REGULATION OF RURAL LAND USE
COERCION OR CONSENSUS?

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This paper examines an activity which lies at the root of many of the environmental problems associated with rural land use: the destruction of vegetation by private landholders, frequently referred to as land clearing where significant areas are involved. The most obvious of the problems which stem from vegetation destruction are soil erosion and associated sedimentation of watercourses, dryland salinity,[2] and the destruction of plant species/communities and wildlife habitats.[3] The paper explores the range of regulatory strategies available to the policy-maker attempting to control the destruction of vegetation and then goes on to examine in some depth the "form"[4] or "design"[5] of the existing legislation in New South Wales and its implementation in practice by the regulatory agencies concerned.

Issues of environmental regulation have traditionally been examined in the context of industrial pollution control. Parallels have been observed between this and occupational health and safety regulation, especially in relation to the law enforcement strategies pursued by agencies.[6] Both have been characterised as forms of "protective legislation", to be distinguished from "economic regulation" which is concerned with restrictions on market entry and with the regulation of charges.[7]

At first sight the issues of industrial pollution and vegetation destruction would appear to have little in common with each other. A closer analysis from the perspective of welfare economics, carried out in the following section, shows that this is by no means necessarily true at the theoretical level, although the argument does lack intuitive appeal. Even when it comes to practical legal regulation there are certain superficial similarities between the forms taken by the respective regulatory regimes as they have traditionally existed in New South Wales. Both use the language

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1 Paper delivered at a Public Seminar entitled "Occupational Health and Safety and Environmental Protection: Current Policies and Practices in the Social Control of Corporate Crime", convened by the Institute of Criminology, 25 October 1989

2 Soil Conservation Service of New South Wales, **Land Degradation Survey, NSW 1987-88** (1989)

3 Benson, J.S., "The Effect of 200 Years of European Settlement on the Vegetation of New South Wales, Australia: An Overview." Paper presented at the XIVth International Botanical Congress, West Berlin, July 1987

4 Cranston, R., **Law, Government and Public Policy** (1987) pp 149-152; Colebatch, H.K., "Regulation and Paradigms of Organisation: Six Theses" in Tomasic, R. and Lucas, R., **Power Regulation and Resistance** (1986) p 19

5 Cranston, R., "Regulation and Deregulation: General Issues" in Tomasic, R., **Business Regulation in Australia** (1984) pp 23-27

6 Vogel, D., **National Styles of Regulation: Environmental Policy in Great Britain and the United States** (1986) p 196; Hawkins, K., **Environment and Enforcement** (1984) p 3

7 Kagan, R.A., "On Regulatory Inspectorates and Police" in Hawkins, K. and Thomas, J.M., **Enforcing Regulation** (1984) f.n.5

of criminal law. Both provide exemption for those who obtain prior approval and comply with relevant conditions. But a closer examination of the existing package of vegetation controls shows that tensions are beginning to develop as the focus moves away from a historically narrow concern with preventing soil erosion towards a broader interest in protecting wildlife habitats and representative or remnant vegetation communities. More recent legislation is beginning to emphasise the role to be played by civil proceedings designed to restrain and remedy rather than criminal prosecutions with their emphasis on punishment, and particularly deterrence. An even more radical initiative appears to abandon the coercive form altogether, placing reliance instead on negotiations with individual landholders culminating ideally in binding agreements relating to the use to which land is to be put, if landholders can be persuaded that this is in their best interests. In New South Wales this form of regulation by agreement is currently of no practical significance but in other jurisdictions it has become a fine art.

This is the language of contract and covenant rather than crime and punishment. Some would see it as capitulation rather than regulation. At the very least it poses fundamental challenges to the definition of vegetation destruction as a criminal offence - challenges which few would dare to contemplate making in relation to industrial pollution, where current pressures are rather in the direction of enhancing its criminality.[8] It raises questions, then, about the appropriate limits of the criminal law and the various forms of regulation which have traditionally existed under its broad umbrella. Perhaps even more fundamentally, the issue of vegetation conservation raises questions about the limits, if any, to the rights of user stemming from loose notions of "private property" in land, which have such powerful ideological significance in Western democracies.[9]

THE ISSUE OF VEGETATION CONSERVATION

Demands for vegetation conservation raise not one but a number of issues for the regulator. They turn on the precise purposes to be served by conservation. These include:

- preservation of plant species/communities and wildlife habitat;
- conservation of scenic/amenity values;
- prevention of soil erosion and salinity;
- enhancing farm productivity through the provision of windbreaks and shelter.

The unregulated market is best equipped to deal with impacts which have a direct effect on any particular landholder's production process. Removal of vegetation which provides windbreaks and shelter will lower the productivity of land

8 See the **Environmental Offences and Penalties Act** 1989 (NSW)

9 A detailed discussion of the ideology of private property is beyond the scope of the present paper. See McAuslan, J.P.W.B.M., **The Ideologies of Planning Law** (1980) pp 2-4; Bradsen, J.R., **Soil Conservation Legislation in Australia** (1988) pp 5-9, 12-17. On the changing concept of property, see Macpherson, C.B., **Property: Mainstream and Critical Positions** (1978) pp 1-13

and correspondingly reduce its value in the market place. So too will the immediate effects of vegetation destruction in terms of soil erosion and salinisation. There is therefore a market incentive built in to ensure that an optimal level of vegetation is retained for these purposes.[10] In practice, however, the market may not operate to produce the efficient outcome that the theory would suggest. This is both because of historically inadequate information about these values of vegetation conservation, and short-run hedonism which leads to a lower level of concern with long-term effects, especially those which may not become apparent in the decision-maker's life time.

The analysis changes fundamentally once it is recognised that the effects of soil erosion and salinity resulting from the removal of vegetation are rarely purely local. They spill over into common property resources in the form of wind-blown dust or the siltation or salinisation of watercourses. In these circumstances a similar analysis to that used in the context of industrial pollution control is appropriate.[11] The spillovers from the process of agricultural production into common property resources are costless externalities. As a result the production process is being effectively subsidised and a greater quantity of product eventuates than is optimal. This is the classic instance of market failure. Some form of regulation is justified to ensure that the landholder internalises these external costs. But the forms of regulation available as a response to industrial point-source pollution cannot be adapted to deal with this situation. The pollution is diffuse and cannot be measured against discharge standards or subjected to pollution charges. In these circumstances there is no alternative but to regulate the land use directly, starting with the initial proposal to destroy vegetation.

A more complex analysis is required where the objective is to preserve plant communities and wildlife habitats or to conserve scenic values. From one perspective, we are no longer concerned with spillovers into common property resources - the costs associated with these side-effects of the production process have been effectively internalised by the assignment of private property rights. But this raises fundamental questions about the nature of private property and, specifically, the ambit of the land use rights associated with it. Have landholders the right to destroy species of plants and animals when, even viewing the situation from a

10 See the example in Baumol, W.J. and Oates, W.E., **Economics, Environmental Policy and the Quality of Life** (1979) p 114

11 The literature here is immense. For an introductory analysis, see Baumol and Oates, **ibid.**; Seneca, J.L. and Taussig, M.K., **Environmental Economics,** (3rd ed. 1984); Stiglitz, J.E., **Economics of the Public Sector** (2nd ed. 1988); Burrows, P., "Government Intervention" in Richardson, G., Ogus, A. and Burrows, P., **Policing Pollution: A Study of Regulation and Enforcement** (1982); Kneese, A.V., **Economics and the Environment** (1977)

narrowly anthropocentric perspective,[12] they may contain vital sources for future generations as gene pools or sources of pharmacological products?[13] Or can it rather be argued that these are common property resources which landholders "pollute" through destruction and mismanagement in exactly the same way as industrial polluters pollute water and the air-shed? The common law may have given landholders rights of unrestricted user by default, but Parliament has long since taken over where the common law courts left off developing the law of nuisance[14] and has frequently asserted its right to regulate private land use without offering compensation.

