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Tensions between public environmental regulation and private property interests: the case of land clearing in New South Wales

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On 29 July 2014, Ian Turnbull, the patriarch of a farming family from northern New South Wales, allegedly shot and killed Glen Turner, an officer of the NSW Office of Environment and Heritage. Turnbull had been investigated and fined previously by the department for illegal land clearing. According to media reports, Turnbull's family claimed that he had become a "broken man", himself a victim of the government's "aggressive stance", and had "battled" legal proceedings regarding illegal vegetation clearing on his property.¹

Turner's tragic death, and Turnbull's state of mind, have been unashamedly politicised by federal, state and local government figures who have sought to conflate the alleged murder with the debate over vegetation laws. Certainly, vegetation laws have been the subject of political controversy in several Australian states for well over a decade. Although different states have different laws, and changes of state governments sometimes involve changes to vegetation laws, ultimately vegetation laws have become a fixture on the Australian legal landscape. Trying to draw a causal connection between vegetation laws and the alleged murder of a government officer is not only insensitive and inflammatory, it is also indicative of a deep misunderstanding of Australian laws and their interaction.

Background

Agriculture dominates the Australian landscape, occupying 60% of the continent,² yet it contributes only 2–3% of the national GDP.³ The legal regulation of this vast private estate has changed radically from colonial times, when land grants were issued on the condition of land clearing and minimum stocking rates.⁴ In the 21st century, environmental regulation of privately held land subject to agricultural use is concerned to control land clearing with a view to limiting environmental degeneration and facilitating landscape remediation. There are clear indicators, however, of contemporary regulatory failure not only in persistent instances of illegal land clearing,⁵ but also in the growing tensions between the regulators and the regulated regarding the legitimacy of land clearing law.⁶

According to the federal Minister for Agriculture, Barnaby Joyce, such tension is underpinned by what is perceived to be the erosion of property rights: "People who owned a certain asset, this time trees, had it taken off them by the government without payment and it created animosity towards the government."⁷ NSW Deputy Premier Andrew Stoner has said: "The native vegetation laws have been a sore point in farming communities since they were introduced by a Labor Greens alliance in 2003."⁸ In response to these tensions, the NSW government is currently reviewing its land clearing laws. Critics claim and hope that the review will recommend greater freedom on the part of landholders to clear their lands, which are presently subject to the permission provisions of the Native Vegetation Act 2003 (NSW).

Vegetation laws arouse tensions between the regulator and the regulated because they operate at the intersection of private property rights and public environmental law. Environmental laws have developed over time in response to the inadequacy of various existing laws related to land and natural resource ownership and use. They are designed to prevent environmental degradation and to protect public health.⁹ Environmental laws regulate land use activities that were previously unregulated, and in many cases restrict and even prohibit activities that were previously incentivised by existing laws, especially property laws.

"For what is land but the profits thereof?"

Based on a particularly Anglo-European and arguably outdated view of the environment as a suite of economic resources articulated succinctly above by Lord Coke in 1628,¹⁰ property law has developed to facilitate economic "growth" through profit-oriented uses of land. Property rights are also associated with the political freedom of private individuals from the government. In recognition of the importance of property rights, the Australian Constitution requires the government to provide compensation for any property it acquires from a private citizen on "just terms".¹¹

The responses to the alleged murder of Glen Turner from the accused's family, the federal Minister of Agriculture, the NSW Deputy Premier and the local mayor indicate that environmental laws are perceived to threaten and even violate property rights and the political freedom and economic profits associated with those rights. This account suggests that property rights are or should be unfettered, and that environmental regulation somehow illegitimately diminishes or "steals" these rights. Indeed, Minister Joyce's reference to payment for "taking" property rights "off" landholders taps into the "takings" discourse that is well-established in the jurisprudence of the United States, in which the property rights movement argues for compensation for a range of environmental regulation of private land. Professor Joseph Sax's analysis of the message of this movement is that "the public must buy back the right to maintain the remaining elements of biodiversity from owners who have a property right to destroy it".¹²

