Liberals primarily supported the Nationals but sometimes supported Labor. The power of Queensland Labor grew over their time in office. On the commencement of the VMA in December 1999 the Labor Party only had 39 votes in favour of the Act, as did the combined opposition parties against the Act. It was

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133 See for example: Queensland government, Legislative Assembly, Vegetation Management Amendment Bill, Second Reading, 26 February 2008, 336-599, and, in particular, Langbroek, 580-582.


135 Queensland government, Explanatory Notes, n 134, 2.
necessary therefore for the Labor Party to rely on the casting vote of the Speaker. The parliamentary authority of the Labor government in the Legislative Assembly gathered momentum after the initial introduction of the VMA. Part of the reason for this may be attributed to the diverse opposition mix which arose from the 1998 State election. This was the year of the rise of the One Nation Party within Queensland, a rise which split and decimated the conservative opposition. The National and Liberal Parties both lost seats to One Nation who, in contesting a State election for the first time, gained an extraordinary 11 seats compared to 9 for the Liberal party and 23 for the National party.

By 2003, with the introduction of the VACA, a much stronger parliamentary Labor Party had emerged unfettered by a viable opposition. The VACA was approved with the support of 58 members of parliament who were primarily Labor members; and, this time, the three Liberal party members voted with the government. The National Party was now down to 11 members and, even with the support of two independents and the sole One Nation member, it was hardly a feasible opposition. If the Queensland One Nation Party had tapped into widespread disquiet within the electorate in 1998 their victory was short-lived. In the 2001 State election they gained three seats; and by the 2006 State election, One Nation held one seat which was ultimately lost in the 2009 election.

The Labor Party achieved its most unassailable position in 2004. It was prior to this State election that Premier Beattie made what proved to be a successful election promise: to end broadscale land clearing of remnant vegetation in Queensland. Pre-election campaigning included images of rural landholders ruthlessly clearing the land.

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The Queensland electorate returned the Labor Party to office with 63 of the 89 available seats. Voting on the 2004 amendments was 58 in favour, again including Liberal support. The Nationals, who were shored up by independent members, could only manage 19 votes against the legislation.

Broadscale land clearing has been an emotive and divisive issue in Queensland. By virtue of the 2004 VMA amendments such clearing was set to end by December 2006 and it was during this year that the Queensland Labor Party won its fourth consecutive term. For the 2006 State election however it was problems in the health system, rather than the environment, which proved to be a critical issue.

The political dominance of the Labor parliamentary party continued, reflecting a long-established tradition in Queensland of a dominant party holding power for a considerable period. The clearing of land and the former strength of the agricultural lobby are so closely entwined within Queensland’s political past that the alienation of some rural sectors and the frustration with increasing regulation was palpable. Environmental laws, such as the VMA, which promise certainty but generate confusion, exacerbate this frustration; this was especially the case with the retrospective amendments passed in 2008. The Labor Party commanded 42 votes in favour of the retrospective amendments as against 19 opposition members. Their force as a political party may have diminished but this was still a considerable majority. Liberal members, being primarily concerned with the retrospective nature of the amendments, changed allegiance and this time voted alongside the Nationals against the Bill.

143 See Appendix One: Timeline. The Queensland governing parties have been as follows: the Labor Party from 1932 to 1957; between 1957 and 1989 variations of conservative parties have held office for example the Country-Liberals, followed by the National-Liberals, followed by the National party; from 1989 to the present the Labor party have dominated. A short inroad into their dominance occurred during 1996 to 1998 when the Coalition held power. Queensland Parliament, Precis of Results of Queensland State Elections 1932 to 2006. Available at: http://www.parliament.qld.gov.au/view/historical/electionsReferendums.asp?SubArea=electionsReferendums_electionDates (viewed 1 February 2009).
Conclusion

This chapter has examined how the VMA was made and implemented from the introduction of the legislation to the 2008 amendments. It is apparent that eristic laws are much more than a procedural implementation exercise albeit an imperfect one: they reflect the political context and reality of the parliamentary processes in which they are made. The reality for Queensland for many years was that a dominant Labor government was able to selectively attend to parliamentary process and its legislative role. The VMA has been characterized by urgent and guillotined debate, forestalled consultation with interested parties, and frequently a lack of opportunity for opposition members to fully examine proposed legislation and speak on behalf of rural constituents.

The Queensland electorate consistently provided authority to the Labor government by returning it to power. However, in a unicameral parliamentary system it is crucial that the incumbent government abides by its own legislative standards and confers more than a cursory nod towards its legislative role. The making and subsequent amendments of the VMA revealed an ingrained parliamentary system; with a dominant leader presiding over a one party government keen to establish its mark following prolonged conservative rule. The more controversial the law the less likelihood there is of scrutiny; the more haste in parliamentary procedure the more likelihood there is of amendments, including retrospective amendments. This underlying flaw is endemic to other parliamentary systems but a cautionary note is particularly relevant in Queensland’s unicameral system. If Parliamentary processes serve the needs of the prevailing majority government and laws are made simply because it is within the mandate of that government to do so, it behooves us to question those processes and the accountability of government.

In March 2009 the Queensland Labor Party, with Anna Bligh as Premier, returned to govern for their fifth consecutive term. In many ways Anna Bligh continued in the authoritarian leadership mode carved by Peter Beattie: she was given the legitimacy of an elected leader and returned Stephen Robertson to the role of Minister for Natural Resources, Mines and Energy. The same Minister was responsible for the controversial 2003 and 2004 VMA amendments. The merger of the Queensland divisions of the Liberal and National parties saw the beginnings of what was to become a viable
opposition. Queensland Labor however still had another term in office. Part of the means by which they achieved a further term forms the basis of the following chapter.
Chapter Five: Vegetation management legislation in 2009

Introduction

This chapter asks: *how the VMA was made and implemented in 2009 and what were the parliamentary processes of the Queensland parliament within which the amendments were made?* Much of the discontent with statutory regulation for rural landholders was generated by the politicisation of the VMA. The Act was frequently characterised by pre-election promises from the Queensland branch of the Australian Labor Party (ALP) followed by post election changes to the law. Such was the case in the 2009 Queensland State election, in which a particularly controversial and retrospective amendment brought about a six-month moratorium on clearing endangered regrowth vegetation. The moratorium began in April 2009 with the *Vegetation Management (Regrowth Clearing Moratorium) Act 2009* (Qld) and ended in October with the *Vegetation Management and Other Legislation Amendment Act 2009* (Qld).

The Queensland electoral system was, in 2009, pivotal to a pre-election political deal that led to the VMA amendments in that year. Accordingly, the electoral system is explored in this chapter, which begins by providing the historical context in which a significant change to Queensland’s electoral system occurred. The change was the adoption of optional preferential voting. A review of political science literature on electoral systems, together with an analysis of the outcome of this change for the 2009 State election, is therefore undertaken. The significance of optional preferential voting is that it has the potential to produce dominant single party government, as evidenced in Queensland, and pre-election political deals, as evidenced in the 2009 State election. The pre-election horse-trading, between the ALP and the Queensland Green Party in 2009, necessitated an examination of the role of the Green Party within the State’s political system and prompted a further research question: *which groups influenced the political processes and the law that was ultimately made?* An analysis of the pre-election preference deal is made, as part of the pay-back for this arrangement was the 2009 VMA regrowth amendments. Finally, consideration is given to the political context in 2009 under which these controversial amendments were implemented.
Historical background leading to a change in the electoral system

The management of rural land in Queensland has reflected the policies and laws of successive governments.¹ There is a long tradition within the State of a dominant political party holding office for a prolonged period. Thus the longest serving National or conservative party premier, Johannes Bjelke-Petersen, held office for almost twenty years from 1968 to 1987. The overall period of conservative government at that time lasted for 32 years,² ending with the demise of Bjelke-Petersen and subsequently the National Party. The downfall of the Bjelke-Petersen administration followed an independent inquiry, undertaken by Tony Fitzgerald, which found evidence of entrenched and widespread corruption within Queensland.³ The Inquiry began in May 1987 and, though initially expected to last for six weeks, it lasted until June 1989. A pivotal moment in the Inquiry came when Michael Forde QC cross-examined Bjelke-Petersen on his understanding of the separation of powers doctrine. The confused response of the ex-premier:

...exposed not only a leader’s flawed and corrupted methodology but also the cabinet’s that had echoed it, the parliaments that had authorised it, a public service that had delivered it, a police force that had facilitated it, a media that had mostly endorsed it and a public opinion that, by and large, had tolerated and even applauded it.⁴

Charges against Bjelke-Petersen for official corruption and perjury during the Inquiry were ultimately withdrawn following a trial and a hung jury. Clearly a great deal remained to be done: the jury foreman at the trial was a branch secretary of Bjelke-Petersen’s political party.⁵ Nevertheless, this period was described as a time of hope for Queensland ‘...as it began the Herculean task of cleaning its Augean stables’.⁶

¹ See Appendix One: Timeline.
³ Fitzgerald G E. Report of a Commission of Inquiry Pursuant to Orders in Council, (Queensland Government Printer, Brisbane, 1989). Available at: http://www.emc.qld.gov.au/data/portal/00000005/content/81350011131406907822.pdf (viewed 4 June 2009). This Inquiry was announced by Bill Gunn, the acting Premier at the time, whilst Bjelke-Petersen was overseas. The announcement followed the catalytic ABC Four Corners investigative Report ‘The Moonlight State’ which highlighted the systemic corruption within both the Queensland government and the police.
Reform of the electoral system – optional preferential voting

One essential task was reform of the electoral system. The longevity of the Bjelke-Petersen era owed much to the electoral system prevailing at that time. A prime area of concern for the Fitzgerald Inquiry was the issue of fairness of the electoral process, particularly electoral laws, zones and boundaries, which were alleged to be biased in favour of the Bjelke-Petersen Government.7 The allegations primarily concerned the unfair advantage given by both electoral gerrymander and malapportionment.8 One of the major recommendations of the Inquiry, therefore, was the formation of an independent Electoral and Administrative Review Commission (EARC) charged with undertaking an extensive review of electoral and administrative processes within the State.9

Following this wide-ranging review, in which submissions were made and public hearings held, the EARC recommended electoral reform. The controversial issues of electoral boundaries and zones were to be addressed by independent bodies ‘free from interference by the government of the day’.10 Change in the voting system was also recommended: from compulsory preferential voting to optional preferential voting. In recommending this change to the voting system the EARC noted a return to ‘first past the post’ would not be appropriate for Queensland as, they contended, this method did not ensure fairness – a major concern to the Fitzgerald Inquiry – and had been rejected by other states and the Commonwealth.11 Optional preferential voting was therefore suggested. The Commission noted they were mindful of evidence that had emerged from New South Wales that optional preferential voting meant many voters expressed just a first preference but concluded:

...this phenomenon reinforces the view that under the current compulsory preferential system voters are being required to express views they may not have.

Encouraging voters to express preferences is ultimately a matter for candidates and parties, not the electoral system.12

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7 Fitzgerald G E, n 3, 127.
8 The Electoral and Administrative Review Commission, Report on Queensland Legislative Assembly Electoral System, Volume I- The Report, November 1990, xiii. defines gerrymander as drawing electoral boundaries to enhance the likelihood of election; and malapportionment as a term used to describe the existence of electoral districts which have significant difference in the number of electors.
9 Fitzgerald G E, n 3, 370-371 the other main recommendation was the establishment of a Criminal Justice Commission to watch over police practices.
10 The Electoral and Administrative Review Commission, n 8, 232.
11 The Electoral and Administrative Review Commission, n 8, 8.
12 The Electoral and Administrative Review Commission, n 8, 59.
The Electoral Act 1992 (Qld) facilitated many of the recommended changes and established an independent Electoral Commission and more equitable electoral districts and redistributions.13

The Electoral Commission described optional preferential voting as ‘an unusual, if not unique, voting system’.14 The shift to this system marked the fourth change to voting methods in the State. Optional preferential voting is a variant of the alternative vote electoral system. Queensland and the New South Wales Lower House are the only States to use optional preferential voting. Optional is perhaps a misleading term in that voting in Australia is compulsory. In this context the term means that voters have the option to vote for one candidate only, or to vote for one candidate and allocate preference to some or all of the other candidates. It is a majoritarian system in that the winning candidate needs to secure an absolute majority of the votes cast. If this is not achieved on the first count, the candidate with the fewest votes is eliminated and their preferences are allocated. This process continues until one candidate has a majority of votes. In contrast, compulsory or full preferential voting requires the voter to allocate preference to all candidates.15

The post Fitzgerald reforms were primarily driven by the Queensland branch of the ALP and by Wayne Goss, their leader at the time. Despite concerns from all parties as to the desirability of adopting optional preferential voting, the influence of the Fitzgerald Inquiry prevailed and the Electoral Act 1992 (Qld), which brought about the changes, was unopposed in parliament.16 For the first time in Queensland, changes were made to the voting system for reasons other than the ‘perceived benefit by the government of the day’.17 In 1989, the year the Fitzgerald Inquiry handed down its report, Queensland Labor won over 50% of the votes cast in the State election as the inevitable electoral backlash against the Bjelke-Petersen administration took its toll.18

13 The functions and powers of the Commission are provided for in the Electoral Act 1992 (Qld).
15 Submissions of arguments both for and against each voting system are detailed in: Electoral and Administrative Review Commission, n 8, chapter 6.
18 Queensland government, Comparison of Party Performance Queensland State Elections 1977-2001, Table 2 B. The percentage of votes for the National Party fell from 40% in the 1986 election to 24% in 1989. Available at:
The end of this politically conservative and evidently dark period meant that Labor returned to dominate the political arena and generally continued to do so, apart from a two-year interlude, from 1989 until March 2012.

Within Queensland, the optional preferential voting system has continued to date. In the first three elections following the changed voting system the effects were marginal. Indeed it appeared that the Electoral Commission of Queensland quietly ‘disapproved’ of optional preferential voting – and certainly did not actively ‘promote the concept’ in those elections. During their time as the incumbent government, the ALP predictably adopted a tactical use of this voting system; and, starting in the 2001 election, campaigned for voters to vote just for the ALP, a strategy known as ‘plumping’. The outcome of an election with a high rate of plumping is that a candidate may be elected with less than a clear majority of votes.

The meaning of representation, within political science literature, contrasts the ‘microcosm’ or proportional electoral system with the ‘principal-agent’ or non-proportional system. In the microcosm system parliament would, as far as possible, be a representative sample of the population; whereas the principle-agent system typifies Members of Parliament acting on behalf of constituents and the composition of parliament is less important than the decisions it makes. The Queensland electoral system is a non-proportional system; smaller parties, such as the Greens, are unlikely to be represented within parliament but may be accommodated outside the Legislative Assembly in the interests of political pragmatism. As for decisions made by the government, some decisions, such as the implementation of the 2009 amendments to the VMA, reflect the very essence of politics and the competing and varied interests of the electorate.


20 Wanna J, n 19, 2.
21 This was especially the case with the 2001 Queensland State election, see for example: Stockwell S, ‘The impact of optional preferential voting on the 2001 Queensland State election’ (2003) 10 (1) Queensland Review 155-162.
23 Farrell D M, n 22, 6-7.
There is little agreement as to which is the best electoral system. For Queensland, a very real concern is that ‘the optional preferential system produces a less representative and less democratic outcome than the compulsory preferential system’. It is only under the latter system that ‘elected representatives could genuinely claim to represent the electorate’. A note of caution accompanies the State’s electoral system such that:

In democratic terms, the use of optional preferential voting in Queensland appears to empower the voter, allowing individuals to decide whether or not to allocate preference to some or all candidates. But in the hands of parties anxious to maximise electoral advantage, optional preferential voting risks becoming a de facto first past the post system – in which candidates can be elected with around 35% of the formal vote.

Optional preferential voting is regarded by some as the facilitator of inclusiveness and, while it may ‘weaken the hand of minor parties in the horse trading over preferences, it gives them extra leverage in bargaining over policies and hence an indirect form of political representation and inclusiveness is achieved’. For Queensland, however, in 2009 this inclusiveness was outside of the parliamentary system with a non-elected minor party.

An analysis of the consequences of electoral systems within Australia by Farrell and McAllister concluded with a recommendation that compulsory preferential voting should be replaced with optional preferential voting. It acknowledged the inherent risks with optional preferential voting:

...where ‘Just Vote 1’ strategies (as practised, for example, by the ALP in Queensland in 1998 and 2001) could so weaken the value of preferences as to

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24 Farrell D M, n 22, Chapter 7. Bowler S, Farrell DM and Pettit R, ‘Expert opinion on electoral systems: so which electoral system is ‘best’?’ (2005) 15 (1) Journal of Elections, Public Opinion & Parties, 3-19 surveyed the views of electoral system experts on the world’s main electoral systems. The survey found a large degree of consensus on the issue of proportionality and the capacity of the different electoral systems to produce proportionality. The electoral system decided as best by the experts was the mixed-member proportional system followed by a single transferable vote system.


27 Wanna J, n 26, 3-4. Also the Queensland Legislative Assembly Electoral System, Volume I – The Report, November 1990, defines first past the post voting as a system where the winning candidate is the one who receives the largest number of votes regardless of whether a majority is obtained. This system is used in the UK, USA, Canada and New Zealand and was for a period, from 1860 to 1892, adopted in Queensland.


result by default in single member plurality elections. But this need not be the case, and other jurisdictions that allow optional expression of preferences (for example Ireland) have not witnessed such trends.30

Other jurisdictions may not have experienced such trends but they remain apparent in Queensland elections, and the ALP, during their political reign, generally directed their supporters to give their party first preference and not preference any of the other candidates.31

Trends in optional preferential voting in Queensland

A more detailed breakdown of trends in voting behaviour is provided in the Ballot Paper Survey undertaken by the Electoral Commission of Queensland following each election.32 Ballot papers in 11 electoral districts are analysed: they include urban, provincial and rural seats and the same districts are considered in each survey to allow a comparative study.33

Figure 5.1 demonstrates how optional preferential voting actually played out in recent Queensland elections.34 The trends are relatively consistent. Voters who simply vote once were in the majority and increased slightly at each election. The ‘Just Vote One’ strategy was an extremely successful tactic for the ALP for many years. Approximately 30% of voters utilised the full preferential vote in each election. Those opting for a partial preference are in the minority. The report for the Ballot Paper Survey conducted following the 2001 election concluded:

This report has refrained from suggesting that we now have a de facto first past the post system as this would be to overstate the issue, but we have moved a considerable distance in that direction.35

30 Farrell D M & McAllister I, n 29,178.
31 Parliament of Australia, Department of Parliamentary Services, Bennett S & Lundie R, 'Australian electoral systems' August 2007, no 5, 12.
32 Electoral Commission of Queensland, 2001 Queensland Election Ballot Paper Survey, March 2002. Under the Electoral Act 1992 (Qld), s 8(1) (c) the purpose being to consider, and report to the Minister on (i) electoral matters referred to it by the Minister; and (ii) such other electoral matters as it considers appropriate.
34 This table has been compiled by taking the percentages supplied in each of the Ballot Paper Survey reports for 2001, 2004, 2006 and 2009. Available at: http://www.eec.qld.gov.au/search.aspx?searchtext=Ballot%20survey. There are no statistics for the 1998 election; the 2012 Ballot Paper Survey results are not yet available but in any event would be outside of the research period for this thesis.
Subsequent surveys did not address this issue but the statistics clearly indicate actual voting practice: the majority of voters do not exercise their preferences.

![Diagram showing trends in optional preferential voting in recent Queensland elections](image)

**Figure 5.1: Trends in optional preferential voting in recent Queensland elections**

The irony is that this voting system was established in an apparently genuine bi-partisan attempt to adhere to the recommendations of the EARC. Back in 1989 the Fitzgerald Inquiry noted: ‘It is no solution to the deep-seated problems which have occurred to simply replace one set of imposed ideas and approaches to administration with another’. It is unlikely that the current voting system will change. It suited the ALP’s tactical use in past elections, when re-election was not an issue, up to the 2009 election when it clearly was.

**Environmental lobbying and the influence of the Queensland Greens in party politics in 2009**

The ability of environmental groups, such as the Greens, to influence policy and law and bring about environmental change, depends upon sustained and strategic lobbying and seizing opportunity. Environmental lobbyists operating outside the parliamentary

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system typically have a low level of influence in the absence of any bargaining power. Lobbying to produce beneficial environmental outcomes requires, according to Connors and Hutton, concentrated activity and considerable expertise on the part of conservationists, a planned education and mobilisation campaign and sometimes an election commitment, given by the Queensland Labor Party, in return for Green preferences. The electoral impact of the Greens within Queensland has been chequered; and the degree to which they have allocated preferences varies with each election. Involvement of the Green Party in electoral politics is a legitimate mode of environmental lobbying. It is also an effective mechanism for change, when the greening of mainstream politics is invariably slow and often disappointing. The utility of preferences as a bargaining tool will necessarily vary and depend on the political power and electoral needs of the Labor Party at any given time. In the 2009 Queensland State election the Greens had a degree of bargaining power and an opportunity to influence amendments to the VMA.

There are 89 electoral districts within the State of Queensland with an average of four candidates contending for each district. State elections are essentially a contest between the two main parties. In 2009 this contest was between the ALP and the conservative Liberal National Party (LNP) coalition formed in 2008. There are Independent candidates and smaller parties such as the Family First Party, but in the 2009 State election, the Independents gained only 4 of the 89 seats. The Greens first appeared upon the Queensland election scene in the 1995 election when they contested 28 seats and polled 2.87% of the vote. This voting percentage was reasonably consistent for the following two elections and increased to 6.76% in the 2004 election.

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and 8.37% in the 2009 election. 45 This increase has been attributed to the ‘substantial interstate migration to the State’s southeast, a pattern that has contributed to a partial transformation of Queensland’s traditional political culture to one more disposed to Green support’. 46 Such support translates for Queensland Labor into the electoral benefits of Green preference deals, particularly in marginal seats. 47 Despite being a minor party, the influence of the Greens in 2009 cannot be underestimated because it is in those marginal seats, particularly in the southeast corner of the State, that an election may be won or lost.

It was the possibility that the election may be lost that prompted the 2009 pre-election preference deal between the ALP and the Greens. The Queensland Labor government returned to power for their fifth consecutive term in 2009. Under the prevailing electoral system Labor gained 51 seats with 42.25% of the vote, the LNP took 34 seats with 41.60% of the vote; and the Green Party, with 8.37% of the vote, were unable to secure any seats. 48 The ALP lost 8 seats and the LNP gained 9 seats. The days of landslide electoral victories for the ALP diminish with each election: from polling over 50% of the vote following the Fitzgerald Inquiry in 1989, their primary vote fell to 46.9% in 2006, to the 42.5% previously mentioned for 2009. The continuing durability of the ALP period in government owed much to the fragmented and fragile Queensland coalition parties. In 2006, a majority of voters polled on the eve of the election, believed the ALP did not deserve re-election but equally that the coalition were not ready for office. 49

The ALP’s long-term grip on governmental office also reflected the electoral system. In the 2009 election, the ALP had 0.65% more primary votes than the LNP. This modest gain however turned into a significant majority of seats within parliament. This is a typical outcome of a non-proportional electoral system, the champions of which tend to emphasise the resulting ‘twin virtues of strong but responsive government’. 50 As a dominant one-party government in a unicameral parliament the ALP had no need to

47 Williams P D, n 46, 329 considers the arguments for and against preference allocation.
bargain or consult with members of parliament outside their party: they had an unencumbered mandate for three years. Nevertheless, strong established political parties should remain responsive since ‘at the end of their tenure of office they remain accountable to the electorate, who can throw them out if they so wish’. The absence of a viable opposition in Queensland until 2011 meant the question of accountability and degree of responsiveness of the Queensland ALP was somewhat diminished.

Green support for Labor was most apparent in the 2009 election. As a minority party in a non-proportional electoral system preference deals for the Greens appear to be their only realistic chance of making an impact. According to the ALP Premier at the time Anna Bligh, such deals do not undermine, ‘what is a very legitimate democratic process’; the Premier went on to say, in response to a question as to whether the preference deal had taken place, ‘in Queensland we’ve committed to a number of environmental issues publicly, nothing secret. And as a result of that, the Greens party has made an assessment of where they will put their preferences’.

**A pre-election preference deal**

Green preferences were directed towards the ALP in 14 marginal seats in the 2009 State election. Figure 5.2 is a comparison of the votes allocated to the ALP, the LNP and the Green parties in the 14 seats in which the Greens directed preferences to the ALP. In the 14 seats depicted in Figure 5.2, the ALP gained between 45% and 49% of the votes in 7 districts, between 40% and 45% in 6 seats and, in the remaining seat of Gaven, they gained less than 40% of votes and lost to the LNP. By comparison, the LNP had only

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51 Norris P, n 50, 66.
52 Bligh A, Premier of Queensland, Transcript of National Press Club Address, 4 September 2009, 19. This statement was in response to a question from Lucy Knight, rural press, Canberra Bureau Chief, Press Gallery Parliament House. In adopting a preference strategy at a time of electoral weakness the State Labor Party adopted a similar tactic to that employed by Federal Labor in the 1990 election. In Richardson G, *Whatever it Takes* (Bantam Books, 1994) Graham Richardson describes the implementation of a similar strategy which gave Federal Labor a narrow victory. Richardson noted the electoral win: ‘occurred because we received an unbelievable preference drift, and there is no doubt that the environment was the issue that delivered us the preference share’ he further noted the win was ‘the culmination of three years hard yakka convincing the conservation movement of our bona fides, shepherding through cabinet a series of hotly contested and controversial pro-environment decisions...’ Richardson concluded this ‘was not the only factor - there never is only one - but it was a very big one in a great Labor victory’ 276.
53 Personal Communication with Drew Hutton from the Queensland Green Party on 29 June 2009. Written confirmation was also provided by Drew Hutton who supplied the Greens State Election Campaign Committee report on the preference deal and the impact upon three policy areas: the wild rivers legislation; a renewable energy scheme and the moratorium on clearing vegetation regrowth.
54 The 14 seats being listed in the Greens State Election Campaign Committee report on the preference deal noted above.
one seat with over 45% of the vote, 7 seats between 40% and 45% and 5 seats between 35% and 40%. In these 14 marginal seats therefore, the ALP may generally have had more votes than the LNP but they still needed Green preferences to achieve the majority of votes as required by the Queensland electoral system.

For the ALP, two electoral districts were particularly reliant on Green preference support: Barron River and Everton. In the Barron River district the LNP polled 43.83% on first preference votes compared to the ALP’s 43.2%. Three candidates contested this seat and, since the first preference votes fell short of a majority, the Green’s contender was excluded and her preferences distributed to the ALP boosting their vote to 52% and the winning seat. A similar picture emerged in Everton when, following counting on first preference votes, the ALP had 44.39% and the LNP 44.12%. Once again, the Green preferences enabled the ALP to secure 51% of the vote and the win the seat.

Figure 5.2: A comparison of the votes allocated to the ALP, the LNP and the Green parties in the 14 seats in which the Greens directed preferences to the ALP in the 2009 State election.

Within the Queensland Parliament, the Greens had a Member of Parliament sit for a short period by default. In October 2008 Ronan Lee, the ALP member for Indooroopilly, defected to the Greens. He was defeated by the LNP in the 2009 election. In the absence of parliamentary representation, Green preference deals of varying degrees – depending on the electoral requirements of the incumbent party – appear set to continue. Part of the payback for such pre-election deals came in the form of post election controversial environmental laws such as the *Vegetation Management (Regrowth Clearing Moratorium) Act 2009 (Qld)*.

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

The politicization of the VMA influenced the structure and substance of the law; and the implementation of the 2009 amendments had a far-reaching potential to disengage rural landholders. The overarching effect of the VMA for the rural community has been to undermine the most basic principles of democracy, however remote and ideal they may be, that ‘all adult citizens should have a voice in respect of decisions made in the
societies in which they live'.

If rural landholders were particularly aggrieved in 2009 it was because the voice of the Greens carried more weight – unlike rural landholders, they had a say. The Greens prompted the 2009 changes to the VMA even if not to the extent which they desired. Prior to the 2009 State election the Green’s biodiversity and environment policy on vegetation was to amend the VMA ‘to protect endangered, of concern and high conservation value regrowth vegetation, all remnant vegetation in urban areas, and vegetation in riparian and wildlife corridors’. Following the State election, a Green party report on the preference deal noted: ‘the Greens support the moratorium and will seek input into the final legislation, including ensuring the connectivity of habitat areas of endangered systems and stabilizing structures to prevent erosion’.

Queensland Labor was duly re-elected and returned to govern on 21 March 2009. The regrowth moratorium was announced in a ministerial release on 7 April. It was to take effect from midnight of the same day. The ban on clearing covered endangered regrowth vegetation, and the Minister of the day, Stephen Robertson, instructed the regulator’s ‘compliance officers to actively monitor and investigate compliance with the moratorium’. On 7 April the Labor government thus announced a retrospective moratorium: this was a law yet to be made. Indeed the opening of the Queensland Parliament did not take place until 21 April. The first parliamentary session was held on 22 April at which time the Vegetation Management (Regrowth Clearing Moratorium) Bill 2009 was introduced. The Act was deemed to have started on the 8 April.

Scrutiny of the Act passed in April 2009, at the start of the moratorium, was limited. Fundamental legislative principles were not considered by the Scrutiny of Legislation Committee (SLC) because the Vegetation Management (Regrowth Clearing Moratorium) Bill 2009 was dealt with as an urgent Bill and the responsibility of the SLC ended once the Bill became an Act and therefore a law. The Committee regarded

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63 The Greens State Election Campaign Committee report on the preference deal supplied by Drew Hutton.
65 *Vegetation Management (Regrowth Clearing Moratorium) Act 2009* (Qld) s 2. Retrospective legislation is considered in Chapter One.
their responsibility towards new legislation as ended once a law was made, even if they had not had the opportunity to scrutinize and report to parliament on the law.\textsuperscript{67}

How then did the Queensland government explain the retrospective moratorium? The Explanatory Notes which customarily accompany a new statute acknowledged that the retrospective application of the Act may ‘arguably offend’ the government’s own legislative standards legislation.\textsuperscript{68} The retrospective moratorium was further explained as necessary to prevent pre-emptive clearing and ‘justified where the interests of the public as a whole outweigh the interests of an individual’.\textsuperscript{69} Ultimately the government’s defence was that the legislation had arisen ‘from an election commitment on the 15 March 2009 by the Premier which included a temporary moratorium on clearing of endangered regrowth’.\textsuperscript{70} The Minister of the day, Stephen Robertson, further confirmed the Premier’s commitment in his Second Reading speech and said the legislation facilitated ‘the implementation of Labor’s commitment announced during the 2009 election campaign to further protect existing vegetation to provide a number of important environmental outcomes’ and in so doing, kept ‘faith with the electors of Queensland to deliver on commitments made by Premier Anna Bligh during the course of the recent State election campaign’.\textsuperscript{71}

To pass the retrospective moratorium, the Bill, as noted earlier, was declared urgent. The Labor government utilised a Standing Order, suspended normal parliamentary business and debated the legislation in one day’s sitting.\textsuperscript{72} It was noted by the ALP Leader of the House that the urgency was necessary ‘to protect the forests of Queensland’.\textsuperscript{73} The legislation has no impact upon the forests of Queensland.


\textsuperscript{69} Queensland government, Explanatory Notes, Vegetation Management (Regrowth Clearing Moratorium) Bill 2009 (Qld), 6.

\textsuperscript{70} Queensland government, Explanatory Notes, Vegetation Management (Regrowth Clearing Moratorium) Bill 2009 (Qld), 1.


Opposition and independent members claimed that the urgency was necessary to appease the Green Party for a pre-election preference deal.74

The impact of the implementation of the 2009 amendments to the Vegetation Management Act 1999 (Qld)

Rural landholders had an opportunity to make submissions on the Act to the relevant regulators and their own Members of Parliament. In the past, consultations surrounding amendments to the VMA have been initiated and subsequently disregarded by the Queensland Labor government.75 A number of submissions revealed how, once again, a law promising certainty generated yet more confusion. Regrowth vegetation affected by the moratorium, which was coloured blue on the mapping system adopted by the regulators, included pastures, crops and part of the township of Dalby76 and the entire area of an avocado orchard in Childers. The government’s response to the concerns of this landholder was: ‘Satellite imagery was used to make regrowth maps and sometimes non-native tree cover, like orchards of different trees, is mistakenly interpreted as native vegetation. This is an inevitable consequence of satellite imagery’.77 A further consequence of the Act was that rights of appeal on moratorium maps were suspended for the duration of the moratorium period.78

The moratorium period was initially set to last for three months but subsequently extended for an additional three months as provided for in the legislation.79 The moratorium thus lasted for six months, until 7 October 2009. In May 2009, one Member of Parliament tabled over 200 submissions regarding the moratorium sent to him by

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74 Queensland government. Legislative Assembly, Vegetation Management (Regrowth Clearing Moratorium) Bill 2009, 23 April 2009, for example: per Seeney J, 175, Cunningham L, 233, Available at: http://parlinfo.parliament.qld.gov.au/isysserv/09da03ca-b259-499a-bc7c-f5c6a1c3ca32/1/hilite/ (viewed 4 June 2009).
78 The Vegetation Management (Regrowth Clearing Moratorium) Act 2009 s 28 removed rights of appeal for the moratorium period.
79 The Vegetation Management (Regrowth Clearing Moratorium) Act 2009 s 7 provided for the six-month moratorium period.
rural landholders. Common themes emerged from these submissions. It was not lost on landholders that the regrowth moratorium was the outcome of a preference deal with the Greens, or that the former premier, Peter Beattie, had promised that regrowth would not be regulated. Many landholders referred to the uncertainty caused by the moratorium, the inaccuracies of the mapping system and the potential effects of a loss of productivity and income coupled with a fall in land values.

The effect of the implementation of the 2009 amendments on one particular landholder from Mitchell was described as follows:

With the introduction of the Moratorium Bill we expect that our overall production will fall by as much as a quarter in the next 6 years, reducing our property’s value to approximately 50%. As responsible land managers we value trees as an essential part of a balanced ecosystem, particularly when used in order to create shade, wildlife corridors and wind breaks. We also use trees such as Brigalow for soil conditioning, as they have the unique ability to place nitrogen back into the soil. However there is a major difference between well managed, ecologically healthy stands of Brigalow, that contribute greatly to soil and plant health, and Regrowth Brigalow, which creates a thick monoculture, causing reduced wildlife numbers and erosion due to lack of ground cover. We have planned for a future on the land, and invested 100% of what we have to give, both financially and physically. We hope that one day our children will want to take on our ‘sustainable and profitable’ business that provides an irreplaceable resource for Australia and the world.

And from a landholder in Goondiwindi:

Our family-run property is located near Westmar, on the southern boundary of Dalby Regional Council. Our family has owned and run this property for 35 years, we are a third generation cropping and cattle property, with all three generations living and working for our current and future livelihood. Already due to legislation, we have a third of our property that we cannot touch as it is timbered. The area that you are proposing on the moratorium is partly made up of shade lines and wind

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breaks that we have purposefully left, so it seems we have been penalized for doing the right thing.82

Other Members of Parliament also tabled letters received from rural landholders, for example:

We are very angered by this latest attack on the farming sector by the Labor government. This latest attack is nothing more than a grab for green votes so as to secure another term in office. There is no economic, ecological or environmental reason for this latest land grab from the current government. Mrs Bligh doesn’t give a toss about endangered regrowth, the Great Barrier Reef or the welfare of country Queensland — all this is a grab for power at farmer’s expense and an agenda from the extreme greens to stop land clearing altogether.

As a business sector we felt that we had managed the current land clearing (vegetation management legislation) well and had adjusted our economics and land management practices accordingly. We have been dealt another severe blow to our industry and cannot trust a government that keeps changing the goal posts and the laws to suit. Furthermore the mapping that we have been issued that covers the latest land grab (blue spots on the maps) are incorrect. Areas shown on our maps that are now to be locked up with no further regrowth management are predominantly grass pastures. Other farmers have said that their blue dots cover the sorghum crop perfectly. The mapping that this land grab is based on is also incorrect.83

One continuing area of contention between rural landholders and the vegetation management regulations has been on the issue of clearing mulga. The regrowth moratorium once again made this type of clearing problematic. During periods of drought, mulga is an essential feedstock for cattle. In 2009, Queensland had endured a prolonged and, in some areas, unprecedented drought. A landholder from Dirranbandi stressed the importance of mulga and the implications of not being able to clear it for feedstock:

...there are several patches of moratorium blue on our map including the regrowth mulga which has deliberately been regrown by us to use for fodder harvesting should we have another drought, which is inevitable, just a matter of when. Our situation is that we are prepared to keep the mulga for however long we can but we need to be able to use it when we have to (instead of selling our very precious breeding herd again). The stands of mulga are never completely ‘wiped out’ as it is too valuable to us.84

The impact of the moratorium also affected rural land sales. A real estate agent specializing in the marketing of rural properties in the Roma distract had this to say:

I have attached details on a property we had recently marketed for Auction. However due to the introduction of the Moratorium and the dramatic effects it had on this particular property we had to cancel the Auction in the last few days prior to Auction as all interested parties withdrew their interest ... The Vendors had spent a considerable amount of money on advertising (in excess of $12,000) and I had also invested considerable time and money in conducting several inspections on the property (250 km round trip just to conduct the inspection). The Vendors had only purchased the property 18 months earlier for $6M and it was expected that a similar figure would have been achieved at our scheduled Auction. As all interest in the property was withdrawn following the implementation of the Moratorium it can be assumed that this action by your government has resulted in the loss of commission income to this business in excess of $100 k, a loss in Transfer Stamp Duty to your own Government of approx $200 k and an even greater figure, yet to be determined, in a capital loss to the owners of the property. Contrary to Mr Stephen Robertson’s comments that this Moratorium will not result in the loss of any jobs, this as you can see is already having a negative impact in our business which will impact not only immediately but also on future business sustainability.85

A potential issue therefore for rural landholders was that of compensation. State liability to pay compensation would arise if a statute provides for compulsory acquisition of property with fair compensation.86 The 2009 amending VMA legislation stipulated that no compensation would be payable under the moratorium as this was an interim

86 Legislative Standards Act 1992 (Qld) s 4 (3) (i).
measure and a means of exploring 'longer term options'. As noted in Chapter Two the VMA was initially passed in 1999 but it took the Labor Government until the contentious 2004 amendments to make a financial commitment to landholders affected by the legislation. Much of the earlier reluctance of the Queensland government was attributed to the unwillingness of the Commonwealth Coalition Government to contribute to a financial assurance for affected landholders. With the April 2009 amendments the government stated their regulators would 'investigate the costs of any future regulation including potential cost to enterprises made unviable'.

Vegetation Management and Other Legislation Amendment Act 2009 (Qld)

At the end of the moratorium period in October 2009, a further Act was introduced and this time the Scrutiny of Legislation Committee (SLC) did examine the proposed statute. As discussed in earlier chapters the SLC has a duty to consider if the proposed legislation complies with fundamental legislative principles, which include requiring that legislation has sufficient regard to rights and liberties of individuals. In keeping with earlier SLC reports on the VMA many concerns were listed. They included, inter alia, concerns with regard to the amended Act’s provisions on offences and penalties, the administrative power of the regulators, and the retrospective aspects of the proposed statute.

In regard to offences and penalties, the Committee noted the potential effect of some of the proposed offences under the amendments, in particular the complexity of statutory provisions contained in the VMA, which was required to be read at that time in

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89 The Vegetation Management and other Legislation Amendment Bill 2009 was introduced on 6 October and the Vegetation Management and Other Legislation Amendment Act 2009 was assented to on 3 November 2009. This Act also introduced a vegetation offsets policy, such policies may be utilised to balance or compensate for environmental impacts of land clearing that cannot be circumvented or alleviated. Under the amending legislation s10 C set out the characteristics of a suitable offset area, including the area and size, any remnant status and current level of protection of the vegetation. It was possible to specify through an Agreement registered at the Land Registry (and therefore binding on successors in title) the details of the offset obligation on the part of the landholder. This Agreement had the potential to require a financial contribution. The Agreement had to be consistent with the State offsets policy which at the time was the Queensland Government Environmental Offsets Policy (QGEOP) established in July 2008. This policy and amendment to the Act was somewhat dwarfed by the moratorium and the implications of the moratorium during this period, for example there was only one mention of offsets by the Minister Stephen Robertson during the Second Reading Speech. The offsets policy continues under s 10 of the current Act and has a 2014 offsets policy.
90 Legislative Standards Act 1992 (Qld) s 4 (2).
conjunction with the *Integrated Planning Act 1997*(Qld). The Committee concluded that the requirements of the law and liability for an offence would be difficult for a landholder to establish. The SLC also had misgivings on the penalties relating to some offences. The letter of response from the Minister to the Committee reiterated much of the detail from the Explanatory Notes that accompanied the proposed new law, by stating that the offences and related penalties were necessary for the Act to be enforced and effective and was equivalent to the unamended provisions of the VMA.