Even if rights of unrestricted user are allowed to landholders, the market will still fail to produce the optimum level of vegetation conservation.[15] One reason for this is that land holder's lack the information to enable them to fully appropriate in the market place the value of land kept for nature conservation purposes. They have, for example, no means of determining the amount which people would be prepared to pay to keep open the possibility that, in the future, the vegetation in question may be found to have commercial utility ("option values"). Even if they did there would be significant "transaction costs" associated with any attempt to discover and get together those who would be prepared to enter into market transactions involving areas of vegetation. And because of the "public goods" character of vegetation conservation, there would be a "freeloader" problem arising from the difficulties involved in excluding those not prepared to pay from enjoying the benefits of conservation. More fundamentally, Krutilla and Fisher have argued that the free market is simply incapable of dealing with environmental goods that technology simply cannot reproduce.[16]

The response to this market failure, however, is by no means clear. If we concede that there are no common property rights in vegetation on privately owned land then it seems that state intervention to protect vegetation must be accompanied by some form of compensation. The analysis is quite different if we regard particular characteristics of vegetation as being part of the common heritage of human kind.[17] In these circumstances, it would be quite appropriate for the state to regulate interference without providing compensation.

In practice, most regulatory initiatives aimed at the conservation of vegetation will have a number of objectives and this further complicates the analysis. Even though, for example, the provisions of the Soil Conservation Act 1938 dealing

12 Boer, B., "Social Ecology and Environmental Law" (1984) 1 **EPLJ** 233; Tribe, L.H., "Ways Not To Think About Plastic Trees: New Foundations for Environmental Law" (1974) 83 **Yale Law Journal** 1315

13 OECD, **Economic and Ecological Interdependence** (1982) pp 34-42

14 See especially **Kent v. Johnson** (1973) 21 **FLR** 177

15 The following points are made by Krutilla, J.V., "Conservation Reconsidered" [1967] **American Economic Review** 777. See also Krutilla, J.V. and Fisher, A.C., **The Economics of Natural Environments** (1975)

16 **id.** p 11 **et seq.**

17 As are whales, for example

with "protected land" may have had their origins in a concern with the prevention of soil erosion, it is quite clear that, as a result of later accretions to the legislation, its objectives now go beyond this and include the preservation of wildlife habitat and plant communities.[18] On top of this, there are a number of other considerations which have to be taken into account in designing appropriate regulations in this area, apart from dealing with market failure.

In the first place, the aims of vegetation conservation regulation will rarely be adequately achieved by mere restrictions. Usually some positive management activity on the part of the landholder will be needed. In the pollution control area we have not hesitated when it comes to placing obligations to install pollution control equipment upon those allowed to pollute, under threat of criminal sanction, even though the criminal law has traditionally sought to restrain rather than to oblige. A direct parallel to this would be a requirement to plant pasture to prevent soil erosion upon removal of vegetation. But in these cases the action required can be seen as part of the bargain under which the industrial concern or the landholder can proceed to engage in an activity from which they obtain direct benefits. The situation is very different where our objectives can only be met by the retention and management of the vegetation, as where they involve preservation of vegetation communities or wildlife habitat. In these circumstances, it is one thing to use a coercive form of regulation to prevent landholders from clearing, but quite another to insist that they manage the land by fencing it to keep off stock and controlling noxious weeds and feral animals, with no immediate financial benefit. Even if a coercive approach was to be adopted at the level of regulatory form it would not be an easy task to exclude the adoption of a compliance strategy, emphasising persuasion and bargaining, when it comes to implementation.[19]

Secondly there is no significant historical tradition of vigorous land use regulation in rural areas. We can take New South Wales as an example. Regulatory initiatives in the field of soil conservation in New South Wales stem from the 1930s, but even at the formal statutory level the policy was based primarily on persuasion and inducement rather than coercion. There never has been any criminal offence of causing soil erosion.[20]

In 1946, amendments to the *Water Act* 1912 required approval to be obtained, under threat of criminal sanction, before vegetation was removed in the immediate vicinity of rivers.[21] It was not until 1972 that these provisions were extended to cover steeply sloping land[22] and in 1986 to land mapped as being

18 Part IV, Division 2, discussed below

19 Hawkins, **op.cit. supra** n.6 pp 3-7, and see below

20 **Soil Conservation Act** 1938

21 **Irrigation and Water (Amendment) Act** 1946, s.2(1)(q). The licensing body was originally the Forestry Commission

22 **Forestry, Soil Conservation and Other Acts (Amendment) Act** 1972, s.6(h)

users being regulated, first by the courts through the law of nuisance and then through residential district proclamations,[24] interim development orders and planning scheme ordinances,[25] farming land was in the past typically zoned so as to free agricultural land uses from the need to get prior consent. It is only after 1980, with the coming into effect of the *Environmental Planning and Assessment Act* 1979 that we have begun to see environmental planning instruments zoning land so as to require consent for certain agricultural activities, such as intensive agriculture and land clearing in certain areas and even to prohibit them completely in especially sensitive areas.[26] Even then these are generous provisions protecting the present use to which the land is being put from any new regulatory requirements, and it is only since 1985 that these have been tightened up.[27]

Set against these very limited regulatory initiatives is a much stronger tradition of requiring those who purchased land from the Crown to effect "improvements" of a specified value[28] and the decision that ringbarking was an "improvement".[29]

This then is part of the context in which any new regulatory initiative must be set. What it means is that arguments asserting common property rights in vegetation on privately owned land or suggesting that landholders should be required to internalise the costs imposed by land degradation spillovers into the air and the water-shed are not going to be easily won. Indeed the scientific connection between land use and alleged spillover might itself be disputed. The connection between removal of vegetation and saline seepage some distance away on land which is an out-flow zone for the saline water table, or between vegetation removal, soil erosion and watercourse sedimentation, is far less obvious than that between a point-source emission and water pollution.[30] There are clearly going to be major difficulties in regulating behaviour where the dispute is not simply about how damaging the consequences are but, much more fundamentally, whether they are in fact "consequences" at all.

There are limits to what we can realistically expect to achieve through coercive forms of regulation in this area. We must constantly have in mind that whatever limited gains we might make in bringing a reluctant group into line by using legal mechanisms may not compensate for the resultant withdrawal of cooperation and the losses which this might produce through forms of behaviour which we could never hope to regulate effectively through the law. We have already noted, for example, the significant difficulties facing any attempt to go beyond land use

24 **Local Government Act** 1919, s. 309

25 **Local Government Act** 1919 Pt. XIIA, inserted in 1945

26 Farrier, D., **Environmental Law Handbook** (1988) pp 205-207

27 **ibid.** and **Baulkham Hills S.C. v. O'Donnell** (1987) 62 LGRA 7

28 Lang, A.G., **Crown Land In New South Wales** (1973) pp 138-140. On South Australia, see McPhail, I.R., and Dendy, T., "Biological Conservation in South Australia" (1989) 2(2) **Australian Biologist** 18

29 **Re Ross** (1913) 23 LCC 52

30 See Western Lands Commission, **Policy on Clearing in the Murray Geological Basin in the Western Division** p 3

never hope to regulate effectively through the law. We have already noted, for example, the significant difficulties facing any attempt to go beyond land use restrictions and to legislate for environmental management. In addition to this the problems of regulatory implementation stemming from the massive area of land involved, the limited population and the general cohesiveness of the communities, dwarf those faced by the State Pollution Control Commission in dealing with industrial pollution, considerable though these are.

REGULATING THE DESTRUCTION OF VEGETATION

The forms which regulations relating to the destruction of vegetation have taken in practice in different jurisdictions are diverse, reflecting the tensions identified in the previous section.[31] Some of them operate on a purely informal basis and probably result in no binding legal obligations even of a contractual nature. Others have a sophisticated legislative and administrative basis which has been fine-tuned over a number of years. The regimes in South Australia and the United Kingdom fall into the latter category. They provide interesting points of contrast with each other and with the New South Wales provisions which will be examined in the next section.