Property rights are not absolute

In Australian law, private property rights have never been absolute and unfettered by other laws. Indeed, the very heart and soul of property rights at Australian law is their existence in relation to competing rights and interests. While the Constitution is often cited as proof of the priority of property rights in Australian law, the reason for the just terms provision is forgotten or misunderstood. As property lawyers know well, that provision was created in acknowledgment of the Crown's prior and ultimate legal and sovereign prerogative to grant and acquire private property. Notwithstanding the academic debate between High Court Justices Brennan and Gummow as to whether the doctrines of tenures and estates have enjoyed a "fascination beyond their utility"¹³ in Australian law or whether they constitute its very "skeleton",¹⁴ the fact remains that these doctrines continue to form the basis of all landholding in Australia, excepting native title.

Australian environmental laws indicate the government's prerogative and arguably also its responsibility to balance private rights with public interests in public health and environmental protection. Historically, government grants of private land in New South Wales were often subject to conditions requiring vegetation clearing and/or the grazing of livestock. The environmental consequences of these 19th-century ideas of land use and ownership are precisely what environmental laws are designed to address.

The Native Vegetation Act established a system that restricts, prohibits and authorises vegetation clearing primarily through reference to the assessment of associated environmental impacts. From an environmentalist viewpoint, it arguably sets appropriately conservative

processes in place to achieve the objectives of the Act. However, scholarly studies and media commentary regarding compliance with and resistance to the Act indicates that a cultural shift may be required. Robyn Bartel and Elaine Barclay identify a significant obstacle to the effectiveness of the Act in the inadequate understanding of motivations for regulatory compliance and resistance in the agribusiness sector.¹⁵ Journalist Elizabeth Farrelly puts it more bluntly:

Sure, once upon a time, farmers were paid to clear land. But that doesn't mean they should now be paid to. It's the old attitudes, not the old trees, that must die.¹⁶

Last year, the Native Vegetation Regulation 2013 (NSW) (which supplements the 2003 Act) was introduced to "strike the right balance between sustainable agriculture and protecting the environment". In effect, it expands the categories of exemptions from permission to clear native vegetation and restores and re-allocates some decision-making responsibility to private proprietors. It is predicted that there will be further reform at the conclusion of the current NSW Biodiversity Legislation Review. Members of Ian Turnbull's family have said that they hoped the tragedy would "prompt change to the Native Vegetation Act to give farmers more say in the clearing of their land".¹⁷ However, it is hard to envisage a change to the Act so radical that it would allow the clearing of 3402 trees from late 2011 to early 2012 and a suspected further clearing of up to 500 hectares since Turner's death in July 2014.¹⁸ By contrast, the family of Glen Turner argued in its submission to the Review that any "amendment to the legislation subject to this Review should be made only based on clear, unemotional, independent and objectively applied science", rather than to accommodate "those with vested short-term interests".

Legislating protections recommended by scientific research is important in regard to private land use because, as US legal scholar Larissa Katz has pointed out: "[O]wners are not required to be expert. They are not required to have good reason for their decision."¹⁹ And yet their decisions "bind us all".²⁰ Bartel has argued that vernacular knowledge — by which is meant local, place-based knowledge held by natural resource managers, including farmers — is too readily discounted in a debate that opposes scientists and farmers. Bartel's empirical research of private landholders' attitudes to land management and land clearing laws over several years reveals a more complex picture than the frame initially suggests. This research presents a strong case for deeper less disingenuous community consultation in law reform processes not only on the basis of participatory models of regulatory theory, but also on the basis of

the existing environmental knowledge of private landholders and the heterogeneity of environments in New South Wales over which the non-differentiated legislation applies.

However, ultimately, it is important to remember that property rights in land are attached neither to responsibility for the land nor to expertise in associated uses of a specific parcel of land, vernacular or scientific. Yet, because “the integrity of ecological systems requires consideration of scales that are greater than individual landowners or individual tracts of land”,²¹ the challenge of environmental law is not diminished by the recent politicised debate about land clearing.

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Footnotes

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21. L Butler “The pathology of property norms: living within nature’s boundaries” (1999–2000) 73 *Southern California Law Review* 927 p 986.



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