Chapter Two
Constitutional Vandalism under Green Cover

Professor Suri Ratnapala

Australia is called the Lucky Country, but luck has played only a small part in the country's success. The conversion of resources into wealth requires capital, technology, enterprise and hard work. People do not invest in wealth creating activity when the risks are too high and the returns too low. Risks increase when the law is unpredictable and property rights are insecure.

The success of Australia's primary industry sector owes much to the relative stability of property rights and contractual certainty secured by what the great Scottish philosopher David Hume called the "three fundamental laws concerning the stability of possessions, translation by consent and the performance of promises".[1] These laws are maintained by the strength of the Constitution and the eternal vigilance of the people.

This essay discusses a new threat to constitutional government and property rights in Australia that has arisen out of what is in principle a worthy and necessary program in public policy, namely environmental protection. The threat arises not from the aim itself, but from the flawed processes by which environmental policies and laws are determined and implemented. These processes not only subvert constitutional principles but also admit bad science.

It is impossible to survey within a brief essay the complex and ever growing environmental regulatory regime in Australia. Hence I will focus my attention on one piece of legislation that typifies all that is wrong and dangerous about recent trends in environmental protection law in this country. The legislation I examine is Queensland's *Vegetation Management Act* 1999 (*VMA*) which applies to all freehold and non-freehold lands in Queensland. This law reflects a regulatory model that is becoming the standard in Australia. In searching for an illustrative case of a statute that comprehensively defeats the values of constitutional government, in particular the rule of law, democratic principle and the basic requirements of natural justice, one need look no further than this Act. I will consider the constitutionality of some aspects of this legislation and the prospects for a successful challenge to its provisions.

Before I discuss the impact of this Act on constitutional government, it is necessary to make some explanatory observations about this form of government and its vulnerabilities.

What is a Constitution and what is constitutional government?

Constitutional government, or government under law, is a remarkable achievement of modern civilization, but it has been gained at a great price. Constitutional government enthrones the rule of law in the sense of the supremacy of known, general and impersonal laws over rulers and subjects alike. Millions of people around the world have died in the establishment and defence of constitutional government. This is not an exaggeration when the human cost of the 17th Century constitutional struggles in England, the American Revolution, the Civil War, the two World Wars, the uprisings against Fascist and

Communist rule, and present day democracy movements are accounted. Constitutional government is hard to win but not so hard to lose. It is always under pressure from seen and unseen opponents.

The term "constitution" once was synonymous with constitutional government that meant a particular type of political order in which the authority of rulers, including their legislative power, was limited through appropriate institutional devices, and both rulers and citizens were subject to the general law of the land. However, the term is now so debased that the most widely read encyclopaedia, the *Encyclopaedia Britannica* informs its readers that in its simplest and most neutral sense, every country has a Constitution no matter how badly or erratically it may be governed.[2] A Constitution in this simple sense refers to the official description of the Constitution or the paper Constitution.

There is another, more realistic sense in which the word "constitution" is used. It refers to the constitution as it actually operates. This is the constitution that lives in the experience of the people, that which economists call the "economic constitution". The constitution in this sense deviates from the paper Constitution, sometimes for the better but often for the worse. The *Constitution Act* of New Zealand reposes absolute power in a single chamber Parliament. Yet New Zealand enjoys a much greater degree of constitutional government than most countries with elaborate written safeguards. The United Kingdom has a robust democracy and an outstanding record on human rights without a scrap of paper that can be called a Constitution. As against these shining examples, we find many countries failing to secure a semblance of the constitutional order proclaimed in their official constitutional instruments.

There is a third, philosophical, sense in which the term "constitution" is used. It is the classical idea of a constitution, which F A Hayek termed the "constitution of liberty" in his famous work bearing that name.[3] In *The Constitution of Liberty* Hayek set out to present a restatement of the principles of a free society. This restatement was completed in the three volumes that constitute the monumental intellectual defence of the rule of law and individual freedom, *Law Legislation and Liberty*.[4] These treatises together explain the logic and the institutional framework of the political order that sustains human freedom.

At the heart of the constitution of liberty is the supremacy of general laws over all authority, public or private. Its modalities include the rejection of sovereign authority, even of elected assemblies, the effective separation of the executive, judicial and law making powers, and the geographical dispersal of power through federal arrangements. The constitution in this classical sense is a response to a perennial problem in human existence – that of creating power to coordinate collective action to secure essential public goods, while restraining the repositories of power from abusing it.

The bedrock of the classical idea of a constitution is a particular conception of the rule of law, namely the subordination of all public and private power to general norms of conduct. It is said that the rule of law is a necessary condition of freedom, but not a sufficient one. This proposition sounds logical, inasmuch as certain laws may diminish the liberty of all while ostensibly remaining faithful to the rule of law ideal. For example, prohibition of alcohol consumption in some countries limits the choice of everyone. But on reflection it is evident that such laws eventually defeat the rule of law. Unreasonably

restrictive laws are likely to be kept in place only by derogations from the rule of law in other respects. Typically, prohibition laws are maintained by privileging certain religious or moral opinions as against others.