South Australia

The current position in South Australia has been reached after a period of trial and error.[32] The original controls in the *Soil Conservation Act* 1939 required written notice to be given to the Soil Conservator of an intention to clear land where substantially the whole of the natural vegetation remained, and compliance with Ministerial directions relating to protection of trees, under threat of criminal penalties.[33] However, in practice the concern was solely with the prevention of soil erosion[34] and enforcement was patchy.[35] Then, in 1980 this approach was supplemented by a fundamentally different scheme based not on coercion through criminal law but on voluntary agreement.[36] The Minister can enter into a heritage agreement where he or she considers that an item should be preserved or enhanced having regard "to its aesthetic, architectural, historical or cultural value or interest".[37]

31 For a general survey, see Thackway, R. and Stevenson, P., **Nature Conservation Outside Reserves**, ANPWS Report Series No.11 (1989)

32 The literature is extensive: Fowler, R.J., "Vegetation Clearance Controls in South Australia - A Change of Course" (1986) 3 **EPLJ** 48; Chatterton, B. and Chatterton, L., "Conserving Native Vegetation on Private Farms in South Australia" (1986) 14(4) **Habitat** 9; Dendy, T. and Harris, C., "South Australian Heritage Agreements: A Progress Report" **Heritage Australia**, Autumn 1988 p 45; McPhail, I.R., and Dendy, T., "Biological Conservation in South Australia" (1989) 2(2) **Australian Biologist** 18; Native Vegetation Authority, **Native Vegetation Management in South Australia**

33 **Soil Conservation Act** 1939 ss.12a (repealed in 1984) and 13

34 Fowler, **op.cit. supra** n.32 at 49

35 Chatterton and Chatterton, **op.cit. supra** n.32

36 **South Australian Heritage Act** 1978 Part IIIA

37 Section 16a(1)(c)(i)

Upon registration, the agreement "runs with the land" in the same way as restrictive covenants do at common law, by binding successors in title to the person originally entering into the agreement.[38] But unlike restrictive covenants,[39] heritage agreements can oblige the landholder to carry out positive management activities as well as imposing land use restrictions.[40] In return the Minister offers, as inducements, grants to reimburse the cost of local government rates and stock-proof fencing.[41] There is no compensation for lost productivity or decline in the value of the land.

In practice, the inducements have not been sufficient. Fowler has commented:

> ... it had become clear by 1983 that the concept was attractive only to those landholders with an existing, strong commitment to vegetation retention. Landholders who proposed to clear land ... proved unwilling in the vast majority of cases to enter into a heritage agreement or to modify or abandon their proposals in any way.[42]

At this point the Government went to the opposite extreme and, without any prior consultation, attempted to control the clearing of native vegetation through the planning system. Planning consent was required and if it was not obtained a criminal offence was committed.[43] There was no mechanism for ensuring that positive management activities were carried out. This system buckled under the opposition which stemmed from administrative delay and demands for compensation[44] and substantially collapsed following a High Court decision which gave a generous interpretation to the provisions in the legislation which protected from regulatory requirements the "existing use" to which land was being put.[45] But of much more significance from the point of view of the policy debate about appropriate regulatory strategies is the fact that in the two years following the introduction of these new, ostensibly coercive, controls, over 80 per cent of the applications dealt with were approved, though usually subject to conditions requiring the retention of some vegetation.[46] Fowler suggests that in the short term these controls may have actually *accelerated* clearance. From this it is clear that criminal prohibitions subject to licence exceptions are only as coercive as the policy pursued by the licensing agency permits.

The upshot of the failure of this regulatory initiative was the *Native Vegetation Management Act*, 1985. This maintains the criminal prohibition on the clearance of native vegetation without prior consent, but owners of land who are refused consent or are restricted by conditions attached to a consent, can insist on

38 Section 16b(3)
39 **Haywood v. Brunswick Permanent Benefit Building Society** (1881) 8 QBD 403
40 Section 16b(1)(a)
41 McPhail and Dendy, **op.cit. supra** n.30 at 22
42 Fowler, **op.cit. supra** n.32 at 49
43 **Planning Act** 1982 ss.46, 47. See Fowler, **id.**
44 McPhail and Dendy, **op.cit, supra** n.32 at 23; Fowler, **ibid.**
45 **Dorrestijn v. SA Planning Commission** (1984) 59 **ALJR** 104: Fowler, **ibid.**
46 McPhail and Dendy, **op.cit. supra** n.32 at 23; Fowler, **ibid.**

the Minister entering into a heritage agreement.[47] Once such an agreement has been concluded, the landholder is entitled to the payment of "a sum of money",[48] based on "the diminution (if any) in the market value of the land resulting from the Authority's decision".[49]

There are a number of exceptions to this compensation requirement. In the first place it does not cover those acquiring land on or after a specified date.[50] Those falling into this category can be denied permission to clear without payment of compensation, although they can still insist on the Minister entering into a heritage agreement in order to obtain tax and rate concessions. All that this may mean is that existing landholders will be motivated to secure compensation by making an application for permission to clear to make up for any decline in market value stemming from this exception. Secondly, no compensation is payable in respect of land which is not "suitable, after clearing, for agriculture on a permanent basis".[51] Thirdly, if the area of land affected by restrictions is 12.5 per cent or less of the total area of the holding (**not** the area of vegetation), the Minister is not legally bound to make any payment.[52] If the area exceeds 12.5 per cent, the payment due can be calculated in such a way as to take into account only the area in excess of the 12.5 per cent.[53]

Statistics show that there has been a significant tightening up under the new regime when it comes to the granting of approvals. In terms of the total area for which applications have been made since January 1986 involving broadacre clearing, over 93 per cent has been protected by an outright refusal.[54] On the other hand it appears that even the offer of compensation has not been sufficient to persuade landholders to enter into management agreements.[55] Only just over 44,000 hectares are protected by heritage agreements stemming from a refusal to grant approval to clear,[56] but in the 1987-88 financial year alone refusals covered over 68,000 hectares.[57] In response to this, administrative arrangements have been made to make the compensation package even more generous. The current position is that, where the area of vegetation to be protected is greater than 12.5 per cent of the holding,

47 Section 27(2)
48 Section 27(1)
49 Section 28(1)
50 12th May 1983: s.27(6)(a)
51 Sections 26(1) and 27(6)
52 Section 26(6)(d)
53 Section 28(2) In other words, the landholder is expected to donate 12.5 per cent of his holding for the purposes of vegetation conservation.
54 **Annual Report of the Native Vegetation Authority for 1987-88**, Appendix 2
55 McPhail and Dendy, **op.cit. supra** n.32 at 24
56 **op.cit supra** n.54 at 11
57 **id.** Table 3

compensation will be given for the whole area if clearance is refused solely on biological grounds or a landholder suffers extreme economic hardship because of the clearance controls. Where the native vegetation is less than 12.5 per cent of the holding, compensation will now be paid if the vegetation is of outstanding conservation significance.[58] Voluntary heritage agreements continue to be available, but only a few are concluded in practice.[59]

United Kingdom

Under section 28(1) of the *Wildlife and Countryside Act* 1981 it is the *duty* of the Nature Conservancy Council to notify, among others, the owner and occupier of any land which it believes is of "special interest by reason of any of its flora, fauna or geological or physiographical features". These areas are known as "sites of special scientific interest" (SSSIs). In the notification, the Council must specify the characteristics of the land which make it of special interest and any operations which it considers would be likely to damage them.[60] The position then is that while the notification is in force,[61] a landholder who wishes to carry out any of the specified operations must first serve notice on the Council. If the Council refuses consent, the landholder cannot proceed for a period of four months, under threat of criminal prosecution, although the maximum fine is only 1,000 pounds and those carrying out "emergency operations" have a defence.[62] During this period the Council must attempt to persuade the landholder to enter into a voluntary agreement to secure the long-term protection of the land.[63] If it cannot manage to do so, the landholder can go ahead unless the Minister intervenes and makes what is known as a "nature conservation order". There are restrictions on the use of such orders, however. If the purpose is to conserve flora, fauna, geological or physiographical features, the land must be of "special interest" and "national importance". The latter requirement is only dropped where the aim is to secure the survival in Great Britain of a plant or an animal, or to comply with an international obligation.[64] The effect of such an order is that the landholder must again serve notice of any intention to carry out damaging

58 Native Vegetation Management Fact Sheets 1 and 2/1987

59 **op.cit. supra** n.54 at 11

60 Section 28(4)

61 After amendments to the **Act** made by the **Wildlife and Countryside (Amendment) Act** 1985, the notification comes into force immediately but the landholder must be invited to submit comments/objections and the Council has nine months in all, from the date of notification, to decide whether or not to confirm it: ss.28(2), 28(4A)