With regard to the administrative powers of the regulators, the SLC regarded these as significant in that they included the power to give a landholder a stop work or restoration notice, and to use reasonable force or take any other reasonable action to prevent breach of a stop work or restoration notice. In his letter of response to the Committee the Minister once again noted that these provisions were similar to the unamended Act; and repeated information supplied in the Explanatory Note stating that the ‘power is justified because situations have arisen as to where the use of reasonable force would be the only means of ensuring an offence in progress is stopped’. The SLC noted that the terms ‘reasonable force’ and ‘other reasonable action’ were not defined in the legislation and that potentially this could impact upon the rights and liberties of individuals.

The retrospective operation of the 2009 amendments to the VMA followed a similar pattern to that witnessed with earlier VMA legislative changes. The statutory requirements of the *Legislative Standards Act 1992* (Qld) oblige the SLC to consider if retrospectivity would have sufficient regard to the rights and liberties of individuals. In reply to the Committees’ concerns the Minister, in his responding letter, again restated

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91 For example the amended ss 19 R and 19 W of the VMA must be read with s 4.3.1 (1) of the *Integrated Planning Act 1997* (Qld) which covers carrying out an assessable development without a permit. See Queensland Parliament, Scrutiny of Legislation Committee, Alert Digest No 10 of 2009, 40-41. In 2009 the *Integrated Planning Act 1997* (Qld) changed to the *Sustainable Planning Act 2009* (Qld).
95 Queensland Parliament, Scrutiny of Legislation Committee, Alert Digest, No 10 of 2009, 42.
97 Queensland Parliament, Scrutiny of Legislation Committee, Alert Digest, No 10 of 2009, 42. The amended section of the VMA is s 54 C which provides: If the person does an act, or makes an omission, in contravention of the stop work notice or restoration notice, an official may use reasonable force and take any other reasonable action to stop the contravention.
the account provided in the Explanatory Note. This was to the effect that retrospectivity was justified to prevent pre-emptive clearing and was mitigated by public announcement of the introduction of the legislation, keeping the period of retrospectivity as short as possible and excluding criminal liability for the retrospective period.™

The parliamentary process for the 2009 amendments to the VMA followed a heavily trodden path. If a proposed law is declared urgent, the SLC will not examine the Bill, as happened at the start of the moratorium. If normal parliamentary procedures are adhered to, the SLC prepare a report that is duly tabled in parliament, as happened at the end of the moratorium. At the time the practice of the Committee in its report was to list the clauses about which they had concerns, and then extract a rationalization from the relevant part of the Explanatory Notes and insert these into the report. The Minister, in his letter of reply to the Committee, likewise repeated the rationalization from the Explanatory Notes.

This process becomes more fundamentally flawed within the Legislative Assembly, as it is in this forum that the concerns of the Committee should be debated and ultimately determined by Parliament.™ However, it is in the Legislative Assembly that such deliberations are unlikely to take place. In the debate on the 2009 amendments, opposition members representing rural constituents listed the concerns of the SLC, but the response from the Minister was minimal.™ The SLC may draw the attention of parliament to proposed legislative clauses that may affect the rights and liabilities of rural landholders but the debate and determination of these issues does not occur and, in reality, often ends with the restatement of information supplied in the Explanatory Notes.

At the start of the moratorium on clearing regrowth in April 2009, the purpose of the amending Act was to protect all regrowth vegetation in rural areas, including certain


areas of riparian regrowth.\textsuperscript{101} At the end of the moratorium period the government made some concessions. The October amendments included:

- Regulation of regrowth vegetation on agricultural and grazing leasehold land and non-urban freehold and indigenous land;
- Protection of mature regrowth vegetation that had not been cleared since 31 December 1989;
- Protection of riparian regrowth in the Great Barrier Reef catchments of Burdekin, Mackay-Whitsundays and the Wet Tropics;
- A new regrowth vegetation code;
- A permit to clear is no longer required but landholders must give notice of intention to clear and a penalty applies in the event of failure to give notice;
- Protection of regrowth vegetation to be the same on freehold and leasehold land.\textsuperscript{102}

Making the regulation of freehold land the same as leasehold land in respect of regrowth marks a continuing move by the VMA to merge the regulation of different tenures. This may well, as the Minister claimed, facilitate a simpler administrative process but it signals a further and basic philosophical shift in the treatment of leasehold and freehold land tenure.\textsuperscript{103}

The October VMA amendments do seem to have taken into account the many submissions made by landholders during the moratorium period. It appeared that consultation with interested parties did have an impact, which had hitherto not been apparent with earlier VMA amendments. Thus, as noted by the Minister, the government made the following concessions:

- A hardship provision – if the new laws render a property unviable the regulators may authorise clearing that would otherwise be protected;

\textsuperscript{101} Vegetation Management (Regrowth Clearing Moratorium) Act 2009 (Qld) s (1) (a) (b).
• Small and isolated areas of protected vegetation may be cleared if a larger area of unregulated regrowth is protected in exchange; and

• Excluding regrowth less than 20 years old to lessen the impact on primary production land. 104

There was no financial compensation for affected landholders beyond a commitment of $2 million to assist bodies such as Agforce to implement training and information on the regrowth regulations. During the moratorium period Agforce took ministers and senior bureaucrats to rural Queensland properties. At the end of the moratorium period Agforce took some of the credit for the concessions, claiming to have ‘lead the way in ensuring the Queensland government understood the implications of the moratorium and legislation to sustainable agricultural production’. 105

The October 2009 amendments to the VMA provided protection for an additional one million hectares of land. 106 The total area of land devoted to agriculture in Queensland is 141.4 million hectares. 107 If one of the main purposes of the Act is to prevent the loss of biodiversity and maintain ecological processes, 108 the VMA has a long way to go. After the October amendments the World Wildlife Fund, Queensland Conservation Council, the Wildlife Preservation Society of Queensland and the Wilderness Society joined together to express their disappointment with the amendments. In a joint statement the conservation groups described Queensland as the bulldozer capital of Australia and said the law would ‘do little to stop greenhouse gas emissions or the continued destruction of our endangered ecosystems and vulnerable landscapes’. 109 The Queensland Greens criticised the exemptions in the legislation and declared: ‘Queensland landholders need certainty and support to comply with these new rules and vegetation needs more


108 Vegetation Management Act 1999 (Qld) s 3 (1).

comprehensive protection to safeguard biodiversity and carbon stores'. The Queensland government has consistently advocated that the VMA would bring certainty to rural landholders. The 2009 regrowth moratorium lasted for six months during which time the requirements of the law were far from certain and the implications for some landholders far reaching. These amendments did little to promote a cooperative working relationship between the government and rural landholders.

**Rural landholders and the Queensland government in 2009**

The political sensors of Queensland Labor in the 2009 State election may well have been attuned to the immediate requirements of an election, but sustainable land management practices on rural land require engagement and cooperation between the regulators and the rural community. It is clear from this thesis this has been a problematic journey. The gulf between political rhetoric and political practice for the Labor government in 2009 was wide. The environment was a key electoral factor. Prior to the 2009 election, a survey of attitudes of Queensland voters towards land clearing and the environment was undertaken on behalf of the World Wildlife Fund. Almost three quarters of Queensland voters polled said that the environment would have a strong influence on their vote. How then did the Labor Government measure up environmentally? Were there inconsistencies between what was said and what was done?

The VMA brought an end to broadscale land clearing in Queensland in 2006. The long-term environmental significance of this legislation cannot be underestimated. The politicization of the VMA, however, engendered alienation in some sectors of the rural community. This estrangement was exacerbated by the government’s support of the surge in mining and mineral exploration permits on rural land at this time. A total of $563.3 million was invested in exploration permits between 2007 and 2008; this amount

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was double the previously assessed period.\textsuperscript{114} In February 2009 the government amended the \textit{Acquisition of Land Act 1967} (Qld) for those affected by land resumption. The potential advance of mining on prime agricultural land caused alarm and anguish in the bush,\textsuperscript{115} not least because clearing for mining is not regulated under the VMA.\textsuperscript{116}

Similar issues emerged in 2009 for nature refuges within the State. A relatively small proportion of land is conserved under this type of voluntary agreement made between landholders and the government.\textsuperscript{117} In Queensland, provision is made for such agreements under the \textit{Nature Conservation Act 1992} (Qld). The object of the Act is the conservation of nature and the emphasis is on community participation.\textsuperscript{118} Yet a growing number of Nature Refuges have been subjected to mining and mineral exploration. The 8000-hectare Bimblebox Refuge in Central Queensland came under threat from mining by Clive Palmer’s Waratah Coal Company in 2009 and remains in danger in 2012.\textsuperscript{119} The significant cultural and natural resources and values of Bimblebox are listed to include ‘a large area of intact habitat in a landscape that has been subjected to widespread clearing’.\textsuperscript{120} A similar fate awaits the Avocet Nature Refuge which supports ‘vegetation ecosystems considered endangered in the brigalow belt bioregion’.\textsuperscript{121} Then Premier of the Labor Government, Anna Bligh said exploration permits on nature refuges would be considered on a case-by-case basis. A genuine acknowledgement of the environmental significance of these sanctuaries should impose a blanket ban on such exploration.


\textsuperscript{116} Clearing for mining is exempt under the regulatory provisions of both the VMA and the \textit{Sustainable Planning Act 2009} (Qld). Under the \textit{Environmental Protection Act 1994} (Qld) the conservation status of regional ecosystems may be taken into account if applicable.


\textsuperscript{118} Nature Conservation Act 1992 (Qld) ss 4 & 6.

\textsuperscript{119} See Bimblebox Nature Reserve. Available at: \url{www.bimblebox.org} (viewed 20 November 2009).


Queensland politics in 2009

This chapter began with reference to Tony Fitzgerald. In July 2009, he addressed an audience in the State Library of Queensland gathered to commemorate the twentieth anniversary of the Fitzgerald Report. Of Queensland politics in 2009, he had this to say:

Access can now be purchased, patronage is dispensed, mates and supporters are appointed and retired politicians exploit their connections to obtain ‘success fees’ for deals between business and government. Neither side of politics is interested in these issues except for short-term political advantage as each enjoys or plots impatiently for its turn at the privileges and opportunities which accompany power.122

Subsequently, in Parliament, Anna Bligh addressed the issue of accountability in government and noted some of the reforms her government had made in such areas as freedom of information.123 She failed to mention her government’s tendency to put to Cabinet those documents that the government wished to suppress. This tactic ensured that such documents were not subject to freedom of information requirements for thirty years and was employed by the Queensland Labor Party on the introduction of the VMA, in order to repress a report by their own Department of Primary Industries on the economic impact of vegetation management legislation on rural landholders.124 Twenty years ago the Fitzgerald Report cautioned that ‘the institutional culture of public administration risks degeneration if, for any reason, a government’s activities ceased to be moderated by concern at the possibility of losing power’.125 The possibility of losing power became a potential reality for the ALP in the 2009 State election. By November of that year the ALP introduced and passed the *Integrity Act 2009 (Qld)* and claimed this to be the start of a raft of integrity and accountability reforms within Queensland.126

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124 Freedom of Information Act 1992 (Qld) s 36 (1) (a).


126 The *Integrity Act 1999 (Qld)* was passed on the 25 November 2009. See also, The State of Queensland (Department of the Premier and Cabinet) *Response to Integrity and Accountability in Queensland*, November 2009.
Conclusion

The making and implementation of the 2009 amendments to the VMA followed a pattern observed with previous legislative changes. The political processes within which the amendments were made tracked a typical parliamentary course of action for a controversial piece of legislation. The Queensland Labor Party has in the past introduced vegetation management legislation at the first sitting following re-election, as in 2004. After re-election in 2009 the vegetation management amendments were announced two weeks before the first parliamentary session; and a retrospective law was made on the opening of the new parliament, which suspended normal parliamentary business.

Ideally the environment should be beyond political expediency. The reality for Queensland, however, is that minority groups may from time to time find themselves in a position to influence and shape environmental policy and law. Under the prevailing electoral system in Queensland – and when the majority Labor governments’ power was in decline and required topping up with preference votes – it was the Greens who had the ear of government and, as such, influenced the political process and the law that was ultimately made. Political reality dictates that a policy favourable to one group will adversely affect another group. In the past, under successive conservative regimes, the rural community in Queensland had an influential role within the State. By 2009 this had lessened to the status of a marginalised group struggling to find a voice and a genuine participatory place in policy decision-making affecting rural land. The amendments brought uncertainty, disruption and marginalisation to those rural landholders most affected by the Act during the six month moratorium period. Rural landholders were aware that the regrowth moratorium was the outcome of a preference deal with the Greens; and angered further by Peter Beattie who had consistently promised regrowth would not be regulated. Many landholders were aggrieved by the uncertainty caused by the moratorium, the specific moratorium inaccuracies of the mapping system and the potential effects of a loss of productivity and a fall in land values. Such disruption must have had a detrimental impact on the regulatory relationship and all for the ultimate protection of an additional one million hectares of land in a State where 141 million hectares is used for agriculture.
Political expediency meant the antenna of Queensland Labor was attuned to the pressing requirements of an election. The political context in 2009 was aggravated by the start of a significant rise in mining and mineral exploration on rural land, including land under the supposed protection of perpetual conservation covenants. Doubts were expressed, not least by Tony Fitzgerald that Queensland had really moved on from the Fitzgerald Inquiry era. It remains of critical importance therefore to constantly review and call into question our parliamentary systems and political processes. The accountability reforms promised by the ALP in 2009 were tested in the following chapter when information on the compliance and enforcement policy and practices of the government's regulatory administrators was sought.
Chapter Six: Compliance and enforcement under the vegetation management regulations

Introduction

This chapter provides an analysis of environmental crime and criminal responsibility, as a framework within which to consider the legislative structure for compliance and enforcement of vegetation management, during the Labor period of government in Queensland. Both Acts pertinent to this thesis are considered. In 2003, the Vegetation Management Act 1999 (Qld) (VMA) and the Land Act 1994 (Qld), (LA) were amended and leasehold land was brought, alongside freehold land, under the VMA for the purposes of compliance and enforcement. As the illegal clearing of land is potentially a significant environmental crime, the chapter begins with an analysis of the literature in this area, which tends to focus on particular statutory schemes and jurisdictions.

Common themes abound within the literature, such as the difficulties of applying general principles of criminal law to environmental law. If environmental crime continues to be regarded as a victimless offence, common perception will need to adjust considerably to acknowledge the victim is generally the environment, and present and ultimately future generations. For Queensland, the crime of illegal land clearing has additional complications. Until relatively recently, clearing was regarded as development and included as a lease condition for leaseholders. Clearing is generally undertaken within a rural landholder’s home environment, inescapably invoking the contentious issue of property rights – particularly for freeholders. The inherent difficulties of defending and prosecuting environmental crime emerged as one of the themes from the literature and are apparent in this and the following chapter.

Breach of the vegetation management regulations potentially take an accused landholder into the realms of criminal law and criminal responsibility. Accordingly an analysis of criminal law and criminal responsibility and attendant literature, with particular reference to the jurisdiction of Queensland, is included. In the initial implementation stages of the vegetation management regulations, there was confusion on the part of some landholders as to their criminal responsibility. This arose because of uncertainty, particularly with vegetation mapping. The relationship between the regulators and regulated was strained. It was not assisted by the predisposition of the Department of 151
Environment and Resource Management (DERM), during investigations, to record conversations without the consent or knowledge of the landholder.

What a property owner may or may not clear depended on how the vegetation was categorized by the regulators under the appropriate vegetation management map, together with any requirements of their land title or titles. Rural landholders seeking clarification of what amounted to an offence might well struggle with the complexities of the statutory arrangement for compliance and enforcement. Accordingly, this chapter sets down the legislative structure for vegetation clearing offences in Queensland. This requires the VMA to be read with applicable and complex planning legislation. Further complications occurred when the *Integrated Planning Act 1997* (Qld) was completely overhauled into the *Sustainable Planning Act 2009* (Qld). Clearing on certain categories of land may amount to an assessable development which landholders can ascertain by applying for a property map of assessable vegetation – some landholders waited up to two years for a confirmatory map.

In 2003 the VMA was amended extensively and, in keeping with other chapters in this thesis, this one examines the question: *how were the enforcement and compliance provisions of the VMA made and what were the parliamentary processes of the Queensland parliament within which the amendments were made?* Government rhetoric was frequently antagonistic and emphasized reliance on traditional command and control legislation. The Scrutiny of Legislation Committee (SLC), as ever hard-pressed for time under government pressure, listed extensive concerns with the changing regulations, but were unable to include detailed consideration of every amendment. As a means of legislative scrutiny this persistent treatment of the committee’s work is further evidence of a lack of accountability on the part of Queensland Labor. Parliamentary procedure pursued the habitual course for vegetation management law making within the State. The amendments were extensive and controversial: they included the removal of the defence of honest and reasonable mistake, an extension of regulatory powers to issue a compliance notice and enter private property, together with further regulatory advantages in an extension of statutory time limits, a reversal of the onus of proof and the denial of the privilege against self-

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1 The political processes are typically considered in this thesis together with the political context but this was examined in Chapter Four. Implementation of the compliance and enforcement provisions is included in the following chapter.
incrimination. The Minister at the time was Stephen Robertson, a member habitually employed and re-engaged during the most contentious amendments to the Act. Such tactics and additional restrictions engendered a basic mistrust and volatility to land clearing investigations.

A fundamental aspect of regulatory compliance lies in the decision to prosecute. The final part of this chapter therefore examines the question: how did the regulator decide to prosecute? If environmental laws are to be effective they must be a realistic and just deterrent. Studies of regulatory enforcement strategies included in this chapter however consistently concluded prosecution was a measure of last resort. This chapter advances the argument that prosecution policy will vary depending on the values and affinities of the governing administration. In the latest period of Labor government the regulators at times took an extreme and forceful attitude to enforcement. The chapter concludes with consideration of regulatory compliance strategy and enforcement guidelines.

Environmental crime

Within many European countries, there is a basic division between what may be regarded as ordinary crime and regulatory breach. The absence of this clarity in common law jurisdictions such as Australia has meant 'that we acquired two paradigms of criminal law: the serious, stigmatic crime and the minor, largely technical offence governing otherwise acceptable activities for the sake of the public welfare'. It is inevitable that this distinction may have no clear boundaries and that the boundaries would shift with time. It is likewise inevitable that growing environmental awareness would lead to recognition, at least in some states, that there are different levels of environmental crimes requiring different sanctions. In New South Wales, for example, the boundaries between ordinary and regulatory crime are given statutory recognition in three levels of offences under the provisions of the Protection of the Environment Operations Act 1997 (NSW). Offences and penalties are divided into: serious offences requiring proof of fault and carrying potentially heavy fines and the possibility of imprisonment; middle range offences carrying fines; and less serious offences dealt with

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by an infringement notice system – these latter two offences are provable in the absence of fault.3

The literature on environmental crime has received intermittent attention within Australia. In 1993 interest was focused on the role of criminal law in environmental protection.4 The consensus of opinion flowing from an environmental crime conference held at that time acknowledged the importance of the role of criminal law; but as one element of a wider and comprehensive system of environmental protection.5

Fundamental and recurring themes periodically reverberate within the literature on environmental crime: the reluctance, in the late 1980s, of regulatory authorities to prosecute;6 the prosecution policies of regulatory agencies;7 the priority of environmental protection;8 striking an appropriate balance between cooperation and coercion;9 criminal enforcement for the intractable minority;10 lack of enforcement despite legislative provision;11 the difficulties of applying general principles of criminal law to environmental law;12 and the limits of criminal sanctions, especially fines, to deter environmental crime.13

Australian analysis of environmental crime tends to centre on a particular piece of legislation and jurisdiction. Literature on environmental crime in Queensland, for example, has concentrated primarily on offences under the Environmental Protection

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4 The proceedings of the 1993 conference were published in: Gunningham N, Norberry J & McKillop S (ed) n 3.


Act 1994 (Qld) and compliance and enforcement measures undertaken by the former Environmental Protection Agency (EPA) as administrators. This has included examination of the early stages of the Act’s implementation; and alleged under-enforcement and regulatory capture, which prompted a detailed denial from the regulator.

The benefit of reliance on criminal law within the environmental arena was questioned in Australia in 1993. Greater use of civil enforcement was endorsed particularly for less serious crimes. However, an American perspective has advocated the significant role that effective criminal prosecution can have alongside civil remedies in establishing a strong system of environmental enforcement. It is argued that an effective criminal enforcement structure should include the possibility of a custodial sentence and that a vigorous prosecution policy can have a beneficial deterrent and educative effect. The key word here is effective; ineffective prosecution, as demonstrated in the following chapter, is counterproductive.

The concept of environmental crime may be more readily acceptable in recent times but many of the difficulties, specifically inherent to such offences, remain. Bricknell has argued that such crimes lack an apparent victim, that their impact may go undetected for a considerable time and, when ultimately detected, the treatment of offenders is frequently too lenient. This assessment is not wholly applicable to illegal land clearing in Queensland: the victim is the degraded land. As for detection, this is primarily

20 In this instance the example of American corporate polluters is given in Smith S, n 19, 12.
21 Bricknell S, 'Environmental Crime in Australia, Australian Institute of Criminology, October 2010, xii.
undertaken by the Statewide Land Cover and Trees Study (SLATS) reports that are included in this chapter. How the regulators decide to prosecute landholders and have conducted some land clearing cases is dealt with in this and the following chapters.

As an environmental crime, the illegal clearing of land within Queensland has additional complexities, thus: illegal clearing entered into the sphere of criminal jurisdiction relatively recently; conduct which was once legal is now illegal; clearing was a covenanted requirement for leasehold land; and the activity of clearing is typically undertaken within a rural landholder's home environment, inevitably invoking issues of property rights and resentment at regulatory intrusion. A deep sense of incompleteness remains in the realm of environmental crime, as policy and lawmakers continue to 'attempt to mould the law to suit the contours of specific social problems'.

Within Australia, the legal and practical difficulty of defending and prosecuting crimes against the environment emerged as an issue in the early 1990s, was noted again in 2010, and remain relevant to some of the land clearing cases considered in the following chapter.

Criminal responsibility

Breach of the vegetation management regulations potentially takes the accused landholder into the realms of criminal law and criminal responsibility. Following the traditional principles of common law, criminal responsibility for an offence requires an act or omission (actus reus) together with a guilty mind (mens rea). As Queensland has a Criminal Code, the common law doctrine of mens rea is replaced with the provisions of the Code, which provides that a person is not criminally responsible for an act or omission that occurs independently of the exercise of the person's will, or for an event that occurs by accident. Judicial views differ regarding the extent to which the

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22 Farrier D, 'In search of real Criminal Law' in Bonyhady T(ed) Environmental Protection and Legal Change (Federation Press, 1992) 79-80.
25 Criminal Code Act 1899 (Qld) s 23 (1) these provisions are primarily based on common law developments. The dominance of statute law is espoused in the frequently cited obiter of Griffith CJ in Widgee Shire Council v Bonney (1907) 4 CLR at 981: 'Under the criminal law of Queensland as defined in the Criminal Code, it is never necessary to have recourse to the old doctrine of mens rea...'
Criminal Code mirrors the common law doctrine of mens rea. Nonetheless, the sole test for Queensland remains with the Code and this is particularly the case if a statute does not expressly include a mental element to a given offence, as is the case for vegetation clearing offences.

There are generally different types of statutory environmental offences: those which require proof of a mental element or guilty mind; those that are offences of strict liability requiring the prosecution to prove only the act but not the state of mind of the accused; and offences of absolute liability where no fault element needs to be proved by the prosecution. Absolute liability offences arise if it is not possible to plead the defence of honest and reasonable mistake. The defence of honest and reasonable mistake under the Queensland Criminal Code is, in essence, the same as the common law defence. The Code provides that:

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

The express or implied provisions of the law may exclude the operation of this defence. This is the case for vegetation clearing offences as the VMA expressly excludes the defence of mistake of fact.

This then distinguishes a strict liability offence, in which it will be open to an accused to plead honest and reasonable mistake, from an absolute liability offence in which this defence is not available. Absolute liability offences are rare in Australia. Indeed the effect of absolute liability ‘is to place on individuals engaged in potentially hazardous or harmful activity a legal obligation of extreme (not merely reasonable) care’. Conversely the Minister responsible for these amendments to the VMA declared the

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27 He Kau Teh v The Queen (1985) 157 CLR, 523, 533-534.

28 Criminal Code Act 1899 (Qld) s 24 (1).

29 Criminal Code Act 1899 (Qld) s 24 (2).

30 Vegetation Management Act 1999 (Qld) s 67 B.


32 Bronitt S and McSherry B, n 31, 192.
removal of this defence as being ‘designed to promote a duty to take reasonable care when undertaking activity which impacts on native vegetation to ensure that the activity is conducted strictly in accordance with the regulatory framework’. 33

It is more typical within Australia for environmental crime to be an offence of strict liability; the justification for this, founded on the decisions of English cases, is that such crime is against society as a whole. 34 That being said the English origins of strict liability crime have been explained as being ‘developed in the nineteenth century when enforcement bodies were considered to lack the capability to investigate the internal complexities of business operations’. 35 This explanation is not applicable to rural landholders in Queensland and the regulatory requirements of vegetation management. Rather, the reliance on strict liability environmental offences reflects ever-increasing societal regulation and the attendant ‘economics and expediency’. 36

The act of unlawful land clearing should remain an offence of strict liability in keeping with other Australian environmental crimes. The practical possibility of an accused landholder successfully pleading the defence of honest and reasonable mistake may well be rare, 37 but at the very least the availability of this defence would render the justice system under which accused landholders operate fair. 38 This is especially so in the light of alleged regulatory mapping inaccuracies and the potential for mistakes to be made in mapping. 39

Regrowth is one of the areas in which mapping has been particularly problematic. The Queensland government has declared that the regrowth vegetation map ‘was developed using rigorous scientific methodologies as well as satellite imagery used by the

34 Bates G, Environmental Law in Australia (6th ed, Butterworths 2006), 236 in which the following English cases are provided as examples: Alphacell v Woodward [1972] AC 824; Environment Agency (Formerly National Rivers Authority v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22.
38 Under comparable offences such as Tier 2 offences under the Protection of the Environment Operations Act 1997 (NSW) the defence of honest and reasonable mistake remains available.
Queensland Herbarium and in the SLATS reports'. However, the regulators in their information for rural landholders note:

Satellite imagery was used to make the regrowth maps and sometimes non native tree cover like orchards are mistakenly interpreted as native vegetation. This is an inevitable consequence of satellite imagery which is why the maps and the law work together. The maps should not be read in isolation and should be interpreted with the legislation. If the vegetation isn’t native or there isn’t a regional ecosystem, the laws do not apply.

The regulators go on to say that such mapping mistakes will be corrected without payment. Nonetheless understanding the maps and interpreting the complexities of the legislation is not an easy task. For example, a rural landholder seeking clarification of the meaning of a regional ecosystem would find this is defined as ‘a vegetation community in a bioregion that is consistently associated with a particular combination of geology, landform and soil’. This assumes rural landholders are aware that statutory definitions may be located in the Schedule to a statute. To further assume an understanding of this definition and an ability to interpret this alongside the map is an unrealistic expectation on the part of the regulators.

Rural landholders who have sought advice from the regulators may still be mistaken about their liability for criminal responsibility. The following experience of a prosecuted landholder from Surat was tabled in the Legislative Assembly by Jeff Seeney. This account demonstrates the uncertainty of regulatory mapping, the effect of the continuing complexity of the VMA, and the confusion surrounding the initial implementation of the regulations:

During July, August and early September 2000, there was a lot of media and press releases from the Government with regard to implementing tree clearing guidelines, and that a permit would be required to clear native title vegetation on all land including freehold land. We were intending to pull some virgin timber around this time and had asked a neighbour to work with us where we had our own dozer and they provided the other to pull about 1,000 acres. I was concerned about the media releasing details of what was to come, being the proclamation of the Vegetation Management Act.

42 Vegetation Management Act 1999 (Qld) Schedule.
Prior to this date I was liaising with senior Department of Natural Resources and Mines (DNR) in Roma, Dalby and Warwick, with regard to what to do if the legislation was introduced whilst we were pulling. We wanted to pull approximately 1,000 acres and had the opportunity to do this as a neighbour was travelling through our property with their dozers and we could hire one of theirs to pull with our own machine. We had these senior officers visit our property at an earlier date, when, they actually drew up a tree-clearing plan for the whole of our property with our assistance, long before it was required from DNR.

They all indicated to me in their own words to keep pulling as we had a plan and that we were pulling within their guidelines and that there was no timber species that was endangered and that a permit would be approved anyway. These DNR personnel had not been briefed on what procedures were required; being what forms would need to be supplied or any details whatsoever with regard to making an application to clear. In other words there was total confusion in DNR for a month as to what was required. A permit would be approved if and when it was required to clear according to our tree clearing plan. They did suggest that if we had a breakdown or got wet weather to hold off and apply for a permit. I made notes in my Diary of these phone calls.

We started pulling on 15 December and later we found out on the news that the Vegetation Management Act was proclaimed in parliament and that there were restrictions on tree clearing in Queensland. In February 2002 I had a phone call from DNR requesting a meeting with me at our property to discuss anomalies with the tree clearing maps. I agreed to meet with them on the next day to what I thought was to correct some anomalies with their maps. I felt that they needed my help as I have lived here all of my life and I was made to think that they needed my assistance, knowing my local knowledge of the district. How wrong was I? Two of them came out and I invited them into our home and made them a cup of tea and they produced maps and started questioning me and it was after about two hours that I realised things were not right when I was asked for my Drivers License to identify myself.

I then realised that he was talking into a tape recorder and that I had told him things that did not relate to the original investigation. I was not made aware that our conversation was being recorded. This has led to me being charged for Tree Clearing without a Permit for clearing 49.7 HA of the 1,000 acres. Technically, we were clearing without a permit for the few days to complete the 1,000 acres, because of their inefficiencies of not being able to issue a permit. I was in fact consulting with them to prevent exactly what has happened.
It is very serious as I appeared in Roma Magistrates Court and the Crown had a barrister from Crown Law Office to present their case. It was adjourned over legal argument, as they have not provided us with the evidence they are bringing against me, which by law they are required to do.43

The outcome of this particular case and the regulatory evidential problems leading to withdrawal of the action by the regulators is common to some of the cases considered in the following chapter. It is clear from this account that the landholder attempted to liaise with regulatory officials and avoid criminal responsibility.

This description also provides some explanation of the animosity felt by some rural landholders towards the regulators. This particular landholder was not made aware that his conversations were being recorded.44 Information provided by the regulators to landholders on compliance discusses the possibility of an interview with an authorised officer being recorded. It states:

...officers may record a conversation to ensure accuracy without your permission. You can get a copy of the recoding. These recordings protect both the authorised officer and the person against whom the allegation was made and may be used in subsequent court proceedings.45

What occurred is contrary to the regulatory claim that authorised officers will act with ‘professionalism and courtesy’.46 It is questionable whether such an investigatory practice is justified: there would be evidential procedures involved in the admissibility of such evidence and it is hardly conducive to a working relationship.

A complex legislative structure for vegetation clearing offences

The experience of the Surat landholder demonstrates the complexities of vegetation management legislation; and prompted an examination of the legislative structure for

44 Recording without the landholder’s knowledge is allegedly a frequent occurrence: personal communication from Ron Bahnisch then Chairman of Australian Property Rights Association on 27 April 2011.
45 Queensland government, Compliance – Investigation, Department of Natural Resources and Water, Information Sheet.
46 Queensland government, Compliance – Investigation, Department of Natural Resources and Water, Information Sheet.
vegetation clearing offences in Queensland. Rural landholders seeking clarification of what amounts to a vegetation clearing offence may well struggle with the statutory scheme. This is because the legislative scheme for vegetation clearing offences requires an understanding of the relevant provisions of both the VMA and the Sustainable Planning Act 2009 (Qld). The Integrated Planning Act 1997 (Qld) was replaced by the Sustainable Planning Act 2009 (Qld) relatively recently; accordingly, most of the land clearing cases considered still refer to the provisions of the Integrated Planning Act 1997 (Qld). Vegetation clearing offences are not included in the VMA but under the provisions of the Sustainable Planning Act 2009 (Qld). The VMA confusingly defines a clearing offence as an offence under the Forestry Act 1959 (Qld), the Nature Conservation Act 1992 (Qld) or the Environmental Protection Act 1994 (Qld); it further defines a vegetation clearing offence as an offence against a vegetation clearing provision; and a vegetation clearing provision means the relevant provisions of the Sustainable Planning Act 2009 (Qld) as far as they relate to clearing vegetation.47

The Sustainable Planning Act 2009 (Qld) includes vegetation clearing as an aspect of development. For the purposes of this Act, development includes carrying out operational work that in turn includes clearing vegetation to which the VMA applies.48 For regulatory purposes therefore, vegetation clearing is potentially an assessable development; and the Sustainable Planning Act 2009 (Qld) prohibits carrying out assessable development without a compliance permit.

What amounts to clearing is defined under the VMA; for the purposes of this legislation it means to remove, cut down, ringbark, push over, poison or destroy in any way including burning, flooding or draining but does not include destroying standing vegetation by stock, or lopping a tree.50 Vegetation includes a native tree or plant but not a grass or mangrove.51 What a landholder may or may not clear depends on how the vegetation is categorized by the regulators under the appropriate vegetation management map. Vegetation management maps present a confusing array. They are

48 The relevant sections are listed in the VMA Schedule e.g. ss 578 (1), 580 (1), 581, 582 or 594 (1) s 578 (1) provide that a person must not carry out assessable development unless there is an effective development permit for the development.
49 The Sustainable Planning Act 2009 (Qld), Part 3, Division 2, s 7(c) and Division 3, s 10, l(f).
50 Defined in the Schedule of the Vegetation Management Act 1999 (Qld).
51 Vegetation Management Act 1999 (Qld) s 8.
broken down into: a regional ecosystem map; a remnant map; a regrowth map; an essential habitat map and a registered area of agriculture map. Over the life of the legislation the definition of regional ecosystem maps has changed. At the time of writing, such maps are defined to include areas of remnant vegetation that are: an endangered regional ecosystem; or, an of concern regional ecosystem; or a least concern regional ecosystem. A remnant map covers remnant vegetation which is defined in the Act as vegetation that has all of the following characteristics: the predominant canopy of the vegetation covers more than 50% of the undisturbed predominant canopy; it averages more than 70% of the vegetation’s undisturbed height and is composed of species characteristic of the undisturbed predominant canopy. A regrowth vegetation map includes endangered, of concern and of least concern regional ecosystems which have not been cleared since 31 December 1989. An essential habitat map covers essential habitat for protected wildlife. A registered area of agriculture map includes, where applicable, any wild river area.

Adhering to the requirements of the VMA and the LA will depend on how the vegetation is categorized by the regulators. In order to clarify how land is categorized, a landholder may apply for a property map of assessable vegetation (PMAV). A PMAV is a property scale map of the location, boundary and status of the vegetation and divides the land into categories. During the life of the legislation the categories have changed – initially there were 24 categories, which made the legislation excessively complex. In 2006 this was reduced to four categories. Further amendments were made in 2009 following the change from the Integrated Planning Act 1997 (Qld) to the Sustainable Planning Act 2009 (Qld).

A PMAV currently divides the land into four categories. These categories are A, B, C, and X regions; and areas, which are subject to a regional ecosystem map, remnant map or regrowth vegetation map. Category A areas include areas which have been unlawfully cleared or are subject to a restoration, compliance or enforcement notice of court proceedings in which the landholder is found guilty. Category B areas are

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52 For example: the definition of this type of map was changed in 2003 by Act No 10 s 75 (3) and in 2004 by Act No 1 s 28 (3).
53 Vegetation Management Act 1999 (Qld) s 20 A.
54 Vegetation Management Act 1999 (Qld) s 20 AB.
55 Vegetation Management Act 1999 (Qld) s 20 AC.
56 Vegetation Management Act 1999 (Qld) s 20 AD.
57 Vegetation Management Act 1999 (Qld) s 20 AK.
58 Vegetation Management Act 1999 (Qld) s 20 AL.
remnant vegetation.\textsuperscript{59} Category C areas are high value regrowth vegetation;\textsuperscript{60} and Category X areas include land that has been cleared, but when the PMAV was made, did not contain remnant vegetation and therefore assessable vegetation.\textsuperscript{61}

Vegetation in category X areas may be cleared without a permit. A permit is required for the other categories unless the clearing is an exempt activity. An exempt activity under the VMA includes fodder harvesting, thinning or clearing for an encroachment.\textsuperscript{62} Category X areas appear white on the maps, anything else will be a particular colour reflecting the vegetation type; it is the coloured areas which should put the landholder on notice that clearing on these areas may amount to an assessable development.\textsuperscript{63} Some landholders have sought expert assistance in respect of mapping. The first task of the experts is typically to assess if the mapping is correct.\textsuperscript{64} During the life of the legislation there has been some frustration surrounding PMAVs, especially in terms of extensive waiting periods.\textsuperscript{65} At the time of writing 8,354 rural landholders had made an application for a PMAV.\textsuperscript{66}

Having established what can or cannot be done with vegetation on their land, a rural landholder must also take into account their land title or titles. Many rural properties encompass more than one title and may include differing titles such as freehold, leasehold or freeholding lease. The land title or titles for each property must be searched at the Land Registry to ensure there are no relevant restricting vegetation notices, covenants or encumbrances.

The many laws governing the management of vegetation on rural land are elucidated in Chapter Three of this thesis. Legislative liability may potentially exist at Commonwealth, State and local government levels. At State level, the VMA and the LA

\textsuperscript{59} Vegetation Management Act 1999 (Qld) s 20 AM.
\textsuperscript{60} Vegetation Management Act 1999 (Qld) s 20 AN.
\textsuperscript{61} Vegetation Management Act 1999 (Qld) s 20 AO.
\textsuperscript{62} Vegetation Management Act 1999 (Qld) s 22 A.
\textsuperscript{63} One of the selling features of rural property may now include that the land to be sold is ‘white on the map’.
\textsuperscript{64} Chenoweth A and Chenoweth D F, ‘Vegetation Regulation: an on the ground perspective’ (2009) paper presented to the Queensland Environmental Law Association. The authors are environmental planning and landscape architects.
\textsuperscript{66} A query regarding the proportion of landholders this amounts to was made to DERM, the email response stated: ‘DERM’s reporting system uses the variable of number of property applications received, a landholder that owns more than one property may submit applications for each of these properties. We have received 8,354 PMAV applications up to and including May 2011. Using this variable it would not be possible to say the percentage of landholders that currently hold a PMAV’. Email from a policy officer, vegetation management, DERM dated 14 July 2011.
and the numerous Acts listed in Chapter Three may be applicable, as may Commonwealth and local government legislation. Despite the many layers of legislation and the complex nature of the particular statutes there remains a general and well-settled legal principle that ignorance of the law is no excuse. Rural landholders, like all citizens, cannot plead ignorance of the law but must abide by the law if they wish to evade the further tangled web of vegetation clearing offences. Such offences were further complicated by amendments to the investigatory and prosecution powers of the regulators in 2003.