It is also claimed that abhorrent institutions such as apartheid and slavery can be implemented consistently with the rule of law, provided that the disabilities they impose are not the result of arbitrary discretions of authorities. This claim is much more problematic. In such cases, the legislators themselves are acting arbitrarily in both establishing and maintaining the institutions.

The rule of law's prescription against arbitrary determinations applies equally to the legislature and to constituent bodies. Such laws are general only in a very perverse sense. Thus in countries where there is cultural diversity, the constitutional privileging of particular religions or languages creates serious problems for the rule of law. It is true that people's lives are more predictable where discrimination results from pre-announced rules rather than from the momentary will of officials. Much depends on the extent to which the discrimination diminishes the life chances of the selected group. The rule of law is maintained in the longer term not by coercive power but by the people's fidelity to the law. Hence constitutions and laws that pre-ordain selected groups to lasting deprivation are inherently unstable owing to the loss of fidelity of the disadvantaged groups, and can be maintained only by increasingly arbitrary projections of coercive power. Hence these laws are as subversive of the rule of law, as laws that confer unfettered powers on rulers.

Endogenous threats to constitutional government

In countries where constitutional government lacks deep roots, liberty is fragile, and vulnerable to the ambitions of individuals and groups who seek by violent means the rewards of absolute power. In established liberal democracies such as Australia, the prospect of forcible overthrow of the constitutional order is remote. However, the freedoms that liberal democracy provides have a tendency to generate endogenous anti-liberal forces. Freedom allows all manner of ideas, projects and movements to grow, including those inimical to freedom. Unless resisted, they can gradually debilitate constitutional government to the point of irreversible decline. The paradox of free societies is that they cannot defend themselves by denying basic freedom to its enemies.

Liberal democracies face two common kinds of internal threat to constitutional government. The first arises from welfare politics. Under current electoral systems, special interest groups seek, and political aspirants offer, benefits that very often can be delivered only at some cost to constitutional government. Apart from direct wealth transfers through the tax system, governments pursue distributional goals through various forms of regulation, such as fair trading and consumer protection laws, competition laws, wage and price fixing, and the myriad licensing schemes. These regulatory devices confer wide discretionary power on officials that seriously derogate from the ideal of government under known and general law that lies at the heart of constitutionalism. This kind of threat, though serious, is manageable, as it is possible to convince people that the short term gains they seek cause more harm than good in the longer term. The worldwide trend to economic liberalization started by Margaret Thatcher, Ronald Reagan and Roger Douglas, and now

driven also by the forces unleashed by liberalized world markets, is evidence of this reversal.

The more serious threat to constitutional government arises from fundamentalism of various kinds. I do not mean, by fundamentalism, deep conviction about a particular worldview, philosophy or faith, whether that be Christian, Islamic, Buddhist or secularist. I employ the term "fundamentalist" to describe a person who not only has an unshakeable conviction in the rightness of his position, but also thinks that his view is so compelling and uncontestable that any competing view must be silenced, if not by persuasion, then by subtle coercion or brute force.

I learnt liberalism and the value of the rule of law very early in my life from a man who had not read any of the great liberal philosophers. He dedicated a major part of his life to the study and practice of the Buddhist doctrine that he embraced without reservation. He devoted another part of his life to politics, in defence of the rule of law and fundamental freedoms for all persons, particularly the freedom to practice other faiths and cultures. He was not a fundamentalist in my lexicon. The 13th Century churchmen who ordered and carried out the Inquisition were fundamentalists. The Marxists who pursued the goal of the Communist utopia at the cost of lives and liberties of many millions were fundamentalists. The Fascists who, following Hegel, deified the state as the ultimate good, were fundamentalists. The Al Qaeda terrorist group, and similar groups who wage holy war against infidels, are fundamentalists.

There is a new fundamentalism that threatens the liberal constitutional order. It is Green fundamentalism. I do not mean by Green fundamentalism, genuine concern about the environment, and the desire to seek rational, balanced and scientifically sound solutions to environmental problems. Rather I refer to the growing intellectual movement that espouses a particular vision of the natural world, and relentlessly pursues the realization of that vision by legal and illegal means, where necessary by overriding the most fundamental rights and liberties of the citizen. It is vocal in the advocacy of its point of view and insensible to other views. It has been spectacularly successful in elevating its message to the position of a faith that others may not question without being branded anti-social. It has skewed public discussions in a way that has stifled opposing views.

I am not suggesting that the issues that environmentalists raise are trivial. This debate is not about the need to protect the environment, but about rational responses to the problems. It is estimated, for example, that the total cost of global warming could be as much as US$ 5 trillion. Yet, as Bjorn Lomborg in his much reviled but unrebutted book, *The Skeptical Environmentalist*, points out, some of the solutions suggested could cost the world trillions, and even tens of trillions, of dollars over and above the global warming cost.[5] This is money that, in the form of investment, could raise billions of people out of poverty and drive their societies to levels of prosperity that make environmental improvements affordable.