62 Section 28(5)-(8))

63 Under s.16(1) of the **National Parks and Access to the Countryside Act** 1949 or, more usually, under s.15(1) of the **Countryside Act** 1968

64 Section 29(1)-(2). The Council believes that all SSSIs serve a national function and its policy is to seek an order whenever this is the only means of protecting an area. But in 1984/85 the Minister refused an order in three cases: Nature Conservancy Council, 11th Report at 15-16. Three orders were made in 1986/87:13th Report at 15-16

operations which have been specified, and the Council then has a further three months to carry out negotiations, but it must pay compensation for any resulting loss of market value during this period.[65] This period of three months is extended if the Council offers either to purchase the land or to enter into a management agreement. But it will still ultimately terminate twelve months from the date when the landholder served the notice or three months from the date the offer is rejected or withdrawn, if this is longer. The only way in which the Council can safeguard the land beyond this period is by compulsorily acquiring it.[66]

In the long-term, therefore, regulation of activities in these areas rests on the so-called "voluntary approach". The underlying rationale for this has been explained by the Government in the following terms:

> Most of what we now think of as most attractive in the farmed landscape is the result of farmers responding to economic and technological pressures in the past. That the result is often so beautiful validates the Government's belief that there is not only no inherent conflict between farming and landscape but that the best guarantee of the future of Britain's landscape lies in the natural feel for it possessed by those who live and work in it. This is why the heart of the Wildlife and Countryside Act is fashioned from a policy of consent.[67]

Landholders who do not wish to subject their land to a regulatory regime can simply opt out. Only in the short term are their activities regulated through a version of criminal law,[68] and the fines here are small in comparison with the profits to be made.[69] Moreover, even this cooling-off period does not apply until landholders have been formally notified under the legislation. Although many sites of special scientific interest had been created under earlier legislation[70] which had offered only minimal protection, they all had to be renotified under the 1981 *Act* and were completely vulnerable up to this point.[71] There is evidence that significant numbers have been damaged or destroyed while awaiting renotification while others are harmed during the cooling-off period. In 1984/85, for example, eight sites were damaged sufficiently seriously to result in total or substantial denotification. Six of these were awaiting

65 Section 30

66 Section 29(3)-(7). During this further cooling-off period the landholder commits an offence punishable with a fine of up to 1,000 pounds if specified operations are carried out, unless they are emergency operations (s.29(8)-(9)). Upon conviction, the court can also order remedial measures to be carried out (s.31)

67 **Operation and Effectiveness of Part II of the Wildlife and Countryside Act, 1981**, The Government's Reply to the First Report from the Environment Committee, Session 1984-85, Cmnd.9522, para 2.3

68 The enforced waiting period under s.28 was not part of the original Bill and the amendment was attacked by farmers' organisations as constituting an abandonment of the voluntary approach: Lowe, P. **et al, Countryside Conflicts** (1986) p 145

69 Friends of the Earth, **Sites of Special Scientific Interest**: 1984 (July 1984) p 17

70 **National Parks and Access to the Countryside Act** 1949 s.23

71 On the process of renotification, see Adams, W.M., **Nature's Place** (1986) pp 112-126

renotification while the other two had been renotified. Another 225 sites or proposed sites had been subjected to short-term or partial damage. Although agricultural operations are by no means the only harmful activity, they were the largest single factor.[72]

In negotiating arrangements for long-term protection through management agreements, the Nature Conservancy Council follows the Financial Guidelines for Management Agreements issued under s. 50(2) of the legislation.[73] Landholders are offered a choice of methods of compensation - either a lump sum for a twenty year agreement, based on the decline in value of the agricultural unit as a result of the restrictions imposed, or annual payments for lost profits, adjusted periodically to take into account changing profit levels. In addition, compensation is to be worked out on the basis that farm capital grants would have been payable to the landholder if the operation had gone ahead, further driving up the cost of compensation.

In practice the majority of landholders opt for annual payments.[74] Shortly after the legislation came into operation there was evidence that the Council was adopting a cautious approach when it came to offering agreements because of limited funds and the inflated amounts involved. But the Government eventually committed itself to fund management agreements fully and the Council's budget has been increased in line with this commitment.[75] At present, areas are not being lost because of shortage of funds. The cost of agreements is actually declining because of the downward trend in agricultural profits.[76] But the system is always vulnerable to any Government which does withdraw funding support because agreements involve an ongoing financial commitment rather than once-off payments. Even lump-sum agreements are normally only for a twenty year period. The Council estimates that once the notification and management agreement process is completed, the ongoing annual cost of maintaining the system will be between 15 and 20 million pounds.[77]

A 1985 report commissioned by the Government on the compensation arrangements has identified a number of problems. In particular, there is evidence that landholders who would not otherwise have contemplated carrying out damaging agricultural operations are proposing to do so for the very purpose of securing a

72 Nature Conservancy Council, 11th Report, 1 April 1984-31 March 1985 p 12. See also Friends of the Earth, **Sites of Special Scientific Interest: 1984** (July 1984). More recently, as the notification and renotification programme nears completion, incidents of damaging agricultural activity seem to be diminishing to some extent only to be replaced by other kinds of damage - for example, the activities of public bodies: Nature Conservancy Council, 13th Report p 12.

73 Department of Environment Circular 4/83. See Adams, **op.cit. supra** n.71 pp 142-154; Council for the Protection of Rural England, **The Price of Conservation?** (October 1982) and **The Wildlife and Countryside Act Revisited** (October 1984) pp 3-5

74 Nature Conservancy Council, 13th Report p 12

75 Adams, **op.cit. supra** n.71 pp 148-153; Lowe, **op.cit. supra** n.68 pp 158-162; Friends of the Earth, **op.cit. supra** n.69 pp 13-17

76 Nature Conservancy Council, **op.cit. supra** n.74 p 12

77 **id.** 8

management agreement and the compensation accompanying it. This removes the risk element ordinarily associated with agriculture. But the Council cannot afford to call any bluff because of the risk of permanent damage. The compensation received might even put the landholder in a better position in the future to carry out damaging activities after the term of the agreement expires.[78]

Another problem is the issue of positive management of SSSIs. In its 1983 Report, the Council pointed out:

> Unfortunately the notion has gained currency that conservation equals inaction. The 1981 provisions, if interpreted negatively, reinforce this view.[79]

The Government's position on this was hardly supportive. After pointing out that s.15 of the *Countryside Act* 1968, under which most agreements are made, specifically allows for terms which provide for the carrying out of management activities in addition to those imposing restrictions, it continued:

> ... the purpose of [ss.28 and 29 of the 1981 Act] is principally preventative and the Government believes it would be inappropriate to extend this statutory scope to encompass positive conservation operations, as the provisions do not preclude the conclusion of management agreements incorporating such operations.[80]

In 1985, the Council stated that it tried to incorporate positive management provisions "whenever possible",[81] but in 1987 it still felt it necessary to point out that more emphasis needed to be placed on positive conservation management prescriptions.[82] Even if landholders can be induced to enter into such arrangements, they will lapse with a change of ownership because it is only land use restrictions which "run with the land".[83]

VEGETATION CONSERVATION IN NEW SOUTH WALES

Protected Land

Under the *Soil Conservation Act* 1938, it is an offence, punishable with a maximum fine of up to $10,000, to destroy, remove or injure trees (including shrubs and scrub) on "protected land" unless an authority has first been obtained from the Catchment Areas Protection Board.[84] "Protected land" includes:[85]

- the area within twenty metres of the bed or bank of any prescribed river or lake;

78 The Report by consultants Lawrence Gould is discussed in Friends of the Earth, **Towards the Demise of Part II of the 1981 Wildlife and Countryside Act** (June 1986)

79 9th Report p 4

80 **op.cit. supra** n.67 at para 3.22

81 **op.cit. supra** n.72 p 13

82 **op.cit. supra** n.74 p 13. The practical difficulties are discussed by Friends of the Earth, **op.cit. supra** n.69 p 17

83 **Countryside Act** 1968 s.15(4); **National Parks and Access to the Countryside Act** 1949 s.16(4)

84 Sections 21C, 21D

85 Section 21B

- steeply sloping land in notified catchment areas which is identified on maps prepared by the Soil Conservation Service;[86]
- land mapped by the Catchment Areas Protection Board as being, in its opinion, "environmentally sensitive or affected or liable to be affected by soil erosion, siltation or land degradation".