**Amendments to investigatory and prosecution powers of the regulators: the Natural Resources and Other Legislation Amendment Act 2003 (Qld)**

In 2003 the Queensland Labor Government amended the VMA and the LA, in particular the provisions relating to enforcement and compliance, in an attempt to address the ‘scourge of illegal clearing’. The amendments to both pieces of legislation marked the continuing trend toward treating freehold and leasehold tenure in the same way in regard to compliance and enforcement of vegetation management regulations. In keeping with the thesis task, the question was raised: what were the parliamentary processes of the Queensland Parliament under which the compliance and enforcement amendments were made and implemented? The Natural Resources and Other Legislation Amendment Act 2003 (Qld) amended a total of five Acts, which included the VMA and the LA. The Explanatory Notes that accompanied the Bill confirmed that the proposed legislation addressed two distinct policy objectives, namely illegal tree clearing and native title. There was no explanation as to why two diverse objectives should be considered within the same Bill. The Minister was Stephen Robertson who promised to investigate ‘every single notification of illegal clearing’ and boasted, in terms of prosecutions, a ‘success rate of 100 per cent in cases that go to court’. This is an exaggerated claim in light of the earlier example of the Surat landholder and some of

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the cases included in the following chapter. Nonetheless, the Minister's emphasis was on the need for additional enforcement and deterrents, which he maintained justified the increased investigatory and prosecution powers of the regulators.

The amendments to the investigatory and prosecution provisions of the legislation were extensive. The Minister claimed the changes were necessary because existing laws were not an adequate deterrent. The SLATS report for the period had identified 61,000 hectares of potentially illegal clearing.70 There was some scepticism surrounding the allegation of 61,000 hectares, particularly as the SLATS report simply identified changes in vegetation coverage.71 It was necessary for Queensland Herbarium to then assess whether the changes would be in breach of regulatory requirements.72 As noted by a compliance official at the time, the 61,000 hectares represented potential illegal clearing of cases yet to be investigated.73 The then Premier Peter Beattie referred to illegal clearing being undertaken by 'cowboys'.74 The message from the Queensland Labor government was clear: traditional command and control legislation was needed.

The 61,000 hectares was used by the Queensland Labor Government as justification for the investigatory and compliance amendments to the law.75 The question was put to DERM whether it subsequently proved possible to ascertain how much of the 61,000 hectares had been illegally cleared. The regulators responded:

SLATS assists in identifying potential illegal clearing by analysing changes in vegetation cover across Queensland. The instances of potential illegal clearing are then entered into DERM's database, where they are assessed and prioritized for

73 Sullivan G, 'Enforcing Queensland's Vegetation Clearing Laws' (2003), Acting Manager, Compliance Coordination Unit, Queensland Department of Natural Resources and Mines, paper presented to the Queensland Environmental Law Association.
action. DERM takes enforcement action on those instances in accordance with its
Enforcement Guidelines.

It is not possible to state categorically what proportion of the 61,000 hectares of
potentially illegal clearing was in fact illegal without completing prosecutions for
all of the clearing activity. Such an undertaking would be beyond the resources of
DERM and would in any event be inconsistent with DERM’s Enforcement
Guidelines.76

As outlined in Chapter Four, the Queensland parliamentary process should include the
Scrutiny of Legislation Committee (SLC) on the introduction of new and amending
legislation. The primary role of the SLC is to consider if the proposed new laws comply
with fundamental legislative principles, and these principles require that legislation has
sufficient regard to the rights and liberties of individuals.77 The SLC considered the
amendments and listed its initial concerns.78

The Committee noted the amendments were numerous and accordingly that it was
difficult, in the time available, to provide a detailed consideration of each amendment.79
The areas of central concern to the SLC included, inter alia, the following:

- Removal of the defence of honest and reasonable mistake;
- Regulatory extension of powers to issue a compliance notice – the
  amendments provided authority for an authorized person to issue a
  compliance notice if they reasonably believed a tree clearing offence is or
  has been committed, the notice would attach to the land and bind
  successors in title;
- Extension of powers to enter private property – amendments were added to
  the LA to bring it into line with the VMA and additionally to expand the
  powers of the VMA, in respect of entry and post entry powers to private
  property, for the purpose of monitoring or enforcing compliance;

76 Queensland government, DERM, letter in response from the A/Director, Litigation Unit dated 4 May 2011. The
Enforcement Guidelines of DERM are considered subsequently in this Chapter.
77 Legislative Standards Act 1992 (Qld) s 4 (2).
October 2010).
79 Queensland Parliament, Scrutiny of Legislation Committee, Alert Digest, No 2 of 2003, 5. Available at:
October 2010). 167
• Extension of powers to obtain a criminal history – authority for an authorized person, if they believed a landholder would create an unacceptable level of risk, to obtain the criminal history of that person including spent convictions;

• Extension of statutory time limits – provision for an extension of the usual time limits applicable to commencement of proceedings if the court considered an extension just and equitable;

• A reversal of the onus of proof in respect of regulatory evidence – the amendments made provision for an instrument, equipment or installation of a prescribed type, in the absence of evidence to the contrary, to be accurate and to have been used by an appropriately qualified person; and

• Denial of the privilege against self-incrimination – amending provisions denied landholders the benefit of the rule against self-incrimination when giving information to an authorized person.80

The Ministerial response to the concerns of the SLC was included in a subsequent Alert Digest report. He stated:

I note the Committee’s comments on whether the amendments have sufficient regard to the rights of persons against whom the provisions have been invoked. I consider that the Explanatory Notes provide an adequate explanation of the purpose of and reasons for the clauses. The provisions only affect those who clear vegetation illegally. The provisions do not change what constitutes illegal clearing. In considering these provisions, the community’s interest in protecting vegetation must be weighed against the individual’s right to privacy. Where proposed provisions infringe fundamental legislative principles safeguards have been included to protect the individual.81

There are recurring patterns in the Queensland parliamentary process that reveal underlying weaknesses in the typical law making practice of the Queensland Labor government. Generally legislation is introduced and accompanied by Explanatory Notes. The rhetoric of the Notes is constantly repeated in parliamentary debate and


Ministerial responses to concerns by the SLC. Thus in this particular instance of amendments, the Minister refers the SLC back to the Explanatory Notes. Subsequently, in the relevant Alert Digest report, it is noted that the Minister’s response is reproduced in full in the appendix to the report. What this amounts to is a letter from the Minister in which the paragraph quoted above is merely repeated.82

Debate on new legislation concerning vegetation management has been regularly declared urgent and frequently guillotined. However, the debate for the compliance amendments was considerably more extensive than usual. This time a Committee Stage was held and the amending clauses were debated. The applicable SLC Alert Digest report was tabled midway through the Committee Stage. As is so frequently the case the Alert Digest report – and the concerns contained therein – did not become a pivotal feature of parliamentary debate even though the object of the Committee was to assist ‘Parliament in its determination whether legislation has sufficient regard to rights and liberties of individuals’.83

A lengthy debate spanning several days ensued. It was unlikely that any of the proposed clauses would be changed as the Queensland Labor Party at the time had a commanding majority. Coalition members put forward several amendments to the proposed legislation during the Committee Stage but none were successful. Reference was not made to the SLC during parliamentary debate; but deliberations did include the areas of central concern to the Committee. Each of these areas of concern will be considered.

**Removal of the defence of honest and reasonable mistake**

Removal of this defence proved to be extremely contentious within parliamentary deliberations. The Minister acknowledged that this was the ‘most frequently raised defence’84 and that landholders commonly pleaded ‘mistakes in map interpretation,

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status of vegetation and errors relating to location on a property. He again asserted that the impact of this legislative change was limited to those engaged in unauthorized clearing. The following chapter, however, shows that the vegetation compliance laws, while clearly affecting those who undertake unlawful clearing, also impact upon prosecuted landholders whose cases were subsequently discharged by the courts. Inevitably some prosecutions will be unsuccessful, but the pervasiveness of this law on rural land necessarily means that rural landholders, as a community, will be aware of the effects of vegetation management enforcement. Land clearing cases are publicized in the local media and press and particularly in the rural press.

**Extension of powers to issue a compliance notice**

Under the 2003 amendments authorised officers were given the power to issue compliance notices (renamed stop work or restoration notices in a further amendment in 2009). This extension of powers to compliance officers, in particular the level of training authorized officers would undergo prior to undertaking this role, was a source of concern to the SLC and during parliamentary debate. The Minister advised that compliance officers would undertake the same vetting processes as other public sector employees. Authorised officers are appointed by and are under the directions of the chief executive.

Following my request, the regulators provided some information on the number of compliance notices issued between 2004 and 2009. The regulatory list supplied did not include names of the parties on whom they were served. Figure 6.1 shows the number of compliance or statutory notices issued over time and by region. Notices may be issued without any litigation having taken place. Or, an authorised officer may, if unsuccessful in litigation proceedings, subsequently issue a compliance notice as

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86 Vegetation Management Act 1999 (Qld) s 25 (1) (b).


88 Vegetation Management Act 1999 (Qld) s 25.

89 Queensland government, DERM, letter in response from the A/Director, Litigation Unit dated 4th May 2011. An interview was undertaken with on the A/Director 13 December 2010.
happened in the case of *Van Reit*, the one Central West case in the 2007-2008 period. Or the regulators may, having been successful in a prosecution case, issue a compliance notice as happened in the case of *Dore*, the one notice made in the North in the 2006-2007 period. In the opinion of this latter prosecuted landholder, once a statutory notice is served the regulators make frequent visits. I therefore asked the regulators if there was a policy on monitoring statutory notices. The reply was: ‘the procedure on how frequently a notice is monitored is a matter for the staff of each region based on the circumstance of the case’.

![Figure 6.1: Number of compliance notices issued by region](image)

Statutory notices are the means by which the land may be re-established with vegetation; as such they are of critical importance. As the regulators provided a list of statutory notices without the names of those served, it is not possible to link all the notices to the cases subsequently considered in the following chapter and clearly some notices would be issued in the absence of litigation. The list of statutory notices supplied by the regulators covers the period from 2004 to 2009, the list of prosecutions supplied from 2000 to 2010. During 2004 to 2009 a total of 18 notices were issued, 12 of those in the South West region. During 2004 to 2009 there were a total of 39 land

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90 Peter Robert Witheyman v Nicholas Daniel Van Reit (2006) Roma Magistrate Court no. 00192264/05(7) transcript of proceedings considered in the following chapter.
91 *Dore & Ors v Penny* [2004] QDC 364 considered in the following chapter.
92 Personal communication with Gary Dore on the 2 July 2010 one of the three defendants in the case of *Dore & Ors v Penny* [2004] QDC 364 considered in the following chapter.
93 Queensland government, DERM, letter in response from the A/Director, Litigation Unit dated 4 May 2011.
clearing cases. All that it is possible to deduce from this is that statutory restoration notices have not been issued in all the clearing cases.

In some cases such notices are not viable because the land has been sold on, as in Winks; or cannot be implemented because of the dire financial circumstances of the defendant, as in Draper. Yet a fundamental object of the vegetation management regulations is to manage ‘the environmental effects of clearing’ to achieve the purposes of the legislation. The purposes include conserving protected vegetation to ensure clearing does not cause land degradation, prevent the loss of biodiversity and maintain ecological processes. The reality is that restoration of the land is not a universal course of action and the objects of the statute remain a distant goal.

Extension of powers to enter private property

With regard to the extensive amendments for entry to private property, the SLC relied on the Legislative Standards Act 1992 (Qld) to raise their disquiet and to ‘draw to the attention of Parliament the nature and extent of these powers’. The Act provides that the question of whether legislation has sufficient regard to rights and liberties of individuals depends on, for example, whether the legislation confers power to enter premises and search for or seize documents or other property without a warrant issued by a judge or other judicial officer. The Minister’s response in the Alert Digest report again reiterated the relevant content of the Explanatory Notes, which acknowledged that ‘entry to a property without a warrant may constitute a breach of fundamental

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94 See the following chapter.
95 Grant Takken v Russell Winks (2009) Beaudesert Magistrates Court no. 3009209 transcript of proceedings, considered in the following chapter.
96 Robert James Black v Reginald Edward Draper (29 September, 2010) Rockhampton Magistrates Court no. M-00087418 transcript of proceedings, considered in the following chapter.
97 Vegetation Management Act 1999 (Qld) s 3 (1).
98 Vegetation Management Act 1999 (Qld) s 3(1) (a) to (g). The purpose of the Act is to regulate the clearing of vegetation in such a way that: conserves remnant vegetation that is: an endangered regional ecosystem or an of concern regional ecosystem or a least concern regional ecosystem and conserves vegetation in declared areas; and ensures the clearing does not cause land degradation; and prevents loss of biodiversity; and maintains ecological processes; and manages the environmental effects of the clearing to achieve all these matters and, finally, to reduce greenhouse gas emissions.
99 The underlying question of whether the land and ecosystems can ever be completely restored to its pre-cleared state is beyond the scope of this thesis.
101 Legislative Standards Act 1992 (Qld) s4 (3) (e).
legislative principles’ but declared that adequate safeguards mitigated the effect of this type of entry. The safeguards were: warrantless entry did not include residential dwellings; entry was limited to serving or checking compliance with a restoration or compliance notice; and, if serving a notice, the compliance officer must reasonably suspect an offence has or is occurring; and finally no power of seizure accompanies warrantless entry.\(^\text{103}\)

In Parliament, warrantless entry generated much disquiet amongst opposition members who queried the need for compliance officers to be given such extensive powers. The Minister justified this provision particularly in terms of the necessity of a physical examination of property to assess observance with a compliance notice.\(^\text{104}\) Once again the explanation for infringement of an individual landholder’s right to privacy was weighed against the community’s interest in protecting vegetation from being unlawfully cleared.\(^\text{105}\)

The 2003 legislative changes considerably expanded the powers of entry to private rural land to monitor regulatory compliance under the VMA and the LA.\(^\text{106}\) Because the initial VMA was so stringent, the Queensland Labor government felt it necessary to bring the LA and leasehold land into line with the regulatory requirements for freehold land. Authorised officers have power to enter a rural landholder’s property if the landholder consents to the entry or the land is subject to any of the following: a lease under the LA; a development approval; a stop work, restoration or enforcement notice or for the purpose of giving a stop work notice if a vegetation clearing offence is being committed.\(^\text{107}\) Comparable legislation, such as the *Environmental Protection Act 1994* (Qld), contains similar provisions in respect of regulatory powers to enter land if the purpose is to monitor compliance.\(^\text{108}\)


\(^{106}\) See for example: *Land Act 1994* (Qld) s 400.

\(^{107}\) *Vegetation Management Act 1999* (Qld) s 30 (1) (c) to (d).

\(^{108}\) *Environmental Protection Act 1994* (Qld) s 452.
Extension of powers to obtain criminal history reports of landholders

Alongside the power of entry, authorized regulatory officers were given additional authority to obtain criminal history reports. The legislation provides that this additional power enables the regulator to decide if entry to a landholder’s property would create an unacceptable level of risk. The request must come from the chief executive to the commissioner of police and the chief executive must then identify any offences involving the use of a weapon or violence, and provide an account to the requesting regulatory officer. The Act further provides that the criminal history report is a confidential document and should be destroyed as soon as practicable within the investigation process. Once again this extensive power was criticised by opposition members in parliament. It was conceded by the Minister in the Explanatory Notes that access to criminal history ‘may be considered a breach of the right to privacy’ but this was declared a necessity because compliance officers ‘are unarmed and work in remote areas with little chance of immediate assistance should they be confronted with a violent situation’. The compliance officer could then be accompanied by a police officer in the event a landholder had previous convictions involving violence.

Other comparable Queensland legislation, such as the *Environmental Protection Act 1994* (Qld), does not have such provisions and it is arguable that authorized officers under both types of legislation would face similar situations. It is also common practice in rural areas – under the many pieces of legislation governing rural landholders – for regulators to seek police assistance during preliminary investigations in the event of any safety concerns. The potential for regulatory authorities in vegetation management to obtain criminal history reports exceeds common practice in other legal settings such as a lawyer-client relationship. A lawyer acting for a client in a criminal matter must seek the client’s written permission to obtain their criminal history. Yet these provisions allow for the disclosure of past convictions to compliance officers, including spent convictions. Ordinarily in Queensland, in furtherance of rehabilitation, a convicted

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109 Vegetation Management Act 1999 (Qld) s 55 B.
110 Vegetation Management Act 1999 (Qld) s 55 C (1) to (5).
111 Vegetation Management Act 1999 (Qld) s 55 D (1) to (3).

174
person's previous convictions are regarded as spent after ten years for an indictable
offence and five years for a summary offence.\textsuperscript{114}

These extra powers granted to regulatory officials operating in this arena demonstrate
the underlying mistrust and volatility of land clearing investigations. This was
particularly the case in the initial period of regulation, but unfortunately the
unpredictability of regulatory visits to rural properties has the potential, in some
instances, to remain problematic.\textsuperscript{115} While the regulators were asked if they had any
record as to how many criminal history checks have been made since the introduction of
the 2003 amendments the response was that: ‘DERM does not keep figures on how
many criminal history checks are conducted’.\textsuperscript{116}

Extension of procedural time limits

A further amendment in 2003 extended procedural time limits. A time limit of one year
was increased in the LA to be in keeping with the VMA which, may be up to five years
after an offence has been committed.\textsuperscript{117} In addition to this set period the Magistrates
Court may, if it considers it just and equitable in the circumstances, extend the time
limits.\textsuperscript{118} This clause was of concern to the SLC and debated vigorously in parliament
but once again was passed without amendment. The implications could be far reaching
for some landholders, as the case of Van Reit demonstrates in the following chapter;
being outside the one year time limit, as the law then stood, meant a thwarted action for
the regulators and no doubt prompted this particular amendment.

Reversal of the onus of proof in respect of regulatory evidence

Further revisions to vegetation management law were included in respect of evidence
relied on by the regulators in illegal clearing cases. The legislation was amended to
provide that instruments, equipment and evidence of remotely sensed imagery are taken

\textsuperscript{114} Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 3 (1) (a) (i) and (b) (i).
\textsuperscript{115} See for example the incident referred to in the case of Harvey Simpson in the following chapter. It has proved
difficult to obtain statistical confirmation but many compliance officers are also ex-police officers. This is true of the
two officers based in the Rockhampton region. Whilst this is understandable in terms of their ability to investigate
and establish whether there is a prima facie case to answer it has the potential to add to an already fractious situation.
\textsuperscript{116} Queensland government, DERM, letter in response from the A/Director, Litigation Unit dated 4 May 2011.
\textsuperscript{117} Vegetation Management Act 1999 (Qld) s 68 (2).
\textsuperscript{118} Vegetation Management Act 1999 (Qld) s 68 (4).
to be accurate and precise in the absence of evidence to the contrary.\textsuperscript{119} The Minister again conceded in the Explanatory Notes that this provision may be a reversal of the onus of proof but declared appropriate safeguards mitigated this.\textsuperscript{120} The safeguards were: the reversal of the onus of proof is limited to types of equipment prescribed under regulation and to remotely sensed images; an appropriately qualified person must certify the remotely sensed image; and the defendant may provide evidence to the contrary.\textsuperscript{121} A subsequent analysis of satellite monitoring questioned these amended evidential presumptions; one regulatory response agreed ‘there was now an argument that they had gone too far in the legislation, the reality was that the defence could still employ their own expert in the field’.\textsuperscript{122}

It might be argued that it would be extremely difficult for a defendant landholder to provide contrary expert evidence: the costs alone would be prohibitive. However, a tactic employed by some rural landholders, or more particularly those advising them, is to enlist the expert mapping services of individuals previously employed by DERM. One lawyer cited three instances in which preliminary investigations were dropped and a fourth case in which a complaint was laid, the hearing adjourned nine times and then subsequently withdrawn by DERM after submission of contrary expert mapping evidence.\textsuperscript{123}

There are also the practical difficulties of providing contrary expert evidence. The VMA provides that a proceeding for a vegetation clearing offence may be brought up to five years after the offence has been committed.\textsuperscript{124} A landholder who cleared some years ago may not be able to prove the vegetation cleared was not of the type specified by the regulators. According to one compliance officer in the Rockhampton region of Central Queensland, the typical initial response to a site visit of suspected illegal clearing was dismay at being questioned on clearing that may have occurred up to five years ago.\textsuperscript{125}

\textsuperscript{119} Vegetation Management Act 1999 (Qld) s 66 A.
\textsuperscript{122} Purdy R, Satellite Monitoring of Environmental Laws: Lessons to be learnt from Australia, (2010) Centre for Law and the Environment, Faculty of Laws, University College London. The quote was described as by a government official and footnoted as a personal communication.
\textsuperscript{123} Personal communication with Gerald Byrne, Barrister, Rockhampton, dated 10 May 2011. An account of the fourth case against Christopher Holmes is included in the following chapter.
\textsuperscript{124} Vegetation Management Act 1999 (Qld) s 68 (2).
\textsuperscript{125} Personal communication with Rockhampton DERM compliance officer dated 8 November 2010.
If the onus of proof in these matters remained with the prosecution the litigation would at least meet the basic requirements of procedural justice. This clause was the subject of particularly protracted debate in the Legislative Assembly. Nevertheless the clause was passed unchanged.

Denial of the privilege against self-incrimination

The powers of authorised officers to require information was further expanded within the realms of the privilege against self-incrimination. The legislation provides that if an authorised officer reasonably believes a vegetation clearing offence has been committed, and an individual may be able to give information about the offence, the individual cannot refuse to give the information because it may be incriminating. The Explanatory Notes grant that this may ‘constitute a breach of the fundamental legislative principles with regard to the protection against self-incrimination’ but stated that any information provided cannot be used in subsequent criminal or civil proceedings. This potential to deny individuals the benefit of the rule against self-incrimination was a prime concern for the SLC, but not as contentious within parliamentary debate as other amendments. Under comparable legislation, such as the *Environmental Protection Act 1994* (Qld), the privilege against self-incrimination remains available except in emergencies.

The privilege against self-incrimination is the common law right of an individual not to answer questions or produce material which may incriminate or potentially lay them open to a criminal charge. Self-incrimination includes both words and real evidence and situations in which an individual is compelled to answer questions or provide documents. Rationalization for the removal of this basic right was included in the Explanatory Notes, which stated that the amendment was necessary to avoid company employees refusing to supply information in relation to an alleged offence, thereby

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127 *Vegetation Management Act 1999* (Qld) s 51 (1) and (4).


129 *Environmental Protection Act 1994* (Qld) s 473 (4) (a).

opting for a smaller penalty for failing to produce information rather than risk prosecution and conviction for an offence of unlawful clearing.\footnote{Queensland government, Explanatory Notes, Natural Resources and Other Legislation Amendment Bill 2003 (Qld) Explanatory Notes, 12. Available at: http://www.legislation.qld.gov.au/Bills/50PDF/2003/NatResEgAB03Ee.pdf (viewed 4 January 2011).} It was established by the High Court in the case of *Environment Protection Authority v Caltex Refining Company Pty Ltd* (1993) 178 CLR 477 that a company cannot claim the common law privilege against self-incrimination.\footnote{In doing so the High Court reaffirmed the original decision of the New South Wales Land and Environment Court in *State Pollution Control Commission v Caltex Refining Co Pty Ltd* (1991) 72 LGRA 212 and overruled the Court of Appeal in *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) LGRA 46.} It seems reasonable, therefore, for the Queensland government to amend the law in respect of companies; but the amendment could have excluded individuals and maintained the traditional protection afforded to individuals confronted with the criminal justice system within an environmental setting.\footnote{That being said in other areas of dealings with government regulators, such as taxation, similar provisions apply in respect of the regulatory powers of authorised officers. Thus warrantless entry to private property is available to the Australian Tax Office in certain circumstances; and individual taxpayers cannot prevent the Tax Office from accessing information from them or indeed claim the privilege against self-incrimination. Under s 263 *Income Tax Assessment Act 1936* (Cth) an authorised officer may enter buildings and take copies of documents, records and data store on computers; s 264 *Income Tax Assessment Act 1936* (Cth) requires the individual to provide this information. Refusal by an individual to supply information amounts to a strict liability offence under s 8 *C Taxation Administration Act 1953* (Cth) conversely, as this chapter shows, vegetation clearing is an absolute liability offence.} The 2003 amendments to vegetation management laws were extremely controversial. Jeff Seeney, the Liberal National Party member for the rural seat of Callide, tabled a petition in parliament signed by 660 petitioners calling for an independent review of vegetation management legislation. The Minister’s letter in reply was likewise tabled in parliament and reiterated much of what had been previously said by way of explanation for the amendments.\footnote{Queensland government, Legislative Assembly, Letter to The Clerk of the Parliament from Minister Stephen Robertson S, 7, October 2003, 3594. Available at: http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2003/030326HA.PDF (viewed 7 January 2011).} Outside parliament, the erosion of basic rights was castigated by the president of the Australian Council for Civil Liberties, Terry O’Gorman, who also noted the dangers inherent in undermining fundamental civil liberties.\footnote{O’Gorman T, ‘Tree Clearing Laws Infringe Rights’, Rural news, ABC, 21 March 2003. Available online at: http://www.abc.net.au/rural/news/index/archive.htm (viewed 22 January 2011).} As noted by Farrier, there is a familiar and aging dichotomy in which we continue to have: ‘on the one hand, politicians keen to pursue law and order bandwagons through vigorous and manifest use of criminal law and on the other, the increasingly faint voice of those advocating the protection of civil liberties through the espousal of the general principles traditionally associated with regulation through criminal law’.\footnote{Farrier D, ‘In Search of Real Criminal Law’ in Bonyhady T (ed) *Environmental Protection and Legal Change* (Federation Press, 1992) 118.}
Prosecution and compliance

A common criticism of environmental laws is their lack of enforcement and the ‘profound gulf between the letter of legislation and its implementation’.137 However, the political climate within which the vegetation management compliance regulations operated was frequently volatile. At times the regulators took a vigorous stance in enforcing the statute and generated much unrest and resentment within some parts of the rural community. Even after the legislation had been in force for some years, the continual amendments frequently fueled a rural backlash as landholders lobbied their Members of Parliament to voice their annoyance at compliance officers or ‘tree police,’138 or took advantage of the Queensland Parliament sitting in rural seats to protest against the legislative amendments.139

As a manifest demonstration of regulatory authority, a prosecution draws attention to both sides of the litigation process and unavoidably brings the defendant landholder into the public arena. Inevitably ‘prosecution is a symbolic act’ and has the potential to segregate a target group.140 It is from this isolating process that likeminded individuals may emerge to stand as a group and challenge the regulator. One such group of rural landholders being Property Rights Australia (PRA) formed in Central Queensland in the early stages of the vegetation management regulations. PRA provides support and financial assistance to some rural landholders during investigation and prosecution. Their role is wide-ranging; as a representative body they provide more than financial support, they also provide the solidarity of a like-minded group of individuals. This organization supports members, particularly during an investigation and prosecution. The Chairman often played an integral part in the conduct of some land clearing cases considered in this thesis.141 It was commonplace for representatives from PRA to attend court hearings alongside the accused landholder.

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141 During the initial interview that took place at the Gracemere property of the then Chairman Ron Bahnisch, he was in possession of all relevant court filed documents and instructed counsel along with the accused landholder. The extent of support provided seemed to vary with the particular needs of each litigant.
How then do the regulators decide who should be prosecuted? Grabosky and Braithwaite aimed to 'shed light' on the enforcement strategies of regulatory agencies in Australia and concluded in the late 1980s that the decision to prosecute was a measure of last resort and regulators were generally 'of manners gentle'. This research incorporated regulatory agencies across Australia. The three major environmental agencies in Queensland included: the Noise Abatement Authority; the Water Quality Council, and the Air Pollution Council. Two of the regulatory bodies refused to cooperate with the research, the Air Pollution Council did so at the behest of the Minister at the time Russ Hinze. Grabosky and Braithwaite analyzed prosecution data from the three Queensland agencies annual reports from 1974 to 1984 and concluded there was 'an explicit avoidance of prosecution in favour of a tolerant, conciliatory approach'. The period of this research would have coincided with the conservative phase of the Bjelke-Petersen government.

A study of water authorities in England also found that they prosecute in extremis, and argued that the economic rational argument that bargaining may be more efficient than expending time and expense on enforcement, misses the 'moral component at its heart and the social context in which enforcement is conducted'. The social context in which enforcement of vegetation management regulations is conducted has been explored as far as it proved possible; Hawkin's description of a regulatory body's decision to prosecute as 'a shadowy entity lurking off-stage, often invoked, however discreetly, yet rarely revealed' proved apt for DERM.

The regulators were not prepared to divulge information beyond the general compliance material available on their web site. An in-depth analysis of their compliance policy is therefore difficult to provide. Following a request for more specific details, the regulators cited their department's compliance strategy, enforcement guidelines, and annual compliance plan as providing sufficient evidence of their policy. An examination of these three documents will be undertaken but it should be noted that they are

143 Grabosky P and Braithwaite J, n 142. In a Queensland, Legislative Assembly, Motion of Condolence, (16 July 1991) 6; Wayne Goss then Premier described Russ Hinze by his commonly known title as 'Minister for Everything'. Goss noted Hinze had resigned from Parliament but did not say this was part of the fallout from the Fitzgerald Inquiry.
144 Grabosky P and Braithwaite J, n 142, 43.
146 Hawkins K, n 145, 288.

180
generalized accounts which encompass all sixty Acts that DERM administers. Consideration of how DERM exercises any discretion in their vegetation management regime is therefore difficult to determine. Discretion is an important aspect of their compliance policy particularly as the erosion of the usual customary safeguards afforded to accused persons may be assuaged by discretion in prosecution and compliance policies that may ‘ameliorate the coercive and potentially unjust nature of “no-fault” liability’.\textsuperscript{147}

The compliance strategy provides that:

DERM is committed to proactively managing and monitoring risks to Queensland’s environment and natural resources through the implementation of a compliance strategy founded on a targeted and transparent approach to compliance, supported by a modern and strong enforcement capability.\textsuperscript{148}

The regulatory claim of a ‘transparent approach’ is not substantiated in light of the information they are actually prepared to divulge. DERM state their approach to compliance will:

- Ensure that our clients understand Queensland’s environmental and natural resource management obligations;
- Encourage voluntary compliance with those obligations;
- Work with government, business, industry and the community to improve performance;
- Monitor compliance with Queensland’s environmental and natural resource management laws; and
- Take consistent and proportionate responses to non-compliance in accordance with the Enforcement Guidelines to achieve environmental and natural resource outcomes and deter further non-compliance.\textsuperscript{149}

The proportionate and consistent approach is again reiterated in the Enforcement Guidelines of DERM, with a stated reliance on an ‘enforcement pyramid’, a concept

developed by Ayres and Braithwaite in 1992.\textsuperscript{150} With time the enforcement pyramid has evolved and adapted to particular regulatory requirements.\textsuperscript{151} Thus Gunningham and Grabosky, in building on the work of Ayres and Braithwaite, have advocated smart regulation which accepts the benefits of the enforcement pyramid and further promotes the ‘virtues of expanding regulation beyond the dyadic (state) regulator-regulatee relationship’ which would ‘include second and third parties (both commercial and non commercial) as surrogate regulators, thereby achieving not only better policy outcomes at less cost but also freeing up scarce regulatory resources’.\textsuperscript{152}

A basic Ayres and Braithwaite enforcement pyramid would begin at the base with self regulation, move to enforced self regulation, then to command and control regulation with discretionary punishment, and finally to command and control regulation with non-discretionary punishment.\textsuperscript{153} The reasoning behind the enforcement pyramid is this: when a state negotiates their regulatory goal with the regulated community and allows them discretion and responsibility this facilitates ‘the best chance of an optimal strategy that trades off maximum goal attainment at least cost’.\textsuperscript{154} As some individuals will inevitably exploit such a policy, Ayres and Braithwaite held ‘the state must also communicate its willingness to escalate its regulatory strategy’.\textsuperscript{155} This escalation would operate within a pyramid of regulatory strategies.


\textsuperscript{152} Smart regulation was developed particularly in Gunningham N, Grabosky P and Sinclair D, Smart Regulation: Designing Environmental Policy, (Clarendon Press, Oxford, 1998) 11; and further, for example, in: Gunningham N and Johnstone R, Regulating Workplace Safety: Systems and Sanctions (Oxford University Press, 1999); and Parker C, The Open Corporation: Effective Self Regulation and Democracy (Cambridge University Press, 2002) and more recently in Gunningham N, ‘Strategizing Compliance and Enforcement: Responsive Regulation and Beyond’ in Parker C and Nielsen V L (ed) Explaining Compliance: Business Responses to Regulation ( Edward Elgar, 2011) 199 - 221.

\textsuperscript{153} Ayres I and Braithwaite J, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press, 1992) for example Figure 2.3 on 39. Braithwaite had previously argued in Braithwaite J, To Punish or Persuade: Enforcement of Coal Mine Safety (Albany, State University of New York Press, 1985) that governments were more likely to achieve compliance with effective self regulation.

\textsuperscript{154} Ayres I and Braithwaite J, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press, 1992) 38.

\textsuperscript{155} Ayres I and Braithwaite J, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press, 1992) 38.
DERM is one of many regulatory agencies throughout Australia to utilise and adapt the enforcement pyramid. DERM's enforcement pyramid was as follows: the bottom of the pyramid shows compliance requiring no enforcement; followed by education and warning notices; then administrative enforcement action such as compliance and restoration notices, with criminal prosecution being the smallest section at the top of the pyramid. Within this pyramid, prosecution is a last resort action and DERM goes on to say: 'consideration needs to be given to whether money is better spent on preventing a problem or remediating the impacts of an unlawful activity rather than undertaking costly prosecution actions'. Some of the cases considered in the following chapter demonstrate that such a measured declaration is often far removed from day-to-day regulatory practice and, rather than promoting a culture of compliance, regulatory behaviour sometimes had the opposite effect.

Critiques of the enforcement pyramid often explore a specific area or issue: for example in 2003 Job and Honaker examined the Australian Taxation Office during the period when the Taxation Office moved from a long established style of command and control administration to a program of responsive regulation. Job and Honaker interviewed employees and found that the shift in compliance method was resisted by some employees but this was balanced by those who were willing to take on new ideas in the furtherance of personal and collective goals. Job and Honaker cautioned that the success of this move to responsive regulation required the Australian Taxation Office, as employers, to communicate and share experiences and to develop intrinsic rewards such as praise and gratitude. Such an examination of the regulatory practice of DERM would have been impossible since, as noted earlier, they declined to reveal any information beyond the broadly based compliance material on their web site.

156 The enforcement pyramid can be adapted in isolation or utilised alongside other enforcement strategies. For example the Australian Taxation Office currently employs an adapted enforcement pyramid together with a differentiation framework compliance strategy. This is comprehensively examined in Hamilton S, 'New Dimensions in Regulatory Compliance –Building the Bridge to Better Compliance' (2012) 10 (2) eJournal of Tax Research.


158 Job J and Honaker D, 'Short-term Experience with responsive Regulation in the Australian Taxation office in Braithwaite V (ed) 111 – 129. A further example is that of Parker, her study of the ACCC and cartel enforcement revealed that a lack of political support for the law could undermine an enforcement pyramid and lead regulators to enforce the law 'softly' and therefore ineffectively. See Parker C, The “Compliance” Trap: the Moral Message in Responsive Regulatory Enforcement' (2006) 40 Law and Society Review 591.

159 A recent search of the regulatory web site, following the change in State government, revealed that the compliance strategy and enforcement guidelines have been replaced with a Regulatory Strategy. This document and the annual compliance plan for 2013 -2014 contain no reference to the enforcement pyramid. For example: Annual Compliance Plan 2013-2014 and Regulatory Strategy are available at: http://www.cheq.qld.gov.au/ (viewed 8 April 2014). The shift in compliance and enforcement is further explored in the concluding Chapter Nine at pp 285 –286.
The decision to prosecute is a fundamental aspect of regulatory compliance and, as a government department DERM is governed by Guidelines from the Queensland Director of Public Prosecutions (DPP). The Guidelines establish a two-tiered test: is there sufficient evidence; and, if so, does the public interest require a prosecution? Sufficient evidence is established by a prima facie case and a reasonable prospect of conviction; together with the overriding caveat that criminal matters require guilt to be established beyond reasonable doubt. Public interest criteria are set down in the DPP Guidelines and adapted by DERM as applicable to environmental crime they include, inter alia:

- The seriousness, triviality, or ‘technical nature’ of the offence;
- The harm or potential harm to the environment caused by the offence;
- Any mitigating or aggravating circumstances;
- The degree of culpability of the alleged offender;
- The availability and effectiveness of any alternatives to enforcement action;
- Whether the offender has been dealt with previously without enforcement action and, if so, what level of enforcement action;
- Whether the breach is a continuing or second offence;
- Whether the offence is ongoing;
- Whether the administrative action or court orders are necessary to prevent a recurrence of the offence;
- The prevalence of the alleged offence and the need for deterrence;
- The length of time since the alleged offence occurred;
- The age and physical or mental health of the offender; and
- Whether there are counter-productive features of the proposed enforcement tools.

The regulators conclude in the Enforcement Guidelines that a principle aim of making a breach of law an environmental crime is to deter others within the same community.

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161 Queensland government, Department of Justice and Attorney-General, Director’s Guidelines, 3.
The third aspect of regulatory compliance policy is the Annual Compliance Plan, which includes details of proposed activities of the regulators over the coming year and in doing so, according to DERM, gives "effect to its commitment to transparency in the way that compliance activities are carried out". The compliance approach is divided into nine areas; one of these is vegetation management. Specific compliance projects are outlined in these areas and there are thirteen projects for 2010-2011. Two of these are relevant to the management of vegetation: a vegetation management best practice framework and a SLATS assessment. The objectives of the best practice framework are described as being:

To make refinements to vegetation management codes, making them more practical and understandable and to increase client awareness and ability to interpret and implement aspects of the vegetation management framework.

The expected outcomes include increased compliance and an increased opportunity for self-regulation and education. What is clear from this project is the regulator's recognition that more needs to be done to ensure rural landholders understand the regulatory requirements.

The SLATS identification of vegetation clearing for 2007-2008 identifies 12,500 hectares of unexplained clearing. The scope of this project is described as being to implement compliance responses based on the scale of clearing and the biodiversity value of the vegetation cleared. The expected outcomes of this project are said to include discussion with landholders, warning letters, penalty infringement notices, restoration notices or legal proceedings. There are points worthy of note in respect of this project. The area of land identified by SLATS has reduced considerably from the 61,000 hectares identified as justification for the 2003 legislative amendments. It would be impossible to clarify how much of the 12,500 hectares of unexplained clearing was actually illegal clearing: DERM were unable to make this clarification in respect of the

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165 Queensland government, DERM, Annual Compliance Plan 2010-2011, n 164, 3.
168 Queensland government, DERM, n 164, 18.
169 Queensland government, DERM, n 164, 18.
170 Queensland government, DERM, n 164, 18.
earlier 61,000 hectares.\textsuperscript{171} What is significant is that this overall reduction in clearing indicates that Queensland is moving towards the objectives of vegetation clearing legislation. Equally there has been a significant shift in terminology from ‘potentially illegal clearing’ references to a less antagonistic reference to ‘unexplained clearing’.\textsuperscript{172}

**Conclusion**

This chapter shows that many of the difficulties inherent to environmental crime remain and that within Queensland there are additional complexities to the offence of illegal land clearing. These complexities include the specifics of this environmental crime in that conduct which was once legal and often a regulatory requirement is now illegal; and the activity of clearing is typically undertaken within a rural landholder’s home environment, inevitably invoking issues of property rights and resentment at regulatory intrusion. This chapter demonstrates that the illegal clearing of vegetation in Queensland does not take into account the different levels of environmental crime to encompass serious, middle range and technical breaches as occurs in NSW. This typical distinction, as established in *He Kaw Teh v The Queen* (1985) 157 CLR,\textsuperscript{173} differentiates between more serious crime requiring proof of a mental element or guilty mind; to offences of strict liability requiring proof of the act but not the state of mind; to offences of absolute liability in which no fault element is required to be proven by the prosecution. The illegal clearing of land in Queensland remains an absolute liability offence.