Lomborg is no libertarian capitalist ideologue. He is a left leaning statistician whose thesis is uncompromisingly grounded in data that even WWF, Greenpeace and the Worldwatch Institute largely accept. When he speaks of the bias in the environmental debate, it is worth listening. He asks why global warming is not discussed with an open attitude but with a fervor befitting preachers. He thinks that the answer is "that global warming is not just a

question of choosing the optimal economic path for humanity, but has much deeper, political roots as to the kind of future society we would like".[6] I cannot but agree.

The main concerns

Environmental law is one of the fastest growing areas of the legal system. It comprises a vast body of statute law that includes Acts of Commonwealth and State Parliaments, subordinate legislation in the form of regulations, orders and decrees, and case law interpreting these provisions. There are rising concerns within primary and manufacturing industries, as well as scientific and legal communities, that the processes of environmental policy formulation and implementation are leading to outcomes having seriously negative impacts on individual producers, industries, local and national economies, civil liberties, the rule of law and on sustainable environmental protection.

In its August, 2004 Report on *The Impacts of Vegetation Management and Biodiversity Regulations*, the Productivity Commission acknowledged the validity of many of these concerns, and made recommendations that in effect require the radical re-evaluation of the philosophy and processes of environmental regulation in Australia. The Commission's report highlighted the following serious defects in the current regulatory system:

- Lack of cost-benefit assessments before regulations are made, and the absence of on-going monitoring and independent reviews of costs and benefits once the regulations are in operation.
- The poor quality of data and science on which native vegetation and biodiversity policy decisions are based.
- Inadequate use of the extensive knowledge of landholders and local communities in the formulation of policy and regulations.
- The failure to take account of regional environmental characteristics and agricultural practices in imposing across-the-board rules, particularly in relation to native vegetation regrowth.
- Serious impediments to private conservation measures, including tax distortions and regulatory barriers to efficient farm management.
- The imposition on landowners of the cost of wider conservation goals demanded by society.

The Productivity Commission's report deals only with native vegetation and biodiversity issues. However, many of its findings are relevant to environmental law and policy generally. There are also other fundamental issues that call for investigation.

Utopian, apocalyptic and evolutionary theories of conservation

Environmental policy at Commonwealth and State levels does not reveal a coherent theory or philosophy of conservation in Australia. Instead, the field has become a battleground for radical environmentalists and other interest groups affected by conservation policies. While this kind of contest is both natural and desirable in a democracy, it can and often does overlook the fundamental questions that need to be addressed.

Nature is dynamic, not static. Ecosystems, the organic world, human societies and culture itself are emergent complex systems. They are adaptive, and it is arguable that they have no teleological or pre-ordained ideal states. The planet itself, according to this view, has no ideal state. If there is an ideal

state, it is important to know what that is and why that state is ideal. In such a world, the following questions, among others, become fundamental:

- What things should be preserved?
- Why should they be preserved as against other things?
- What things can be preserved?
- In what form should things be preserved?
- In what ways should we seek to preserve what we must preserve?

Environmental fundamentalists tend to apply two inter-related and complementary theses to these questions. One is inspired by the utopian vision of the world as an idyllic Garden of Eden that is an end in itself. Alternatively, it regards Earth in all its physical and biological complexity as a super-organism called Gaia.

The Gaia Hypothesis, formulated by James Lovelock in the mid-1960s, proposes that our planet functions as a single organism that maintains conditions necessary for its survival. This hypothesis is by no means substantiated, but has become the inspiration of the romantic and radical elements within the environmental movement. As a hypothesis about the nature of the complex system that is Earth, it cannot do much harm. However, there is a tendency among Gaia believers to deify the concept, and to subordinate the interests of all beings to the wellbeing of Gaia, about which they claim to have superior knowledge. The Gaia thesis leads believers to the apocalyptic thesis. According to this view, human societies have acquired the technological capability of destroying the balance that sustains Gaia, and unless this capability is controlled, Gaia and all that lives within are doomed.

There are highly respected scientific opinions that challenge environmental fundamentalism. The dearth of dispassionate and objective discussion of these questions is unfortunate, and may prove catastrophic to humanity and the very environment that we seek to protect.

A problem with the vegetation management legislation in Australia is that it is designed on the assumption that ecosystems are static. The overwhelming goal of these laws is the protection of “remnant” vegetation and other ecosystems thought to be necessary for biodiversity. They take no account of the fact that trees regrow and forests thicken. They do not acknowledge that ecosystems will change in the short term depending on how areas are managed (for example, with or without fire, with or without grazing), and that in the longer term ecosystems change and adapt to climate change.