Until the introduction of the category of environmentally sensitive land in 1986,[87] the accepted view was that the legislation was primarily concerned with the prevention of certain forms of land degradation resulting from vegetation destruction. This was made quite explicit in the case of steeply sloping land in catchment areas by the circumstances in which such areas could be notified.[88] This focus on the prevention of land degradation rather than the conservation of vegetation is reflected in the Board's policy with regard to the issue of authorisations. Initial discussions with soil conservation field officers lead to some proposals being dropped,[89] but of the applications which are made, the vast majority are granted. Between 1 January 1980 and 30 June 1984, the last date for which figures are available, 730 permits out of 747 applications involving land along prescribed watercourses were granted and 1,176 out of 1,210 applications for steeply sloping land in catchment areas.[90] The emphasis is placed rather on the attachment of conditions designed to prevent land degradation. So, for example, clause 10 of the Standard Conditions for Permanent Clearing provides:

> Immediately on completion of clearing operations, disturbed and other bare ground shall be sown with pasture seed and fertilised, or otherwise revegetated.

With the introduction of Part V of the *Environmental Planning and Assessment Act* in 1980, a general duty was placed on the Board, in reaching its decisions to "take into account to the fullest extent possible all matters affecting or likely to affect the environment".[91] But this only requires a broader range of environmental factors to be taken into account, not that they be given particular weight, or indeed any weight at all.[92] Legally it would be quite acceptable for the Board to continue to focus on the prevention of land degradation rather than, the preservation of wildlife habitat and vegetation communities. Nevertheless the Board has given some weight to these factors, but again through the attachment of conditions rather than outright refusals. So, for example, 50 per cent of larger trees in

86 There are a number of exceptions: s.21C

87 **Soil Conservation (Further Amendment) Act** 1986

88 Section 20(1A), inserted in 1978, and later amended by the **Soil Conservation (Amendment) Act** 1985 Schedule 3(3)(a)

89 Interviews with the Executive Officer of the Catchment Areas Protection Board: 27 August 1989 and 6 October 1989

90 Report of the Catchment Areas Protection Board for the period 1 January 1980 to 30 June 1984

91 Section 111. Where an activity is likely to significantly affect the environment, the Board must require the landholder to submit an environmental impact statement: s.112. See generally Farrier, **op.cit. supra** n.26, chapter 14

92 **Parramatta Sports Club Ltd v. Hale** (1982) 47 LGRA 319

river red gum stands must be retained and a minimum of one such tree every fifteen metres along each side of the watercourse. Trees used for nesting by rare or endangered fauna must not be destroyed.[93]

Following the 1986 amendments, the Board has extensive powers to protect vegetation for purposes other than the limited one of preventing land degradation. Environmentally sensitive land can include, *inter alia*, areas containing rare or endangered flora or fauna, areas of archaeological or historical interest, bird breeding grounds, wetlands and even areas of purely scenic beauty.[94] It would, for example, be possible for privately owned rural areas to be mapped as environmentally sensitive on one of these grounds so as to override the provisions of a local environmental plan under which land clearing for agricultural purposes is permissible without the need to obtain prior development consent. So far, the mapping process has been completed for two areas[95] and there are encouraging signs that these powers are to be used in the broad way in which they were intended. An area of lignum has been protected at the request of the Department of Water Resources because of its significance as a bird breeding ground and the other area, where the primary concern was with mass movement, also contains some Aboriginal sites.[96] But it remains to be seen how frequently these very significant powers are used and whether, when it comes to applications for authorisations, the Board continues its existing approach of protecting land through the attachment of conditions rather than outright refusals.

Western Division

Under the *Western Lands Act* 1901, clearing of non-marketable trees (including saplings and seedlings) on areas of *leased* land in the Western Division exceeding half a hectare, is prohibited unless it is carried out in accordance with a clearing licence issued by the Western Lands Commissioner[97] or falls within one of a range of exemptions.[98] Breaches are punishable with a maximum fine of $10,000.[99] Applicants have a right of appeal from the Commissioner's decision to the Land and Environment Court, but in practice appeals are never undertaken.[100]

The specific aims of this regulatory regime are not spelt out in the legislation. Prior to 1985 the relevant provisions were actually contained in the *Forestry Act* 1916 but responsibility for issuing licences in the Western Division was delegated to the Commissioner by the Forestry Commission. The 1985 amendments contain no indication of what factors the Commissioner should take into account in reaching a decision. In practice, the economic viability of the proposal is not considered even

93 Standard Conditions for Authorities Issued in Respect of Trees on Protected Land Adjacent to Rivers and Lakes
94 Section 21B(6)
95 A public consultation process is currently being carried out in a third area where there are problems of dryland salinity
96 **supra** n.89
97 Section 18DB(1)-(3)
98 Western Lands Regulations c1.50C
99 Section 49(1)(a)
100 Section 18D(9)

though an error here may lead a landholder to seek approval to clear more land in an attempt to alleviate his financial situation. However, the assumption[101] is that, after 1980, the Commissioner has the same duty under section 111 of the *Environmental Planning and Assessment Act* as the Catchment Areas Protection Board to "take into account to the fullest extent possible all matters affecting or likely to affect the environment". The problem is that there has been no effective regional planning carried out in the Division and decision-making proceeds on a largely *ad hoc* basis, with no framework for considering cumulative impact.

Applications are routinely referred to the Forestry Commission, the Soil Conservation Service and the National Parks and Wildlife Service. The role played by the NPWS has been especially interesting. It has no direct statutory responsibility, but in practice the Commissioner has sought to place some of the onus of assessing the conservation value of particular areas upon the Service. As a result of concerns expressed by the Service that representative areas of certain vegetation associations were inadequately conserved in national parks (Coolibah/Black Box; Gidgee/Brigalow; White Cypress Pine) the Commissioner, in October 1986, imposed a blanket environmental impact statement requirement in relation to applications to clear these areas on the grounds that the activity was "likely to significantly affect the environment" within s. 112 of the *Environmental Planning and Assessment Act*.[102] In practice, this was effectively an embargo on clearing in these areas because landholders were unwilling to prepare environmental impact statements. The requirement was only intended to be temporary while a survey to identify specific areas to be retained was carried out, but this was never done and the blanket requirement appears now to have been dropped.

Two other policies adopted by the Commissioner, however, continue to impose significant restrictions on the area of land cleared. The first is the maximum allowable area policy under which the area of each property which can be cleared is limited according to the zone in which it is situated, the purpose of the lease, the purpose of the clearing and the size of the property.[103] The effect is to protect substantial areas, although not necessarily the areas which are significant in terms of environmental protection. It ignores the fact that properties are not uniform in terms of conservation significance. The purpose of the second policy is quite explicit. The Commissioner has recently announced[104] that because of the apparent connections between land clearing, rising water tables and dry land salinity in the Murray Geological Basin, it is "unlikely" that a clearing licence will be granted "unless the application includes sufficient information showing that the proposal has no likely significant adverse impact on the groundwater or salinity problems of the Basin". Even though it is made clear, as required by administrative law principles, that the Commissioner will continue to exercise his discretion in relation to individual applications, the reality of the situation is such that applications will no longer be

101 Farrier, **op.cit. supra** n.26 p221

102 **Western Lands Commission Newsletter** No.5, October 1986

103 **ibid.**

104 Western Lands Commission, Policy on Clearing in the Murray Geological Basin in the Western Division, 4 May 1989

made and there is effectively an embargo on clearing in this area. Again we can see the use made of environmental assessment requirements to impose what are in practice outright prohibitions. It is also clear, if we compare this approach with that taken by the Catchment Areas Protection Board, that the effects of regulation through licensing systems can vary dramatically depending on the precise policy pursued by the decision-maker. Such is the flexibility of licensing as a regulatory form. But it is important to remember that the land here, unlike much of the land dealt with by the Catchment Areas Protection Board, is held under leasehold rather than freehold title and this undoubtedly has an important bearing on the Commission's willingness to impose such broad ranging restrictions.