The legislative structure for vegetation clearing offences in Queensland was explored in this chapter and it is evident such offences are contained in a complex statutory scheme which requires both the VMA and the LA to be read in conjunction with the *Sustainable Planning Act 2009* (Qld). Consistent with other chapters in this thesis, consideration is given to the Queensland parliamentary processes under which the amendments to the compliance and enforcement provisions of the vegetation management regulations were undertaken. These amendments followed a recurring pattern within the parliamentary process and manifest fundamental flaws in the typical law making practice of the Queensland Labor government, particularly when laws are controversial. The legislative

\textsuperscript{171} Queensland government, DERM, letter in response from the A/Director, Litigation Unit dated 4th May 2011.
\textsuperscript{172} Queensland government, DERM, n 164, 18.
\textsuperscript{173} *He Kaw Teh v The Queen*, (1985) 157 CLR, 523, 533-534.
system was complicated further by widespread amendments to the investigatory and prosecution powers of the regulators, for example, the reversal of the onus of proof in respect of regulatory evidence, such as mapping, requires a rural landholder to obtain contrary expert evidence in order to challenge the mapping. The costs of such evidence are prohibitive. The objects of vegetation management regulations might ultimately be achievable but the means by which they have been achieved must be questioned. The means by which such regulations are enforced is of equal importance and the question of how the regulators decide to prosecute was explored and regulatory claims of transparency were not evident. Even when the scales are tipped in favour of the regulatory prosecutors there remain inherent difficulties of successful prosecution of environmental crime as the following related chapter demonstrates.
Chapter Seven: The litigation of land clearing cases

Introduction

The main focus of this chapter is to answer the following research question: *how were the compliance and enforcement provisions of the vegetation management regulations implemented?* The chapter begins with a discussion of the practical difficulties of establishing a complete picture of illegal land clearing investigations and cases. Obtaining a detailed insight into the policy for regulatory compliance and enforcement within Queensland proved both a challenging and time consuming exercise. Despite the claim of regulatory transparency, it is not evident in practice. The vegetation clearing cases examined in this chapter were not identified by the list of finalized prosecutions ultimately provided by the regulators, as this list had removed the names of all relevant parties. Rather, the land clearing cases included here were identified from the rural media and during interviews with rural representatives. This in turn led to contact with investigated and prosecuted rural landholders and their lawyers.

It is apparent in the cases examined that the Queensland courts rely on statutory procedural guidelines in implementing the legislation and sentencing offenders. In this chapter, these guidelines are explored prior to an examination of the cases, as it is necessary to appreciate how sentences are arrived at and the significant limitations on the current financial penalty range. An in-depth analysis of some of the Queensland land clearing cases is provided; most of these cases have not been examined in the existing literature, particularly those cases heard in the Magistrates Courts.

The first case considered challenged the validity of the vegetation management laws. The courts present an important forum for testing the law and challenges to the legislation may potentially provide practical precedent as evidenced in this chapter. Negotiating a pathway through the justice system, however, requires competent legal representation; many perils await the injudicious litigant in person especially those litigants seeking advice and guidance from a non-legal agent. This chapter includes some such cases. Consideration is given to a withdrawn action by the regulators after prolonged court appearances; followed by an example of a compliance order being quashed by the courts, as it proved impossible for the landholder to comply with.
Thereafter two groups of cases are examined: those in which the difficulties inherent in successful implementation and prosecution are readily apparent and those that proved more successful for the regulators. Finally, consideration is given to a further key question for this thesis: what wider issues did the compliance and enforcement provisions raise in terms of procedural fairness and access to justice? There are underlying and prevalent flaws in all criminal justice systems but some of the cases explored in this chapter draw attention to particular inequities that exist in land clearing litigation.

The complexities of compliance

Compliance and enforcement of vegetation management regulations and the attendant complexities involved have received some academic attention in Queensland. Bredhauer undertook a critique of the 2003 amendments to the vegetation management regulations shortly after the changes were made. In 2006, I undertook an analysis of the effect of the 2004 vegetation management statutory amendments, which included reference to two highly publicized land clearing cases involving Ashley McKay and Graham Acton, both prominent Central Queensland graziers. As their cases remain of interest, they will be considered further in this chapter. In 2007, McGrath referred to some land clearing cases and the ‘numerous unsuccessful challenges to controls on vegetation clearing...based on constitutional issues’. In 2009 two legal practitioners provided an assessment of the amendments to the law in that year – along with a commentary on three land clearing cases – to the Queensland Environmental Law Association. In 2011 Bell undertook an analysis of some land clearing legislation and argued for a less rigid regulatory regime; this article included reference to three of the cases considered in this chapter. None of these latter papers clarified why the arguments put forward by

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4 Simmonds M, ‘Recent Amendments to the Vegetation Management Act 1999 (Qld)’ (2009) and Devlin R, ‘Vegetation Clearing Offences under IPA Integrated Planning Act 2009 (Qld)’ (2009). Papers presented to the Queensland Environmental Law Association. Ralph Devlin has acted in some of the land clearing cases on behalf of the regulator. This paper was presented prior to the passing of the Sustainable Planning Act 2009 (Qld). An analysis of enforcement and compliance of illegal land clearing has been undertaken in some states notably New South Wales, for example, Bartel R, ‘Compliance and Complicity: An Assessment of the success of land clearance legislation in New South Wales’(2003) 20 Environmental and Planning Law Journal 116-136.
defendant landholders had proved unsuccessful. A detailed analysis of Queensland land clearing cases is therefore lacking and will be provided in this chapter.

The implementation of laws will necessarily be problematical if the laws are complex. Those rural landholders brought within the compliance regulatory framework might only account for a minority of the agricultural community, but it is apparent the statutory regulations are difficult to understand, not just by landholders but by those operating within the regulatory field. It was commonplace during illegal clearance hearings for magistrates to refer to the complexities of the legislation, and for magistrates and judges to remark upon the fact that for some statutory vegetation definitions ‘their complexity is evident’ and can become even more complex within the ‘chains of nested definitions’. The Queensland government invests finance into programs to assist landholders to understand the legislation. The regulators have sometimes undertaken prosecution when appropriate; but this chapter also includes cases that do not meet the regulatory compliance requirement of a ‘consistent and proportionate’ response.

Establishing a list of land clearing cases

A completely accurate account of land clearing cases was difficult to establish. This is because vegetation clearing offences are summary offences initiated in the Magistrates Court. This court, unlike District and Supreme Courts, does not have a body of case law. Cases are not available on-line, it is necessary to purchase a transcript from the relevant court. This requires knowledge of the case name prior to purchase.

It might be expected that a detailed regulatory list, including names of the parties, would be available in the annual reports of the regulators. In March of 2009 two departments were merged to create the Department of Environment and Resource Management (DERM): the Department of Natural Resources and Water and the Environmental Management.

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6 For example the cases of: Dore & Ors v Penny [2004] QDC 364 and Burns v State of Queensland [2006] QCA 235 considered subsequently in this chapter.
7 For example magistrate Comack in Victor Craig Elliot v Richard Tudor Knights (2006) Dalby Magistrate Court no – M-183067/05 (2) transcript of proceedings 37.
8 For example Fryberg J in Witheyman v Simpson [2009] QCA 388, 23.
9 For example programs undertaken by Agforce and Queensland Farmers Federation as discussed in Chapter Three.
Protection Agency (EPA). In the past the EPA had published reasonably detailed statistics on compliance. For example in the EPA 2007-2008 Annual Report, a comprehensive table of finalized prosecutions and restraint orders under the *Environmental Protection Act 1994* (Qld) was provided which included the names of the parties in the cases. Further information included prosecution and restraint orders commenced but not completed, and a detailed breakdown of infringement notices issued. In addition, the Queensland State of Environment Report (2007) included details of prosecutions under the *Environmental Protection Act 1994* (Qld) for the period 2003 to 2007 in the appendix. This incorporated the name of the defendant unless the charges were dismissed or no conviction was recorded. The former Department of Natural Resources and Water did not include such compliance statistics in their annual reports. It has proved impossible to locate such earlier reports despite a section in the DERM web site on ‘previous annual reports’.

The initial annual report from the amalgamated DERM covered the period 2009-2010 and followed the tradition of the old Department of Natural Resources and Water. The report simply included a short section on compliance. Reference was made to the fact that thirty prosecutions were finalized with a total sum of $1,054,100 meted out in fines, but there was no breakdown of the legislation under which the prosecutions were instigated. The only table of figures presented included a comparison of the total amounts of prosecution fines since the 2005-2006 Annual Report. Not surprisingly, the total amount of fines for the 2009-2010 year was substantially larger because of the amalgamation of two departments, but no mention was made of this. In the absence of detail as to the relevant legislation under which the fines were obtained, the table has little significance. There is no detailed breakdown of prosecutions such as those provided in the previous EPA Annual Reports.

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14 Queensland government, DERM, see for example: Available at: http://www.derm.qld.gov.au/about/corporatedocs/previousreports.html (viewed 5 June 2011). There was only one past report included which covered the period from the time of amalgamation.
In relation to vegetation clearing, the DERM 2009-2010 Annual Report notes that the largest fine of $94,000 was imposed.\textsuperscript{14} Nothing further was said regarding prosecutions under the vegetation management regulations beyond:

The department refined its approach to vegetation management prosecutions this year to ensure that enforcement work better supports the policy objective of the legislation and helps to protect Queensland's biodiversity.

The department's lawyers have been able to demonstrate not only the impact of clearing on biodiversity values, but also the commercial benefits that flow from unlawful vegetation clearing. This has been reflected in the high penalties awarded by the courts. The department will continue to take this approach to deter further non-compliance.\textsuperscript{19}

Thus the regulators remain the custodians of information about those who have been investigated and prosecuted, or indeed of any other compliance measures undertaken. Bricknell has claimed, within Australia, that ‘most illegal acts are dealt with using lesser sanctioning options such as infringement notices’.\textsuperscript{20} In the absence of a detailed breakdown of compliance options taken by DERM, it is difficult to reach this conclusion about Queensland. The finalised prosecution list supplied to me by the regulators did not include those cases which were not finalised nor why they were not finalised.

The finalised prosecution list covers the period from 2001 to 2010. The accompanying regulatory letter cautioned:

Please note this spreadsheet is not a publicly available document. It has been prepared and provided for your information only. You are welcome to extract information from the spreadsheet for the purposes of your research; however, the spreadsheet is not to be published in its entirety in your PhD.\textsuperscript{21}

In this spreadsheet, the names of the parties, representing lawyers and magistrates were not included. DERM stated ‘the cases are identified by number rather than defendant name for privacy reasons’.\textsuperscript{22} This is an unusual claim and contrary to DERM's

\textsuperscript{14} Queensland government, DERM, Annual Report, 2009-2010, n 15, 25.
\textsuperscript{15} Queensland government, DERM, Annual Report, 2009-2010, n 15, 25.
\textsuperscript{21} Queensland government, DERM, letter in response from the A/Director, Litigation Unit dated 4 May 2011. A discussion on dealings with the regulators, including obtaining compliance information, is included in the section on research methodology in Chapter One of this thesis.
\textsuperscript{22} Queensland government, DERM, letter in response, n 21.
transparency commitment. Such cases are in the public domain and have no in-camera requirements regarding hearings.

Some cases have several entries in the regulatory list supplied. For example, there are entries for each defendant as some cases included property owners, property managers, lessees and contractors. The practice of the regulators is also to have separate entries for each type of vegetation cleared. Bearing in mind the multiple entries for some cases, an attempt was made to quantify the cases into yearly periods to ascertain if any particular year or period proved more litigious. The results are set out in Figure 7.1.

![Figure 7.1: Finalised prosecutions by the Department of Environment and Resource Management](image)

The graph shows that there was a peak in finalised prosecutions by DERM in 2002 and that the main period for prosecution was between the years 2002 to 2004. The regulators had a period with fewer prosecutions and apparently less success during 2005 to 2007. This is reflected in some of the cases examined in this chapter. In 2005, the Minister announced additional compliance staff would be employed to meet an increasing workload. The 2005 to 2007 period was not generally a successful time for the regulators, nonetheless a media release in 2005 claimed: ‘Queensland is recognised as a

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24 Robertson S, ‘Government strengthens NRM compliance capabilities’ (Media release 23 May 2005) in which the Minister noted compliance staff would increase from 34 to 55 to meet the unit’s increasing workload. Available at: [http://statements.cabinet.qld.gov.au/](http://statements.cabinet.qld.gov.au/) (viewed 10 July 2011).
leading agency in Australia in terms of enforcement of natural resources compliance legislation'.\(^{25}\) From the information supplied in response my query, as to departmental structure and personnel in compliance and enforcement as at 2011, it was apparent compliance personnel had remained a large group.\(^{26}\) The number of prosecutions in the final period of 2008 to 2010 has remained relatively stable. The table may not provide a completely accurate account, but it does provide a general indication of prosecutions under the vegetation management legislation.

The list of finalised prosecutions supplied by DERM includes: the region in Queensland where the land clearing took place; the court and date of hearing; the result; the legislation; the vegetation status and the area cleared. Each of these is considered in more detail as the regions in Queensland are divided into: North; Central West; South East; and South West. All the cases listed are in the Magistrates Court within the relevant region. The list therefore is not a complete picture of the final outcome of each case. As this chapter shows, cases always begin in the Magistrates Court, but if they are appealed they work through the court hierarchy. Some cases may therefore appear as finalised when in fact they were subsequently finalised in a higher court.

In the results section of the regulatory list supplied, the clarity of information varied. Typically, the fine and amount is documented, and if the landholder had a conviction recorded that is also documented. Of the cases that included information on fines and convictions, by far the majority of landholders did not have a conviction recorded against them. As this chapter illustrates, it is unlikely that a conviction will be recorded following an illegal land clearing case. The decision on whether or not to record a conviction is governed in Queensland by the provisions of the *Penalties and Sentences Act 1992* (Qld).\(^{27}\) This Act provides that the court may exercise a discretion having regard to all the circumstances of the case including the nature of the offence, the

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\(^{26}\) The following information was supplied by DERM. 'The department’s compliance and investigations branch comprises the following teams: Investigations - about 40 specialist investigators based in Brisbane and regional centers, responsible for investigating major breaches of DERM’s legislation including the VMA; Investigations support - supports investigation through the development of policies and procedure and the provision of training; Strategy and planning – responsible for developing the department’s proactive compliance policy, compliance strategy and annual compliance planning process; Major projects – project manages significant proactive compliance projects. The litigation unit in Brisbane is made up of 20 lawyers with responsibility for all the departmental prosecutions and other litigation and advice work associated with compliance and enforcement'. Queensland government, DERM, letter in response from the A/Director, Litigation Unit dated 4 May 2011.

\(^{27}\) *Penalties and Sentences Act 1992* (Qld) s12.
offender's character and age, and the impact of recording a conviction on the offender's economic or social well being. In the cases examined in this chapter the nature of the offence was never an issue considered by the court, nor submitted for consideration by those prosecuting. Indeed it was more common – as for example in *Dore* 28 and *Winks* 29 – not to record a conviction without specifying why that option had been taken. In the case of *Draper*, 30 the magistrate included reference to the *Penalties and Sentences Act 1992* (Qld) and concluded that a conviction should not be recorded because of the impact upon the defendant's economic and social wellbeing.

Many, but not all of the cases on the regulatory list, stated if the landholder had entered a plea of guilty. The majority did so. This is typical of proceedings at this level. Most criminal cases begin and end at the lowest rung of the court hierarchy in the Magistrates Court. Typically the defendant will enter a guilty plea and the case does not proceed to trial. 31 At this lowest level of proceedings, fully contested trials are rare; but, as this chapter shows, cases may be prolonged considerably by appeals.

The category of vegetation cleared was generally recorded in the regulatory list, as was the amount of land cleared under each type of category. Within the regulatory list there was great variation in the land areas cleared and in the different types of vegetation cleared. It may be that 'punishing of environmental offences in Australia has been largely unsystematic', 32 but what is apparent from the regulatory list and some of the cases subsequently examined, is that the Queensland courts are becoming more structured in terms of fines imposed for illegal clearing in utilizing the legislative framework for sentencing.

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Sentencing of land clearing cases

Sentencing is a fundamental task of the court. This task is discretionary but the discretion is structured by ever increasing legislation. Further structure has been introduced in some jurisdictions with sentencing databases. The issue of consistency in sentencing has, as noted by Preston C J, long been the subject of debate in Commonwealth common law jurisdictions, with the crux of debate focusing on whether the sentencing discretion should be ‘fettered, structured or simply replaced by mandatory penalties’. The need for consistency in sentencing prompted the first sentencing database in New South Wales, which ultimately included sentences from the Land and Environment Court. Queensland followed this model in 2007 with the Queensland Sentencing Information Service; a repository of information compiled to assist lawyers to provide ‘well-prepared and well-researched’ sentencing submissions to the courts. Preston C J has advocated the utility of a sentencing database in promoting a general consistency of approach to sentencing.

The legislative structure for sentencing in Queensland is provided by the procedural guidelines in the Penalties and Sentences Act 1992 (Qld). The purposes of this Act include providing a range of sentences for appropriate punishment and rehabilitation to include, if appropriate, protection of the Queensland community as a paramount consideration. The Act’s purposes further include: promoting consistency; providing fair procedures for imposing sentences; and providing sentencing principles to be applied by the courts. The sentencing principles are wide-ranging and reflect the common law sentencing purposes, they include: punishment in a way that is just; rehabilitation; individual and general deterrence; and community denunciation and...

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35 Preston B J and Donnelly H, n 34, 1. Prior to this information on sentencing in the Land and Environment Court of New South Wales had not been included in the Judicial Information Research System.
36 de Jersey C J, Launch of the Queensland Sentencing Information Service, Banco Court, March 2007. This service includes statistics from all Queensland criminal jurisdictions, case law, Practice Directions, and Chief Magistrates Notes. The Queensland Sentencing Information Service was established by the Queensland government’s Department of Justice and Attorney General, this service is available to legal practitioners if criminal law is a major area of practice. Available at: http://www.sentencing.justice.qld.gov.au/ (viewed 29 July 2011).
38 penalties and Sentences Act 1992 (Qld) s 3 (a) and (b).
39 Penalties and Sentences Act 1992 (Qld) s 3 (c) to (e).
protection of the Queensland community.\textsuperscript{40} Reference to protection of the Queensland community in the sentencing principles and the purposes of the legislation envisages protection from the perpetrator of an ordinary crime rather than an environmental crime. The offence of illegal land clearing, however, invariably generates the degradation of land and the loss of biodiversity. The purposes of the \textit{Penalties and Sentences Act 1992} (Qld) could be amended to encompass environmental crime with an additional clause to include, if appropriate, the protection of the environment on behalf of the community.

There are further principles under the \textit{Penalties and Sentences Act 1992} (Qld) the court must have regard to that are of particular relevance to vegetation clearing offences, they include: the maximum and minimum penalty for the offence; and the nature and seriousness of the offence including harm to the victim.\textsuperscript{41} Once again the legislation envisages a human victim whereas the victim of the environmental crime of illegal land clearing will invariably be the environment and the community. The Act could be amended to add, if appropriate, any harm done to the environment. Inclusion of environmental harm in the sentencing legislation would be a factor the court would then have regard to in relation to the nature and seriousness of the offence.

Further related principles the court must have regard to include: the extent to which the offenders are blamed; the extent of damage or loss; the offender’s character, age and mental capacity; mitigating circumstances; and the extent of assistance given to the regulator.\textsuperscript{42} In considering the character of the defendant, the court may consider previous convictions, any contributions to the community or other matter the court considers relevant.\textsuperscript{43} The court has discretion to record or not record a conviction.\textsuperscript{44} If the accused landholder has pleaded guilty, the timing of the guilty plea is important; a guilty plea must be taken into account and referred to in open court.\textsuperscript{45}


\textsuperscript{41} \textit{Penalties and Sentences Act 1992} (Qld) s 9 (2) (b) and (c).

\textsuperscript{42} \textit{Penalties and Sentences Act 1992} (Qld) s 9 (2) (d) to (i).

\textsuperscript{43} \textit{Penalties and Sentences Act 1992} (Qld) s 11.

\textsuperscript{44} \textit{Penalties and Sentences Act 1992} (Qld) s 12.

\textsuperscript{45} \textit{Penalties and Sentences Act 1992} (Qld) s 13(1) (a), (2) (a) and (3).
For vegetation clearing offences, in addition to the Penalties and Sentences Act 1992 (Qld), an extra guide on penalty amounts is provided for the courts. This additional guide accompanied the compliance and enforcement amendments in 2003 and assists the court in arriving at a financial penalty. For each hectare of vegetation unlawfully cleared, penalty units are recommended and depend on the type of vegetation cleared. Thus illegally clearing an endangered regional ecosystem is 30 penalty units per hectare; an of concern regional ecosystem is 24 penalty units per hectare; a least concern regional ecosystem is 18 penalty units per hectare; and regulated regrowth is 12 penalty units per hectare. Once a figure is reached this may be reduced if there are mitigating circumstances. The cases in this chapter demonstrate that a plea in mitigation is not a difficult task for those representing rural landholders: at the very least defendants typically have no criminal record and have pleaded guilty, but most mitigating circumstances go beyond these fundamentals.

Allocating a number of penalty units to each hectare of land illegally cleared makes it possible to place a monetary value on each hectare cleared. Thus clearance of an endangered regional ecosystem would amount to $2,250 per hectare; an of concern regional ecosystem would amount to $1,800; a least concern regional ecosystem would amount to $1,350 and regulated regrowth $900 per hectare.

The maximum penalty for breach is currently 1665 penalty units or $124,875 for an individual. For a corporation, the maximum fine may be up to five times this maximum penalty or $624,375. Because of the existence of a maximum penalty, there is a point at which the legislative penalty guide is spent, for example an illegal land clearance of 55.5 hectares of endangered regional ecosystem reaches the maximum penalty of $124,875. It is arguable that clearance of more than 55.5 hectares of endangered regional ecosystem reflects an increase in culpability and more extensive environmental harm. Moreover, extensive clearing is likely to increase grazing pasture and improve land value. As there are potential benefits of extensive clearing to the landholder, it is imperative that financial penalties are an appropriate deterrent and not a business cost. The courts could be given discretion to impose a higher sentence than the current

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46 Vegetation Management Act 1999 (Qld) s 60 B (1).
47 Vegetation Management Act 1999 (Qld) s 60 B (2) (a) to (d).
48 Sustainable Planning Act 2009 (Qld) s 578 (1), provides that a person must not carry out assessable development unless there is an effective development permit for the development. The Penalties and Sentences Regulation 2005 (Qld) s 2 A prescribes the monetary value for each penalty unit, which is currently $75.
49 Penalties and Sentences Act 1992 (Qld) s 181 B.
maximum in instances of extensive clearing. This would require a legislative change. As
the law stands, if the land cleared places the potential fine beyond the maximum
penalty, then typically the maximum will be the starting point which will generally be
reduced by a percentage, determined by the court, if there is mitigation.\(^{50}\)

Under the vegetation management regulations the only sanction available for unlawful
clearing is a fine. To date, the only prison sentence imposed for clearing land in
Queensland was under the *Wet Tropics World Heritage Protection and Management
Act 1993* (Qld).\(^{31}\) In a subsequent case under the *Nature Conservation Act 1992* (Qld),
the defendant narrowly avoided a custodial sentence.\(^{52}\)

In New South Wales, the *Native Vegetation Act 2003* (NSW) provides for a $1.1 million
financial penalty for clearing without approval.\(^{53}\) Within that State, therefore, there is
potential for a substantial fine. In 2003 Bartel argued such fines – though initially too
lenient and minimally enforced – appeared to be increasing and moving beyond nominal
levels, even if lagging behind other environmental sanctions.\(^{54}\)

The foundations of a regulatory system lie in the sanctions that underlie it. Advice and
incentives may be the initial and preferable way to encourage compliance.\(^{55}\) But the
existence of sanctions and the attendant publicity of land clearing cases remind rural
landholders of the existence of the vegetation management legislation and the authority
of the regulators. Because of the widespread resentment against vegetation regulations,
an early challenge to the validity of the law, as occurred in the case of Bone v Mothershaw [2002] QCA 120, has provided a useful precedent. The existence and advantage of a precedent is that it clarifies the law and reduces the possibility of further litigation.56

Litigation challenges – Bone v Mothershaw, a Queensland precedent

The case of Bone v Mothershaw considered the application and validity of a local law prohibiting the clearing of vegetation without a permit.57 Robert Bone, a freeholder and farmer, cleared protected vegetation and refused to rehabilitate the land. The defendant had legal representation throughout the case. He was convicted in the Magistrates Court and fined $20,000 together with costs. Bone appealed to the District Court and subsequently the Supreme Court, claiming the local laws were inconsistent with the VMA and the Integrated Planning Act 1997 (Qld); he challenged the validity of laws to take an interest in land and not provide compensation. Both appeals were dismissed with costs. In the Supreme Court hearing, McPherson J A noted that the VMA made provision for local laws to impose vegetation clearing restrictions on landholders and that the Integrated Planning Act 1997(Qld) was not inconsistent with local laws.58

The Constitution of Queensland 2001 (Qld) empowers the Queensland government ‘to make laws for the peace welfare and good government ...in all cases whatsoever’.59 This law was relied on in the case, which also held there had been no acquisition of land but rather a valid statutory restriction and, whilst acknowledging the evidence submitted that the value of the land had been greatly reduced, McPherson J A concluded that Bone...

...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...But the law provides no remedy for this action or its consequences when it is the result of legislation validly passed under

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56 Thus for example Property Rights Australia sought legal opinion on the validity of the Vegetation Management Act 1999 (Qld) and the utility of mounting a challenge to the legislation in court. The advice, in light of Bone v Mothershaw, was that such an action would be futile.
57 Bone v Mothershaw [2002] QCA, 120.
58 Bone v Mothershaw [2002] QCA 120 para [20-21] s7 of the Vegetation Management Act 1999 (Qld) covers the application of the Act, s7(2) provides that the Act does not prevent a local law from imposing requirements on the clearing of vegetation in its local government area.
59 The Constitution of Queensland 2001 (Qld) s 8 provides for the law-making power of the parliament as set down in Constitution Act 1867 (Qld) s 2.
law-making authority that by its terms or nature authorises or permits such an outcome'.  

Following this decision, an application was made for special leave to appeal to the High Court. This application was denied and accordingly this Queensland precedent remains. The Bone case reaffirmed the law in holding that a landholder is not entitled to compensation following legislative restrictions and in reasserting the authority of the Queensland Parliament to make laws.

**Litigation challenges – a misguided journey**

In the case of *Dore & Ors v Penny* [2004] QDC 364, the three Dore brothers initially pleaded guilty in the Magistrates Court to a vegetation clearing offence under the *Integrated Planning Act 1997*(Qld). The land cleared was approximately 30 hectares of remnant endangered regional ecosystem. Each brother was fined $15,000 for the *Integrated Planning Act 1997* (Qld) offence and $3000 for the LA offence. Convictions were not recorded against them. The brothers had legal counsel to represent them in the Magistrates Court but acted on their own behalf thereafter with assistance from David Walter, a non-legal agent. Their first appeal was to the District Court of Queensland.

In *Dore & Ors v Penny* [2005] QCA 150, the Dore brothers subsequently applied for leave to appeal which was refused by the Court of Appeal in the Supreme Court of Queensland. The brothers were directed to apply to a single judge in the Supreme Court. Accordingly, in the subsequent case of *Dore & Ors v Penny* [2006] QSC 125, an amended application was filed but was again unsuccessful. Jones J held: ‘... the applicants have acted upon advice by a person who has no legal qualifications but who holds views about land tenure and parliamentary sovereignty which are plainly misguided’.  

The Dore saga highlights a complex litigation process particularly for litigants in person. In the first application to the Supreme Court, the Dore action was thwarted

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60 Bone v Mothershaw [2002] QCA 120 para [25].
61 Bone v Mothershaw [2002] QCA 120 at the end of this case is an editor’s note which provides that the High Court refused special leave to appeal on the 25 June 2003.
63 Dore & Ors v Penny [2006] QSC 125 para [17].
because Bradley DCJ, in the District Court, had applied the *Justices Act 1886* (Qld) as the appropriate legislation for an appeal against conviction. It was noted by Williams JA, in the Supreme Court, that the appropriate avenue for an appeal, in a case of this nature, should have been pursuant to the *Judicial Review Act 1991* (Qld). The implication of this for the Dore brothers was a further unsuccessful court hearing almost a year later. Ultimately the Dores offered to settle the matter and paid the initial fine together with the extensive costs that had accumulated.

Negotiating a pathway through the justice system requires legal representation. The journey of the Dore brothers through the litigation maze should have ended after the hearing in the Magistrates Court in which they appear to have had competent legal representation. Their decision to pursue the matter as litigants in person and seek guidance from a non-lawyer placed them at a considerable and inequitable disadvantage. It was clear from *Bone v Mothershaw* that the rights of landholders, however restricted, were held to be determined by validly enacted statutes; and moreover that judicial opinion would likely follow earlier precedent and hold:

... ‘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 the requirements of natural justice’.

Another misguided journey, embarked upon as part of a civil action, occurred in the case of Catherine Burns. She was the freehold owner of land and wished to clear native vegetation to increase the value of her land prior to sale. She accordingly applied for a development permit under the provisions of the *Integrated Planning Act 1997* (Qld) and the VMA. The permit to clear was refused and there followed a series of cases in which Catherine Burns appealed against the refusal to obtain a clearing permit. In her initial

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64 *Dore & Ors v Penny* [2005] QCA 150 para 3. An application under the *Judicial Review Act 1991* (Qld) could also be made to a single judge in the Supreme Court sitting in Cairns, the Dore brothers had been obliged to travel to Brisbane and make an application to the Full Court of the Court of Appeal.

65 Personal communication with Gary Dore on the 2 July 2010.

66 In the personal communication noted above the question was asked: why the brothers decided to proceed after the Magistrates Court hearing? Gary Dore stressed strongly the humiliation of being labelled a criminal within his own community and accordingly he had sought advice from his local MP who had suggested the brothers sought guidance from the non-legal agent David Walter, a former police officer. In the hearing before the Full Bench of the Supreme Court, David Walter was denied the opportunity to speak on behalf of the brothers, which meant Gary Dore was obliged to address the Court. It was a stressful, expensive and futile exercise.

67 *Jerusalem Jaffa District Governor v Suleiman Murra* [1926] AC 321, per Viscount Cave LC at 328, quoted in *Bone v Mothershaw* [2002] QCA 120, para [25], by McPherson JA. The initial Magistrates Court case was included in the finalised prosecution list supplied by the regulators.

appeal to the Supreme Court, Catherine Burns had representing counsel. This appeal was dismissed.

The case was further appealed to the Full Bench of the Supreme Court. Catherine Burns acted on her own behalf and was assisted by David Walter, the non-legal agent from the *Dore* case. It appears that the same written submissions were made. Jerrard JA reiterated salient points from earlier proceedings, in particular that the permit had been refused because the land was a known habitat for endangered species such as the mahogany glider and the cassowary. It was acknowledged that Catherine Burns was over 70 years of age, a widow whose land was her only significant asset and that the value of her land was considerably reduced by the legislative restrictions on clearing.

Jerrard JA concluded by dismissing the appeal and supporting the earlier decision, noting that the application largely challenged the State’s legislative power to impose restrictions and, as such, was...

...plainly untenable, because the sovereign law making power of the Queensland Parliament, considered in a somewhat similar context in the decision in *Bone v Mothershaw*, included the power to impose upon Mrs. Burns the requirement that she have a development permit prior to changing the complexion or presentation of her land by clearing it.

One of the more perverse effects of the implementation of vegetation clearing legislation has been a body of doomed litigation in which David Walter has sometimes represented, but more typically provided written submissions, on the same misguided argument relied on in the *Dore* and *Burns* appeals. This has occurred in at least ten cases. In this bundle of cases, the Queensland courts exercised considerable tolerance towards this particular non-lawyer, even dismissing an application by the regulators for non-party costs. But in a similar New South Wales case, the landholder was subjected to a considerable fine and costs order. As noted in that case by Lloyd J, the accused

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69 *Burns v State of Queensland* [2006] QCA 235 para [3] - [5]. The provisions of the VMA have changed over the years. Catherine Burns was subject to the VMA as in force in August 2002.

70 *Burns v State of Queensland* [2006] QCA 235 para [18].


73 *Director-General of the Department of Environment and Climate Change v Hudson* [2009] NSWLEC 4. The defendant was convicted of two offences under the *Native Vegetation Act 2003* (NSW) and fined $400,000 for the first offence and $8,000 for the second offence. This was a NSW case but the landholder and his non-legal agent are both based in Queensland.
landholder faced criminal proceedings with potentially serious consequences, but nonetheless chose to be represented, to his detriment, by a non-legal agent.\textsuperscript{74}

The potential for David Walter to act for rural landholders in the future was brought to a head in January 2011. The Queensland Legal Services Commission received a complaint from a local authority asking the Commission to prosecute Walter for engaging in legal practice without the appropriate qualifications.\textsuperscript{75} The Commission instead sought and obtained an injunction in the Supreme Court restraining Walter from engaging in legal practice when not a legal practitioner.\textsuperscript{76} Daubney J noted:

\begin{quote}
It is one thing for the respondent himself to run these misconceived arguments in proceedings to which he personally is a party… It is quite another thing, however, for him to use other parties effectively as stalking horses to enable him to continually repeat these contentions.\textsuperscript{77}
\end{quote}

The injunction will protect any potential rural landholders seeking advice or representation since it restrains Walter from: providing legal advice; corresponding or communicating on behalf of litigants or potential litigants; drafting documents or appearing in court on behalf of litigants in proceedings.\textsuperscript{78}

\textbf{Litigation challenges – a regulatory case withdrawn and a compliance order quashed}

Much of the litigation process involves continual negotiation between both sides of a case. At some point in the proceedings it may become obvious to one side that the most prudent course of action is to withdraw the matter from the court. Negotiations will then turn to costs, which may be borne by the discontinuing party. In the matter of \textit{Bradley Coome v Christopher Holmes} a complaint was made by the regulators in January 2009,
in which it was alleged the landholder carried out an assessable development without a development permit contrary to the Integrated Planning Act 1997 (Qld).\(^7\) In addition to the complaint the defendant was served with a compliance summary brief; a title search; maps and satellite images and a field inspection report.

The compliance summary brief is, in effect, a standard form prepared by the regulatory prosecutor and contains, along with an insight into how the case is prepared, the following information:

- Details of the defendant – being Christopher Holmes a 47 year old grazier;
- Details of the land – the defendant was described as an owner and occupier and the title owned a grazing homestead freeholding lease; this title would be treated under the legislation as if it was freehold;
- Details of the offence – the land allegedly illegally cleared was 24.64 ha of endangered vegetation and 25.15 ha not of concern vegetation.\(^8\)

The facts relating to the case included the regulators' reliance on information regarding vegetation cover change from the Statewide Land Cover and Trees Study (SLATS) analysis of satellite imagery taken between May 2005 and July 2006.\(^9\) A compliance officer had visited the property in June 2008 and, as the defendant was overseas, had utilised a warrant to enter the land. On the defendant's return in July 2008, a recorded interview took place at the property. It was not apparent if the landholder was aware the recording took place, but details of this interview were subsequently served on him.\(^10\)

The interview elicited the following information: Christopher Holmes made the decision to clear the land believing it to be regrowth; he made no checks with the regulators but instructed a contractor to undertake the work; the purpose of the clearing had been to improve pasture for grazing; the defendant cooperated with the investigation.\(^11\)

The compliance summary brief also included a sentence submission on behalf of the regulators. Within this, the case of Bone was relied on including the remarks of Robin J that 'the community now expects penalties that visit real pain upon offenders to be

\(^7\) The file on the case of Christopher Holmes was kindly supplied, with his consent, by Gerald T Byrne counsel acting in the case.

\(^8\) Queensland government, Compliance Summary Brief, Complainant Bradley Coome v Christopher Holmes 1-3.

\(^9\) Queensland government, Compliance Summary Brief, n 80, 5.

\(^10\) Queensland government, Compliance Summary Brief, n 80, 5.

\(^11\) Queensland government, Compliance Summary Brief, n 80, 5-6.
meted out in respect of environmental-type offences. It was requested by the regulators that the penalty range be between $15,000 and $20,000. This sum is much less than the financial penalty guide provided for in the legislation. There is provision in the summary brief to detail the maximum penalty. The regulators had completed this with regard to the endangered vegetation penalty, which would have been $54,000 for 24 hectares. No mention was made of the land allegedly cleared that was not of concern vegetation; but 25 hectares equates to $33,750 making a total potential fine of $87,750.

There were no compliance or restoration notice requirements included within the summary brief; nor a request for a court order for a compliance notice or restitution costs, but it was clear investigation costs would be claimed. If the regulators sought to achieve the purposes of the legislation, as they claim in the sentencing submission, restoration of the land should be an integral part of sentencing.

The defendant sought legal advice and was represented by a solicitor. There followed a series of mention hearings and adjournments in the Biloela Magistrates Court. Advice was sought from counsel who had defended in other land clearing cases. The advice was to plead guilty and this was indicated to the regulators who sought an adjournment to prepare for sentencing. Between September and October 2009 the case had two more mention hearings in the Biloela Magistrates Court, the second hearing adjourned on the papers to the Rockhampton Magistrates Court.

At some point in the proceedings the regulators changed the penalty they intended to seek from the defendant. This may have been because the initial amount suggested fell way below the statutory guide but in any event the initial $15,000 to $20,000 was

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84 Queensland government, Compliance Summary Brief, n 80, 8.
85 Queensland government, Compliance Summary Brief, n 80, 8.
86 Queensland government, Compliance Summary Brief, n 80, 9.
87 In a personal communication with Christopher Holmes on the 21 July 2011, he confirmed the regulators have not served a restoration notice on his land since the case was withdrawn.
89 Counsel was Philip Sheridan who also acted in the cases of: Peter Robert Witheyman v Ekari Park Contracting Ltd and Nicholas Daniel Van Reit (2006), and Victor Craig Elliot v Richard Tudor Knights (2006) subsequently considered in this chapter.
92 The file perused only covered the period from counsel acting solely. The increase in fine was indicated during the period the defendant was represented by a solicitor.
replaced by a suggested minimum sum of $70,000. Before Christopher Holmes changed legal advisors, his lawyer told the regulators he intended to plead not guilty. The change in plea was prompted by the increase in the fine sought by the regulators. In response the regulators set out the potential costs of a fully contested hearing. A lawyer for the departmental compliance unit outlined the possible expenditure to include: further expert evidence to verify the regional ecosystem mapping costing in the range of $3,000 to $7,000; further satellite imagery identifying the tracts of land cleared costing in the range of $5,000 to $10,000; further flora, fauna and biodiversity impact reports at a cost of $5,000 per report; and additional costs associated with preparing the case for contested trial. The inevitable preoccupation with the financial implications of litigation emerged between the lawyers for both sides. The primary focus of correspondence between the lawyers was the extensive costs involved in a potentially contested trial and who might end up paying them.

The defendant discontinued instructing his original solicitors and counsel and sought direct advice from a Rockhampton barrister. The advice was to obtain expert evidence. It was felt necessary to instruct three different consultants with particular expertise in vegetation and mapping. The significance of this expert evidence was that two of the reports were undertaken by consultants who had extensive former experience working for the regulators. Work undertaken by these two experts included a property inspection, the preparation of detailed property mapping, image interpretation and rectification and interpreting the regulator's information and data sets. The expert evidence, inter alia, took the regulatory ecosystem map and highlighted the discrepancies in the remnant and non-remnant boundaries. A comparison of the two maps shows a clear distinction between the boundaries of the land on the regulatory

93 Submission on Costs, prepared by Gerald T Byrne, Counsel acting for Christopher Holmes, 7 December 2009. Also in the personal interview with Christopher Holmes, on the 20 July 2011, he indicated he felt he had no alternative but to change his plea to not guilty when the fine sought was increased. He was adamant he was not guilty but had pleaded such when his initial legal team had estimated he faced costs of defending the case of around $80,000 for his own lawyers. There was always the potential to be liable for the regulatory costs too. Thus he reasoned if he paid the $20,000 fine and the matter ended it would have been the easiest way to be rid of the matter. It was the opinion of Christopher Holmes that the regulators dealing with this compliance issue were inexperienced and lacked an understanding of rural land and vegetation.
94 Letter from a Litigation Unit Lawyer, Department of Environment and Natural Resources, to instructing solicitors P & E Law dated 22 October 2009.
95 Within Queensland it is possible to instruct a barrister directly providing the work undertaken complies with the Bar Association of Queensland 2007 Barristers Rules and in particular Rule 77 which covers the work a barrister may undertake.
96 Of the three expert reports obtained, one was from Aurecon Australia Pty Ltd for a vegetation assessment at a cost of $6,297; the second report was undertaken by a former regulatory employee operating now as Rural Property Design, this involved a two and a half day property visit and a report on each area of interest and amendments to the regulatory mapping in relation to vegetation mapped as remnant and non-remnant, the cost for this evidence was $2,653; the third expert report was likewise prepared by a former regulatory employee operating as Clear Solutions at a cost of $3,630. The total cost of expert reports was $12,580.
map compared to the expert's amended map. As has been mentioned in the previous chapter, the complexity of this operation and the accompanying costs make such an exercise beyond the realms of most accused landholders.