Since natural systems are dynamic, prohibiting land management and tree clearing will result in forest encroachment and woodland thickening that will impact on biodiversity and surface water runoff. It will not be a case of holding the landscape in some sort of precautionary stasis. The full implementation of the vegetation management laws of Queensland is likely to be general woodland thickening across approximately 50 million hectares of Queensland.[7]

Bill Burrows, a highly respected environmental scientist who has spent a professional lifetime investigating these questions, is worth quoting on these matters:

> “It is obvious that some organisms will be either threatened or favoured by tree clearing bans. Yet the proponents of bans clearly imply that this will be good for *all* the State’s biodiversity. Permanently setting in train bans that will unarguably change the structure and composition of 70 per cent of the State’s forests and woodland vegetation (30 per cent of Queensland’s total

land area!) is a preposterous impost on our present fauna and flora. The dense woody plant communities that will result will be *resistant* to natural disturbances such as fire. We will take from them the one widely accepted element in the distinctive evolution of our flora and fauna[8] – except for rare and grossly destructive holocaust fires! This is not precautionary – it is challenging nature. Our greenies are figuratively putting out the flames with napalm!".[9]

There is another way of looking at nature which is informed by evolutionary theory and the science of emergent complexity. This approach does not condone wilful or negligent environmental harm, and recognises the need to prevent harm that is preventable. The critical difference is that, according to the evolutionary viewpoint, there is no pre-ordained ideal state of nature. The environment is a dynamic process that is unfolding in consequence of endogenous forces, including the endeavours of human beings to better their lives. Jennifer Marohasy observes that it is now widely accepted that there was no original pristine state, and that "competition, adaptation and natural selection, sometimes against a backdrop of catastrophic climate change, have driven the evolution of life on earth".[10]

Even if we assume for argument's sake that Earth is Gaia the super-organism, there is no way that we can know her mind, or what drives her, and what her ideal state is if there is one. All of this does not mean that we cannot or must not prevent harm that is preventable. What it means is that we should be aiming to have a healthy environment, as against the pursuit of an imaginary, unachievable pristine state at the cost of all other interests. The removal of technological civilisation from the ecological equation, as the fundamentalists demand, will produce dramatic reactions throughout the world that are hard to predict and impossible to control.

These opinions are not without their critics, and certainly they need rigorous examination and testing. The complaint of this essay is that they are not given the serious consideration they deserve in policy making.

Spuriousness of the precautionary principle

Environmentalists have a powerful weapon against science. It is called the precautionary principle. The precautionary principle is that "where there are threats of a serious or irreversible environmental damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation".

The principle is in fact almost an oxymoron. Even as a stranger to science I find it hard to think that scientists always search for scientific certainty before acting. Most scientists will agree that where there is a threat of serious or irreversible environmental damage, preventive measures should not be postponed provided that (a) the threat is real or at least probable; (b) preventive measures are possible; and (c) the likely damage warrants the cost of prevention. The first premise of the precautionary principle cannot be reached without dispassionate scientific investigation. Hence the principle is practically useless as a basis for rationally responding to environmental problems.

In practice, though, the principle allows subjective doomsday alarmism to trump evidence. In the arena of public opinion, dispassionate and reasoned argument is hardly a match for doomsday rhetoric. The irony is that doomsday may be hastened more by blinkered green fundamentalism than by objective and

balanced scientific investigation that takes account of the dynamic and evolving nature of the world, and the limits of our capacities to design the physical and cultural aspects of life as we wish.

Science, policy and due process

It is said that science and politics do not mix well. No science is perfectly objective or exact, but historically the natural sciences have insulated their methodologies from emotive debate better than other disciplines, although not without their own struggles. However, politics tend to intrude on science when political decisions depend heavily on scientific theories and findings, and environmental law and policy is no exception.

The integrity of science can be compromised at two levels. Firstly it can be compromised by bias at the level of investigation. Secondly, and more commonly, science can be compromised by policy makers through misunderstandings or misuse of scientific findings.

If good science is critical to good environmental law and policy, then it is essential that the processes of environmental policy making, legislation and adjudication are subject to appropriate standards of substantive and procedural due process. It requires, in the minimum, that views of all stakeholders and experts, including government agencies, property owners, traditional users, producers, environmentalists, relevant scientists and economists are heard in objective inquiry. The process should not privilege special interests, whether they are those of proprietors or of environmentalists. Decisions should be taken by independent tribunals, and not by bodies structurally biased to particular policy positions. The decisions should be judicially reviewable, and where appropriate subject to parliamentary review.

Environmentalism and civil liberties

There are growing concerns that aspects of environmental law and policy have unacceptably high costs in terms of their impact on civil liberties. Among the concerns are the following features of environmental legislation:

- Regulatory decisions affecting rights being taken in breach of natural justice by structurally biased tribunals, that deny rights holders reasonable opportunities to present their cases.
- Uncertainty of laws defining environmental offences that make compliance difficult and costly.
- Investigatory powers that are intrusive and compromise due process.
- Negation of traditional procedural and evidentiary safeguards in prosecutions for environmental offences, including the reversal of evidentiary burdens usually borne by prosecutors.
- Denial of compensation to property owners for the loss of property rights and diminution of property values.