Environmental Planning

With the coming into operation of the *Environmental Planning and Assessment Act* 1979, the potential scope of what were now to be called environmental planning instruments was considerably expanded. Under s. 26(a) they can provide for "protecting, improving or utilising, to the best advantage, the environment". More specifically, under s. 26(e) they may include provisions "protecting or preserving trees or vegetation". Since the early 1980s there has been an increasing tendency to use environmental planning instruments to regulate land clearing in zones designated for environmental protection purposes.[105] In some areas land clearing may be prohibited completely under the provisions of the local environmental plan. But this is deceptive if taken at face value. In practice, prohibitions are far from being set in concrete. An Act of Parliament is not needed to amend them. Amending instruments are made by the Minister, at the initiative of local councils in the case of local environmental plans. In theory the Minister has the power of veto[106] but the current State Government has made clear its reluctance to interfere in what it regards as matters of local concern. In other contexts prohibited developments are regularly made permissible with consent through "spot rezonings", and consent is then given. It remains to be seen whether prohibitions in environmental protection zones will prove to be equally vulnerable in the longer term to changes in the political complexion of local councils and the economic circumstances of the community. Then there is the vexed question of the precise ambit of the provisions which exempt "existing uses" from the prohibition.[107] These may well allow landholders to clear regrowth vegetation to maintain but not to increase the intensity of the existing use.[108]

In other areas land clearing may require development consent. Under State Environmental Planning Policy 14, for example, coastal wetlands have been mapped in a number of local government areas and here land clearing, *inter alia*, requires

105 Local environmental plans also frequently provide for the making of tree preservation orders: Farrier, **op.cit. supra** n.26 pp 207-208

106 Section 70(1)(c)

107 Sections 106-109

108 The existing use provisions do not allow any increase in the area of land used "from the area actually physically and lawfully used", or any "intensification" of the use (ss.107(2)(b), (b1) and 109(2)(b),(c), except within the narrow limits set out in Part VI of the Environmental Planning and Assessment Regulation 1980 if consent is obtained.

both development consent and the concurrence of the Director of Planning.[109] It is also classed as "designated development", which means that an environmental impact statement (EIS) has to be submitted with any development application and objectors have a right of appeal to the Land and Environment Court against any consent which is granted.[110] Decision-makers are required to take into account a wide range of factors before deciding whether or not to grant consent. This includes, in very general terms, the impact of the development on the environment and any steps which may be taken to prevent environmental damage.[111] "Environment" is defined broadly to include "all aspects of the surroundings of man",[112] which clearly mandates consideration of the significance of any vegetation to be cleared and its role as wildlife habitat. More specifically, decision-makers are directed to take into account the likelihood of soil erosion.[113] On the other hand, it has been held that the economic viability of the present use to which land is being put must also be weighed.[114] The interests of owners themselves are to be considered. This was in the very different context of a proposed motel development which would have replaced a low income boarding house, but it clearly has implications for decisions involving land clearing proposals.

So far, of the twenty one development applications made under SEPP 14, five have been refused.[115] But although the emphasis is upon attaching conditions rather than outright refusal, this can be misleading. What is happening in practice is that a considerable number of proposals, many involving significant agricultural activity, are being informally discouraged when an inquiry is made to the Department concerning matters to be covered in the EIS, and as a result are being dropped at this early stage.

Those who breach the provisions of environmental planning instruments by carrying out development which is absolutely prohibited or by failing to secure prior consent or to comply with the conditions attached to a consent, where development consent is required, commit what at first sight appear to be relatively serious criminal offences. If prosecuted in the Land and Environment Court, they can be punished with fines of up to $20,000 and a daily penalty of up $1,000.[116]

But this coercive posture is largely symbolic. The equivocal attitude towards breach of these provisions is reflected in the fact that an alternative to criminal

109 See also SEPP 26: Littoral Rainforests
110 **Environmental Planning and Assessment Act** 1979 ss.77(3)(d) and 98
111 Section 90(1)(b)
112 Section 4(1)
113 Section 90(1)(ml)
114 Section 90(1)(d): **Bauer Holdings Pty Ltd v. Sydney CC** (1981) 48 **LGRA** 356
115 The vast majority have had nothing to do with agricultural land clearing proposals but involve such things as canal estates, drainage for agricultural purposes and roads.
116 Sections 122, 125, 126

prosecution is provided. Under s. 123, civil proceedings can be brought to remedy or restrain breaches of the Act. This not only allows action to be taken against errant public officials but also against those who actually carry out development in breach of the legislation or an environmental planning instrument.[117] Once proceedings have been begun under s. 123, the defendant cannot be convicted and fined in criminal proceedings unless the Court refuses to make an order.[118]

In practice, the lower burden of proof will strongly favour the use of civil proceedings. The explicit aim of such proceedings is to restrain the damaging activity, insofar as it has not been completed, and to remedy the situation. This, rather than general deterrence, will usually be the primary consideration in environmental disputes. Traditionally remedial orders have not been associated with criminal proceedings, although the explanation for this is historical and there are now a growing number of statutory exceptions. In fact, under the *Environmental Planning and Assessment Act* there is a very restricted power available to the court to make a remedial order upon conviction in criminal proceedings. Where the breach consists of damage to trees or vegetation, an order can be made requiring them to be replaced and maintained.[119] But such a response would be prohibitively expensive where a significant area is involved,[120] and even though the intent may be remedial, the effect would be punitive, and perceived by the courts as such. From the nature conservation standpoint, it will ordinarily be sufficient if the land is left to itself to regenerate. But an order requiring this can only be made in proceedings under s. 123. It would not fall within the precise terms of the provision which allows a remedial order to be made following conviction.

Apart from this, while enforcement agencies may not perceive themselves as having any moral mandate from society to seek punishment of individuals engaged in productive activities, except as a last resort,[121] and while prosecution and punishment may be perceived as counter productive, further alienating landholders from conservation policies, the use of civil proceedings may be more acceptable and strategically more effective. In most cases the mere threat of expensive civil proceedings will be sufficient to induce a landholder to comply with a requirement that illegally cleared land be left to regenerate.[122]

117 Compare the provision in **Soil Conservation Act** s.21 CA and **Western Lands Act** s.47, discussed above, which allow remedial notices to be issued without having to obtain a prior court order.

118 Section 127(7). In theory a criminal conviction could be secured first and then proceedings taken under s.123, but this would be highly unlikely in practice.

119 Section 126(3)

120 It may also not be physically practical in some environments.

121 Hawkins, **op.cit. supra** n.6 p 204, 207

122 In spite of all this, prosecution for breach of SEPP 14 has been considered on two occasions both involving large scale clearing for agricultural purposes. In one case, where the prosecution was brought by the Department, the summons was held over on condition that the vegetation was allowed to regenerate. In the other, a prosecution by a council went ahead even though the aim was clearly remedial rather than punitive, but the land was sold so that no order under s.126(3) could be made. There is an argument that an order could have been made against the new owners if proceedings had been brought under s.123, rather than prosecution. But the Land and Environment Court has a broad discretion: **Warringah SC v.Sedevcic** (1987) 63 **LGRA** 361. It is clear that the Department and councils have not yet realised the potential of s.123.

Civil proceedings under s. 123 can be brought by any member of the public. There is also a right of private prosecution in the local courts.[123] The effect of these provisions is that the enforcement agency is no longer in total control of the enforcement strategy pursued. Unlike the Western Lands Commission and the Catchment Areas Protection Board, councils and the Department of Planning are not insulated from public input of a very direct kind which could, for example, undermine any deliberate policy of using legal proceedings as a last resort. On the other hand, however, in this situation enforcement agencies are in a position where they could opt out of the formal enforcement process altogether and cast the burden on to inadequately funded conservation groups.