With regard to the regulatory evidence, in November 2009, the regulators requested a report on the regional ecosystem mapping of Christopher Holmes's property from the Queensland Herbarium. An initial report was prepared and concluded:

The aerial photographs and imagery showed that all of the area of interest cleared between 2005 and 2006 had been previously cleared. The 1980 aerial photos clearly show very recent clearing in much of the area of interest and the 1986 photos show that the remainder was cleared between 1980 and 1986. These areas are still obviously non-remnant in the 1994 photos and most of the area still appears to be non-remnant on the 2004 aerial photographs. I therefore conclude that all of the areas of interest cleared between 2005 and 2006 were non-remnant at the time of this clearing. The Queensland Herbarium mapping has been amended accordingly.97

In short, the area cleared by the defendant was mapped as remnant at the time the clearing took place but it should have been mapped as non-remnant and accordingly not invoked the legislation. For the accused landholder the costs already outlaid to reach this point had mounted.98

Without prejudice negotiations between the lawyers for each side continued as to costs. The regulators made an offer to withdraw the charge if the defendant would be willing to agree that no costs order be made.99 The defence did not agree and counsel responded with a submission on costs. This noted that the defendant had been prepared to plead guilty, but had been obliged to change to a not guilty plea when the regulators also changed tack and increased the penalty sought.100 The submission on costs relied on the

97 Queensland government, Queensland Herbarium, DERM, Brushe J, 'Initial Report on the Regional Ecosystem mapping associated with Lot 14 on Plan DW51, Locality of Camboon, Banana Shire,' November 2009. It is clear from the defendant's file that a phone call took place between counsel for the defendant and the regulators' lawyer around the 5 November 2009 indicating the contrary expert evidence to be provided by the defence. The Queensland Herbarium report is dated November but does not include a specific date. In the opinion of Christopher Holmes, in the interview on the 21 July 2011, the Queensland Herbarium report was presented after being notified the defence had contrary expert evidence.
98 In addition to the $12,580 for expert evidence the previous solicitor's bill was $10,995 and the later counsel's bill was $1,817, costs therefore equalled $25,392.
99 Letter from a Litigation Unit Lawyer, Department of Environment and Natural Resources, to instructing counsel dated 1 December 2009.
100 Submission on Costs, prepared by Gerald T Byrne, Counsel acting for Christopher Holmes, 7 December 2009, 4.
Justices Act 1886 (Qld), which makes provision for an award of costs against a public officer taking into account the circumstances relevant to the case. The circumstances relevant to a particular case include considering whether there was a failure to take appropriate steps to investigate a matter and whether the investigation was conducted in an appropriate way. Counsel for the defendant submitted, inter alia, that the regulators had failed to take appropriate steps to investigate, by failing to confirm the accuracy of their mapping and in failing to check the accuracy of the mapping from resources available within their own department, for example, Queensland Herbarium.

Negotiations continued and ultimately a deed of arrangement was entered into in respect of costs. It is not possible to convey the contents of this deed, as settlement was conditional upon the arrangements remaining confidential. Costs on behalf of the defendant have been noted but considerable costs on the part of the regulators must have been incurred.

A further instance in which costs accumulated apparently unrestrained within the various levels of regulatory departmental bureaucracy was that of Whyenbirra Pty Ltd v Department of Natural Resources. As noted in the last chapter, a statutory compliance or restoration notice may be issued against a landholder following court proceedings regardless of the outcome. Whyenbirra Pty Ltd had pleaded guilty to clearing remnant vegetation of various classifications. The case before the magistrates was an appeal against a compliance notice subsequently served on the defendant. The appeal sought an order for the compliance notice to be overturned and for costs against the regulators. The magistrate upheld the appeal and described the compliance notice as:

...unreasonable and unjust as it is unclear, confusing, oppressive, uncertain, vague and impossible to comply with. I find that the appellant has demonstrated that the decision to give the notice was wrong at law and should be overturned and that an order as to costs should be made in favour of the appellant.

The hearing continued as Whyenbirra Pty Ltd had also applied for an order declaring that the director-general of DERM was in contempt of court. The basis of this
application was that the appellant had previously obtained a stay on the compliance
notices' operation prior to the appeal being considered; and, during the period the stay
was in operation, the regulators had lodged a restoration notice on the land title at the
Land Registry.107 Such a notice would be an encumbrance on the title and would clearly
affect the value of the land and any potential sale insofar as it binds successors in title.108
It was accepted by the magistrate that the director-general was in contempt but she felt
it inappropriate to impose a fine or imprisonment.109 Instead the magistrate decided the
director-general should apologise to the court and the defendant and pay the costs of
both the appeal against the compliance notice and the contempt application.110 The
director-general did not become involved in the subsequent publicity which followed
from this matter, rather a regulatory spokesperson acknowledged that an apology for the
contempt was made to the defendant and that the necessary amendments to the land title
had been made.111

The inherent difficulties of successful prosecution: the cases of Ashley
McKay, Nicholas Daniel Van Reit, Richard Tudor Knights and Harvey
Scott Simpson

It would seem crucial for a regulatory agency to be seen as acting fairly and to avoid at
all costs ‘the risk of public criticism of bullying or extravagance’.112 The cases against
Christopher Holmes and Whyenbirra Pty Ltd, together with the following cases, do not
reflect well on the regulators.

Ashley McKay, an Augathella grazier, was charged with destroying trees otherwise than
in accordance with a tree clearing permit. Because of the protracted litigation and
because McKay remains a prominent member of the agricultural community, the
proceedings received much publicity.113 The relevant legislation was the LA and the
Forestry Act 1959 (Qld), as the McKay land is held under two grazing homestead

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107 Whyenbirra Pty Ltd v Department of Natural Resources (2008) 9.
108 Vegetation Management Act 1999 (Qld) s 55.
109 Whyenbirra Pty Ltd v Department of Natural Resources (2008) 32.
110 Whyenbirra Pty Ltd v Department of Natural Resources (2008) 32.
113 Both local and rural press in Central Queensland have tended to cover the McKay case. For example: Editorial
‘The pursuit of Ashley McKay’ Queensland Country Life, (March 6 2003). In November 1999 a ‘60 Minutes’
television program, aired shortly before the case started, this featured an interview with McKay and officers from
DERM. In June 2010 McKay provided an update on his case to the Property Rights Australia Annual Conference.
See: http://www.propertyrightsaustralia.org/objectives/property-rights-australia-icm-agmconference-2010-emerald
(viewed 12 August 2011).
leases. The clearing occurred during April and November 1999. McKay had a permit to clear trees.

There were in effect two litigation paths in the McKay case. The first began in December 2000 when the matter was before the Magistrates Court in Charleville. The manner in which the regulatory prosecutor Bernard Doonan conducted this initial case was held to be oppressive, unjust and discriminatory and accordingly, the prosecution was stayed. From that decision the regulators appealed to the District Court. In this appeal, Forde DCJ accepted the appellant’s argument that the magistrate had erred in concluding there was any improper purpose or internal oppression associated with the prosecution. However Forde DCJ did conclude that the magistrate was justified in granting a stay of execution, because of the more favourable nature of tree clearing permits granted to two adjoining neighbours of Ashley McKay, he accordingly held: ‘to continue to investigate with a view to prosecuting when the permits are so discriminatory points immediately to an injustice which may allow the court to exercise its power and grant a stay’. The appeal was therefore dismissed with the regulators bearing the costs.

There followed a further application by the regulators seeking leave to appeal to the Supreme Court. The appealed was allowed and heard by the Full Bench of the Supreme Court. Both de Jersey CJ and Mullins J agreed with the leading judgment of Williams JA. This time the regulators were successful: the appeal was allowed and the order granting a permanent stay of prosecution was set aside. Williams JA applied Walton v Gardiner (1993) 177 CLR 378, which considered the circumstances in which criminal proceedings should be permanently stayed and decided that the answer was to be reached by weighing factors such as ‘the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice’. On this basis Williams JA concluded that the provision of more favourable tree clearing permits to adjoining neighbours was not sufficient to

14 Forestry Act 1959 (Qld) s 53 (1) (b) provides a person must not destroy a tree, or get other forest products or quarry material on a Crown holding otherwise than in accordance with a permit, lease, licence, agreement or contract granted or made under this Act, or the Land Act 1962 (Qld).
grant a stay of proceedings and the case was remitted back to the Charleville Magistrates Court. McKay bore the costs of the appeal including now those of the earlier appeal to the District Court.

The second litigation returned to the Magistrates Court. It was now August 2004. It is an offence under the Forestry Act 1959 (Qld) to destroy trees otherwise than in accordance with a permit. The wording of the permit is therefore critical to the determination of criminal responsibility. Questions of procedural justice were abandoned with the initial limb of litigation: the issue turned to statutory interpretation and particularly the construction of the tree clearing permits. Accordingly, the central issue was now whether the wording of clearing permits issued to McKay covered the clearing that actually took place. The magistrate held that the meaning of the clearing permits may have been better expressed but was nonetheless plain and that the actual clearing that occurred went beyond the authority of the permits. McKay was found guilty. He was fined $125,000, ordered to pay costs of $65,530 and compensation of $85,353; and, unusually, had a conviction recorded against him.

McKay appealed to the District Court. The issue of construction of the clearing permits was argued further. In the Magistrates Court it had been submitted and rejected that McKay should have the benefit of any uncertainty and ambiguity in the permit wording. In the District Court, Wilson J held, inter alia, that where a statute interferes with the property rights of an individual it must be 'strictly construed in favour of the property owner appellants'. Wilson J allowed the appeal and the financial penalties imposed previously were set aside. McKay had pleaded guilty to clearing on a road reserve and he was fined $10,000 in respect of this.

The matter however did not end with the appeal. McKay went on to refer regulatory personnel to the Crime and Misconduct Commission who, in turn, referred the case

120 Doonan v McKay [2004] Charleville Magistrate Court no – M-00000421/00; M -00000422/00 transcripts of proceedings.
121 Doonan v McKay [2004] Charleville Magistrate Court no – M-00000421/00; M -00000422/00 transcripts of proceedings.
122 Doonan v McKay [2004] Charleville Magistrate Court no – M-00000421/00; M -00000422/00 transcripts of proceedings.
back to the regulators.\textsuperscript{125} In March 2007, the regulators announced that an independent investigator would be appointed to examine the four staff involved in the case.\textsuperscript{126} McKay currently continues his case against the regulators.

In 2005 a regulatory investigator, Peter Witheyman, swore a complaint against Nicolas Daniel Van Reit. He was charged with carrying out an assessable development or clearing of native vegetation without the necessary development permit. In the initial Magistrates Court hearing the defendants sought determination of a preliminary point that the proceedings were instituted out of time.\textsuperscript{127} As previously noted, proceedings for an offence under the VMA are dealt with by summary trial and must start within a year after the commission of the offence, or within one year after the offence comes to the knowledge of the regulator and within five years after the offence has been committed.\textsuperscript{128} If a magistrate considers it just and equitable in the circumstances, they may extend these time periods.\textsuperscript{129} In the initial hearing the magistrate found for the defendants and agreed that the proceedings were out of time and was not persuaded that circumstances justified extending the time periods. Magistrate Costello had this to say:

\begin{quote}
The complainant is armed not only with satellite technology; it also has all the necessary financial support along with the legislation that requires the defendants to submit to lengthy, and in some ways, repetitive interrogation. There seems such an imbalance in capacity but that is the legislation.\textsuperscript{130}
\end{quote}

There followed an appeal by the regulators to the Queensland District Court.\textsuperscript{131} The matter was heard towards the end of 2007. In dismissing the appeal, McGill DCJ considered the chronology of events in the case and the relevant legal authorities on statutory time periods. He concluded that the pursuit of the prosecution was subject to unreasonable delay and that the conduct of the regulators was ‘decidedly tardy’.\textsuperscript{132}
further appeal to the Supreme Court of Queensland followed in 2008. The Full Bench of the Court of Appeal concurred and, once again, dismissed the appeal. In the leading judgment, Fraser JA noted that statutory time limits necessarily mean that some prosecutions that might otherwise proceed are barred, but that in itself was not an injustice, set against the important public purpose requirements that limitation periods achieve. The regulators were ordered to pay the landholder's costs of the proceedings. The matter did not end there: Peter Witheyman subsequently served a compliance or restoration notice on Van Reit.

In 2006 Richard Knights was charged with carrying out an assessable development or clearing vegetation on freehold land without a development permit. This matter was particularly complicated and took four days to be heard. The landholder had made an application in respect of 1,521 hectares, to extend grazing capacity but retain substantial areas of remnant vegetation. The charge arose from a regulatory inspection of the land as part of the application process. The application to clear had been made by consultants who analysed the existing mapping and highlighted a number of errors in the regional ecosystem maps: for example some areas of land had been declared as disturbed, but were naturally open grassland areas; and more than a thousand hectares had been wrongly classified as remnant when it had not attained sufficient regrowth to be reclassified as remnant.

The regulators sought guidance from the Environmental Protection Agency, who advised that no remnant vegetation on the land should be cleared. Taking this advice, and because the landholder did not satisfy the regulators that he had an acceptable solution to protect the landscape from increased salinity and water-logging, the application was eventually refused. Departmental file notes tendered in evidence showed that similar applications on nearby properties in the same terrestrial bioregional corridor had been approved.

133 Witheyman v Van Riet & Ors [2008] QCA 168 (20 June 2008).
135 Personal communication with Philip Sheridan counsel acting for Van Reit on 5 May 2010.
Presentation of the case by the regulators proved problematic. A compliance officer called by the prosecution had inspected the property on two occasions but was unable to say what he really did ‘as he didn’t take very good notes’.\textsuperscript{138} It was apparent however, to the compliance officer, that the regional ecosystem map then in force had errors that were addressed by the regulator and Queensland Herbarium: in particular land marked as remnant was in fact disturbed. Further exhibits of satellite imagery submitted in evidence by the prosecution were based on data that was out of date. The data was obtained in August 1997; any clearing between that period and when the Act was proclaimed in September 2000 would have been lawful. Moreover, the remote sensing officer who provided the satellite imagery confirmed in evidence that remotely sensed images can only provide evidence of a change in vegetation ‘whether the change occurs from natural factors, such as fire, drought, flood storm or wind or some other act of God cannot be determined by comparison of remotely sensed images’.\textsuperscript{139}

The case for the prosecution was further compounded when their witnesses gave inconsistent evidence: they used different versions of the regional ecosystem map and the regulator and the expert witness used different scales of measurement.\textsuperscript{140} Magistrate Cornack was satisfied that clearing had occurred on the land but the regulators were unable to prove the exact location of the clearing or the type of eco-system that had been cleared. She accordingly found Richard Knight not guilty. Dismissal of the case paved the way for Richard Knight’s lawyer to take advantage of the Justices Act 1886 (Qld). Under this legislation a magistrate may make an order for costs that are just and reasonable.\textsuperscript{141} But there is an element of discretion in relation to an award for costs in favour of a defendant against a public officer, if the magistrate is satisfied that it is proper that the order for costs should be made.\textsuperscript{142} In deciding whether it is proper to make the order for costs, the magistrate must take into account all relevant circumstances including, inter alia, whether the investigation into the offence was conducted in an appropriate way.\textsuperscript{143}

\textsuperscript{138} Victor Craig Elliot v Richard Tudor Knights (2006) Dalby Magistrate Court no – M-183067/05 (2) transcript of proceedings 7.
\textsuperscript{139} Victor Craig Elliot v Richard Tudor Knights (2006) Dalby Magistrate Court no – M-183067/05 (2) transcript of proceedings 18.
\textsuperscript{140} Victor Craig Elliot v Richard Tudor Knights (2006) Dalby Magistrate Court no – M-183067/05 (2) transcript of proceedings 20-28.
\textsuperscript{141} Justices Act 1886 (Qld) s 158 (1).
\textsuperscript{142} Justices Act 1886 (Qld) s 158 A (1).
\textsuperscript{143} Justices Act 1886 (Qld) s 158 A (2).
Ordinarily a magistrate may award costs only under the scale of costs prescribed by regulation.\textsuperscript{144} However a higher amount for costs may be allowed if the magistrate is satisfied that this would be just and reasonable having regard to the special difficulty, complexity or importance of the case.\textsuperscript{145} On behalf of the defendant it was accordingly submitted to the court that this was a complex case in terms of the complicated scientific evidence submitted, the extensive number of prosecution witnesses called and the piecemeal disclosure of documentary evidence which continued until the second day of the hearing. Magistrate Cornack accepted the submission and stressed it had been a difficult case involving ‘complicated legislation’.\textsuperscript{146} As the costs were itemized, the magistrate ordered sometimes double and sometimes up to three times the statutory amount ordinarily granted. She concluded: ‘No order that I can make today can properly compensate really Mr. Knights because he has been put to a huge expense in defending himself in these proceedings’.\textsuperscript{147} The regulators subsequently appealed to the District Court, prior to the hearing of this appeal however the regulators withdrew the case and the matter ended.\textsuperscript{148}

The case against Harvey Simpson was lengthy and complicated and has yet to be finalised. The matter began in 2005, when the defendant was charged with three counts of unlawful clearing which represented three different categories of vegetation and included: 19.9 hectares of remnant endangered vegetation; 525.9 hectares of remnant of concern vegetation; and 76.4 hectares of remnant not of concern vegetation. The total area allegedly cleared therefore amounted to 622.2 hectares. In the initial Magistrates Court hearing Harvey Simpson was acquitted of all three counts of unlawful clearing.\textsuperscript{149}

There existed many similarities between the Simpson case and that of Richard Knights: it was a matter heard in the Dalby Magistrates Court, once again before Magistrate Cornack and involved the same compliance officers: Peter Witheyman and Craig Elliot. The same defence lawyer followed a similar and successful line of attack: the officers were vague in their evidence and they used various versions of the regional ecosystem.

\textsuperscript{144} \textit{Justices Act} 1886 (Qld) s 158 B (1) (a) & (b).
\textsuperscript{145} \textit{Justices Act} 1886 (Qld) s 158 B (2).
\textsuperscript{146} \textit{Victor Craig Elliot v Richard Tudor Knights} (2006) Dalby Magistrate Court no – M-183067/05 (2) transcript of proceedings, 37.
\textsuperscript{147} \textit{Victor Craig Elliot v Richard Tudor Knights} (2006) Dalby Magistrate Court no – M-183067/05 (2) transcript of proceedings, 37.
\textsuperscript{148} Personal Communication with Philip Sheridan counsel acting for Richard Knights on 5 May 2010.
\textsuperscript{149} \textit{Peter Robert Witheyman v Harvey Scott Simpson} (2005) Dalby Magistrates Court no – M-492/05 transcript of proceedings.
maps – for example, some regional ecosystem maps incorrectly showed naturally occurring open plains as areas that had been cleared and some maps did not show a large shed on the land.\textsuperscript{150} Moreover the Digital Cadastral Data Base (DCDB) evidence used by the regulators to determine property boundaries was moved, for the purposes of the prosecution, approximately 100 meters to the south-west for the purpose of assessing the area of alleged clearing.\textsuperscript{151}

At the subsequent hearing on costs the magistrate introduced a degree of fairness towards the defendant, being satisfied that the case was a complicated one involving difficult legislation, scientific evidence and inadequate disclosure by the regulators prior to trial.\textsuperscript{152} The defendants’ costs were therefore ordered to be paid by the regulator and again included some items that amounted to three times the statutory amount ordinarily granted. The regulators appealed to the District Court.\textsuperscript{153} Harvey Simpson was again successful and the appeal was dismissed with costs. The regulators made a further application for leave to appeal from this decision, the grounds of the appeal being that the District Court judge had ‘erred in his construction of the \textit{Integrated Planning Act 1997 (Qld)} and the VMA’.\textsuperscript{154} This application was successful.

An important aspect of the Simpson case was the defendant lawyer’s claim that some of the clearing was undertaken at a time when this particular classification of vegetation had been removed from the VMA, and consequently such clearing could not amount to an offence. The initial VMA was passed in December 1999 but remained unproclaimed and therefore not legally in force until September 2000. In the September version of the Act one of the purposes of the legislation, which covered of concern regional ecosystems, had been deleted.\textsuperscript{155}

The amendment to the legislation was explained by the then Minister R J Welford as being due to the reticence of the Commonwealth government to assist the Queensland...
government in establishing a financial package for affected rural landholders. As explained by the Minister:

With no Commonwealth funding support, we regrettably have no choice but to remove mandatory protection for these areas before the Vegetation Management Act is proclaimed. This action honours a commitment the Premier made at a Community Cabinet meeting in Roma. This amendment means that on freehold land, we will protect ‘endangered’ regional ecosystems – that is, those with 10% or less of their original vegetation remaining – but rely upon the regional planning process and regional vegetation planning committees to voluntarily extend protection, through a local planning process, beyond this level.\textsuperscript{156}

These sentiments were echoed in the Explanatory Notes tabled alongside the Bill and, accordingly, references to of concern regional ecosystems were removed from the Act two days before it became law.\textsuperscript{157}

Such was the Act in September 2000; by March 2004, this particular purpose was brought back into the legislation. This time the Minister was Stephen Robertson, and the amended legislation was explained as being in furtherance of a pre-election commitment to end broadscale land clearing and protect of concern regional ecosystems on freehold land, in line with the restrictions on clearing on leasehold land.\textsuperscript{158} Both the 2000 and the 2004 Acts were correctly described by Queensland Labor as being to honour election commitments to the people of Queensland.

It was alleged in the Simpson case that the defendant undertook an assessable development without a permit between January 2001 and April 2004. In both the Magistrates Court and the District Court, lawyers for the defendant successfully pleaded that removal of the relevant purpose of the Act meant that some of the clearing was not unlawful at the time the clearing took place. The Full Bench of the Supreme Court of Queensland disagreed.\textsuperscript{159} In the leading judgment, Muir JA declared that it did not


\textsuperscript{159} Peter Robert Withymen v Harvey Scott Simpson [2009] QCA 388, 11.
appear to be the intention of the legislation, in removing that particular purpose, to affect the other unambiguous objectives which included the clearing of vegetation on freehold land and therefore had 'general application to freehold land'. The case also involved a lengthy argument in favour of the defendant on statutory interpretation and construction of a statute, particularly as reliance had been made on extrinsic materials such as the Explanatory Notes, mentioned above, in which the policy reasons for removal of the clause were reiterated. Muir JA concluded that the lower courts had erred in law in accepting the defendant's legal argument and that extrinsic material could not displace the clear meaning of the text. The defence lawyers applied for special leave to appeal to the High Court. The application was unsuccessful, French CJ said the Court of Appeal had not made an error of law but 'proceeded according to established principles of statutory interpretation'.

The next stage in this matter would be to remit the case back to the Magistrates Court. The regulators have confirmed that this case has been remitted but a hearing date had not been set at the time of writing. A compliance officer and representative from Queensland Herbarium attended the Simpson property early in 2011 (the road to the property had recently opened following around five weeks of isolation due to extensive flooding). Unfortunately, an altercation ensued and it would appear likely that Harvey Simpson will face additional criminal charges in respect of this.

Some success for the regulators: the cases of Graham Acton, Russell Winks, Bruce Henderson and Reginald Edward Draper

Some cases will prove easier to successfully prosecute. For example, cases in which the accused cooperates with the investigation, pleads guilty and does not challenge the regulatory evidence. A good example is the first two cases against Graham Acton. This rural landholder is the director of the Acton Land and Cattle Company, owners of more than a million hectares of land within Central Queensland. He has had three land

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161 Muir JA cited several authorities in support of this including a joint judgement of Hayne, Heydon, Crennan and Kiefel JJ in Alcon (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 260 ALR 1 at 16-17.
162 Harvey Scott Simpson v Peter Robert Witheyman [2010] HCA Transcript 165. Appeals from State Courts of Appeal require special leave to proceed under s 35 (2) Judiciary Act 1903 (Cth). In considering whether to grant an application for special leave to appeal the High Court may have regard to any matter that it considers relevant and particularly if the potential appeal involves a question of law that is of public importance s 35 A (a) (i) Judiciary Act 1903 (Cth).
164 Queensland government, DERM, letter in response from the A/Director, Litigation Unit dated 4 May 2011.
165 Personal communication with the chairman of Property Rights Australia on 27 April 2011.
clearing prosecutions against him. The first was in 2001 for the illegal clearance of 50 hectares of vegetation following which he was fined $1500. The second case was in 2004 and involved the largest area of land cleared since the vegetation regulations came into existence. The third case arose in 2011.\textsuperscript{166} In the 2004 case, Acton cleared 11,830 hectares of which 5320 ha was remnant vegetation. The extent of land cleared in this case must have caused far-reaching harm to the environment. He was fined the largest penalty at the time: $100,000. There was no order for costs. The reasoning behind the regulatory leniency in respect of costs was attributed to the cooperative nature of apparently lengthy negotiations and the guilty plea.\textsuperscript{167}

The Acton case is an example of the statutory financial penalty guide under the VMA failing to penalise and take account of large scale clearing. Although the $100,000 fine was deemed to be high in 2004,\textsuperscript{168} it is unlikely this penalty would have been more than a running cost to this particular landholder, and any stigma from the case was short-lived.\textsuperscript{169} Graham Acton maintains a place as a prominent member of the agricultural community: he is called upon as a spokesperson for the cattle industry, particularly by the rural media. A photograph of him astride a horse at his cattle station Paradise Lagoons outside Rockhampton was featured on the front of the 2008/2009 Yellow Pages directory for Central Queensland with the caption ‘Celebrating Australian Flavour’. There are significant individual and general deterrence factors in the sentencing of such a high profile rural landholder, which cannot be adequately utilized if statutory fines are limited to a specific amount.

In terms of area of land cleared there are cases at the other end of the scale from that of Graham Acton. The case against Russell Winks was one such case, which proved

\textsuperscript{166} The 2011 case was ultimately dropped by the regulators in 2012 after the period of research for this thesis. This however would have been a good example of yet another case DERM had difficulty in prosecuting. The facts are: the regulators initially brought six charges - against Graham Acton and his brother, their company Acton Land and Cattle Co Ltd, and in their capacity as directors of the company. The sixth charge was against their station manager. The solicitor acting for the Acton’s, made a submission of no case to answer on the basis of s 67A Vegetation Management Act 1999 (Qld) which provides that responsibility for unauthorised clearing of vegetation is taken to have been carried out by an occupier of the land, in the absence of evidence to the contrary. In this instance evidence to the contrary was that the clearing had been undertaken by the station manager who pleaded guilty and received a fine of around $80,000. E-mail correspondence in reply from Roger Baker, Senior Partner at Rees Jones solicitors, Rockhampton, dated 26 March 2013.

\textsuperscript{167} The defendant’s solicitor, Roger Baker, kindly supplied information on the case heard in the Rockhampton Magistrates Court, on 15 July 2005.


\textsuperscript{169} The Acton family is frequently listed in the top 20 of Queensland’s top 100 rich list, see for example ‘Queensland’s Top 100 Richlist’ 2010. Available at: http://richlist.index.com.au/read-feature/27/Acton-Family (viewed 24 August 2011).
relatively easy for the regulators to prosecute. The defendant had cleared, without a development permit, 8.6 hectares of remnant native vegetation, most of which was endangered regional ecosystem. The magistrate calculated the applicable penalty as $18,585. Mitigation on the part of Russell Winks included an exemplary past, a guilty plea, the fact the offence had been committed more than five years previously and the land had been sold on. There was acknowledgment by the magistrate of the environmental significance of the clearing: he noted ‘it is important to take into account the high value to the community of the vegetation that has been lost’. Mitigating factors accordingly reduced the fine by a third: the fine was therefore $12,390 together with the regulators investigatory costs of $1700. The fact that the land value may well have increased by this clearing was not an issue taken up by the magistrate. In keeping with most illegal clearing cases, a conviction was not recorded.

The case against Bruce Henderson was equally straightforward. In this case, a total of 274 hectares of remnant vegetation was illegally cleared, including just over 53.7 hectares of endangered vegetation, 3 hectares of concern and 246.3 hectares not of concern. Legal representatives for both sides agreed expert evidence on the impact on biodiversity in the area need not be obtained; nor was a valuation report deemed necessary as it was likewise agreed the valuation of the land would have improved after clearing. As there was no mention of mapping during the hearing; the defence must have accepted the regulatory evidence on this. The appropriate fine for this amount of clearing would have been $458,730 following the statutory guidelines; it was accordingly submitted by the prosecution that the maximum fine of $124,875 should apply. Taking account of the plea in mitigation (the defendant was of good character, pleaded guilty and cooperated with the investigation) the magistrate reduced the fine to $90,000. There was no costs order or conviction recorded. As this was a case in North Queensland it does not appear that a restoration order was made.

171 Grant Takken v Russell Winks (2009) 1; utilising s 60 B Vegetation Management Act 1999 (Qld).
172 Grant Takken v Russell Winks (2009) 2.
179 See breakdown of statutory notices in Chapter Six.
In 2010 Reginald Edward Draper pleaded guilty to unlawful clearing of native vegetation on freehold land. Draper, a grazier, cleared a total of 255 hectares: 226 hectares of endangered regional ecosystem, 3 hectares of concern regional ecosystem and 26 hectares of least concern regional ecosystem. Donald Edmistone, a contractor employed by Draper, undertook the clearing. Edmistone cleared the land between April and July 2009; the regulators issued a compliance notice to stop the clearing in August of the same year. Edmistone’s dealings with the regulators and the Magistrates Court were relatively brief. As he cooperated with the investigation and admitted liability he was fined $20,000. He had been paid $73,000 for the work undertaken. Draper had assured Edmistone he had a permit to clear but he had not verified this with the regulators prior to undertaking the work.

The Draper case was not as straightforward as that of Edmistone. He exercised his right not to be interviewed by the regulators. It did not help Draper’s case that he had made an application to clear 1,135 hectares under the 2004 ballot which had been denied, nor that in 2007 he was paid the sum of $35,000 by the Queensland Rural Adjustment Authority because of the adverse effect the VMA had on his ability to clear. In this case, expert evidence was submitted by DERM and accepted by the court. The evidence held that prior to clearing the area had been one of the largest patches of endangered remnant vegetation left in Queensland. The report submitted that:

The clearing has had a significant adverse impact on regional ecosystems in the area and on flora values associated with the property at the bioregional, sub regional and local levels. Further the unlawful clearing occurs in the Isaac/Comet Downs sub region, which is the eleventh most cleared of Queensland’s 119 sub regions with 78 per cent of the sub region cleared. Further the unlawful clearing adds to the issues of continued clearing in these areas, such as habitat fragmentation, habitat loss, weed invasion, soil loss, loss of nutrient cycling and increased greenhouse gases.

The same lawyer acted in Draper as had previously acted for the defendants in the cases of Van Reit and Knight. He followed a similar line of argument: the confusion surrounding the VMA, the many amendments and the difficulty of interpreting the

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regulatory maps.\textsuperscript{185} Prior to the hearing, the defence lawyer challenged the original regulatory map and assessment of the area of land illegally cleared. The initial total area of alleged illegal clearing had been 726 hectares, but following the defence challenge the regulators had reduced this to 255 hectares and amended the complaint.\textsuperscript{186} The issue of regulatory mapping therefore remains problematic. The potential inequity from the reversal of the burden of proof in respect of regulatory evidence, considered in the previous chapter, is equally evident in this case. Draper’s lawyer gave evidence during the sentencing hearing of his client’s dismal financial circumstances – to instruct an expert on mapping was clearly beyond his means.

The matter was adjourned following lengthy submissions made by the prosecution and defence, and the defendant was subsequently sentenced at a later date.\textsuperscript{187} The case for the prosecution was generally better prepared than in \textit{Van Reit} and \textit{Knight}. Accordingly in sentencing, Magistrate McGrath accepted not only the evidence, but also most of the legal argument submitted by the prosecution.

In sentencing Draper, Magistrate McGrath relied on the statutory framework and the sentencing precedent provided by \textit{Dore}. Insofar as sentencing principles were concerned, the offence was regarded as serious with a far reaching and deleterious effect on the environment, particularly as most of the cleared land fell into the category of endangered regional ecosystem.\textsuperscript{188} The defendant’s culpability was accepted by the magistrate because of his prior dealings with DERM and dishonest assurance to the contractor that a tree-clearing permit had been obtained.\textsuperscript{189} Magistrate McGrath did not accept that the defendant could have erred in his interpretation of the maps.\textsuperscript{190} The magistrate further noted Draper had not cooperated with the regulators and had benefitted from the clearing in having more grazing land available.\textsuperscript{191}

In arriving at a fine for this offence, the additional guidance provided by the \textit{Penalties and Sentences Act 1992} (Qld) meant it was necessary to take into account, as far as

\textsuperscript{188} \textit{Robert James Black v Reginald Edward Draper} (2010) 2-4.
practicable, the financial circumstances of the offender and the nature of the burden that
the payment of a fine would be on him. Counsel for the defendant produced evidence
of the defendant’s dire financial circumstances. Two recent Queensland District Court
cases provided further interpretive authority on the governing principles following the
courts imposition of a fine: Kumar v Garvey (2010) QDC 249 and Engwarda v O’Brien
(2010) QDC 357. Both cases follow the traditional route of authorities such as the
Queen v Hoad (1989) 42 ACR 312 which established that a penalty must be appropriate
to the offender and the offence. This was the line of legal reasoning accepted and
applied by the magistrate. The Draper case involved extensive clearing of endangered
regional ecosystem, being a total of 226 hectares. Once again the penalty guide was
exceeded and the court started with the maximum fine that was reduced by mitigation to
$110,000. In keeping with other land clearing cases, a conviction was not recorded.

Procedural fairness in land clearing cases

Once a landholder is accused of unlawful clearing of land they are brought within the
criminal justice system for a considerable amount of time. As the cases in this chapter
illustrate, litigation may last many years. At the very least rural landholders accused of
illegal clearing should face a process that is fair. This prompted the following research
question: what wider issues did the compliance and enforcement provisions raise in
terms of procedural fairness and access to justice? The reality remains that there are
limitations on procedural fairness inherent to all criminal justice systems. Some of the
illegal clearing cases considered in this chapter serve to highlight specific intrinsic
inequities of criminal justice particularly within the realms of the adversarial system,
and two of the basic tenets of access to justice being the right to legal representation and
the system of appeals.

Within the adversarial system, there is an inherent imbalance of power. This imbalance
typically has in-built mechanisms as to procedural fairness – such as the underlying
duty on those who prosecute to act fairly and impartially – but there remain other
customary safeguards which (as this and the previous chapter has shown) are somewhat
eroded under the vegetation management regulations. As prosecutor, the regulator has

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192 Penalties and Sentences Act 1992 (Qld) s 48.
193 The duty on prosecutors to be fair is set down in: Queensland government, Department of Justice and Attorney-
    General, Director’s Guidelines, 1. Available at:
complete control over a case. It is the prosecutor who: makes the decision to prosecute; to submit or not submit evidence; to decide on legal arguments to present to the court; and, to withdraw from a case. Essentially the prosecution must prove its case according to the relevant court rules of procedure and the rules of evidence. The prosecution typically carries the burden of proving every element of the alleged illegal clearing beyond a reasonable doubt. The evidential burden of the regulators under the vegetation management regulations, however, is lessened by the legislation – particularly the 2003 amendments.

Innate difficulties of successful prosecution remain within the adversarial system, despite a reduced evidential burden on the part of the regulators. Cases may fail because of evidential deficiencies rather than a blameless defendant. As some of the land clearing cases have shown in this chapter, arguments may center on legal technicalities and process such as: failing to proceed within statutory procedural time limits as in Van Reit; the correct legislation to apply following an appeal after a guilty plea as in Dore; and statutory interpretation and the use of extrinsic materials as in McKay and Simpson. The legal and practical difficulties experienced by regulatory agencies in prosecuting environmental crime have been noted in the past and were evident in some of the land clearing cases examined. It would appear, however, that the perverse effects of legal contest are set to continue as ‘adversaries exhaust their energies in legal battles and the basic goals of the regulatory process remain unattended’. This chapter illustrates that this problem still remains: the fundamental objects of the vegetation management legislation often seem far removed from the preoccupations of litigation and the precincts of the court.

Competent legal representation is the underlying crux of procedural fairness within the criminal justice system. Landholders accused of illegal clearing are unlikely to be au fait with the criminal litigation process. The reality for most accused individuals is that the

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194 A perspective on the inadequacies of the adversarial system is provided by a retired judge of the Australian Federal Court: Fox R W, ‘Justice in the Twenty-First Century’ (Cavendish Publishing, 2000) 9-18, he does however conclude: ‘Despite all these impediments, it is probably correct to say that the decision-maker mostly manages to make correct factual findings on the central issue or issues’, 16.


potential costs of litigation are beyond their means. Of the rural landholders who are charged, most choose to plead guilty, either because they are guilty, or taking on a government regulatory body presents too great a challenge. Vegetation clearing offences do not fall within the financial assistance provisions of legal aid. To engage in litigation therefore requires substantial individual financial resources, or support such as that provided by Property Rights Australia, and a steadfast determination for a considerable period.

Rural landholders with legal representation fare better than those without representation. Those with experienced legal representation may be able to challenge the evidence and avoid litigation as happened in Holmes. Litigants in person are poorly equipped to act in a procedure that systematically places them at a disadvantage. They remain peripheral participants in an unintelligible legal process where those in the know perpetuate the familiar. Rural landholders assisted by a non-legal agent, as in Dore and Burns, have been equally if not more disadvantaged. Reliance on such an agent reflects the financial inaccessibility of law and an underlying mistrust and alienation from lawyers and the legal system.

Some of the cases examined in this chapter exemplify the protracted nature of litigation when cases are appealed. If the landholder is successful but the regulator appeals, the only option for the landholder is to continue. In Van Reit, litigation was prolonged because the regulators continually appealed; lack of success in the Magistrates Court did not prevent subsequent unsuccessful appeals to the District Court, the Supreme Court and the Court of Appeal. In Simpson the regulators similarly appealed and achieved success ultimately in the Supreme Court. This time the landholder applied for special leave to appeal to the High Court, which was refused. Simpson, however, was a case in which Property Rights Australia had a vested interest: Harvey Simpson was given financial and undoubtedly emotional support. In McKay the landholder is a member of Property Rights Australia and has received some financial assistance from the organisation. He has also incurred considerable individual expense and appears to

198 There are initiatives to address the difficulties for litigants in person in some jurisdictions, for example the Judiciary of England and Wales has produced and released at the beginning of 2013: A Guide for self-represented litigants in Interim Applications in the Queen’s Bench Division of the High Court. Available at: http://www.judiciary.gov.uk/Resources/ICO/Documents/Guidance/srl_qbd.pdf. (viewed 15 March 2013). The need for such guidance is increasing and apparent at all levels of litigation.
maintain complete control of his litigation: Ashley McKay has successfully appealed against his conviction and has continued an independent crusade against the regulators.

The cases reveal the realities of litigation; the system of appeals is complex. Appeals invariably entail delay and increased costs. Rights of appeal are typically set down in the establishing and amending statutes for a given court. Thus, practice and procedure for the Magistrates Court is set down in the Magistrates Court Act 1921 (Qld). The District Court of Queensland Act 1967 (Qld) covers the District Court and ensures adherence to the court hierarchy in not allowing appeals from the Magistrates Court directly to the Supreme Court.\textsuperscript{199} Observance of other statutes such as the Justices Act 1886 (Qld) and the Criminal Practice Rules 1999 (Qld) is likewise necessary.

Appeals are time consuming and require legal expertise in drafting, preparing and filing the requisite court documents. Rights to appeal are limited and may require a potential appellant to obtain leave to appeal. Limitations on the rights of appeal also exist in terms of strict time periods that vary depending on the court; and, though it may be possible for an appeal to be allowed out of time, this again requires an application to the court to be determined. In Queensland a right of appeal without leave lies from the Magistrates Court directly to the District Court and should be made within one month of the Magistrates’ decision.\textsuperscript{200} Generally in an appeal case the court may dismiss the appeal and uphold the original decision as happened in Knight; or allow the appeal and remit the matter back to the lower court as happened in the Simpson and McKay cases. Remitting is the more typical outcome; it is rare for an appeal case to rehear the original matter or for an appeal court to be able to make the necessary findings to resolve a case.\textsuperscript{201}

As illegal clearing cases begin in the Magistrates Court, appeals to the District Court necessarily entail legal representation from both senior and junior counsel in addition to an instructing solicitor. This level of legal representation continues to be necessary if a case is further appealed. The extensive costs involved in prolonged appellant litigation are inevitably beyond the realms of most litigants: in Van Reit, Simpson and Knight the

\textsuperscript{199} District Court of Queensland Act 1967 (Qld) s 112.