Given that certain environmental objectives are worth achieving, the question arises as to who should bear the costs involved in their achievement. The common law principle is that those who cause damage to others must pay for reparation, but beyond that, if individuals are asked to sacrifice property for the benefit of all society, the cost of that sacrifice must be borne by society as a whole. This is an important principle that lies at the heart of constitutional government, and the case for conservation laws that depart from this principle needs to be rigorously tested.

The *Vegetation Management Act* 1999 of Queensland – a case of constitutional vandalism

The *Vegetation Management Act* (*VMA*) violates almost all of the basic principles of constitutionalism and good government. The *VMA* is not an accident or isolated instance, but a dangerous regulatory model that is spreading across the economy and society. The Queensland Electoral and Administrative Review Commission (EARC), following an extensive investigation, published its *Report on the Review of the Office of Parliamentary Counsel* in 1991. The Queensland Parliament enacted the *Legislative Standards Act* 1992 to implement EARC's recommendations.

The impressive Act lays down a series of "fundamental legislative principles" to be observed by lawmakers in Queensland. These salutary principles proclaim Parliament's commitment to constitutional government. They require that legislation has regard to the rights and liberties of individuals and the institution of Parliament, and set out a series of standards that condemn the grant of ill-defined administrative powers, inconsistency with the principles of natural justice, the reversal of the onus of proof in criminal cases, entry into private premises and search and seizure of private property without judicial warrant, retrospective imposition of deprivations or punishments, compulsory acquisition of property without paying compensation, grant of immunity to officials from prosecution or civil actions, inappropriate delegation of legislative power, the enactment of "Henry VIII clauses" that allow the amendment of Acts by delegated legislation, and the removal of delegated legislation from the scrutiny of Parliament.[11]

The *VMA* violates almost all of these standards, raising serious questions about the authorship of the legislation and the level of scrutiny that the Queensland Parliament gives to its laws.

Undemocratic lawmaking

The *VMA* establishes an utterly undemocratic form of law making affecting property rights in the State. In fact the Act does not make the law, but leaves legislative power in the hands of the Minister and executive officers, to be exercised outside the parliamentary process.

The Act requires the Minister to prepare, and the Governor-in-Council to Gazette, a vegetation management policy for the State. This is not policy in the ordinary sense, but is a legislative instrument that controls the other powers under the Act, in particular the preparation of regional vegetation management codes.[12] Despite its binding effect, it is deemed not to be subordinate legislation.[13] Similarly, declarations (and interim declarations) of holdings as areas of "high nature conservation value" or areas "vulnerable to land degradation", and the codes governing vegetation clearing in those areas, are deemed not to be subordinate legislation.[14] Since subordinate legislation requires parliamentary approval, the sole purpose of these exclusions is to remove these instruments from parliamentary scrutiny and hence public debate.[15]

Given their legislative nature these instruments are not generally subject to judicial review. Instead of the usual legislative practice, the Act establishes a consultative process, including review by the Minister's own advisory committee. While land owners and the public may present their views, the law ultimately is what the Minister wills. This is the classic instance of the process open to

capture by those who engineer it, in this instance the Green lobby. The process is structurally biased and insulated from the glare of public debate. There is no appeal from these Executive laws to Parliament or to the courts.

Retrospectivity, impossibility and the cost of compliance

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

A property owner will be required to read and construe the legal effect of the "declared area code". This may seem straightforward but, as owners have discovered, it is often not. The tree clearing limitations are fixed in relation to Regional Ecosystem Maps (REM), which are binding on land holders unless they are able, at much cost, to show that the maps are wrong. There are occasions where an REM may change an area of land from a non-remnant vegetation area to a remnant vegetation area, thereby retrospectively abrogating the landholders' rights to clear, unbeknownst to the landholder. Since such clearing attracts criminal punishments, the effect is to impose punishment retrospectively for innocent acts.

In making such retrospective punishment possible, the *VMA* violates a principle accepted by all civilised nations and declared by Article 15(1) of the United Nations *Covenant on Civil and Political Rights*, that innocent acts must not be made crimes with retrospective effect (*nullum crimen sine lege*). A lawyer brought to my attention the case of her client, who cleared some land on the verbal assurance from the Department of Natural Resources and Mines that the vegetation was not remnant, and later found that the REM had designated the area as remnant. It took several years for her client to have himself cleared of the alleged offence, during which time the department refused to assess his other clearing applications, causing serious economic loss.

Tree clearance permits, once issued, may give rise to similar problems, particularly when the terms of a permit prove impractical or even impossible to comply with. A permit that allows some species to be cleared, but not others, may be a virtual prohibition if selective clearance may not be practical or possible given the nature of the forest. It is a basic principle of all civilized legal systems, and a rule of common law, that the law must not ask the impossible (*lex non cogit ad impossibilia*). An enactment that requires the impossible is not a law but a directly punitive act.