Conservation Orders, Protection Orders and Conservation Agreements

Under the *Heritage Act* 1977, interim[124] and permanent[125] conservation orders, as well as emergency orders under ss. 130 and 136 can be made to protect not only buildings and works but also *places* of scientific, natural and aesthetic significance for the State.[126] The effect of interim and permanent conservation orders is that a range of activities are prohibited unless the Heritage Council's approval is first obtained or unless there is total or partial exemption.[127] Breach of these provisions constitutes a criminal offence punishable with a maximum fine of $10,000 and up to six months' imprisonment.[128] In addition the court can make an order forbidding development or even use of the land for a period of up to ten years.[129] There is also an equivalent provision to s. 123 of the *Environmental Planning and Assessment Act* allowing anybody at all to bring civil proceedings to restrain and remedy a breach of the Act.[130]

In the past, conservation orders have been used to protect particular natural areas. There are still a small number of permanent orders and a number of interim orders which were placed on areas by the previous State Government. But these will gradually disappear as they lapse. The current Government has wrought a crude separation between the Planning and the Environment portfolios even though the *Heritage Act* and the *Environmental Planning and Assessment Act* are predicated on the fundamental principle that urban planning and heritage issues cannot sensibly be dealt with separately from the broad issue of environmental planning and protection. The *Heritage Act* falls within the portfolio of the Minister for Planning and it is now clear that its use to protect natural areas in the future will be very limited.

The Minister for the Environment does, however, have regulatory powers under the *National Parks and Wildlife Act* 1974 as a result of 1987 amendments.

123 Section 127(1), (3), (6)
124 Sections 24-34
125 Sections 35A-55
126 Section 4(1). See, generally, Farrier, **op.cit. supra** n.26 pp 87-89; 174-176
127 Section 57
128 Section 157
129 Sections 160-162
130 Section 153

These allow him to make interim, but not permanent, protection orders on the recommendation of the Director of the National Parks and Wildlife Service, covering land of natural, scientific or cultural significance or land on which there is fauna or native plants in relation to which the Director intends to act.[131] Orders can provide for the "preservation, protection and maintenance" of the land and its fauna and flora,[132] which means that landholders can be ordered to carry out positive management activities as well as having restrictions imposed on their land use. Even the existing use of the land can be regulated, without compensation. Breach can be punished with a fine of up to $10,000 and imprisonment for up to six months.[133]

However, these orders only last for up to twelve months and they cannot be renewed unless ownership of the land changes hands.[134] Long term protection could be through an environmental planning instrument, but neither the Minister for the Environment nor the Director of the Service have powers of initiation over these, and they do not allow interference with existing uses. Alternatively, the Minister can pursue a very different regulatory strategy and seek to persuade the landowner to enter into a conservation agreement. These can be made for a range of purposes, including nature and landscape conservation and the preservation of fauna and flora.[135] If an agreement is reached with the present landholder, upon registration it will run with the land and bind future landholders.[136] But the Minister has precious little to offer in return for the land use restrictions and management obligations which can, in theory, be imposed upon landowners. There is no provision for compensation to be paid. The only inducements that can be offered are advice and assistance, albeit including financial assistance.[137] Even if development consent is required under the applicable environmental planning instrument(s), the Minister is in no position to use this as a bargaining tool in an attempt to induce an agreement because the Minister for the Environment has no decision-making role to play in the development control process under Part IV of the *Environmental Planning and Assessment Act*.[138] In these circumstances, conservation agreements in New South Wales, like heritage agreements in South Australia, will only attract those landowners whose interests in conservation are so strong that they are prepared to take the risk of a fall in the market price of their land in order to ensure that it is protected against their successors.[139] Even in these circumstances this regulatory device does not entirely avoid the issue of coercion. We can expect future landholders to be far less enthusiastic about carrying out agreements than the landowners who originally entered into them, especially when it comes to positive management activities. The

131 Sections 91A, 91B
132 Section 91B(3)
133 Section 91G
134 Section 91D
135 Section 69C
136 Section 69E
137 Section 69C(2),(3)
138 Once, however, an agreement has been concluded, it must be taken into consideration by the consent authority when deciding whether or not to give consent under this legislation: s.90(1)(a1)
139 As well, to some extent, against public authority developers: s.69I

ultimate threat is civil action for breach of contract,[140] however, and not criminal prosecution.

In practice, only one conservation agreement has so far been concluded, so that these provisions are not even operating effectively at the very limited level which the legislation allows.

IMPLEMENTING VEGETATION CONSERVATION LEGISLATION

Law-making and Permissions

There are three different stages at which the question of implementation arises. The final stage is traditionally referred to as that of *law enforcement*. Prior to this, however, there will usually be a decision to be made about *whether a permission should be given*, in the form of a licence, approval, consent, permit or authorisation. And there may even be an earlier stage of delegated *law-making*. In the following discussion, the focus will be upon the issue of law enforcement, but some consideration needs to be given to the two earlier stages because of their important bearing on this issue.

Some legislation does not directly create even an obligation to secure a permission to carry out an activity. The *Heritage Act*, discussed above, only creates such an obligation if a body of rules are applied to a particular area of the natural environment as a result of the making of an order by the Minister or the Chairman of the Heritage Council. The *Environmental Planning and Assessment Act* gives local councils, among others, albeit subject to the Minister's supervision, even more enhanced powers of creativity by simply fixing the broad parameters within which detailed rules can be made in the form of local environmental plans. Similarly, the Minister for the Environment is empowered to make detailed legal rules in the form of conservation agreements, although in this case they are subject to the veto of the landholder and, even if agreement is reached, the ultimate recourse is to civil rather than criminal proceedings. Here the law itself is the product of a bargain.

This, then, is the starting point for any empirical study of the implementation, and possible failure, of environmental law. We need, for example, to look much more closely at the factors which have led to the making of only one conservation agreement in New South Wales since 1987 and the apparent cessation of the use of orders under the *Heritage Act* to protect the natural environment.

The setting of conditions to be attached to permissions also amounts to the exercise of a law-making function.[141] Whereas the role of the police in determining the scope of the criminal law is purely negative, stemming from their powers of veto over the criminal process, agencies which also exercise a licensing or other permission-giving function are given an official mandate to determine exactly what the law to be enforced by the courts is. This extends not only to making general rules,

140 Section 69G: damages, as opposed to an injunction, can only be obtained where the breach stems from "an intentional or reckless act or omission"

141 Hawkins, **op.cit. supra** n.6 p 23; Richardson **et al**, **op.cit. supra** n.11 chapters 3 and 4

in the form of standard conditions, which apply across the board to all permissions but to individualised rules which apply to specific applicants. This may have a direct bearing on the process of law enforcement. If, as is usually the case, the enforcement agency is also the licensing agency, it is hardly surprising if it comes to view the rules which it is responsible for making as being fundamentally different from those traditionally labelled criminal law and inherently more flexible, at the very least at the level of law enforcement.[142]

This, of course, assumes that the agency decides to grant a licence. Its whole approach to this initial question also has a vital bearing on the subsequent issue of law enforcement. If it adopts a strategy based on the assumption that it is appropriate to issue licences in most cases and is known to adopt such a strategy, then it is more likely that people will be encouraged to bring themselves within the regulatory system than if it adopts a restrictive approach at this level. An agency which defines its primary role as being to ensure that activities are carried out in accordance with appropriate conditions, rather than not being carried out at all, is not going to find it easy to adapt to the very different techniques, emphasising proactive patrol rather than inspection, and reaction to complaints, required to deal with those who are not prepared to bring themselves within the system. On the other hand, a much stricter approach to the issue of licences will necessarily mean much greater resort to these techniques, but in an environment where the distances involved, the sparse population and the relative cohesiveness of the communities make it extremely difficult to implement them effectively.