\textsuperscript{200} Justices Act 1886 (Qld) s 222 (1).

\textsuperscript{201} This limitation of the appeal system was discussed by Fryberg J in Peter Robert Witheyman v Harvey Scott Simpson [2009] QCA 388, 23.
defendants had some financial assistance and continued support from Property Rights
Australia.

Conclusion

A key focus of this chapter was to answer a subsidiary research question of this thesis, which asked: how were the vegetation management enforcement and compliance provisions implemented? An initial problem encountered was in establishing a complete and accurate list of all illegal clearing investigations and prosecutions. This was exacerbated by the regulator's reluctance to provide comprehensive details either within their annual reports or in response to a request for information. An open and transparent approach to the implementation of vegetation management regulations might have been more forthcoming had the compliance and enforcement record of the regulators achieved more success. That being said, as the administrative agency, DERM (the former Department of Natural Resources and Water) has not embraced transparency in the same manner as the previous Environmental Protection Agency.

One aspect of the implementation of regulatory compliance and enforcement, which proved to be consistent in all cases considered, was the use of the statutory sentencing guidelines provided by both the Penalties and Sentences Act 1992 (Qld) and the VMA. It is the latter legislation which authorises the courts to arrive at a pecuniary penalty dependent upon the category of vegetation and amount of acreage cleared. As this financial penalty is capped, there is a point at which illegal clearing is not penalised. The example provided within this chapter is that of illegally clearing 55.5 hectares of endangered regional ecosystem. Illegal clearing beyond this amount is not sanctioned and yet is arguably more environmentally damaging. Such extensive clearing would increase cattle carrying capacity and, in turn, land value. It is imperative that financial penalties are not merely a business cost; and that the significant deterrence implications of sentencing high profile members of the rural community, such as Graham Acton, are utilized.

The implementation of vegetation management compliance and enforcement regulations was tested in the courts. This early challenge to the validity of the VMA in Bone v Mothershaw settled vegetation management law within Queensland: even if the court
might sympathise with the landholder that the law was unfair, legislative restrictions bring no entitlement to compensation. The absence of legal training, which would have acknowledged the precedent provided by Bone, prompted a non-legal agent to embark upon a series of misguided litigation on behalf of several rural landholders.

It is imperative for a regulatory agency to be seen as acting fairly in the implementation of laws, yet many of the cases considered in this chapter do not reflect well on the regulators. In Holmes, the landholder obtained contrary expert mapping evidence, which prompted a withdrawal of proceedings after protracted negotiations and numerous court applications. In Whyenbirra, a compliance notice proved impossible to comply with and, as it had been lodged as an encumbrance on the land title, the director-general of DERM was obliged to rectify the title and apologise for contempt of court. Other cases examined highlight the intrinsic difficulties of successful prosecution in environmental crime. The case of McKay traversed the court hierarchy for many years, ultimately the defendant was primarily successful, but regulatory personnel were referred to the Crime and Misconduct Commission and subject to independent investigation. In Van Reit and Knights, both landholders succeeded in their cases. In these matters the regulators unsuccessfully appealed and, in the course of settling costs, both landholders received up to three times the statutory amount ordinarily granted for some items. Addressing the balance in costs awarded reflects a degree of fairness on the part of the courts. Cases such as Acton, Winks and Henderson – in which the accused cooperated with the investigation, pleaded guilty and did not challenge the regulatory evidence – proved inevitably easier for the regulators to prosecute.

Laws, particularly when enforced, will inevitably be pervasive and especially so for those whose livelihoods operate within their ambit. Queensland may now be on a path towards reaching the objects of vegetation management legislation; but there have been casualties en route and, in some sectors, irreparable damage to the regulatory relationship. The situation has at times been exacerbated by the deep-seated problem of access to justice and impelled a further research question: what wider issues did the compliance and enforcement provisions raise in terms of procedural fairness and access to justice? This problem may be familiar to all criminal justice systems but this chapter serves to highlight the imbalance in procedural fairness within land clearing.
litigation, particularly in the areas of the right to legal representation and the system of appeals.

Some of the cases examined in this chapter exemplify the protracted nature of litigation when cases are appealed. Yet the ability to successfully defend an appeal all too frequently hinges on the ability to engage legal representation. In Dore, assistance by a non-legal agent unnecessarily prolonged litigation in a matter which should have ended in the first Magistrates Court hearing. In McKay, Van Reit, Simpson and Knights the defendants had some financial assistance and continued support from Property Rights Australia. If the landholder is successful but the regulator appeals, the only option for the landholder is to continue as evidenced in Van Reit, Knight and Simpson. Of these four Property Rights Australia cases, McKay was the only landholder to be convicted and that conviction was overturned. The matter of Simpson remains outstanding. Property Rights Australia has played a significant role in enabling and supporting these cases and in facilitating a body of litigation that might not otherwise have existed.
Chapter Eight: The making and implementation of the Rural Leasehold Land Strategy

Introduction

At the beginning of 2000 in Queensland, a policy shift in leasehold tenure was inevitable, the vast expanse of State rural land had endured extensive and prolonged degradation and rural lease terms were about to expire. Part of the solution was to amend leasehold legislation to incorporate sustainable land management. This chapter examines the making and implementation of the amendments to the *Land Act 1994 (Qld)* (LA). The following research question was explored: *how were the LA and the Rural Leasehold Land Strategy made and implemented and what were the parliamentary processes of the Queensland parliament within which the amendments were made?* 1 In 2001, some years before these amendments were made; the Minister for Natural Resources introduced a discussion paper as the first phase of the Rural Leasehold Land Strategy. This was followed by a draft strategy in 2003. The essence of the strategy was to establish a link between security of tenure and sustainable land management practices: additional lease periods would be granted on top of the basic 30 years as an incentive for environmental performance. This thesis has observed that the Labor period of government within Queensland was often characterised by a lack of transparency and accountability. This is further evidenced in this chapter insofar as the regulators denied access to submissions made by interested parties following the 2001 discussion paper and the 2003 draft strategy.

The making and implementation of the Rural Leasehold Land Strategy never reached the same heights of controversy as the *Vegetation Management Act 1999 (Qld)* (VMA). This began with the language of the Minister: in sharp contrast to the introduction and amendments of the VMA, government rhetoric was founded on conciliation and collaboration rather than confrontation and blame for past land management practices. There was recognition by the government that the move to sustainable land management would be a long-term and mutual goal. Leaseholders were not overly concerned by the proposed change; there was no reason to expect anything other than the status quo to

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1 Political processes have typically been considered with political context but Chapters Four, Five and Nine examine the political context for the period which includes the introduction and implementation of the Rural Leasehold Land Strategy.
continue. The amendments were not contentious because leaseholders could obtain lease renewal at the very least for the same 30-year term – even if their land was not in good condition. The law was made following appropriate parliamentary procedure and was unopposed, and even commended, by the opposition.

This chapter will examine how the Rural Leasehold Land Strategy has been put into practice. The strategy is commonly known as the Delbessie Agreement, having been launched at a cattle property of the same name. The Land and Other Legislation Amendment Act 2007 (Qld) provided the amendments to implement the strategy and a framework upon which lease renewal is now based. The main change is in the implementation of a new lease. The renewal process now includes a wide-ranging land condition assessment and, on the basis of this assessment, a complex and lengthy land management agreement. Such agreements are contractual and take effect once registered, along with the other title documents, at the Land Registry. A new lease must include general mandatory conditions and imposed conditions. Lease conditions are meant to be reviewed by the regulators every 10 years. If these reviews are conducted with any rigour, it will be a vast improvement on the situation noted in Chapter Two in which the historical lack of adaptive change in pastoral lease conditions was established. A potentially significant mandatory condition is the statutory duty of care which was clarified along with the Rural Leasehold Land Strategy amendments to the LA. In the future, landholders might practically show compliance with the duty of care provisions by demonstrating performance of their land management agreement. To date, however, there is nothing to show that the duty of care condition, initially introduced in 1994, has had any significant and beneficial environmental impact on rural State land. As noted in Chapter Three, environmental laws should benefit the environment but it is impossible to make this conclusion definitively in the absence of evaluation and assessment, that is, if there is no means to measure whether any positive change has been made.

The regulators now have more extensive duties on lease renewal in respect of assessing the condition of the land and negotiating the terms of a new lease and land management agreement. They are assisted in this role by the Ministerial guidelines on what constitutes good condition of leased land and the Ministerial Advisory Committee. The length of a renewed lease will be determined by the condition of the land. Assessment
of condition is complex and extensive; it includes a desktop appraisal and a detailed field inspection. The regulated undergo a more protracted lease renewal process and ultimately have more onerous duties and obligations to meet the requirements of their lease and land management agreement.

One of the purposes of the land management agreement is to establish a monitoring and reporting program. The long-term sustainability of leased land will depend on the regulators having adequate resources to maintain and develop this program. What is apparent in this chapter, is that lease renewal under the amended legislation is much more resource intensive for the regulators. It was explained in Chapter Two that lease conditions had remained dormant for many years; the automatic 20-year extension for rural leases in 1986 would not have excessively challenged regulatory resources. The passage of time will determine if the Queensland government has sufficient will and resources to invest in a comprehensive and sustained implementation of the Rural Leasehold Land Strategy. If regulatory resources are channeled into the renewal stage it might mean that resources for education and communication, compliance and enforcement are negligible.

The Rural Leasehold Land Strategy: initial discussion paper and draft strategy

In December 2001 the Minister for Natural Resources Stephen Robertson announced the introduction of a discussion paper as the initial stage of the Rural Leasehold Land Strategy. The Minister noted:

The Beattie government is committed to achieving sustainable management of all of our State's natural resources, including leasehold land. We also recognise that this is best done in partnership with an economically viable rural farming sector. To this end, the government is committed to increasing certainty for stakeholders in the State's rural leasehold land, including indigenous and conservation interests, and to increasing accountability.2

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The discussion paper was timely: in the twenty-year period from 2001 to 2021 almost half of the pastoral holdings within the State, amounting to 42 million hectares, would be due for renewal. It was also judicious as rural land and environmental degradation were issues of concern. Approximately 1800 rural leases were affected, covering 86.6 million hectares or half of Queensland, environmentally this land is significant: 96.3 per cent of land affected by the Rural Leasehold Land Strategy is mapped as remnant vegetation by the Queensland Herbarium.

In 2003, the same Minister introduced the draft Rural Leasehold Land Strategy. Addressing the Queensland Parliament, Robertson said:

Certainty is the key word here. This approach provides leaseholders greater certainty in terms of their security of tenure. It ensures our land resources are better protected against further environmental decline by making conservation a condition of the lease…

The Minister stressed the linkage between security of tenure and sustainable land management practices: additional lease periods would be granted on top of the basic 30 years as an incentive for environmental performance. This change in policy direction is worthy of note. The last significant event in lease renewal was in 1986 when the Bjelke-Petersen government granted an automatic 20-year extension to most pastoral leases. At that time, both sides of parliament agreed that a 30-year lease had limitations and supported the security of tenure provided by an extended 50-year term. In 2003 the Queensland Labor government, unopposed by the opposition, reverted to the 30-year lease period and held out the possibility of an extended 40-year term as a reward for good land condition and an inducement for sustainable land management practices.

Both the 2001 discussion document and the 2003 draft strategy refer to extensive consultation taking place between interested parties. Following the initial discussion paper, deliberations occurred with relevant public sector groups including the Departments of Premier and Cabinet, Treasury, State Development and Primary

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Industries together with leaseholders and organisations such as Agforce, Landcare and the Queensland Conservation Council.6 Workshops were held for leaseholders to attend and 84 written submissions were made.7 After the 2003 draft strategy was released, the regulators noted that landholders had attended 19 regional workshops and a further 70 written submissions were received.8 Neither the submissions nor transcripts of public hearings were available on the regulator’s web site. Yet the objects of the Land Act 1994 (Qld) include ‘open and accountable’9 administration and, on introducing the new strategy, the Minister committed to ‘increasing accountability’10 A request to read the submissions and transcripts of the public hearings engendered this reply:

...copies of written submissions are kept on department files and I don’t know if transcripts of public hearings were made and/or were kept. To obtain copies of written submissions I suggest you apply through the ‘right to information’ process available through www.rti.qld.gov.au.11

This response was in keeping with other requests for information from the regulators.

Open and accountable administration, however, should mean a transparent process with ready access to the contributions of interested parties upon which the Rural Leasehold Land Strategy was apparently based. This is particularly pertinent, as the Queensland government continually stressed the extent and period of time during which consultation was undertaken. It proved impossible to clarify the number of rural landholders who attended the initial 2001 workshops. It was estimated by the regulators that more than 1000 people attended the 2003 public hearings. It is arguable that many of these individuals were present because they were curious about the new regulatory regime and wished to provide some input. It remains unclear if transcripts of the public hearings exist. Responsible government requires transparency in administrative procedure. There has been a manifest regulatory failure on the part of the Department of Environment and Resource Management (DERM) to be open and accountable in

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6 Queensland government, Department of Natural Resources and Mines, Draft State Rural Leasehold Land Strategy, 2003, I.
7 Queensland government, Department of Natural Resources and Mines, Draft State Rural Leasehold Land Strategy, 2003, I.
8 Queensland government, Department of Natural Resources and Water, State Rural Leasehold Land Strategy (undated) I. This document and some of the original regulatory material is no longer available on the Queensland government’s web site.
9 § Land Act 1994 (Qld).
administrative processes and to adhere to the objects of the legislation they administer during the Labor period of government.12

The Land and Other Legislation Amendment Act 2007 (Qld)

The Land and Other Legislation Amendment Act 2007 (Qld) made the amendments to the Land Act 1994 (Qld) to implement the Rural Leasehold Land Strategy. The amending legislation was introduced in March 2007 by Craig Wallace, the Minister at the time. It was passed in April of the same year. Unlike the introduction and many amendments of the VMA, debate on the proposed statute followed due parliamentary process. The Bill went through a First and Second Reading, during which members from both sides of the Legislative Assembly were given the opportunity to contribute to the debate. This moved on to a consideration in detail of all the amending clauses. The legislation was passed without any amendments, but the parliamentary dominance of the Queensland Labor Party continued in 2007.

The Rural Leasehold Land Strategy provided for all new and renewed rural leases for 20 years or over, and greater than 100 hectares in size, to be subject to a land management agreement. This agreement would be between the lessee and the Queensland government. According to the Minister, the strategy recognised the importance of security of tenure for successful grazing and agriculture and therefore rewarded sustainable management of land.13 The amendments were not controversial, in part because leaseholders could obtain lease renewal at the very least for the same term.

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12 As the Rural Leasehold Land Strategy is fundamental to this thesis I decided to pursue a Freedom of Information (FOI) application in January 2012. Initially an FOI officer from DERM advised I did not need to put in a formal application as the files would be located and they would contact me. There followed several emails and telephone conversations. During this period I had made contact with Des Boyland in his capacity as a member of the Rural Leasehold Land Strategy Ministerial Advisory Committee. Des Boyland spoke to the State Land Asset manager on my behalf. The manager contacted me, mentioned the FOI application and asked if I would attend a meeting with him and other senior policy officers at the DERM office in Brisbane. I attended a meeting on 18 April 2012. Prior to the meeting, I had submitted, as agreed, a series of questions on the Rural Leasehold Land Strategy. In many ways the meeting was futile as the DERM officers talked very generally around my questions. I therefore suggested I reduce the questions and asked if they would supply written responses which seemed more reliable than my interpreting their oral responses. The written replies were given by one of the senior policy officers on the 29 May 2012. I had assumed the written submissions might be made available to me at the meeting – especially as the suggested meeting was after the change in State government. It was apparent this was not to be the case and after the meeting the State Land Asset manager said in an email dated 24 April 2012 that the submissions would not be released since he believed the expectation, at the time the submission were made, was that they would not be publicly available. It was clearly open to me to pursue the original FOI application but I decided against this in light of the time and expense already incurred and the likelihood of further wasted time and expense.

Thus a 30-year lease could be renewed for 30 years. The new and extensive administrative processes might have challenged the expectations of leaseholders: a renewed lease was no longer a straightforward matter of filling in a form and paying a prescribed fee. But there was no widespread outcry prompted by the proposed change. There was no reason to expect leases would not be renewed as they had in the past.

This is the essence of the strategy:

- If the land was not deemed to be in good condition the lessee would be offered a lease term up to 30 years;
- Good condition was to be determined by the Ministerial Advisory Committee;
- Landholders who could demonstrate successful remediation of their land, within the first 10 years of their land management agreement, may apply for a 10 year extension to extend their lease to 40 years; and
- A further 10 years would be available, making the lease a 50 year term, if the land was in good condition and, if the Minister considered it appropriate, the lessee entered into a conservation agreement or a conservation covenant and/or an indigenous access agreement.\(^\text{14}\)

The opposition supported the 'overall intention' of the legislation but voiced concerns as to how the Act was to be administrated.\(^\text{15}\) Some members, typically those from the land, articulated similar concerns which included: doubts as to land inspections, and the ability of those undertaking them, to take into account variables such as the unprecedented drought which affected most of Queensland at that time;\(^\text{16}\) the lack of trust of leaseholders towards the regulators, declared to be in marked contrast to the

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\(^{14}\) Queensland government, *Land and Other Legislation Amendment Bill*, Second reading, 15 March 2007, 1120, per Wallace C. Available at: http://www.parliament.qld.gov.au/documents/Hanscap/2007/2007.03.15.WEEKLY.pdf?xml=http://www.parliament.qld.gov.au/internetsearch/sysquery/c0beb077-6b90-4b4b-8ac7-1e6b526b159f2?nullig (viewed 13 December 2011). The relevant legislative provisions became as follows: s 155 A (1) (b) *Land Act 1994 (Qld)* makes provision for a 40 year extension; s 155 B (1) (b) *Land Act 1994 (Qld)* makes provision for a 50 year extension; s 155 BA (1) (b) provides for extensions up to 75 years and requires a conservation agreement, an indigenous land use agreement and all or part of the leased land being in an area of international conservation significance under the *Cape York Peninsula Heritage Act 2007 (Qld)*

\(^{15}\) Queensland government, *Land and Other Legislation Amendment Bill*, Second reading, 15 March 2007, 1233, per Hopper.

\(^{16}\) Queensland government, *Land and Other Legislation Amendment Bill*, Second reading, 15 March 2007, 1304, per Johnson.
former good working relationship with the Land Commissioners;\textsuperscript{17} and the need to rebuild trust between leaseholders and the regulators.\textsuperscript{18} It is probable that many of these concerns had been raised by rural constituents and would have been reflected in the submissions the regulators were reluctant to disclose. Had the proposed amendments been contentious, the opposition would not have supported the legislation. On the contrary, Jeff Seeney, member for the National Party’s rural seat of Callide and the most vociferous and steadfast opponent of the VMA, commended the Minister for rewarding good land management practice and adhering to applicable legislative procedures with regard to drafting and parliamentary process.\textsuperscript{19}

Contrary to parliamentary debates on the VMA, account was taken during the Second Reading discourse of the Alert Digest report prepared by the Scrutiny of Legislation Committee. The concerns of the Committee were taken up by the Shadow Minister, in particular the concern that leaseholders whose interest had been terminated were denied any entitlement to claim compensation and, in the absence of ministerial approval, such leaseholders were also prevented from removing any improvements if their holding was terminated.\textsuperscript{20} The Minister replied that where a lease was revoked under the provisions of the LA no compensation would be payable for the extinguishment of this interest in land; but the Act did make provision for the lessee of a revoked lease to apply to remove improvements. As this provision was consistent with the legislation existing at the time – and with previous Acts introduced and administered by conservative coalition governments – the Minister was deemed to have responded to the satisfaction of the Committee.\textsuperscript{21}

The Rural Leasehold Land Strategy becomes the Delbessie Agreement

In December 2007 the Queensland government launched the Rural Leasehold Land Strategy at the Delbessie cattle property in Hughenden. This property has been in the McNamara family since 1929. Greg McNamara was elected the northern chairman of

\textsuperscript{17} Queensland government, Land and Other Legislation Amendment Bill, Second reading, for example 15 March 2007, per Johnson 1247 and Menkens 1251.
\textsuperscript{18} Queensland government, Land and Other Legislation Amendment Bill, Second reading, 15 March 2007, for example per Menkens 1251, Cunningham 1253, and Malone 1258. The loss of trust between the regulators and the regulated and the need to rebuild trust is discussed in Chapter Three.
\textsuperscript{19} Queensland government, Land and Other Legislation Amendment Bill 2007, Second reading, 15 March 2007, 1253, per Seeney.
Agforce in November 2007. At the end of his first week in office he was told his property had been chosen to host Premier Anna Bligh, Minister Craig Wallace, chairman of Agforce at the time Peter Kenny and president of the Australian Rainforest Conservation Society Aila Keto, together with assorted entourage and the press. These four parties signed what became known as the Delbessie Agreement. The failure to include an indigenous representative is noteworthy, particularly as the Rural Leasehold Land Strategy makes provision for indigenous land use and access agreements.

The Australian Rainforest Conservation Society fulfilled the environmental role but it seemed odd that a body primarily concerned ‘to protect, repair and restore the rainforests of Australia and to maximise the protection of forest biodiversity’ should be involved with Delbessie lands. The list of achievements of the Society does not include the Delbessie Agreement. As a skilled negotiator and renowned conservationist, Aila Keto has a considerable reputation amongst environmental groups and may have been one of the few individuals within the State capable of undertaking this role. The independence of the Society might have been compromised: they are supported by a grant from the department who administered the Agreement. Agforce are the largest rural organisation within the State and as such their negotiating role was a logical inclusion.

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24 Des Boyland, member of the Ministerial Advisory Committee and representative of the Wildlife Preservation Society of Queensland written replies in response to my questions dated 1 May 2012. Now retired Des Boyland is a scientist who began his career in the Queensland public service in 1959. He originally worked as a plant taxonomist and mapped vegetation and completed his working life as a senior executive responsible for the conservation of nature with the former State Environmental Protection Agency. In keeping with the research strategy and protocol employed for this thesis an email together with an explanatory information sheet and consent form was sent to Aila Keto with a series of short questions in relation to the involvement of the Australian Rainforest Conservation Society (ARCS) in the Delbessie Agreement. As no reply was forthcoming a further email was sent some months later, which again elicited no response. Aila Keto founded the Rainforest Conservation Society of Queensland (now the ARCS) in 1982. She is a well known authority on World Heritage matters and was primarily responsible for the groundwork behind three nominations being the Wet Tropics, Fraser Island and the Central Eastern Rainforest Reserves. She was instrumental in bringing an end to rainforest logging in Queensland and to the protection of more than 1.5 million hectares of rainforest. She has been the recipient of many environmental awards. In 2000 she was nominated as Queenslander of the Year; in 2001 she was awarded a centenary medal for service as an expert on wet tropics and as a leading conservationist and academic. See generally, Australian government, Australia Celebrating Australians. http://www.itsanhonour.gov.au/honours/honour_roll/search.cfm?aux_award_id=1116111&search_type=quick&showld=true (viewed 20 December 2011) and the ARCS site: http://www.rainforest.org.au/idl.greats.htm, (viewed 20 December 2011).
25 Australian Rainforest Conservation Society, the Homepage of the Society notes ‘ARCS is supported by a grant from the Queensland Department of Environment and Resource Management’: Available at: http://www.rainforest.org.au/arcsinfo.htm (viewed 20 December 2011).
26 Nonetheless, as noted in Chapter Three, Agforce receives significant financial support from the Queensland government: their governmental funding and membership would outstrip that of the Australian Rainforest Conservation Society.
The Delbessie Agreement was not binding legally; it was an information document that included the signatures of the four parties on the initial page, or forward. The Agforce president assured landholders they had nothing to fear: the message from the Minister was conciliatory and appeared to envisage that the move to sustainable land management would be a long-term goal. Wallace noted:

I don't want people from my department going to a property that's been in a 10-year drought and declaring that it's not in a good condition – that would be wrong. I make this commitment to the people of rural Queensland that my department will work cooperatively with them to come up with an arrangement that suits all parties and gets all properties up to 100 per cent in the future.27

In December 2007 all Queensland rural leaseholders received a letter from the Minister announcing the introduction of the Rural Leasehold Land Strategy, and noting that it would be operational early in 2008. The Minister said:

The strategy recognises that it is not possible for leaseholders to conserve cultural heritage and protect the environment alone, nor is it reasonable to expect that they should. Clearly it will take a collaborative effort and mutual compromise for the strategy to work…28

In August 2008 the Agforce president called for the Queensland government to finalise the details of the strategy, implement the reforms and appoint the Ministerial Advisory Committee.29

The State Rural Leasehold Land Ministerial Advisory Committee

The Ministerial Advisory Committee was duly formed in August 2008. The function of the committee was described as being 'to provide scientific, technical and policy advice to the Minister on specific issues related to the state wide management and use of rural leasehold land and the implementation of the Delbessie Agreement'.30 The LA was amended to make provision for the Committee to advise on the management and use of

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rural leasehold land. The legislation also allowed the Minister to establish regional committees to support the Advisory Committee. The Minister could decide the functions or terms of reference of the Advisory Committee, its membership and how it was to operate.

An assessment of land condition is integral to the implementation of the Rural Leasehold Land Strategy. Good condition is not defined in the Act but there is statutory provision for Ministerial guidelines about what constitutes good condition of leased land. Before making the guidelines the Minister must seek advice from the Ministerial Advisory Committee. If the advice of the Committee is not given within a reasonable period the Minister may make the guidelines. The role of the Committee is strictly advisory: equally, as the legislation notes, the Minister ‘may have regard to the guidelines’.

Under the terms of reference the functions of the Committee are, inter alia, to advise on:

- The sustainable management and use of rural land;
- Practice guidelines for natural resource condition assessment, including the assessment of good condition which takes regional variability into account;
- Policy initiatives in response to contemporary and emerging issues;
- The framework for land management agreements, covenants and use and access agreements;
- The effectiveness and appropriateness of frameworks for monitoring and evaluating natural resource conditions;
- Appropriate time frames for recovery of landscape condition;
- Research and development that is required to support the implementation of the strategy and recognise the diversity of landscapes and the impact of climate variability on land condition; and

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31 Land Act 1994 (Qld) s 394.
32 Land Act 1994 (Qld) s 394 (2) (a) (ii).
33 Land Act 1994 (Qld) s 394 (2) (b) and (c).
34 Land Act 1994 (Qld) s 394 A.
35 Land Act 1994 (Qld) s 394 A (2).
36 Land Act 1994 (Qld) s 394 A (3).
37 Land Act 1994 (Qld) s 394 A (6).
• Community and sectoral concerns related to the use and management of leasehold land.\footnote{Queensland government. State Rural Leasehold Land Ministerial Advisory Committee, Terms of Reference, cl 2.2.}

At the time of writing, eleven of the twelve Committee members have retained office since the Committee was established.\footnote{Being February 2012: the committee’s future in light of the outcome from the March State election is uncertain but their term has been extended for twelve months to 2013. Personal communication with Des Boyland 6 February 2012, n 24.} In August 2008, the Minister, Craig Wallace, announced the establishment of the committee and provided details of the members and their expertise which included: natural resource management, rural industry, agricultural and environmental science, public policy, native title and cultural heritage.\footnote{Wallace C, ‘Queensland Rural Leasehold Land Advisory Committee Appointed’ (Media release, 21 August 2008).} There is one rural landholder on the Committee in the position of Chair and a technical advisor from Agforce.\footnote{The Chair is Kenneth Drysdale a former president of the United Graziers Association of Queensland and an Augathella grazier.} There are two conservationists on the Committee, one from the Wildlife Preservation Society of Queensland and one from the WWF Australia and an indigenous land management expert. There are also technical advisors on the Committee who hold senior positions in the regulatory bodies of DERM and the Department of Primary Industries and Fisheries. The technical advisors are non-voting members. By November 2008 the Minister had announced that the Committee was reviewing draft guidelines for assessing what amounted to good land condition.\footnote{Queensland government. Questions Without Notice. Rural leasehold land, 11 November 2008. 3345. per Wallace C. Available at: http://www.parliament.qld.gov.au/documents/hansard/2008/2008_11_11_WEEKLY.pdf#xml=http://www.parliament.qld.gov.au/internetsearch/syssquery/dbehf7ee-a079-47e2-ac50-bb8a613419e/1/hilite/viewed 6 January 2012).} The guidelines were duly prepared and, in accordance with statutory requirements, publically available.\footnote{Land Act 1994 (Qld) s 394 A (4) & (5).} The latest Guidelines were released in April 2011.\footnote{Queensland government, Questions Without Notice, Rural leasehold land, 11 November 2008, 3345, per Wallace C. Available at: http://www.derm.qld.gov.au/land/state/rural_leasehold/pdf/delbessie_guidelines_v2.pdf (viewed 7 January 2012).}

**Lease terms and conditions**

The terms and conditions of a pastoral lease instrument need not comply with the required characteristics of a general lease, which require exclusive possession and a certain term.\footnote{The Wik Peoples v The State of Queensland (1996) 187 CLR 1, discussed in Chapter Two, held a pastoral lease was a creature of statute and need not grant a right to exclusive possession.} The LA makes provision for lease conditions and includes general mandatory conditions and imposed conditions. The mandatory conditions include the
statutory duty of care and use in accordance with the tenure’s purpose, together with a land management agreement condition and an improvement condition.46 Imposed conditions are wide ranging and typically include development and care, sustainability and protection of the leased land.47 The lessee has a statutory obligation to perform the conditions of the lease.48 Failure to do so may lead to forfeiture49 but, as observed by Young, forfeiture has rarely been used in the past because of the political and administrative difficulties in implementation.50 Forfeiture is not an expectation of lease title holders in Queensland. According to the regulators, the lack of forfeiture is because of the ‘range of administrative steps prior to that action and those steps resolve the issue’.51 There has been no forfeiture of leases under the Delbessie Agreement and in approximately 25 years prior to the strategy, there was only one forfeiture.52

For the environment, and for the parties to a lease, it is important to review lease conditions.53 Young advocated 10 to 15 year review periods.54 For rural leasehold land in Queensland, a review of imposed conditions must be made at the same time that the land management agreement is reviewed by the regulators, which is at least once every 10 years.55 The Delbessie Agreement also provides for a self-assessment of the land management agreement every five years but does not provide any further information as to how this might be implemented.56 The 10-year timeframe to review lease conditions is an improvement for the environment, and also for both lessor and lessee. It provides the opportunity to assess what is working within the terms of the lease and if conditions need to be further adapted to the specific requirements of the land and the parties to the lease. It was observed in Chapter Two that lease conditions had been static for many years prior to the Rural Leasehold Land Strategy and that change was typically implemented through legislation. This provision to adapt the lease instrument marks a policy shift with potential benefits for the environment.

47 Land Act 1994 (Qld) s 203.
48 Land Act 1994 (Qld) s 213.
49 Land Act 1994 (Qld) s 234.
55 Land Act 1994 (Qld) ss 211 (1) and 176 X.
56 Queensland government, Department of Natural Resources and Water, State Rural Leasehold Land Strategy, 7.
Clarification of the statutory duty of care condition

A statutory duty of care for leasehold land was first introduced into Queensland in the LA – this meant that all leases were ‘subject to the condition that the lessee has responsibility for a duty of care for the land’. Duty of care was not defined in the 1994 Act; clarification came with the 2007 amendments, along with the Rural Leasehold Land Strategy. The duty of care requirements oblige landholders with leases issued for agricultural, grazing or pastoral purposes to take all reasonable steps to:

- Avoid causing or contributing to land salinity that reduces the land’s productivity or damages other land;
- Conserve soil, water resources and biodiversity; maintain native grassland free of encroachment from woody vegetation;
- Protect riparian vegetation;
- Maintain pastures dominated by perennial and productive species; and
- Manage any declared pest.

The amendments were introduced into Parliament by the Minister and were said to be ‘articulated in a more comprehensive manner’. Beyond this brief introduction the additional duty of care obligations were not the subject of any protracted parliamentary discussion, they were supported by one other member of the Labor Party and remained unchallenged by the opposition. This was not a controversial amendment – it might be argued that this was because the amendment affected leasehold tenure; it is unlikely such an amendment would have gone unchallenged had it affected freehold land.

At the Commonwealth level, the Industry Commission in their 1997 Inquiry into ecologically sustainable land management advocated a statutory duty of care. A key recommendation was for the regulation of natural resource management to be built around a general duty of care for the environment. The Industry Commission proposed extending the common law duty of care to environmental statutes, which would require resource managers to take all “reasonable and practical” steps to prevent their actions

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57 Land Act 1994 (Qld) s 199.
58 Land Act 1994 (Qld) ss 199 (1) (2) (a) to (h).
60 Industry Commission. A Full Repairing Lease; Inquiry into Ecologically Sustainable Land Management, September 1997, 73.
causing foreseeable harm to the environment'. A further Commonwealth Report prepared for the re-named Productivity Commission in 2001, developed the earlier recommendations and concluded that a statutory duty of care was a significant means to articulate environmental standards and positive measures for environmental management' but was not the only solution and would need to ‘be supported by complementary approaches, including encouragement of voluntary action, education and financial incentives’. Complementary approaches in Queensland include additional lease periods and security of tenure for landholders who adopt sustainable land management practices and enter into a nature reserve or an indigenous land use agreement. Incentives therefore are not financial, although payments are made with some nature reserves. If leases are renewed for the same 30-year period in any event, it is questionable whether the possibility of an additional ten years is actually an incentive.

As noted by Holmes, a duty of care was ‘historically treated as an empty gesture’ but he concluded that the inclusion of this provision is now evidence of ‘considerable potential in providing a legal basis by which the lessee can be required to demonstrate that their management is sustainable’. The duty of care is now a standard part of all new leases and is described by the regulators as the most significant of conditions. It is critical for the environment that the duty of care condition is utilised to promote and develop sustainable management of rural land. The degree to which this will happen is open to question. In the past there has been little in the way of compliance and enforcement on leasehold land with the result that ‘lessees virtually had a free go’. The long-term viability of this duty will depend on the extent of collaboration and the level of education regulators undertake with landholders, to promote recognition and understanding of the requirements of this lease condition. In the future, landholders might practically show sustainable land management practices by demonstrating compliance with their land management agreement. Again it remains an open question whether regulators will have sufficient resources to undertake collaboration and education, compliance and enforcement in addition to the renewal process.

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61 Industry Commission, A Full Repairing Lease; Inquiry into Ecologically Sustainable Land Management, September 1997, 70.
65 Des Boyland, member of the Ministerial Advisory Committee and representative of the Wildlife Preservation Society of Queensland written replies in response to my questions dated 1 May 2012.
The process of lease renewal under the Delbessie Agreement

The main change in lease renewal under the Delbessie Agreement is in the implementation of a new lease and the conditions of offer. The renewal process is guided by statute and now includes a land condition assessment and, on the basis of this assessment, a land management agreement. A lessee may apply to renew a lease once eighty per cent of the existing term has expired, unless the existing lease prohibits renewal, for example if it contains a reservation for a future conservation area; or unless, in the opinion of the Minister, special circumstances exist.66 Special circumstances are not defined in the Act but regulatory policy provides examples of such circumstances that might apply to rural leasehold land. They include: environmental circumstances such as an agreement to surrender land required for a national park or a nature refuge; indigenous circumstances such as an indigenous use and access agreement; or natural resource management in which the leaseholder has agreed to negotiate a statutory covenant or to remediate major land degradation.67 Special circumstances might require a substantial undertaking on the part of the lessee.

The regulatory process for lease renewal before the lease has expired follows a similar pattern to renewal before the implementation of the Delbessie Agreement. Thus lease renewal follows a standard and staged procedure. Initial contact is made with the lessee two years from the date of lease expiry; if the landholder does not respond a reminder is sent 12 months from the expiry date; and, if this also elicits no response, a final notice to apply will be sent 6 months from the expiry date.68 Notices to landholders in the final 12-month period of the lease remind the lessee, in the event of non-renewal, that the land must be vacated on the expiry date; these final notices are also sent to local government and any mortgagee or other party with an interest in the lease.69 If it appears a lease would expire before a renewal application is finalized, the Minister may extend the term of the lease for periods of no longer than a year until the application is finalised.70 Lease renewal still requires the completion of the necessary forms and the

66 Land Act 1994 (Qld) s 158 (1) to (3).
70 Land Act 1994 (Qld) s164.

246
payment of a fee. The initial form includes details of the applicant and the land tenure.71 A second form deals with the renewal application and informs the leaseholder that upon renewal a land management agreement is to be entered into following an assessment of the condition of the land in consultation with the landholder.72 Following implementation of the Delbessie Agreement, the process is more protracted if the landholder intends to apply to renew the lease.

The additional responsibilities of the Rural Leasehold Land Strategy will necessarily complicate and render the lease renewal process a more time consuming exercise. The application to renew a lease may be undertaken by a leaseholder with or without legal representation. Some lessees instruct a land consultant. A lease may only be renewed if the application is made in accordance with the legislation and the chief executive has made an offer of a new lease, including the conditions on which the offer is made.73 The lessee must fulfill the conditions of the offer to accept the lease.74 If the leaseholder is not offered a new lease, it is possible to appeal the chief executive’s decision, but only if the refusal was because the lease conditions on the previous lease had not been fulfilled.75

There is an extensive list of issues the chief executive must consider before making an offer to renew a lease which incorporate the conditions of the offer and the conditions of the new lease. In summary they include:

- The interest of the lessee;
- Whether part of the lease should be declared a State forest under the Forestry Act 1959 (Qld);
- Whether the public interest could be adversely affected if the lease were renewed;
- Whether part of the land is needed for environmental or nature conservation purposes;
- The condition of the land;

73 Land Act 1994 (Qld) s 157 A and s 160 and s 161.
74 Land Act 1994 (Qld) s 161.
75 Land Act 1994 (Qld) s 160 (3).
• The extent of or risk of land degradation;
• Whether the lessee has complied with the conditions of the lease and any land management agreement;
• Whether part of the lease has a more appropriate use or is needed for a public purpose;
• Whether a new lease is the most appropriate form of tenure;
• The lessee’s record of compliance with the Act; and
• The natural environmental values of the land.76

The above list incorporates the 2007 amendments to the LA. These changes were far reaching, and indicative of the move towards sustainable management of the land. This is evidenced by including an assessment of the condition of the land, by consideration of the natural environmental values of the land and by additions to the land degradation clause.77

**Land condition assessment**

The length of a renewed lease will be determined by the condition of the land. The regulators will assess the condition of the land utilizing the Guidelines mentioned previously along with the relevant statutory provisions. Thus a term lease for rural leasehold land will be renewed for 30 years, or 40 years if the land is in good condition, or 50 years if the land is in good condition and the lessee enters into either conservation or indigenous access use agreement or both types of agreement.78

The Guidelines are 70 pages long; they were developed to support the implementation of the Rural Leasehold Land Strategy. According to the regulators, they are for the use of their technical officers and ‘not intended to form the basis of a lessee monitoring program, but may be a useful reference tool for lessees seeking to maintain or improve the condition of their land in accordance with the requirements of a land management

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76 *Land Act 1994* (Qld) s 159 (1).
77 Under Schedule 6, *Land Act 1994* (Qld) degradation includes any of the following: soil erosion, salinity or scalding; destruction of soil structure, including, for example, the loss of fertility, organic matter or nutrients; decline in perennial pasture grasses, pasture composition and density; low ground cover; thickening in woody plants; stream bank instability and slumping; the presence if any declared pest; water logging; rising water tables; or a process that results in declining water quality.
78 *Land Act 1994* (Qld) s155 (3) (4) and (5).
agreement". The Guidelines were developed over a two-year period by a regulatory technical group of experts and subsequently evaluated and endorsed (but not determined as initially announced by the Minister) by the Ministerial Advisory Committee. According to the regulators they are based on nationally and internationally accepted principles and methods of assessing biodiversity and land management.