Negation of the separation of powers and natural justice

The enforcement provisions of the *VMA* violate the most fundamental requirements of criminal justice and should concern every civil libertarian. The intrusive investigatory powers, the coercive extraction of evidence, the conferment of judicial powers on executive officers, the reversal of the burden of proof, the various presumptions favouring prosecutors, and the use of criminal

history, combine to create a regime more reminiscent of a police state than of a liberal democracy. A detailed analysis is not possible, hence I will discuss the most pernicious provisions.

The guilt of a person accused of a vegetation clearing offence under the *VMA* need not be determined by a court but may be conclusively established by an authorized officer, a functionary under the command and control of the Minister and his department. (The judicial trials mandated by Division 3 of Part 4 of the Act have no application to vegetation clearing offences under the *VMA*). If an authorised officer issues a compliance notice, a failure to comply without a reasonable excuse results in an automatic penalty.[16] If the accused is a corporation the penalty increases five-fold.[17]

The innocuous term "compliance notice" masks two startling facts. Given the uncertainties of the law discussed previously, the authorized officer's compliance notice becomes a legislative act. It states what the law is with respect to the property in question. As one landholder remarked at a recent conference I attended, the law is declared at the point when the authorized officer alights from his Toyota! The second extraordinary fact is that the issue of the compliance notice is simultaneously a straightforward conviction and sentence without trial. The compliance notice is both the charge and the conviction, collapsed into one.

Moreover, the authorized officer does not have to come to an objective determination on facts or law. He or she need only "reasonably believe" that the landholder is committing a vegetation clearing offence or has committed a vegetation clearing offence.[18]

This is not the end of this incredible scheme. The authorised officer not only makes a summary conviction but is also empowered to enforce that conviction. Under s. 55(5) the authorized officer may "use reasonable force and take any other reasonable action to stop the contravention"; and to make matters worse for the landholder, the cost or expense of this enforcement may be recovered as a debt owing to the State.

The Act allows a limited appeal to the Magistrates' Court within 20 days against the decision to issue the compliance notice, but not on the existence of a reasonable excuse or on the penalty.[19] Contrast this with infringement notices under other laws. A speeding ticket or parking ticket is not a judgment of my guilt. If I ignore it, the police must charge me and have me convicted by a court after a fair trial. Not so the authorized officer, who may proceed to physically enforce his own order (compliance notice) without having to seek a judicial determination.

The *VMA* installs a process far more objectionable than the procedure that the High Court in *Brandy's Case*[20] condemned for offending the separation of powers in the Commonwealth Constitution. The fact that State Constitutions have no explicit separation of powers does not make this scheme any less reprehensible.

The powers of the authorized officer recall the authority of the infamous Star Chamber. They combine legislative, judicial and executive powers in the one person. If this does not alarm our learned judges, lawyers, politicians and civil society leaders, Australian constitutionalism is in serious trouble.

Section 55 and the rule in *Kable's Case*

It is possible that, despite the absence of separation of powers in the

Queensland Constitution, the enforcement procedure of s.55 may not survive a constitutional challenge. I like to think that the High Court will regard this assault on the rule of law as at least equally dangerous to representative government as State free speech limitations it has condemned in cases such as *Theophanous v. Herald & Weekly Times Ltd*,[21] *Stephens v. West Australian Newspapers Ltd*,[22] and *Lange v. Australian Broadcasting Corporation*.[23] These rulings were based on the importance of the freedom of communication on public matters to representative democracy. Is not representative democracy similarly undermined when legislative, judicial and executive powers are combined in the hands of unelected officials who may abrogate the rights and liberties of citizens in ways that leave them with little recourse to the courts or Parliament?

As much as I hope that the High Court would recognise an implied separation of powers in the State Constitutions, I do not expect that to happen, given the position that the Court has historically held on the powers of State Parliaments. However, I have little doubt that the High Court has good grounds to invalidate the s. 55 procedure on the narrower principle established in *Kable v. Director of Public Prosecutions*.[24]

In brief, the principle in *Kable* declares that a State court must not be given non-judicial powers of a kind that are incompatible with that court's exercise of the judicial powers of the Commonwealth. In that case, the power to order the continued detention of a named prisoner after the end of his term of imprisonment was held to be inconsistent with the exercise of federal judicial power. Justices Gaudron, McHugh and Gummow emphasised the fact that State courts were parts of an integrated system of courts established by the Commonwealth Constitution, such that measures undermining public confidence in State courts would offend the Commonwealth Constitution's separation of powers. Gaudron J observed that the Act directed at Kable makes a mockery of the judicial process, and hence "weakens confidence in the institutions which comprise the judicial system brought into existence by Ch III of the Constitution".[25]

The question then is whether the enforcement provisions of s. 55 of the *VMA* involve the Queensland courts in a function that weakens public confidence in those courts in a way that is incompatible with their exercise of federal judicial power.

An appeal lies to the Magistrates' Court against a compliance notice. However, as previously mentioned, it is clear from a reading of s. 62 that the only question before the Magistrates' Court is whether the authorized officer "reasonably believed" that a vegetation clearing offence is being committed or has been committed. Whether or not the person had a reasonable excuse for non-compliance is not within the purview of the Magistrates' Court as the law is cast. The most liberal interpretation that we can give s.62 would only mean that the Magistrates' Court may consider whether the authorized officer had sufficient evidence to reasonably believe that a "vegetation offence is being committed or has been committed".

What is that evidence? It is evidence that the authorized officer or the department has gathered, but which has not been tested by impartial inquiry. Since the charge and the conviction are one and the same, the Magistrates' Court can only decide whether the authorized officer had reasonable cause to bring the charge. The decision that the Magistrate makes is not whether the

charge is proved, but whether the charge should have been made. This is not an exercise of judicial power. The appeal in effect is an appeal against the decision to charge.

In asking the Magistrate to decide whether the charge is warranted, the statute co-opts the Magistrate to an executive function – that of deciding whether a person should have been charged. It asks the Magistrate to step into the shoes of the authorised officer, and decide whether a compliance notice is justified on the untested evidence available to the officer. The procedure makes the Magistrates' Court an agent of the executive branch.

In sum, the statutory scheme uses the Magistrates' Court as an instrument or appendage of the executive arm of government, simply to provide respectability to a process that, at its best, is a projection of arbitrary power with no regard to natural justice or procedural fairness. It taints the Magistrates' Court and seriously undermines public confidence in the judicial system.

Under s. 77(iii) of the Commonwealth Constitution, the Parliament may invest federal jurisdiction in any State court. Parliament has vested federal jurisdiction in the Queensland Magistrates' Court by virtue of s. 39 of the *Judiciary Act* 1903. Hence the Queensland Magistrates' Court is part of the integrated federal judicial system as found in *Kable*. The provisions that taint it also taint the federal judicial system in a way that offends the principle in *Kable*.

Reversing the burden of proof

Division 2 of the *VMA*, dealing with evidence, effects a total reversal of the burden of proof in trials concerning tree clearance. Section 65 makes it unnecessary to prove that official acts are done within the authority of the Act. A certificate issued under s. 66B is deemed sufficient evidence of the accuracy of remotely sensed images and the official conclusions drawn from them.

The key issues in a tree clearing offence are:

- Whether a stated area is, or is likely to be, an area of remnant vegetation; and
- Whether in fact vegetation in a stated area has been cleared.

A certificate under s. 66B constitutes evidence of the above two matters. In short, the certificate makes it unnecessary for the prosecution to prove its case but necessary for the landowner to disprove it. This is a negation of due process in criminal and civil matters that is fundamental to civil liberty. Not content with this arsenal of prosecutorial weapons, the perpetrators of the *VMA* have even removed from land owners the defence of mistake of fact.[26] These provisions cumulatively deny landowners the basic safeguards of procedural justice available even to persons accused of the most heinous crimes.

Taking property without compensation

The *VMA* and other related legislation fail to provide compensation for the loss of property value that results from the imposition of land use restrictions. Under the *VMA* the State is not intervening to prevent private or public nuisances, in which event no compensation is owed. On the contrary, property values diminish because the State is limiting the property's use and enjoyment to serve what it considers to be the public interest in conservation. The State thus converts private property to public use and hence should compensate the

owner. The duty to compensate owners for property taken for public purposes is a principle of justice. The cost of public benefit must be met by the public, and not by individual owners whose property is taken.

If the Commonwealth limited land use for conservation purposes, it would amount to an acquisition of property for which just compensation must be paid under section 51(xxxi) of the Commonwealth Constitution. When the question arose in *Commonwealth v. Tasmania (The Tasmanian Dam Case)*,[27] only four of the seven Justices addressed the issue, the other three finding it unnecessary, having decided the case on other issues. Justices Mason, Murphy and Brennan thought that the restriction of land use, though limiting Tasmania's ownership rights, did not result in the Commonwealth acquiring any property. Justice Deane on the contrary found that the absence of a material benefit for the Commonwealth did not prevent the conclusion that there was an acquisition, holding that the property acquired was the benefit of the prohibition.[28]

In the later case of *Commonwealth v. Western Australia*,[29] the High Court considered whether the issue of a Commonwealth authority to carry out defence practice on land within the State amounted to an acquisition of property in the minerals reserved for the State. The majority held that frequent or prolonged authorizations could conceivably amount to an acquisition of property in the minerals, but dismissed the appeal on the ground that there was no evidence of the frequency of the authorizations. Justices Callinan and Kirby, on the contrary, considered the extent of authorization to be irrelevant, and held that there was an acquisition of property. In so deciding, Justice Callinan stated that:

> "The Declaration [made in this case] may be compared to a restrictive covenant; if one person (for his or her own reasons) wishes to sterilize or restrict the usages of another person's land, the latter, in a free market place, would demand recompense and the former would be expected to pay it".[30]

Despite the lack of clear judicial authority on this issue, there is a strong argument that the restriction of land use for conservation purposes is an acquisition. The government is taking away a property right to achieve one of its purposes. The purpose need not be direct material use of the property. In sequestering the trees, the government is sequestering carbon that offsets the carbon emissions by other groups of industrialists and consumers. The government acquires the carbon rights to the trees that are saved by its prohibition, that it then tacitly passes on to others.