The land condition assessment process is twofold and includes a desktop assessment and a field inspection. The purpose of the desktop assessment is to ‘collate and analyse all relevant documents and data pertaining to the lease and to prepare and plan for the field inspection;’ and the purpose of the field inspection is to ‘assess the condition of all accessible parts of the lease land in terms of the land condition attributes’. The land condition attributes are described as a ‘subset of the duty of care principles’ and include: pasture; soil; biodiversity; declared pests; salinity; riparian vegetation and natural water resources. The first three attributes – pasture, soil and biodiversity – are described as being the primary determinants of lease land condition in that they are said to reflect land management practices. The remaining attributes – declared pests, salinity, riparian vegetation and natural water resources – are noted to be critical for long-term stability.

The land management agreement should address any matters of concern once attributes are assessed and their condition recorded and provided to the landholder.

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The land condition attributes are measured by the regulatory Guidelines by means of indicators; there are a total of twenty-three indicators. In order to demonstrate the degree to which each indicator is accessed, the indicator for soil surface condition will be examined. For each of the indicators a question is presented, the question for soil condition is: are there signs of soil surface erosion or soil movement across the site? The indicators are rated from one to four with one being the best condition. The following ratings for soil surface condition are:

- Rating one – there is very little evidence of soil erosion or soil disturbance across the site;
- Rating two – the site has minor soil erosion or soil disturbance, evident in a list of nine descriptors that include soil surface compaction and minor soil deposition;
- Rating three – the site has moderate soil erosion, evident in a list of eight descriptors that include some exposure of roots and subsoils;
- Rating four – the site has severe soil erosion, evident in a list of eleven descriptors that include root exposure and vegetated areas isolated in moulds or depressions.

A glossary of definitions is provided for each indicator. For soil, the definitions of: site, rills, gully, and terracettes is provided.

What is apparent from these definitions and the descriptors generally is the complexity and degree of assessment undertaken for each of the twenty-three indicators. For example, the relevant indicators for the leased land must be assessed and given a ‘calibrated threshold score’ that is 70 for each of the three main attributes of pasture, soil and biodiversity. An adjusted score, which does not include some indicators, is used for biodiversity. According to the regulator, this ensures the lessee is not penalised for previously lawful past land management practices, such as tree clearing.

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86 The indicators include, inter alia: proportion and distribution of preferred species, health of preferred and intermediate species; soil surface condition; ground cover; declared pest plants and animals; proportion and density of native ground layer species; large trees; shrub layer; woody debris and litter; non-native species; size of patch; salinity; riparian area disturbance; bank instability and potential soil erosion.


88 The Guidelines define the following terms; site – a 100 m x 100 m assessment area, identified by the ‘initial’ site coordinates or the ‘centre’ site coordinates; rills – any discontinuous erosion channel up to 30 cm deep or wide; gully – a channel more than 30 cm deep, often with short precipitous sides and a moderately to very gently inclined floor or a small stream channel and terracettes – an erosion step caused by sheet erosion.

Landholders may well be overwhelmed by the extent of assessment undertaken even if, as mentioned above, this information is simply there as a reference tool. The Guidelines indicate that leaseholders will be invited to participate in field inspections of their land and the fact that they are readily available is indicative of a transparent, albeit complex, process. The regulators were asked if leaseholders were taking an active part in the lease renewal process. The response was:

Yes. Lessees are encouraged to attend the land condition assessment. Feedback from our regional teams indicate, conservatively 90% attend to some extent (e.g. one or two sites to a day) to see the process. Approximately 10% attend for the entire inspection. The lessee is directly engaged through all stages of the process – desktop assessment/planning; land condition assessment; and negotiation of land management agreements. 90

There is therefore evidence of some engagement between leaseholders and the regulators.

If landholders do not agree with the regulatory assessment of the condition of their land they may apply for a review. The review is internal and follows the regulatory internal review policy for rural leasehold land.91 The policy may be summarized as follows:

- Lessees will be notified by the regulator that they are eligible to apply for an internal review if they are within 10 points for each of the three attributes of the calibrated threshold for good condition. Leases not within this boundary must rely on the Judicial Review Act 1991 (Qld);
- The application must be within 20 days and on the approved template, including reasons why the lessee considers the decision should be reviewed based on the assessment process contained in the Guidelines;
- If the application is properly submitted, a senior regulatory official will review the issues in dispute;
- There should be ongoing dialogue between the parties during the review, which may be upheld or substituted; and
- If the lessee disagrees with the review decision and the parties are unable to resolve the dispute, mediation will be instigated.92

90 Queensland government, Department of Environment and Resource Management, written replies from a senior policy officer dated 29 May 2012 to further questions submitted following the meeting on the 18 April 2012.
In addition to the Guidelines, a regulatory fact sheet exists to assist landholders on land condition assessments. There is nothing in the fact sheet to inform the landholders that they may apply to review a land condition assessment.\textsuperscript{39} Assuming a leaseholder could locate the relevant policy and template for application, it is arguable that technical expertise would be required for a comprehensive review submission to be properly submitted. Equally the possibility of review under the \textit{Judicial Review Act 1991} (Qld) would call for expert representation. The costs of both types of review might be prohibitive for many landholders. The regulators were accordingly asked if any landholders had applied for review and if so, if a lawyer or land consultant had represented them. The reply stated:

Regionally: South West - 5 lessee requests for review of land condition assessment determination (3 represented by a consultant); Central West - no reviews requested; North - 2 reviews requested (no solicitors or consultants engaged). Total - 7 requests for review from 257 (as at 30 April, 2012) land condition assessments.\textsuperscript{34}

Only a relatively small proportion of landholders have applied for review. This could indicate that most are satisfied with the process; but it remains open to question that some landholders might not have applied because of the cost and complications involved in the process.

\textbf{Development of a land management agreement}

Following an assessment of land condition, a land management agreement is developed. This agreement is the mechanism by which rural leaseholders might demonstrate compliance with the statutory duty of care provisions. The purposes of a land management agreement are described in the LA as being, inter alia, to:

- Identify and describe the natural and physical attributes of the land;
- Record the condition of the land at a particular point in time;
- Improve or maintain land condition so that it is or will be at least, in good condition;
- Identify any land degradation issues relating to the land;

\textsuperscript{34} Queensland government, Department of Environment and Resource Management, e-mail in reply from a senior policy officer dated 29 May 2012 to further questions submitted following the meeting on the 18 April 2012.
• Establish the agreed management outcomes for the identified land
degradation issues and the associated management strategies to address
them;
• Establish a monitoring and reporting program;
• Establish a process to verify the performance of the lessee in relation to the
outcomes; and
• Establish a dispute resolution process and a review process to maintain the
relevance and effectiveness of the agreement.15

The regulatory emphasis on working in partnership with leaseholders in the preparation
of a land management agreement is apparent in the information contained in the Rural
Leasehold Land Strategy, and is emphasised by the regulators.96 Regional officers
undertake this process. Information on the regulatory web site to assist landholders
includes: a guide to developing a land management agreement; a land management
agreement template; and a publication on managing grazing lands in Queensland. The
regulatory guide is 19 pages long; it reiterates the statutory requirements and procedural
steps of such agreements.97 For the first time, leaseholders are cautioned that the
agreement is a legal document and, as such, legal advice is recommended. Landholders
are informed that, to assist them, a generic template of standard terms has been
developed which will be adapted to each landholder’s particular circumstances. The
template is 45 pages long and sets down the general obligations of the parties, followed
by the specific details of the leased land including, inter alia, the condition and values of
the land, management outcomes and strategies, monitoring and reporting and, if
applicable, any indigenous cultural heritage or future conservation areas.98

In the regulatory guide on land management agreements, landholders are advised of the
internal review process in the event an agreement cannot be settled. Regulatory policy
on the review process informs landholders that Agforce provides an advisory service for any rural lessee but if the parties are unable to resolve the dispute, mediation is set in process.\(^9\) If mediation on the land management agreement is unable to solve the dispute, the offer of the lease is deemed to have lapsed;\(^10\) ultimately, therefore, a leaseholder who cannot settle on a land management agreement risks losing the leased land. The regulators were asked if leaseholders took an active part in negotiating their land management agreement. The response noted: ‘Yes. The land management agreement is negotiated between the lessee and the inspecting officer. 100% have taken part’.\(^11\) A further question asked if any landholders had applied for a review of the land management agreement and, if they had been represented by a lawyer or land consultant. The answer was:

No. There has been no activation of the dispute resolution process to date. Land management agreements are negotiated in a fair and practical manner between the lessee and the inspecting officer.\(^10\)

Prima facie this appears to be the case. The Delbessie Agreement provides for land management agreements to be self-assessed every five years and reviewed every 10 years or earlier at the request of either party.\(^10\)

Land management agreements are to be an integral part of the conveyancing transaction on transfer of a lease, and therefore have the potential to ensure continuity for sustainable land management. The agreement forms part of the conditions of offer for a new lease, and will take effect once registered at the Land Registry.\(^10\) A request was made to the regulators to see a completed agreement. An agreement was supplied but with this caveat:

This LMA was developed under the Guidelines V1.1. There have been some changes to Attributes and Indicators assessed under the new Guidelines V2.0 but the themes and scope around managing identified issues remain the same. These are primarily contained in Schedule 4. Also of note is that the relevant actions are suggested and/or agreed by both parties. Often the lessee offers specific detail

\(^10\) \textit{Land Act 1994 (Qld)} s 442.
\(^11\) Queensland government, Department of Environment and Resource Management, written replies from a senior policy officer dated 29 May 2012 to further questions submitted following the meeting on 18 April 2012.
\(^10\) Queensland government, Department of Environment and Resource Management, written replies from a senior policy officer dated 29 May 2012 to further questions submitted following the meeting on 18 April 2012.
\(^13\) Queensland government, Delbessie Agreement (State Rural leasehold Land Strategy) 7.
\(^14\) \textit{Land Act 1994 (Qld)} s 176 U and s 279.
around management practices that we record in the LMA. Therefore it should not be misunderstood that the specifics are not things that the Department specifically requires - each LMA is negotiated and is tailor made for each lease.105

The agreement supplied followed the template. Together with annexures it was lengthy and no doubt a more extensive document than the lease under which the land had been granted. The agreement will bind successors in title, and a new lessee will be required to lodge, with the transfer document, a statutory declaration as to awareness of land condition and the level of compliance with lease conditions and any land management agreement.106 At best, this check at the time of transfer puts a purchaser on notice of lease requirements and land condition. Prospective purchasers, and those who finance them, might be deterred by land which falls short of lease conditions and the requirements of a land management agreement. However, if a lease were to be granted for 30 years regardless of land condition, the statutory declaration is not a real deterrent; and 30 years exceeds the time period of most mortgages. It would be beneficial for the long-term sustainability of the land if, as suggested by Gunningham and Grabosky, financial institutions were ‘concerned about the environmental risks posed by any assets which they might hold as security for a loan’.107 They would only have such concerns if there was a genuine risk of lease forfeiture for failing to comply with lease conditions and a land management agreement. If forfeiture was a real possibility at the time of a lease transfer supported by finance, an expert environmental assessment of compliance with lease conditions and the land management agreement would need to be undertaken to ascertain if the proposed purchase presented any risk.

Failure to comply with a land management agreement is dealt with by means of a remedial action notice. Prior to giving a remedial action notice, the minister must give a warning notice to the landholder, who in turn may make written submissions as to why the notice should not be made. The statutory provision for such notices provides that the minister may give a lessee a remedial action notice if the lessee is breaching a condition of the lease, using the land in breach of the statutory duty of care or in a way that is likely to cause or has caused land degradation; or is in breach of a lease condition.108 A

105 Queensland government, Department of Environment and Resource Management, email correspondence in reply from a senior policy officer, dated 14 May 2012.
106 Land Act 1994 (Qld) s 322 (4) (b) (i) and (ii).
108 Land Act 1994 (Qld) s 214 (1) (2) (a) (i) and (ii).
lessee may appeal against a decision to give a remedial action notice.\footnote{Land Act 1994 (Qld) s 214 B.} Non-compliance with a remedial action notice potentially has considerable implications for a lessee. Ultimately this may lead to forfeiture of the lease.\footnote{Land Act 1994 (Qld) s 234 (1).} It is likely, however, that forfeiture will remain an untapped solution. The legislation makes non-compliance with a remedial order an offence, in the absence of a reasonable excuse.\footnote{Land Act 1994 (Qld) s 214 D (1) the maximum penalty is 400 penalty points.} In the event a leaseholder is convicted of an offence, the court may impose a penalty and order that the whole or part of the remedial action notice is complied with.\footnote{Land Act 1994 (Qld) s 214 D (2).}

Conservation agreements and conservation covenants

The Delbessie Agreement provides a means by which leaseholders are encouraged to enter into a conservation agreement or covenant; the incentive to do so is an additional 10 years to the lease term. As a field inspection of the leased land will be undertaken as part of the implementation of the Delbessie Agreement, presumably the regulators would identify areas of land that might be suitable for conservation. A conservation agreement is likely to be a Nature Refuge which is provided for by the \textit{Nature Conservation Act 1992 (Qld)}.\footnote{Nature Conservation Act 1992 s 4 (Qld).} Environmentally, the long-term advantage of a conservation agreement is that it may run in perpetuity and bind the original and subsequent landowners. From 2007 Agforce have actively promoted the Nature Refuge program; in 2010 they received $8.5 million from the Queensland government to support landholders to establish and manage refuges, and the number of agreements entered into has increased.\footnote{Agforce and the Nature Refuge Program. Available at: http://www.agforceqld.org.au/index.php?r=Page/policies&page_id=96, (viewed 25 January 2012).} The Nature Assist scheme utilises a competitive tender process and funding is provided to landholders who submit a successful tender. According to the regulators for a tender to be successful it must ‘offer the best conservation outcome for the least overall cost’.\footnote{Queensland government, Department of Environment and Heritage Protection, Nature Refuges, Nature Assist. Available at: http://www.derm.qld.gov.au/wildlife-cecosystems/nature_refuges/natureassist/index.html#how_does_it_work, (viewed 25 January 2012).} Since 2007 there have been two rounds of funding, one for $1.7 million and a second for $4 million.\footnote{Queensland government, Department of Environment and Heritage Protection, Nature Refuges, Nature Assist.}
The Nature Assist program replaced the Vegetation Incentives Program (VIP). As noted in Chapter Four, research into the VIP concluded that one of the main problems with the program was uncertainty by landholders in the tender process. With the VIP, landholders were assisted by Greening Australia who could advise on land condition but not on the financial amount to include in the tender. This process continues in the Nature Assist program; landholders are advised:

Nature refuge officers are available to help you develop your tender. Although they are not permitted to provide advice on the financial component of your tender, they can provide specialist advice on management activities best suited to protecting the conservation values of your property.

Calculating a financial sum is arguably the most difficult aspect of the tender process: it was clearly apparent in the initial VIP – in the first round of tenders the bids were too high and not accepted by the regulators.

The management principles for a nature refuge require the owner to conserve the significant cultural and natural resources of the area, provide for their controlled use, and for the interests of landholders to be taken into account. It is necessary for the minister and the landholder to agree that the designated area of land should be a protected area; and also to agree on the management intent for the land and terms of the conservation agreement. Under the Nature Conservation Act 1992 (Qld) the agreement may include any of the following terms: a requirement for the government to provide financial or other assistance, technical advice or to carry out specified activities. Terms may allow or require a landholder to: carry out specific activities, prohibit a specified use or restrict the use or management of the land; refrain from or not permit or carry out specified activities; or permit or restrict access. If the landholder is provided with financial assistance under the agreement, this must be repaid in the event of contravention. The conservation agreement may contain terms that are binding on

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117 An analysis of the vegetation incentives program and attendant research is included in Chapter Four.
121 Nature Conservation Act 1992 (Qld) s 22 (a) to (c).
122 Nature Conservation Act 1992 (Qld) s 45 (1) (a) to (d). Under s 43 a protected area for these purposes means a nature refuge, or a coordinated conservation area or a wilderness area.
123 Nature Conservation Act 1992 (Qld) s 45 (5) (a) to (c).
124 Nature Conservation Act 1992 (Qld) s 45(5) (d) to (i).
125 Nature Conservation Act 1992 (Qld) s 45 (5) (k).
the landholder and successors in title;\textsuperscript{126} in which case the agreement should be lodged at the Land Registry.\textsuperscript{127}

The possibility of additional security of tenure also applies to a conservation or statutory covenant. These types of covenant differ from a conservation agreement in that they are made under the LA and may cover a wider range of matters in addition to conservation. Under a statutory covenant, preservation may include a building or be aimed directly at preserving a native plant or a natural or physical feature of the land.\textsuperscript{128} The statutory covenant is registered at the Land Registry and thus binding on successors in title.\textsuperscript{129} Registration is a significant aspect of continuity for sustainable land management practices. As an integral part of any future conveyancing transaction, new leaseholders will purchase land in full knowledge of the terms of agreement or covenant and their responsibilities. The Delbessie Agreement has potential to encourage greater use of conservation agreements and statutory covenants.\textsuperscript{130} Agforce and the National Farmers Federation promote utilisation of this type of agreement, and voluntary agreements have increased because of this. What is questionable is how far landholders would regard the additional lease term as a real incentive. As discussed in Chapter Five, there remains skepticism around conservation agreements when even those executed in perpetuity are not protected from the impact of mining and mineral corporations.

Indigenous access and use agreements

Under the LA, an indigenous access and use agreement means an indigenous land use agreement under Commonwealth legislation;\textsuperscript{131} or a contractual arrangement between a lessee and Aboriginal or Torres Strait Islander people that allows an activity (such as camping, fishing, gathering or hunting; performing rites or ceremonies or visiting sites of significance) to be carried out for traditional purposes.\textsuperscript{132} Aside from this statutory definition there is no further guidance within the Act as to the content and form of such

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{126}] Nature Conservation Act 1992 (Qld) s 45 (4).
\item[\textsuperscript{127}] A registrable conservation agreement means a conservation agreement expressed to be binding on successors in title and registered in accordance with the requirements of s 134 Nature Conservation Act 1992 (Qld).
\item[\textsuperscript{128}] Land Act 1994 (Qld) s 373 A (4) (a) and (b).
\item[\textsuperscript{129}] Land Act 1994 (Qld) s 373 A (5) (b).
\item[\textsuperscript{130}] Previous research has been undertaken on voluntary agreements entered into by rural landholders in Queensland; this research considered four voluntary schemes, including nature refuges, at the time of writing all schemes were under-utilised. Kehoe J, 'Voluntary agreements in Queensland Australia: contributing factors and current incentive schemes', in S Wilkes (ed) Seeking Environmental Justice, (Rodopi, Amsterdam-New York, 2008).
\item[\textsuperscript{131}] Native Title Act 1993 (Cth) s 253 under which such agreements are noted in the register of Indigenous Land Use Agreements.
\item[\textsuperscript{132}] Land Act 1994 (Qld) Schedule 6.
\end{enumerate}
\end{footnotesize}
agreements. Regulatory advice however includes a 38-page pastoral indigenous land use agreement template. Alongside the template is a user guide. Both the guide and template are the result of negotiations facilitated by the National Native Title Tribunal between DERM, Agforce, the Queensland South Native Title Services and North Queensland Land Council. The guide explains that the template is but one of three tools available for making access and use agreements and, that the remaining two templates for use under the Delbessie Agreement will be made available at a future date. At the time of writing these templates were not available, nor had any indigenous agreements under the Delbessie Agreement been made.

Negotiation of this type of agreement at Commonwealth level has proved to be a complicated process; it is time consuming and therefore expensive. The pastoral indigenous land use agreement template provides that each party bears its own costs in relation to the preparation, signing and review of the agreement. The onus to facilitate and, potentially, to assume responsibility of payment for insurance is very much on the lessee. Each side of the agreement would need expert representation and advice. Some bodies, such as the Queensland Native Title Service, assist traditional owners in negotiating and resolving indigenous land use agreements. For landholders, Agforce—having been part of the negotiations for the template and guidelines—promote their use and provide assistance through their native title officer. The incentive under the Delbessie Agreement is the possibility of a 50-year term; it is questionable if the inherent requirements of such agreements will be prohibitive to their adoption. It appears to be the aim of the Queensland government to utilise indigenous land use

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136 Clause 18.1 of the pastoral indigenous land use agreement template provides: Subject to clause 18.3 the Lessee and Native Title Party will at all times each maintain a public liability insurance policy in relation to the Agreement; 18.2 requires: the policies must each be for an amount of not less than $10 million for any single event up to the total aggregate liability stipulated in the policy of insurance; 18.3 states: the Native Title Party will only be required to obtain and maintain a public liability insurance policy in relation to the Agreement if the Lessee: a) identifies an insurer willing to provide such insurance to the Native Title Party; b) gives reasonable written notice to the Native Title Party that it requires the Native Title Party to obtain such insurance; c) advises, in the written notice that the Lessee will meet the cost of obtaining such insurance; and d) pays the cost of obtaining such insurance upon receipt of the insurers tax invoice.
agreements as a means to resolve native title matters over land subject to a native title claim.\textsuperscript{137}

**Future conservation areas**

The Rural Leasehold Land Strategy amendments to the LA made provision for future conservation areas.\textsuperscript{138} Three circumstances are set down for the government to require land for conservation purposes:

- Prior to lease expiration – in which the government will negotiate with the leaseholder to purchase the whole or part of the leased land and pay the market value of the land and lawful improvements;
- At lease renewal – a new lease will be offered for a period consistent with the legislation but on expiry of that lease a further lease will not be offered over the land reserved for future conservation, again market value for the land and lawful improvements will be paid;
- During the term of the lease – with agreement with the landholder the government may acquire land at any time with the purchase price being guided by the residual value of the expiring lease and lawful improvements.\textsuperscript{139}

The government has acknowledged that removing land ‘at the time of renewal may have an adverse impact on the grazing or agricultural enterprise concerned’.\textsuperscript{140} Regulatory policy appears to favour negotiation and the imposition of a future reservation condition only if the landholder does not wish to sell or cannot reach an agreement.\textsuperscript{141}

If, on renewal, a future conservation area is included in the leased land, the landholder must comply with statutory land management principles. The principles for future conservation areas are: that any use of natural resources for agriculture or grazing must


\textsuperscript{138} Land Act 1994 (Qld) s 198 A and s 198 B.

\textsuperscript{139} Queensland government, Department of Environment and Resource Management, Delbessie Agreement, (State Rural Leasehold Land Strategy) 2007, 10.

\textsuperscript{140} Queensland government, Department of Environment and Resource Management, Delbessie Agreement, (State Rural Leasehold Land Strategy) 2007, 10.

be ecologically sustainable, maintained predominantly in their natural condition and with their significant cultural and natural resources protected.\textsuperscript{142} For the purposes of this part of the legislation, cultural resources includes places or objects that have anthropological, archaeological, historical, scientific, spiritual or sociological significance or value.\textsuperscript{143} Ecologically sustainable means the use is within the area’s capacity to sustain natural processes while maintaining the life support systems of nature and ensuring the benefit of use to present generations does not diminish the potential to meet the needs and aspirations of future generations.\textsuperscript{144} Natural resources mean the natural and physical features of the area, including wildlife, soil, water, minerals and air.\textsuperscript{145} The implications of failing to comply with the land management principles for a future conservation area are far reaching: if a lease contains such a reservation, the landholder must not act or omit to act, or allow anyone else to act or omit to act, in a manner inconsistent with the land management provisions.\textsuperscript{146} Failure to comply is an offence under the legislation and carries a maximum penalty of 1665 penalty units in addition to the prospect of forfeiture for the whole lease in the event of conviction for such an offence.\textsuperscript{147}

In 2010 the Queensland Labor Government announced a commitment to expand the total protected estate in Queensland from 10.3 million hectares to 20 million hectares by 2020.\textsuperscript{148} Protected areas include national and conservation parks and nature refuges on private land.\textsuperscript{149} The Delbessie Agreement is part of this general shift towards terrestrial biodiversity conservation. It would, therefore, assist landholders if the government had a search mechanism so that current and prospective leaseholders could locate and identify areas of proposed future conservation. This would enable leaseholders to plan appropriately. The additional land management provisions, if a new lease contains a future conservation reservation, are an added burden for leaseholders and may deter otherwise interested purchasers. Equally, if a proposed future conservation area formed a significant proportion of the leased land it is arguable this may adversely impact upon land valuation and may have implications for mortgaged properties. A lease containing

\textsuperscript{142} \textit{Land Act 1994 (Qld)} s 198 A (1) (a) to (c).
\textsuperscript{143} \textit{Land Act 1994 (Qld)} s 198 A (2).
\textsuperscript{144} \textit{Land Act 1994 (Qld)} s 198 A (2).
\textsuperscript{145} \textit{Land Act 1994 (Qld)} s 198 A (2).
\textsuperscript{146} \textit{Land Act 1994 (Qld)} s 198 B.
\textsuperscript{147} \textit{Land Act 1994 (Qld)} s 234 (e) (ii).
\textsuperscript{148} Queensland government, Biodiversity Integration Unit, Department of Environment and Resource Management, Protected Areas for the Future : Cornerstones for Terrestrial Biodiversity Conservation, 2010, 1.
\textsuperscript{149} Queensland government, Biodiversity Integration Unit, Department of Environment and Resource Management, Protected Areas for the Future: Cornerstones for Terrestrial Biodiversity Conservation, 2010, 46.
a future conservation area reservation is potentially problematic: land management responsibilities are more onerous and, as the lease nears expiry, environmental value in the reserved land should have increased but the monetary value of the land may well diminish. It will be interesting to see if leaseholders will be prepared to take a lease containing a future conservation area reservation.

Initial renewals under the Delbessie Agreement

Craig's Pocket was the first lease to be renewed under the Delbessie Agreement. The renewal received publicity in the rural press. Tenure was for 40 years as the land assessed was deemed to be in good condition. On signing the lease, the lessees were joined by the then Minister Stephen Robertson and the president of Agforce who described the event as 'a landmark moment which recognised the value of lessees as land managers'. It is significant that the prime rural organisation in Queensland now promotes lessees as managers of land. As noted in Chapter Two, following the Payne Commission, leaseholders were encouraged to be and regarded as land owners. Agforce made mention of a Nature Refuge on the land in a media release. Under the provisions of the legislation a Nature Refuge could have extended the lease term to 50 years. The regulatory annual report noted:

Craig's Pocket contains significant conservation values and the lessees voluntarily agreed to protect 3565 hectares as a nature refuge. The management practices for the nature refuge are included within the land management agreement and remain for the renewed term of the lease even if the lease is sold.

The nature refuge on this lease is not in perpetuity, but runs for the lease term. It was not apparent why the refuge was incorporated into the land management agreement and not as a separate perpetual agreement and a 50-year lease term. The regulators were questioned on this and responded: 'Craig's Pocket had an existing Nature Refuge agreement. It was noted in the land management agreement in accordance with the land management template'. It might have proved more of an incentive to other landholders if Craig's Pocket had been granted for 50 years.

150 Agforce, 'First Delbessie Signing a Landmark Moment' (Media release, 8 October 2009).
Some implementation statistics on the Rural Leasehold Land Strategy are included in the regulatory Annual Reports. From the start of the strategy there have been three reports.\textsuperscript{153} A minimal amount of information is supplied in the first of these reports: the Delbessie Agreement is cited by the Director-General and described as a highlight for the 2009 to 2010 period.\textsuperscript{154} Only three leases had been renewed during this period and 56 land condition assessments completed.\textsuperscript{155} By the second reporting period, a further 41 leases had been renewed and 86 land condition assessments completed.\textsuperscript{156} In this second report, implementation of the Delbessie Agreement by the land assessment teams was noted as being the recipient of a 2011 DERM Excellence Award for Engaging and Servicing Communities.\textsuperscript{157} In the third Annual Report no mention is made of the Delbessie Agreement, nor are there any implementation statistics.\textsuperscript{158} In an attempt to establish some insight into implementation a request was made to the regulators for a more complete set of figures.\textsuperscript{159}

Further and better regulatory implementation figures were eventually supplied and collated into a series of graphs generally depicting three annual periods up to the 30 June for each year. Figure 8.1 depicts trends in land condition assessments. In each period the majority of land condition assessments have evaluated land in good condition. By the final 2012 period 96% of land was appraised as good. A total of 253 assessments have been undertaken to June 2012. Of this total, 87% were deemed to be in good condition, 13% not in good condition and 0.4% accounting for an inaccessible

\textsuperscript{158} Queensland government, Department of Environment and Resource Management, Annual Report 2011-2012. Available at: http://www.derm.qld.gov.au/about/pdf/annual-report (viewed 1 February 2013). This Annual Report covers the end of the Labor period of government and the beginning of the LNP administration. There has been some change in land policy with the new government which will be documented in the concluding Chapter Nine.
\textsuperscript{159} The initial request had been included in the list of questions presented at the meeting with the State Land Asset Management team on the 18 April 2012, noted earlier in this chapter. Some information was provided in the written response from a senior policy officer on 29 May 2012 but it was not sufficient to compute any meaningful graphs. Further email correspondence ensued and ultimately the senior policy officer provided implementation statistics for progress as at 30 June 2010, 2011 and 2012 on 16 and 17 January 2013. It is from these figures that the graphs included in this chapter are compiled. Statistics to December 2012 were supplied but these were not included: this is because they go beyond the research period and because three comparable time periods presents a more accurate depiction. It is acknowledged that the regulatory reporting period in 2012 goes beyond the research period by three months but these figures provided the best available option.
lease. According to a scientific member of the Ministerial Advisory Committee, these results were surprising.

The rating of most of the various holdings in the different biogeographic regions as good is higher than I would have expected based on extensive experience in Western Queensland. Of course landholders cannot be penalised for buffel grass pastures and other exotic grasses that have been sown with the required approvals or advice from government...160

It is impossible to comment on the accuracy of these assessments in the absence of empirical data on the condition of State rural land. However, the ratings are, prima facie, evidence of a conciliatory approach on the part of the Labor government.

![Figure 8.1: Land condition assessments](image)

The regulatory division of land includes the North, Central West and South West regions. Figure 8.2 shows over time and region the number of assessments that have taken place within each area. The bulk of assessments have taken place in the Northern region which would occupy more pastoral land, for example a total of 120 land condition assessments have been undertaken in the Northern region, compared to 47 in the South West.

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160 Des Boyland, member of the Ministerial Advisory Committee and representative of the Wildlife Preservation Society of Queensland written replies in response to my questions dated 1 May 2012.
Figure 8.2: Regional breakdown of land condition assessments

Figure 8.3 provides a further breakdown of the condition of land over time in each of these regions. What is striking is the one incidence – in the South West region in 2010 – in which the majority of land (67%) was deemed not to be in good condition. In 2011, this area still had a higher proportion of land determined not to be in good condition. The South West region is dominated by the Mulga Lands, a terrain with a problematic history. Initial evaluation of this area generated concern that assessment of ‘the most naturally unstable bioregion in Queensland, was too harsh’ and moreover ‘policies of past governments in subdividing various holdings based on inappropriate data has lead in certain circumstances to poor outcomes from a management perspective’. The Mulga Lands were also a site of considerable controversy during the implementation of the vegetation management regulations. This area had a much higher clearing rate than other regions. The intensity of clearing has been rationalized in the past because of prolonged drought, during which Mulga is an essential feedstock for cattle. Again it is difficult to challenge these assessments of land, but it is noteworthy that by 2012 all regions had a significant majority of land in good condition. Indeed, all land in the Northern region was assessed as good in this later period. The regulators have insisted on and continually adopted the terms ‘good condition’ and ‘not in good condition’ as

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161 Des Boyland, member of the Ministerial Advisory Committee and representative of the Wildlife Preservation Society of Queensland, written replies in response to my questions dated 1 May 2012.
265
preferable to describing land as in ‘bad condition,’\textsuperscript{163} which is further evidence of their conciliatory stance.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{chart.png}
\caption{Regional breakdown of land in good or not in good condition}
\end{figure}

Having established the condition of the land, the regulators go on to negotiate a land management agreement with landholders. Figure 8.4 illustrates developments in finalised agreements. It was not impossible, from the regulatory statistics supplied, to compare negotiated agreements with those finalised over the three annual periods. However the cumulative number as at June 2012 was 219, of which 133 (61\%) had been finalised and 86 (39\%) were under negotiation. It was noted by the regulator that the renewal process has different timing processes. For example fieldwork is seasonal and, as such, teams undertake land conditions assessments during the dry season and negotiate land management agreements during the wet season.\textsuperscript{164}

\begin{footnotesize}
\textsuperscript{163} Queensland government, Department of Environment and Resource Management email correspondence in reply from a senior policy officer, State Lands Asset Management dated 16 January 2013.
\end{footnotesize}
The number of leases renewed is depicted in Figure 8.5 and shows a steady increase in the final year, with the initial 2010 period being lower and reflecting the implementation process. Leases are renewed in accordance with the provisions of the LA. This means leaseholders can apply early to renew. As at June 2012 there were 316 active lease applications with expiry dates up to 2033 – the regulators give priority to those leases due to expire in the next five years.\(^\text{165}\)

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Figure 8.6 demonstrates the terms granted for renewed leases. As the initial period included less than five renewed leases, two periods 2010-2011 and 2011-2012, were collated. Only two leases have been granted for a 50-year term. According to the regulator, neither of these leases required an indigenous land use agreement as native title had been extinguished, nor did the minister require a nature refuge.\textsuperscript{166} No further explanation was given as to why the terms were therefore 50 years. The number of leases granted for 40 years and less than 40 years in each of the periods provided were relatively consistent. It might be expected that there would have been more variance. However, leases granted for less than 40 years amounted to 21 (48\%) between 2010 and 2011 and 23 (52\%) between 2011 and 2012. Those granted for 40 years amounted to 22 (47\%) between 2010 and 2011 and 25 (53\%) between 2011 and 2012. By far the majority of the leases granted for less than 40 years were granted for a 30-year term.\textsuperscript{167} Collectively as at the end of June 2012, 94 leases had been renewed, this included one conversion to a perpetual lease, the two (2\%) 50-year leases, 44 (47\%) leases for less than 40 years and 47 (50\%) 40-year terms.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure86.png}
\caption{Terms granted for renewed leases}
\end{figure}

On the basis of these figures, the lease renewal process – in terms of desktop and field inspections, land condition assessments and land management agreement negotiations – is resource intensive and time consuming. If regulatory resources are invested at the

\textsuperscript{166} Queensland government, Implementation Progress (as at 30 June 2012) paper supplied by a senior policy officer on 14 January 2013.

\textsuperscript{167} The amount includes a small number of leases (< 5) with terms of 34, 31 and 21 years, on seeking clarification of this the senior policy officer said there were various reasons for this such as a sub-division in the past, in any event none of the reasons given related to the condition of the land.

268
front-end into lease renewal, there might be a shortfall for education and communication, compliance and enforcement.

The possibility of partnership

The Labor government and regulators continually stressed their commitment to working in partnership with the rural sector on lease renewal. A partnership arrangement might work more readily with leasehold as opposed to freehold tenure. Holmes has contended the leasehold negotiating framework is advantageous where rights and duties need to be tailored to the circumstances existing at the level of individual titles. The most relevant context is in the pastoral zone, where individual landholdings may embrace an area greater than some coastal local government areas.168

The nature and effect of the basic conveyancing transaction for each of the tenures is different, a lease requires negotiation of terms and conditions and there remains a continuing connection between lessor and lessee. The lease instrument is an individualised and long-term document drafted to incorporate the terms and conditions under which the leaseholder agrees to take the land. Typically rural leases, such as pastoral leases, will contain standard conditions but the agreement is specific to an individual landholder and the land.

A partnership implies a joint venture, but there is an unequal bargaining position inherent to negotiations for a State lease. It is unlike a commercial lease in which the parties are more likely to be in comparable negotiating positions. It would be difficult to envisage a leaseholder challenging or suggesting an adjustment, substitution or removal of a lease condition in the absence of legal or other representation.169 The regulators

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169 There might be an argument that the LA relies on voluntarism on the part of the leaseholder. The basic meaning of voluntary would be an individual acting or doing something without compulsion or obligation. Voluntarism has discipline specific meanings and the best definition, for the purposes of this research, is that of Gunningham et al in which they note: 'voluntarism is based on the individual... undertaking to do the right thing unilaterally, without any basis in coercion...voluntary agreements between governments and individual businesses taking the form of non-mandatory contracts between equal partners one of which is the government in which incentives for action arise from mutual interest rather than from sanction'. Gunningham N, Grabosky P and Sinclair D, Smart Regulation: Designing Environmental Policy, 1998, 56. There is some degree of choice in a landholder deciding to take on a lease initially but once the lease is running, to remain a viable business, and possibly meet the requirements of a supporting financial institution, the lease must be renewed and it is renewed on the State's terms: there is limited negotiation and no choice. Land management agreements are mandatory, their conditions determined by the regulator and both the
confirmed that well over 90% of leaseholders do not instruct a lawyer or land consultant in lease renewal negotiations. At best the partnership is indicative of a joint interest, but the responsibility and obligation to meet the statutory duty of care and the requirements of a land management agreement fall squarely on the landholder. If, as promised by the Labor government, the Rural Leasehold Land Strategy is to be a collaborative venture, it is not yet clear how this collaboration will operate once the renewal process is complete. Regulatory resources and concentration has necessarily had to focus on the process of lease renewal.

Conclusion

The Rural Leasehold Land Strategy is part of a general shift towards terrestrial biodiversity conservation on State rural land within Queensland. The Land and Other Legislation Amendment Act 2007 (Qld) made provision for all new and renewed rural leases for 20 years or over and greater than 100 hectares in size, to be subject to a land management agreement alongside their lease. The additional requirements of the strategy will necessarily complicate and render the lease renewal process a more time consuming exercise. The expectations of leaseholders might have been challenged by the extent of assessment under the new processes, but the backlash that accompanied the introduction and amendment of the VMA was not repeated with the LA. There was no reason to expect leases would not be renewed as they had in the past.

The crux of the Rural Leasehold Land Strategy was to align security of tenure with sustainable land management. If leases are renewed for the same 30 year period in any event, it is questionable whether the possibility of an additional ten years is a realistic incentive. The same could be said of the additional 10 year term for a conservation covenant or indigenous land use agreement. The complexity surrounding indigenous agreements was noted and likely accounts for their absence. There is also a dearth of conservation agreements aligned to the strategy – only two lease terms of 50 years have been granted to date and neither had a nature refuge agreement. Of the leases renewed by the end of June 2012, half have been assessed as in good condition and granted 40-year terms. This chapter has considered the changes in lease renewal brought about by

lease and agreement have the potential to invoke sanctions in the event of breach. There may not be compulsion to enter into a new lease but there is obligation.

Meeting with DERM senior policy representatives on April 18 2012.

270
the implementation of the Rural Leasehold Land Strategy but, as the following final chapter concludes, land policy and law are set for further change with the shift to a Liberal National Party government.
Chapter Nine: Conclusion

Introduction

This thesis has examined the making and implementation of statutory land management practices on privately held rural land in Queensland. The purpose of the research has been to advance understanding of natural resource legislation and to contribute to the body of knowledge on State environmental laws. Two laws were examined: the *Vegetation Management Act 1999* (Qld) (VMA), which marked the first regulatory controls for vegetation management on freehold land; and the *Land Act 1994* (Qld) (LA), which introduced a new management regime for leasehold land. Both Acts were devised to counter the environmental effects of unsustainable use of agricultural land. Ultimately the VMA was a key driver in the phasing out of broadscale land clearing: this was the environmental significance of the Act. Moreover the legislation represents reparation for the past and an affirmation of the move towards biodiversity conservation on privately held rural land. This environmental gain came at a cost – for vegetation management regulations, law and politics did not simply meet, but collided for more than a decade, often amid a context of chaos and contention. The environmental significance of amendments to the LA has yet to be determined. It represents a move towards biodiversity conservation and has far reaching potential for rural State land, but the Rural Leasehold Land Strategy is resource intensive and, as established in this chapter, unlikely to be adopted in its present form, by the recently elected and financially constrained Liberal National Party (LNP) government.

This chapter will revisit the research questions, add a further question and consolidate the main findings of the thesis. Recommendations for changes in policy and law are included and followed by suggestions for further research. The additional research question enables the two Acts to converge further in this concluding chapter. Both environmental laws aimed to rectify the degradation of rural land caused by unsustainable policy and law. Yet, despite this common environmental endeavour, the statutes differed. A final question will accordingly be addressed: *why was the making and implementation of the VMA more controversial and complicated than that of the LA?* The argument advanced encompasses a range of reasons, each elicited at various stages of this study. Land tenure and the title held by a rural landholder lie at the core of

272
the differences between each Act. Legislative restrictions for leasehold tenure can be imposed with little contention or demands for compensation, and with far less disorder and disruption to the balance between public and private rights. The VMA was characterised by a lack of genuine consultation over a realistic period of time and, unlike the LA, became an electoral asset exploited as required by the Queensland Labor government. There were moreover practical distinctions which manifested considerable disparity in the pace and timing of change brought by each statute. In exploring this final question, it is the aim of this thesis to establish that the public environmental good and long-term sustainability of rural land can be more readily achieved with leasehold title. The concern, as elucidated in this chapter, is that leasehold tenure might be facing its own expiry in Queensland.

Research questions consolidated

The making and ensuing amendments of the VMA witnessed a deep-rooted parliamentary system and an authoritarian one party government – characteristics of a unicameral Queensland Parliament regardless of which political party holds power. Chapter Four examined the following question: how was the VMA made, implemented and amended from the introduction of the legislation in 1999 to 2008? The VMA was typified by urgent and guillotined debate and pre-emptive consultation with interested parties. The more controversial a law, the less likelihood there was of scrutiny, the more haste in parliamentary procedure and the more likelihood there was of amendments, especially retrospective amendments.¹ This prompted a further research question: what were the parliamentary processes of the Queensland Parliament and the political context under which the VMA was made and implemented?

Contentious laws go beyond routine implementation; they reveal the political context and reality of parliamentary process. As noted in Chapter Four, comparable governmental systems have similar failings, but the legislative role and mechanisms for statutory scrutiny are all the more critical in a unicameral parliament. During the research period, the Scrutiny of Legislation Committee (SLC) typically discharged its role with competence and raised concerns appropriate to its statutory authority. But scrutiny often ended with the Alert Digest report: the machinery of parliament rarely

¹ This argument is developed from the one put forward by Riddell P, Parliament under Pressure (Victor Gollancz, London, 1998) 29, quoted and referred to in Chapter Four.
stopped to address concerns. Queensland Labor had a propensity to display contempt for proper parliamentary process. A recurring theme has emerged in this thesis: that of a lack of accountability during the Labor period of administration.

The making and implementation of the VMA during the 2009 State election year followed the pattern described in this research for a controversial piece of legislation. Chapter Five was devoted to asking: how the VMA was made and implemented in 2009 and what were the parliamentary processes of the Queensland parliament and the political context within which the amendments were made? After re-election in 2009, the vegetation management regrowth amendments were announced by the Labor government two weeks before the first parliamentary session. When parliament sat, normal business was suspended and a further retrospective law made. The first legislation to be addressed in the new parliament was the VMA. The statutory amendments had been made in this instance following negotiations with a minority political group. The potential for such groups to affect and shape the law prompted the following question: which groups influenced the political processes and the law that was ultimately made?

Many rural landholders were cognisant that these amendments were the product of a preference deal with the Queensland Green Party; they were further incensed by Premier Beattie who had consistently promised regrowth vegetation would not be regulated. Tensions abounded and the gulf between the regulators and the rural community widened. For Queensland Labor, a further and final term of office was secured at the 2009 State election. This return to power was aided in part by the pre-election deal for preferences. An additional one million hectares of regrowth vegetation gained protection. This was a positive step towards the conservation of biodiversity on private land but a relatively small area in a State with 141 million hectares of agricultural land.

The thesis then examined compliance and enforcement under the VMA. Common themes abound within the literature on environmental crime, such as the difficulties of applying general principles of criminal law to environmental law. It was apparent that these difficulties remain and, within Queensland, there were additional complexities to the offence of illegal land clearing. For Chapter Six, the following question was central:
how were the enforcement and compliance provisions of the VMA made and what were the parliamentary processes of the Queensland parliament within which the amendments were made? The relationship between the regulators and regulated, particularly those investigated and prosecuted, was often characterised by tension, distrust and volatility. The statutory scheme was complex and complicated further by widespread amendments to the investigatory and prosecution powers of the regulators. These amendments followed a recurring pattern within the Queensland parliamentary process for a controversial law. The following question was accordingly explored: how did the regulators decide to prosecute?

Analysis of the regulatory decision to prosecute covered the compliance strategy and enforcement guidelines available within the public domain, including consideration of the enforcement pyramid devised by Ayres and Braithwaite. Within this model, prosecution is an option of last resort and research into regulatory enforcement strategies has consistently concluded this to be the norm. At times however, the proportionate and consistent approach to prosecution, advocated and allegedly adhered to by the Department of Environment and Resource Management (DERM), was not evident in practice. It is contended that prosecution policy was influenced by the political values and affinities of the governing administration. Within Queensland conservative administrations have traditionally used prosecution as a measure of last resort; the latest Labor period of administration conversely undertook periods of forceful prosecution.

Regulatory claims to transparency were not evident in practice and this became even more evident in Chapter Seven, which examined the following question: how were the compliance and enforcement provisions of the vegetation management regulations implemented? The cases included in this chapter were elicited from rural media and interviews with organisations such as Property Rights Australia (PRA). This facilitated contact with investigated and prosecuted rural landholders and their lawyers. Such context provided a socio-legal aspect to this research and facilitated an insight into what was happening in practice. Traditional doctrinal research would pay no heed to the lower courts. Yet it is within this setting the much of the land clearing litigation was undertaken. Rudimentary flaws were apparent, as they are in all criminal justice

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2 Political processes have typically been considered together with political context in this thesis but this was examined in Chapter Four.
systems, but some of the cases examined revealed particular inequities of land clearing litigation in Queensland. This gave rise to a further question: what wider issues did the compliance and enforcement provisions raise in terms of procedural fairness and access to justice?

It is fundamental for a regulatory agency to be seen as acting fairly in the implementation of laws, yet some of the investigations and cases considered do not reflect well on the regulators. What is more they reveal a lack of procedural fairness within our criminal justice and adversarial systems, not least in two of the basic principles of access to justice: the right to legal representation and the system of appeals. Litigation in this chapter includes cases in which the parties demonstrate disillusion with the legal profession and the justice system. Dissatisfaction may be the norm, but justice systems evolve, they are not static and, as such, it is imperative they are continually and critically evaluated.

The thesis then moved in Chapter Eight to address the same question of the LA that has been asked of the VMA: how were the LA and the Rural Leasehold Land Strategy made and implemented and what were the parliamentary processes of the Queensland parliament within which the amendments were made? A lack of regulatory transparency, identified in Chapters Six and Seven, was again evident. Submissions made by interested parties, and upon which the strategy was held to be based, were not made available by the regulators, though regulatory implementation statistics were provided. For the most part this was not a controversial law; the expectations of leaseholders were not challenged. Even if land was not in good condition, pastoral leases would be renewed for the same 30 year term. The law was made following statutory and parliamentary guidelines and supported by the opposition. Implementation of the renewal process witnessed a detailed and wide-ranging land condition assessment and, on the basis of this assessment, a complex and lengthy land management agreement and a renewed lease term. Rural leaseholders might in future demonstrate observance of the statutory duty of care by adhering to the requirements of their land management agreement. The agreements set up a monitoring and reporting program. The long-term sustainability of State land will depend on the regulators having adequate resources to maintain and develop this program.
A further and final research question

Both the VMA and the LA are legislative responses to rural land degradation and signal the move towards the conservation of biodiversity on private land. For all that they have in common there is much divergence between each statute. The concluding part of this thesis brings both pieces of legislation together and asks: *why was the making and implementation of the VMA more controversial and complicated than that of the LA?*

There are wide-ranging reasons for the differences in these two environmental laws. The pace and timing of change differed between the two statues. When the LA was introduced in 1994, it had been more than thirty years since the legislation had changed. The Rural Leasehold Land Strategy was undertaken in one amending Act in 2007. The VMA was marked by more hurried, recurrent and often retrospective change over a prolonged period of time. The timing of change on rural landholders likewise diverged. The effect of the VMA was abrupt and sometimes retrospective. The effect of the LA was piecemeal: leaseholders would be impacted as their lease neared expiry. In short, the VMA affected a large group of landholders immediately; the LA affected individual landholders gradually and with a long lead time for adjustment.

As the first regulatory control for the management of vegetation on rural freehold land, controversy preceded and accompanied the introduction and many amendments of the VMA. Legislative restrictions on freehold tenure are inherently problematic: it is less contentious to make and implement environmental legislation on leasehold land. As the law grants limited property rights to lease tenure, and the State government retains a considerable degree of control, legislative restrictions generate less resistance. It is from leasehold tenure, and ultimately the lease instrument, that rights are clarified, restricted and denied and, as such, ‘it is politically and administratively easier to withhold property rights than it is to regulate or recapture rights.’

The contentious issue of compensation further contrasts both Acts. For freeholders, there was an expectation of and pressure for compensation following the VMA; leaseholders made no demands for compensation following amendments to the LA. The vegetation management regulations were set apart and exacerbated by delay: it took the

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277
Queensland Labor government almost five years to produce a fiscal package for affected landholders. The Rural Leasehold Land Strategy was giving rather than taking: additional lease terms would be granted as an incentive for land assessed as in good condition. Of the number of leases renewed at the end of June 2012, half had been granted an additional ten years. How genuine an incentive of ten years is, remains open to debate – but the additional lease period is an extended term. Legislative vegetation management restrictions were perceived by many with freehold title to be a property right taken back by the government.

Rural landholders granted an additional ten years have benefitted from the Rural Leasehold Land Strategy; but the public environmental good will be enhanced if the strategy is effectively implemented. Environmental legislation, such as the VMA and the LA, generally give precedence to public over private rights and interests. Achieving and maintaining a balance between such rights and interests can generate tension and controversy, as evidenced by the VMA. However misguided, freehold title is all too frequently regarded by those who hold it as absolute ownership with unfettered rights. Public restrictions are deemed an imposition and a public environmental gain perceived to be borne at a private cost. Because the rights that attach to leasehold tenure are more restricted, the public and private balance is more readily accomplished, as evidenced by the LA.

The VMA was controversial because it affected those rural landholders who had demonstrated sustainable land management practices by retaining native vegetation. Landholders who had cleared extensively and retained little or no native vegetation or protected regrowth have remained unaffected by the legislation; whereas rural leaseholders who had exercised sustainable land management were rewarded under the LA.

Consultation with interested individuals and rural organisations differed with each Act. For the VMA, consultation did little to promote a good working relationship between the regulators and regulated. Prior to the introduction of the VMA, consensus or anything approaching a meeting of minds was problematic: the Vegetation Management Advisory Committee became overwhelmed by division and was disbanded in an untimely fashion. The former chairman provided insight into the work of the committee,
not the regulators. This breakdown in the consultation process was aggravated by the 2004 VMA amendments in which the Labor government failed to heed the extensive work undertaken over a prolonged period by regional vegetation management groups. Consultation with the LA adopted a more measured policy pace; like the VMA, it was characterised by a lack of transparency, but both government and regulators appeared to be listening to those affected by the legislation.

In marked contrast to the introduction and amendments of the VMA, government rhetoric accompanying the LA was founded on conciliation and collaboration rather than confrontation and blame for past land management practices. Divisive and derisory language was familiar to both sides of the VMA debate. For many people on the land, the regulators were known as the tree police, the government described some landholders as cowboys.4

The change for leaseholders was facilitated on an individual level: lease renewal meant one-to-one negotiation with DERM. The change for landholders following the VMA was often hasty, frequently confusing and typically without negotiation or compromise. The more established rural organisations such as Agforce and QFF helped to facilitate the transition to regulation; but the VMA generated the formation of Property Rights Australia (PRA), a rural body reacting to dissatisfaction with the regulatory environment and determined to protect property rights.

The Rural Leasehold Land Strategy was not utilised by Queensland Labor as part of an election campaign or pre-election horse trading for preferences. The VMA conversely was politicised and, as an electoral asset, predisposed to emerge in the public arena around election times. In the decade from 1999 until 2009 the VMA was amended many times.5 The most significant amendments typically coincided with a State election when pre-election commitments became post-election laws. For example the elections in:

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5 As noted in Chapter Three there have been 17 reprints, 23 amending Acts and 497 amendments of which 179 have been retrospective.

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1999 – in which the VMA was introduced; 2004 – which marked the beginning of the end of broadscale land clearing; and 2009 – which brought in a controversial moratorium and regrowth provisions.6

Recommendations for changes in policy and law

Adoption of a transparent and accountable public administration is required for Queensland. There is no provision for this in the VMA but the objects of the LA include ‘efficient, open and accountable administration’.7 Equally, as noted in Chapter Five, the Integrity Act 2009 (Qld) was brought in by the Bligh Labor government and declared to be the beginning of integrity and accountability reforms within Queensland. As documented in this thesis, the Labor period of government and the VMA and LA were generally characterised by a lack of transparency and accountability. Submissions made during the course of policy formulation should have been available online, in common with the practice of other governments such as the Commonwealth. Equally, compliance and enforcement warrants a comprehensive and detailed insight into regulatory statistics. In keeping with the practice of the former Queensland Environmental Protection Agency, as discussed in Chapter Seven, this could be a representative summary in the regulatory annual reports including a more detailed breakdown of the statistics on each piece of legislation administered.

Policy change could be initiated to provide additional support in the initial transitional stages of regulatory change and to make available incentives to adopt sustainable land management. In the past, landholders were given tax incentives to clear land; in the future, they could be given tax incentives to conserve biodiversity. An education and communication role is undertaken competently by bodies such as Agforce and the Queensland Farmer’s Federation (QFF) but these organisations do not represent all landholders. Reliance on these bodies is in part indicative of tensions in the regulatory

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6 The environment did not feature significantly in the 2006 Queensland state election. In the campaign prior to the 2012 election the Queensland Labor Party was at its lowest ebb. In an attempt to secure Green votes and preferences the Premier at the time, Anna Bligh, announced that a green corridor spanning 2,200 kilometres would be established from the ‘border to the beach’ to protect biodiversity. The plan was said to involve the creation of ‘new national parks and voluntary conservation agreements with landholders to ensure good management of the corridor’. Labor for Queenslanders policy, Bligh A, ‘Border to the beach’ (1 March 2012). Available at: http://www.queenslandlabor.org/2012/03/01/border-to-the-beach/ (viewed 10 January 2013) and ABC News, ‘Bligh vows green belt from border to beach’ (2 March 2012). Available at: http://www.abc.net.au/news/2012-03-01/bligh-vows-to-create-green-corridor/3862278 (viewed 10 January 2013).

7 Land Act 1994 (Qld) s 4.

8 The Integrity Act 1999 (Qld) was passed on the 25 November 2009. See also, The State of Queensland (Department of the Premier and Cabinet) Response to Integrity and Accountability in Queensland, November 2009.
relationship, particularly during the Labor period of administration. The State
government should endeavour to repair this relationship and work collaboratively with
those on the land. Working in partnership was a stated aim of the Rural Leasehold Land
Strategy, but this aim should also extend to rural landholders with freehold title.

As for recommended changes in the law, it has been noted that the purposes of both the
VMA and the LA indicate a move towards better environmental management on rural
land in Queensland. However, sustainable land management practices are not static nor
do they operate in isolation: their aim must be to foster the conservation of biodiversity
on private land. Conservation is not defined in the VMA and yet the purpose of the Act
is to conserve remnant vegetation and vegetation in declared areas. A useful definition
of conservation in relation to biodiversity is ‘the protection, maintenance, management,
sustainable use, restoration and improvement of the natural environment’ The VMA
lacks these factors, which together promote the conservation of biodiversity. One of the
purposes of the VMA is to prevent the loss of biodiversity. The purposes of the Act
should be amended to include the conservation of biodiversity. Such an amendment
would align more closely with the LA which includes this provision as part of the duty
of care condition. This and the following recommendation would ensure consistency
across rural land tenures.

It was noted in Chapter Three that leasehold, but not freehold titleholders in Queensland
are subject to a statutory duty of care for their land. Following an Inquiry into
ecologically sustainable land management, the Industry Commission recommended that
a statutory duty of care for the environment should be included for landholders who
own or manage their land regardless of legal title. It would potentially be better for the

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9 As documented in Chapter Three the purposes of the VMA under s 3(1) (a) to (g) Vegetation Management Act 1999
(Qld) is to regulate the clearing of vegetation in such a way that: conserves remnant vegetation that is: an endangered
regional ecosystem or an of concern regional ecosystem or a least concern regional ecosystem and conserves
vegetation in declared areas; and ensures the clearing does not cause land degradation; and prevents loss of
biodiversity; and maintains ecological processes; and manages the environmental effects of the clearing to achieve all
these matters and, finally, reduces greenhouse gas emissions. The concepts of sustainability and protection were
introduced as statutory objects under s 4 Land Act 1994 (Qld). Sustainability is defined as: ‘sustainable resource use
and development to ensure existing needs are met and the state’s resources are conserved for the benefit of future
generations’ and protection as the ‘protection of environmentally and culturally valuable and sensitive areas and
features’.

10 Vegetation Management Act 1999 (Qld) s 3 (1) (a) to (b).
11 Native Vegetation Framework Review Task Group 2009, 62. Australia’s Native Vegetation Framework,
Consultation Draft, Australian government, Department of the Environment, Water, Heritage and the Arts, Canberra.
12 Vegetation Management Act 1999 (Qld) s 3 (1) (d).
13 For example the Vegetation Management Act 1999 (Qld) s 3 (1) (e).
14 The Land Act 1994 (Qld) s 199 (2) (h).
15 Industry Commission, A Full Repairing Lease; inquiry into Ecologically Sustainable Land Management,
September 1997, 72.
environment if all tenures were subject to this duty. This is particularly relevant in Queensland where rural freehold land is more likely to cover more productive and scarce arable land, compared to the marginal and more arid leasehold regions. To include a statutory duty of care for freehold land would require a change to the *Land Title Act 1994* (Qld). As noted in Chapter Eight, the long term significance of this duty will depend on the regulators having sufficient resources to undertake collaboration and education, not only at the time of negotiating a new lease and land management agreement but also in the future when land condition is assessed. It is when this assessment occurs that landholders might required to show practical compliance with the duty of care provisions, by demonstrating performance of their land management agreement. How the regulators will enforce this duty, and if there will be a willingness to enforce, is open to question: in the past there has been little in the way of compliance and enforcement on leasehold land in Queensland. The environmental efficacy of the statutory duty of care condition is at best a potential mechanism to develop recognition of and adherence to the duty, which is currently lacking for freehold title.

The extensive amendments to compliance and enforcement of vegetation management regulations were explored in Chapter Six. This chapter documented that broadscale land clearing has reduced significantly under the VMA. This evident behavioural change on the part of rural landholders should be reflected in a more collaborative and cooperative regulatory scheme. Such an approach would not undermine the significant environmental gain achieved by the phasing out of broadscale land clearing; rather it would indicate a willingness to work in partnership in the future. It is recommended that the government review and amend the compliance and enforcement provisions of the VMA. Particularly the provision that instruments, equipment and evidence of remotely sensed imagery are taken to be accurate and precise in the absence of evidence to the contrary. The ability of rural landholders to provide contrary expert evidence requires considerable financial resources and the tenacity to defend a case.

Sentencing of land clearing cases was examined in Chapter Seven in which it was established that the purposes of the *Penalties and Sentences Act 1992* (Qld) include providing a sufficient range of sentences and ensuring the protection of the Queensland community. Reference is also made to the protection of the Queensland community in

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16 *Vegetation Management Act 1999* (Qld) s 66 A.
17 *Penalties and Sentences Act 1992* (Qld) s 3 (b).
the sentencing principles of this Act.\textsuperscript{18} This legislation envisages protection from the perpetrator of an ordinary crime rather than an environmental crime. The offence of illegal land clearing however invariably generates the degradation of land and the loss of biodiversity. Both the purposes and principles of the \textit{Penalties and Sentences Act 1992} (Qld) could be amended to encompass environmental crime with an additional clause to include, if appropriate to the offence, the protection of the environment on behalf of the community.

There are further principles under the \textit{Penalties and Sentences Act 1992} (Qld) the court must have regard to and which are of particular relevance to vegetation clearing offences. They include: the maximum and minimum penalty for the offence; and the nature and seriousness of the offence including harm to the victim.\textsuperscript{19} Once again the legislation envisages a human victim whereas the victim of an illegal land clearing crime will invariably be the environment and the community. The Act could be amended to add, if appropriate, any harm done to the environment. A general environmental duty to prevent or minimize environmental harm is provided for in the \textit{Environmental Protection Act 1994} (Qld) but this encompasses harm caused by pollution not land degradation. To include environmental harm in the \textit{Penalties and Sentences Act 1992} (Qld) would be a factor the court would then have regard to in relation to the nature and seriousness of the offence at the time of sentencing. As noted by Preston CJ: ‘Even where harm is not an element of the crime, the objective harmfulness of the offender’s actions is relevant to determining the seriousness of the crime’.\textsuperscript{20}

Variation in the extent and type of land clearing was apparent in the cases considered in Chapter Seven. This distinction should be reflected in the VMA in relation to penalty amounts, for example:

- The difference between small and large scale clearing should be reflected in the financial penalties imposed. The law should be changed to accommodate large-scale clearing beyond, for example, 55.5 ha of endangered vegetation.

\textsuperscript{18} \textit{Penalties and Sentences Act 1992} (Qld) s 9 (e).
\textsuperscript{19} \textit{Penalties and Sentences Act 1992} (Qld) s 9 (2) (b) and (c).
• In a similar vein to the *Protection of the Environment Operations Act* 1997 (NSW), the vegetation management regulations could be amended to encompass different levels of offence. Following the example set by the NSW Act; the more serious offences would require a mental element and proof of fault and carry larger fines than the current maximum.

• Clearing on a lesser scale should be a crime of strict and not absolute liability in keeping with other comparable environmental crimes.

• The possibility of treating clearing on a lesser scale with civil penalties could be explored. Alternative dispute resolution, particularly mediation, lends itself to continual working relationships such as that between the regulator and rural landholder. Mediation could be facilitated to include working with the landholder to restore the land.

**Areas for further research**

Future research could follow and compare the VMA and the LA under a conservative Liberal National Party (LNP) government. Changes in the legislative process were introduced by the Bligh government in 2011. They included revision to the committee system and the introduction of a regulatory assessment statement for new legislation. These changes have been adopted, with some amendments, by the LNP. The committee system amendments brought in the Environment, Agriculture, Resources and Energy Committee to replace the Scrutiny of Legislation Committee (SLC) for matters including land and vegetation management. In keeping with the operation of the former SLC, this committee examines, amongst other things, the application of fundamental legislative principles in accordance with the *Legislative Standards Act 1992* (Qld). The law which governs the functions of this latest committee remains the same but the focus has become more specialised. Before the changes were implemented, a regulatory assessment statement was only required for significant subordinate legislation if proposed new laws imposed appreciable costs on the community or part of the community. In future all significant regulatory proposals for both primary and

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subordinate legislation will require a regulatory assessment statement. Further research could assess these changes in the legislative process under a conservative government.

The end of the long period of Labor government in Queensland marks the end of the general time frame for this thesis. A newly formed and electorally ascendant LNP government took office in March 2012, with 78 seats in the parliament. The Labor Party retained only 7 seats. This was an unprecedented parliamentary majority for Queensland. In his first ministerial release, and before the first parliamentary session, Andrew Cripps, Minister for Natural Resources and Mines, announced a review of investigation and enforcement processes under the VMA and in particular a review of penalty processes.22 The review was set to last from six to eight weeks during which time investigations were put on hold and an existing unnamed appeal withdrawn. In September of the same year the Minister addressed the Agforce conference and announced a strategy to streamline vegetation management.23 As at February 2013 the necessary amendments to the law were yet to be made, but according to the Minister will be passed within the first quarter of the year.24 The VMA will not be repealed nor are there calls for this from Agforce or other rural organisations. But the Newman government has promised to restore balance and fairness to the administration of the Act and, according to the Minister, develop ‘vegetation management policies that recognise and encourage sustainable agricultural production rather than being fixated on vilifying landowners, as was previously the case’.25

Further research could be undertaken to monitor statutory amendments and the implementation of compliance and enforcement under the LNP government. Grabosky and Braithwaite’s research was considered in Chapter Six: they found that regulatory prosecution was rare in 1980s Queensland. Their period of research marked a pinnacle of conservative rule under the Bjelke-Petersen administration. An area of further study could investigate whether the latest LNP government will adopt a similar approach of

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appeasement towards those on the land. Gaining an insight into compliance and enforcement may prove problematic: the first and latest annual report of the LNP government contains no reference to investigations or prosecutions under any of the Acts administered.\textsuperscript{26} If this is because there has been no enforcement activity, it could indicate a return to earlier conservative policy.

Moves are afoot for changes in land tenure within the State. An inquiry, described as being into the future and continued relevance of government land tenure across Queensland, was referred to the State Development, Infrastructure and Industry Committee in June 2012.\textsuperscript{27} The terms of reference required the committee to report back to the Legislative Assembly by the end of November 2012. This was subsequently changed and an interim report was tabled in November 2012 with the final report now due by the end of March 2013. Submissions were invited and public hearings were held in Brisbane and six regional areas. A public briefing was undertaken in the Legislative Assembly Chamber of the Queensland Parliament. A total of 103 submissions were made, all submission are available on the inquiry web page together with a transcript of the public briefing. Transparency, at least in this area, is in marked contrast to the Labor period of government.

The impetus for this inquiry originated from the Deputy Premier Jeff Seeney, mentioned earlier in this thesis as the most determined and resolute opponent of the VMA whilst in opposition. Seeney is a landholder and represents the rural seat of Callide. He announced the inquiry in June 2012 and noted:

\begin{quote}
In some cases leasehold land may need to be transitioned to freehold title, and if that's necessary this inquiry will indicate how we make that transition in a way that is fair to the people of Queensland and is fair to those willing to invest in development.\textsuperscript{28}
\end{quote}

Government rhetoric is reminiscent of the mid 1950s and the Payne Commission considered in Chapter Two. Back then a conservative government took office following prolonged Labor rule and embarked on considerable change for land policy and law.

\textsuperscript{28} Phelps M, ‘Seeney orders Queensland land tenure review’ Queensland Country Life (21 June 2012).
The Delbessie Agreement is now referred to as the State Rural Leasehold Land Strategy, and one of the proposed initiatives included in the latest annual report of the LNP government is to simplify the operation of the strategy ‘for sustainable and productive use of rural leasehold land for agribusiness’.29 Future research could analyse, in relation to the land tenure inquiry, the submissions made and transcript of the public hearing; together with amendments to the LA and how those changes were made and implemented.

A further area of future study could encompass quantitative research to survey a representative sample of rural leaseholders that have completed their lease renewal process. It would be instructive to ask leaseholders if they read their lease conditions, understood their implications, and what attempt was made by the regulators to explain their practical meaning. This might be a longitudinal study which would revisit the same leaseholders following their five-year self-assessment and the regulatory ten-year assessment. It would be interesting to see if the changed process has impacted on day-to-day land management practices. It could be with relief that leaseholders, having undergone an unfamiliar and protracted renewal process, place their land management agreement alongside their other title documents only to be revisited when renewal next comes around.

Queensland politics in 2012

As evidenced in this research, fundamental change in land policy and law has accompanied each State administration. Of the two environmental laws explored, neither Act is destined to be repealed but will certainly be amended to reflect conservative ideology and values. The latest conservative administration addressed contentious aspects of the VMA soon after taking office in March 2012. As for the LA, the evolution of tenure appears set to continue. There will be a degree of recurrence in policy and law with the current LNP government and the last long-standing conservative period of government examined in Chapter Two. Times however have changed and the State is now heavily reliant on the resources industry. Describing its achievements in the 2011-2012 annual report, the LNP noted the first objective for the

community was: ‘a globally competitive mining, petroleum and gas industry’. This resource dependence has far reaching implications for the environment and climate change, and for privately held rural land as keeper of those resources. The political and ideological association between the LNP government and rural landholders is evident. Deputy Premier Seeney might, following the tenure inquiry, appease rural leaseholders with greater security of tenure. But conservative support and promotion of the resources sector has generated unexpected political alliances and signals tensions to come.31

Conclusion

The scope of this thesis was undertaken primarily during the latest Labor period of administration in Queensland. The aim of the research has been to advance understanding of natural resource legislation and contribute to the body of knowledge on State environmental laws. This is a detailed account, over a long time span that encompasses the emergence of policy, the making of legislation and the variable implementation of enforcement of vegetation management regulation on both freehold and leasehold tenure. The research tracks the shifting fortunes of Queensland Labor from dominance to decline. This ebb and flow of political power generated instability and prompted repeated amendments to vegetation management laws. The effectiveness of this Labor regime is examined: the VMA did not bring certainty to rural landholders as habitually promised by the government. But it did ultimately play a part in protecting the unique biodiversity of the State. As such, both the VMA and the LA formed part of an extensive suite of environmental laws enacted during Labor’s reign, in an attempt to make reparation for past policy and law and promote the conservation of biodiversity on rural land.

By utilising socio-legal research this thesis has adopted a broader approach than purely doctrinal study. Such a research strategy is not without challenges: the Queensland Labor government’s commitment to accountability and transparency was not always evident in practice; and a significant amount of land clearing litigation is undertaken at the lower end of the court hierarchy, where the realities of legal practice are rarely seen

31 Environmental campaigner Drew Hutton, former leader of the Queensland Greens and founder of ‘Lock the gate,’ faced charges under s 805 Petroleum and Gas (Production and Safety) Act 2004 (Qld) in the Dalby Magistrates Court in December 2011. The Act provides that a person must not obstruct without reasonable excuse an authorised officer; in this case the obstruction was of a coal seam gas company. Hutton was found guilty and fined $2000. Leader of Katter’s Australia Party, Bob Katter attended the hearing and supported Hutton. The irony of this odd alliance was not lost on Katter who declared ‘things must be crook in Talarook.’
and much less written about. The traditional and typical focus on orthodox legal sources, such as reported judgements, might inform on the law but socio-legal research sheds light with a different focus on a very important arena where environmental laws are played out.
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318

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# Appendix One: Timeline

<table>
<thead>
<tr>
<th>Year</th>
<th>Legislation/policy</th>
<th>The significance for rural land management</th>
<th>Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>1957</td>
<td><em>Land Act 1962 (Qld)</em></td>
<td>Following recommendations from the Payne Commission (1959) the 'populate or perish' policy pervaded and promoted widespread development of rural land.</td>
<td>Country-Liberal: Frank Nicklin</td>
</tr>
<tr>
<td>1986</td>
<td><em>Land Act 1962 (Qld)</em></td>
<td>This amendment gave most pastoral leases an automatic 20 year extension the significance of this being there was no impetus to adapt land policy: the additional term meant a preservation of the status quo. Introducing the legislation into parliament the Minister at the time Bill Glasson declared that the new laws consolidated the government's stated aim since 1957 of gradually giving greater security of tenure to rural landholders. There was no explanation by the Minister as to why it had taken 29 years to reach the stated aim.</td>
<td>National Party: Joh Bjelke-Petersen</td>
</tr>
<tr>
<td>1991-93</td>
<td><em>Land Act 1962 (Qld)</em></td>
<td>There was now a Labor government and, following recommendations from the Wolfe Review (1990), provisions were made for controls and permits for clearing on leasehold land. Clearing rates fell but for reasons other than legislation.</td>
<td>Labor: Wayne Goss</td>
</tr>
<tr>
<td>1994</td>
<td><em>Land Act 1994 (Qld)</em></td>
<td>Again following recommendations from the Wolfe Review (1990) a new Act was passed with a focus on land sustainability: for the first time lessees had a responsibility for a duty of care for the land.</td>
<td>Labor: Wayne Goss</td>
</tr>
<tr>
<td>1996-98</td>
<td>Broadscale Tree Clearing Policy</td>
<td>During the brief Rob Borbidge and Joan Sheldon coalition government there was no legislation in respect of land clearing or sustainable land management. However a task force was formed and a partnership agreement made between the Queensland government and the Commonwealth government, the purpose being to turn around the long-standing decline in Australia’s native vegetation cover. A Broadscale Tree Clearing Policy was introduced and adapted from the previous Goss Labor government; it did little to curtail clearing on rural leasehold land.</td>
<td>National Liberal coalition: Ron Borbidge/ Joan Sheldon</td>
</tr>
<tr>
<td>1999</td>
<td><em>Vegetation Management Act 1999 (Qld)</em></td>
<td>One of the most controversial pieces of legislation to be debated in the Queensland parliament during Labor’s period in power, the Act was introduced and passed utilising the guillotine process. The controversy surrounded the first clearing restrictions on freehold land.</td>
<td>Labor: Peter Beattie</td>
</tr>
<tr>
<td>2000</td>
<td><em>Vegetation Management Act 1999 (Qld)</em></td>
<td>The Act was proclaimed in September - a peak period in land clearing had been generated in the 10 month period prior to proclamation. The initial implementation of the Act was opposite to its fundamental purpose.</td>
<td>Labor: Peter Beattie</td>
</tr>
<tr>
<td>2001</td>
<td>Rural Leasehold Land Strategy</td>
<td>The first discussion paper on the Rural Leasehold Land Strategy was introduced: submissions on this were invited.</td>
<td>Labor: Peter Beattie</td>
</tr>
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323
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<thead>
<tr>
<th>Year</th>
<th>Title</th>
<th>Description</th>
<th>Party/Person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feb 2003</td>
<td>Vegetation Management Act 1999 (Qld) &amp; Land Act 1994 (Qld)</td>
<td>Both Acts amended to enhance deterrence of illegal clearing, leasehold land was brought under the Vegetation Management Act 1999 (Qld) for the purposes of compliance and enforcement of illegal clearing.</td>
<td>Labor: Peter Beattie</td>
</tr>
<tr>
<td>March 2003</td>
<td>Rural Leasehold Land Strategy</td>
<td>A draft Rural Leasehold Land Strategy was introduced: once again landholders and other interested parties were invited to make submissions.</td>
<td>Labor: Peter Beattie</td>
</tr>
<tr>
<td>May 2003</td>
<td>Vegetation Management Act 1999 (Qld)</td>
<td>Despite Peter Beattie promising there would be no moratorium on clearing applications a moratorium was announced and provided for in this amendment.</td>
<td>Labor: Peter Beattie</td>
</tr>
<tr>
<td>2004</td>
<td>Vegetation Management Act 1999 (Qld) &amp; Land Act 1994 (Qld)</td>
<td>Significant amendments which: further aligned vegetation management under freehold and leasehold tenure; brought an end to broadscale land clearing by 2006; introduced the first financial commitment to affected landholders of $150 million. These amendments were pre-election promises followed by post election changes to the law.</td>
<td>Labor: Peter Beattie</td>
</tr>
<tr>
<td>2006</td>
<td>Vegetation Management Act 1999 (Qld)</td>
<td>December marked the end of broadscale land clearing in Queensland in accordance with the earlier 2004 amendment.</td>
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<td>2007</td>
<td>Land Act 1994 (Qld)</td>
<td>This Act clarified the statutory duty of care – introduced in 1994 – for leaseholders.</td>
<td>Labor: Anna Bligh</td>
</tr>
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<td></td>
<td>Land Act 1994 (Qld)</td>
<td>Introduction of the Rural Leasehold Land Strategy in March 2007, in December the strategy was launched and became the Delbessie Agreement.</td>
<td></td>
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<tr>
<td>2008</td>
<td>Land Act 1994 (Qld)</td>
<td>Implementation of the Delbessie Agreement: this amendment made provision for all new and renewed rural leases to be subject to a land condition assessment and a land management agreement. Such agreements form part of the conditions of offer of a new lease, can be registered at the Land Registry and will bind successors in title.</td>
<td>Labor: Anna Bligh</td>
</tr>
<tr>
<td>2009</td>
<td>Vegetation Management Act 1999 (Qld) &amp; Land Act 1994 (Qld)</td>
<td>The Queensland Labor Party introduced controversial regrowth amendments to the Act as part of a payback for a pre-election preference deal, once again pre-election promises were followed by post election changes to the law. A financial commitment of $2 million was made to Agforce to implement training and information on the new regrowth amendments.</td>
<td>Labor: Anna Bligh</td>
</tr>
<tr>
<td>2012</td>
<td>Vegetation Management Act 1999 (Qld) &amp; Land Act 1994 (Qld)</td>
<td>Less than a month in office the Liberal National Party (LNP) announced a review of the investigative and enforcement processes of the Vegetation Management Act 1999 (Qld). In June 2012 the LNP established an inquiry into the future and continued relevance of government land tenure across Queensland. The terms of reference require the committee to report to the Legislative Assembly by the end of March 2013.</td>
<td>Liberal National: Campbell Newman</td>
</tr>
</tbody>
</table>
Appendix Two: Research protocol – 2009/607

INFORMATION SHEET

PhD Research Project

My research examines the effect of two pieces of legislation on rural landholders in Queensland. The Acts are the Vegetation Management Act 1999 (Qld) and the Land Act 1994 (Qld), each Act covers different tenures (freehold and leasehold) at different periods. I currently undertake this research in a sole capacity. My supervisors are Professor Tim Bonyhady, Director of the Australian Centre for Environmental Law, ANU College of Law and Professor John Rolfe, Director of the Centre for Environmental Management, CQU.

I have been allocated a Research Training Scheme place at the ANU to undertake my thesis.

Why am I carrying out this research?

My research addresses law and policy changes in the past two decades in Queensland relating to vegetation management and the introduction of clearing restrictions for vegetation on agricultural land. There is little other academic attention in this area.

The management of vegetation on private rural land in Queensland is a major policy issue. Vegetation management has implications for biodiversity, carbon sinks and impacts in some areas on water quality emissions into the Great Barrier Reef. This thesis will contribute to discourse within Queensland on questions of accountability of government; and the effectiveness of environmental laws. The thesis will show that what has happened on the land has been dominated and fashioned by the political cycles and political systems of successive governments; and, moreover, that much of the angst with statutory regulation for rural landholders has been generated by the politicisation of the Vegetation Management Act 1999 (Qld).

What does the research involve?

In order to place these laws within a social context a modified case study research strategy will be employed in this thesis. The case study is an area of research familiar within the social sciences, but less so in law which has a long-established adherence to doctrinal legal research. Such insights provide a realistic perspective on what is actually happening and may be usefully employed to complement and expand upon the traditional doctrinal use of case law and legislation. This type of analysis is imperative to understanding the political realities of how laws are made within Queensland, how they operate and, importantly, how they impact upon those most affected by them.

I have sought your feedback on these laws either:

• by virtue of your role in a Queensland Government department;
• because of your official role in a representative body of rural landholders;
• because you are a rural landholder;
• because you are a Member of Parliament within Queensland;
• because of your role as a spokesperson for a political party or conservation group;
• by virtue of your role as lawyer acting for a rural landholder; or
• because of your academic expertise within this area.

Participation in the project is purely voluntary, and there will be no adverse consequences if you decide not to participate. If you agree to participate in this research project I would ask you to discuss with me your views on the legislation or particular aspects of the legislation which is envisaged to last no more than one hour.

The interview will be unstructured and can be at a mutually convenient time on the telephone, by e-mail or at a place which is convenient for you. The discussion will not be audio-taped.

You may withdraw from participation in the project at any time, and you do not need to provide any reason. If you decide to withdraw from the project I will not use any of the information you have provided. The results of this study will form the basis of my thesis and may be published in academic journals or books. However, the names of individuals will not be reported in connection with any of the information obtained in discussions without written consent of the individual(s) concerned. You will have the opportunity to request a copy of the research results when published.

Are there any risks if I participate?

I do not intend to seek any information in discussions which is particularly sensitive or confidential. It is possible that others may be able to guess the source of information provided in discussions, even if it is not attributed to any person. Accordingly, it is important that you do not tell me information which is of confidential status, or which is sensitive or defamatory.

Contacts.
If you have any questions or complaints about this research please feel free to contact:
Jo Kehoe
Central Queensland University, FABIE, Rockhampton,
Tel: 07 4930 9213
Email: j.kehoe@cqu.edu.au

If you have concerns regarding the way the research was conducted you can also contact:
ANU Human Research Ethics Committee:
Human Ethics Officer, Human Research Ethics Committee, Australian National University. Tel: 6125 7945.
Email: Human.Ethics.Officer@anu.edu.au