Section 51(xxxi) of the Commonwealth Constitution is not binding on the States. However, if a State in acquiring property is acting as the agent of the Commonwealth to execute a Commonwealth purpose (such as observing the Kyoto targets as a matter of foreign policy), it is conceivable that the just terms requirement will apply, particularly if the Commonwealth is granting funds for this purpose under s. 96 of the Constitution.[31]

Apart from constitutional principle and the demands of justice, the denial of compensation is damaging to good governance. The denial of compensation eliminates the discipline that the price mechanism brings to decision making. A government that need not compensate owners has less reason to "get it right" than a government that must. The uncoupling of power and financial responsibility allows governments to seek short term political dividends. It promotes politics and ideology over facts and science.

Conclusion

The *VMA* was supposed to combat environmental vandalism, but its provisions have vandalized Australia's cherished constitutional principles. The principles that have been sacrificed are not merely principles of constitutionalism and justice, but also of good governance. Parliamentary scrutiny and public discussion of delegated legislation, natural justice and procedural fairness, evidentiary safeguards, and compensation for government takings militate against arbitrary and erratic government. All these precautions are subverted by the *VMA*.

The *VMA* epitomizes the current philosophy and methodology of environmental regulation in Australia. It is a model that is replicated at State and federal levels. It is not clear at all that these extraordinary regulatory schemes are benefiting Australian society. As discussed in this paper, there is a strong body of scientific opinion that challenges the utopian aspirations and the efficacy of this model to promote the health of the environment.

The reason why these dissenting voices are largely disregarded by governments, media and academia is not easy to fathom. It is possible that environmental fundamentalism has become endemic in these key sectors as a result of several decades of unchallenged proselytizing. It is also the fact that sober reflection is no match for apocalyptic alarmism in the contest for public opinion. Politicians follow the currents of opinion. Until public opinion is swayed to the cause of a more open and objective debate about conservation, we are unlikely to see a change in political will, and constitutional government in this country, and the well-being of Australian society, will remain in serious jeopardy.[32]

Endnotes:

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5. B Lomborg, *The Skeptical Environmentalist: Measuring the Real State of the World*, Cambridge: Cambridge University Press.
6. *Ibid*., 318.
7. W H Burrows, B K Henry, P V Back, M B Hoffmann, L J Tait, E R Anderson, N Menke, T Danaher, J O Carter and G M McKeon, (2002), *Growth and carbon stock change in eucalypt woodlands in northeast Australia: Ecological and greenhouse sink implications*, in 2002:8 *Global Change Biology*, 769-784.
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9. Bill Burrows (2004), unpublished speech to the 2004 conference of Property Rights Australia.
10. J Marohasy (2004), *Time to Re-define Environmentalism*, in *Institute of*

Public Affairs Review, 56:4, 29-32 at 29-30.

11. *Legislative Standards Act* 1992, s. 4(2) and (3).
12. *Vegetation Management Act* 1999, s. 11(2).
13. *Ibid*., s. 10(7).
14. *Ibid*., ss. 17(6) and 18(4).
15. Under s.49 of the *Statutory Instruments Act* 1992, subordinate legislation must be tabled in Parliament, and under s. 50 may be disallowed.
16. Maximum penalty 1,665 penalty units ($124,875): s. 55 of the Act.
17. Section 118B of the *Penalties and Sentences Act* 1992.
18. *Vegetation Management Act* 1999, s. 55(1).
19. *Ibid*., s. 62.
20. (1995) 183 CLR 245.
21. *Theophanous v. Herald & Weekly Times Ltd* (1994) 182 CLR 104.
22. *Stephens v. West Australian Newspapers Ltd* (1994) 184 CLR 211.
23. *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520.
24. *Kable v. Director of Public Prosecutions* (1995-1996) 189 CLR 51.
25. *Ibid*., at 108.
26. *Vegetation Management Act* 1999, s. 67B.
27. *Commonwealth v. Tasmania* (1983) 158 CLR 1.
28. *Ibid*., at 286-7.
29. *Commonwealth v. Western Australia* (1999) 196 CLR 392.
30. *Ibid*., at 488.
31. *Pye v. Renshaw* (1951) 84 CLR 58, 83.
32. The author gratefully acknowledges the comments of Dr Jennifer Marohasy, Director of the Environment Unit of the Institute of Public Affairs.