Enforcement

Reiss[143] distinguishes between *compliance* and *deterrence* as forms of law enforcement. Both seek to secure conformity with the law. But whereas the latter emphasises the detection of violations and the punishment of violators to deter future violations, the former relies on rewards or withheld penalties. The availability of penalties is vital to a deterrence strategy but not to one based on compliance. When it comes to pollution control, research by both Hawkins[144] and Richardson *et al*[145] in the UK has shown how a compliance strategy can be pursued within a regulatory form with its roots firmly in the criminal law. Prosecution becomes a weapon of last resort. Richardson *et al* emphasise the significant role played by persuasion, education and cooperation in regulating the emission of trade waste into sewers.[146] Hawkins identifies bargaining as "the central feature in the game-like compliance process"[147] in which officers move from a more conciliatory to a more coercive

142 Richardson, **et al, op.cit. supra** n.11 pp 194-195 found that the pollution control agencies which they studied applied a principle of uniformity when it came to setting formal conditions, but that little emphasis was placed on this when it came to enforcement

143 Reiss, A.J. Jr., "Selecting Strategies of Social Control Over Organizational Life" in Hawkins, K. and Thomas, J.M., **Enforcing Regulation** (1984) pp 23-24

144 Hawkins, **op.cit. supra** n.6

145 Richardson, **et al, op.cit. supra** n.11

146 **id.** 127 **et seq.**

147 Hawkins, **op.cit. supra** n.6 p 103. See pp 122 **et seq.**

approach.[148] In Australia, Grabosky and Braithwaite's survey of the enforcement strategies pursued by State environmental agencies specialising primarily in pollution control and waste disposal revealed that over 80 per cent viewed education and persuasion as being more important than law enforcement. Even the threat of prosecution or licence suspension was "generally viewed as an adversarial breakdown indicative of failure by the regulatory agency".[149]

The activity of destroying vegetation, however, has fundamentally different characteristics from that of causing industrial pollution and these will necessarily influence the strategy pursued by enforcement agencies. It is a once-off rather than a continuing activity, the cost of which, if it is carried out on any scale, contains its own inbuilt deterrent to repetition. Even if a relationship between regulator and regulated is established by an application for permission to clear land, it will necessarily be a relatively brief one in comparison with the ongoing relationship between pollution control agencies and industrial polluters. If bargaining is to take place at all it is likely to centre on the licensing process itself and the fixing of conditions rather than the stage after a breach has been discovered.

The destruction of vegetation will usually be a deliberate activity, unlike the causing of pollution which can range from the deliberate through the negligent to the simply accidental. For those who clear without obtaining prior approval, the only possible argument mitigating culpability is that they had no knowledge of the legal requirements. Those who breach the conditions of a licence are restricted to excuses alleging mistake, but these will not be easy to sustain. In the absence of these factors the activity will look very much like a deliberate flouting of the agency's authority.

Insofar as there is bargaining after breach it will be a once-off exercise with the objective of remedying past damage, without any of the element of tightening standards up for the future which we find in the case of pollution control. The only real argument will be about the degree to which, and time scale in which, remedial work must be carried out, but this will only be a significant issue in the very few cases where extensive, and expensive, replanting is required. It does not arise at all in relation to requirements simply to allow cleared land to regenerate. And if the Soil Conservation Service requires cleared land to be put down to pasture and fertilised in order to prevent soil erosion, this will only be a significant bone of contention with the landholder if the original intention was to sow crops rather than pasture.

It is against this background that we must consider the enforcement policies pursued by the Western Lands Commission and the Catchment Areas Protection Board under the legislation discussed above. Neither could be said to have an extensive record of resort to prosecution. Between January 1980 and June 1984, the Board instituted 29 prosecutions in cases involving protected land along prescribed watercourses and a further 9 for clearing on steeply sloping land in catchment

148 **id.** 133

149 Grabosky, P. and Braithwaite, J., **Of Manners Gentle: Enforcement Strategies of Australian Business Regulation Agencies** (1986) pp 190-191

areas.[150] Currently it institutes about one prosecution a month in the Local Courts but has so far taken only one case to the Land and Environment Court, and this involved a County Council rather than a landholder. The provisions in the *Western Lands Act* which gave the Commissioner power to prosecute for offences involving clearing only came into operation in early 1986 and following that the Commissioner set in train a programme designed to make people fully aware of the restrictions before beginning to institute prosecutions. As yet there are no precise figures available, but a limited number of prosecutions in Local Courts have been initiated over the last eighteen months.

The limited number of prosecutions may be in part attributable to the difficulties faced by these bodies in detecting breaches. The task of identifying those who choose not to bring themselves within the system by applying for a licence, is immense. LANDSAT imagery will only detect large scale clearances. Both agencies rely to a limited extent on reports from neighbours and other government officers working in the field. The Western Lands Commission arranges overflights of each of its districts every two years. In the past there were regular inspections by field officers. In recent years these have not been possible due to resource constraints. The Commission has only nine Rangelands Management Inspectors and four Rangelands Liaison Officers to cover an area of 32.5 million hectares and they have a range of other functions to perform apart from policing clearing and cropping regulations. The current aim is to inspect every five years, but whether this will be realised in practice will depend on the availability of resources.[151] Another problem was that until recent amendments to the legislation extended the period to one year,[152] prosecutions for breaches had to be commenced within six months. Apart from the difficulties of detection already noted, this caused particular problems where poison was used and the effects did not become apparent for some time.

Soil Conservation Service field officers are responsible for detecting and investigating of breaches of the protected land provisions for the Catchment Areas Protection Board. The use of specialist officers has been considered but the distances involved make the expense prohibitive. The Soil Conservation Service has, since its foundation, adopted an approach based on education, persuasion and inducement rather than coercion and deterrence.[153] There is no criminal offence based on the causing of soil erosion, apart from the protected land provisions which deal with the specific problem of vegetation destruction and which are the responsibility of the Board rather than the Commissioner. There are provisions allowing the relevant Minister and, since 1985, the Commissioner to make soil conservation requirements by way of notice, failure to comply with which constitutes

150 **op.cit. supra** n.90 pp 15, 20

151 **Western Lands Commission Newsletter** No.8, August 1989 pp 2-3

152 **Western Lands (Amendment) Act** 1989 Schedule 5(4), inserting s.52(4)

153 Cummins, E.J., "Fifty Years of Service to the Farmers - Rural Soil Conservation 1938-1988" (1988) 44(1) **Journal of Soil Conservation NSW** 14; Soil Conservation Service of NSW, **Corporate Plan** (June 1989) p 4; Cunningham, G.M., "Total Catchment Management (TCM)" (1988) 44(1) **Journal of Soil Conservation NSW** 42

a criminal offence,[154] but these have hardly ever been used. Coming from this background, where prosecution is not even used as a last resort, it is not surprising that soil conservation officers feel very uncomfortable with their role as law enforcement officers for the Board.

Hawkins has argued that enforcement agencies will not resort to prosecution except where they see themselves as having a mandate, based on a perceived moral consensus.[155] For both sets of field officers, the immediate population from which they must seek such a mandate consists to a considerable degree of the landholders themselves. Communities in the Western Division are especially isolated from the urban population along the coastal fringe. Although attitudes are beginning to change, it is still generally true that there is considerable hostility to controls over clearing. These are the communities in which officers and their families must live as well as work.

Soil Conservation officers have written instructions to investigate and report to the Board all breaches which they discover, but the discretion to prosecute lies not with them but the Board. The Western Lands Commissioner, on the other hand, allows his field staff much wider latitude. They make the initial decision as to whether a matter should proceed any further or be dealt with purely by an informal warning, but the Commissioner makes the decision to prosecute.

A primary concern of both agencies is to ensure that breaches are remedied. Soil Conservation officers will seek to persuade offenders to carry out remedial work. But if this fails, the Board can issue a formal notice under s. 21CA of the *Soil Conservation Act*, requiring that any continuing activity cease and remedial work be carried out, where it is satisfied that there has been a breach of the *Act* and an "adverse effect on the environment". About ten of these notices are sent out each year. They can be issued in addition to prosecution, but they are also used as an alternative. They are especially valuable in cases where the evidence is disputed, because the burden of proof is lower. The Board only has to be "satisfied", subject to a right of appeal to the Land and Environment Court. If a notice is breached, then the task of prosecution is straightforward.

Notices can also be issued under s. 47 of the *Western Lands Act* in response to breach.[156] Prior to recent amendments to the *Act*[157] notices **had** to be issued as a first step in response to illegal cultivation but they were and remain available as an alternative to, or in addition to, prosecution where illegal clearing is involved. They are used much more frequently than those issued under the *Soil Conservation Act* - a little under one per week. They are not restricted by any time limit so that they had the significant advantage of bypassing the difficulties created by the old six month limit on prosecutions before it was extended to a year.

154 See Farrier, **op.cit. supra** n.26 pp 218-219
155 Hawkins, **op.cit. supra** n.6 pp 204-207
156 See also s.46
157 **Western Lands (Amendment) Act** 1989 Schedule 5(3)(b), inserting s.49(1)(a1)

Both the Catchment Areas Protection Board and the Western Lands Commission have a graded series of responses. In a majority of the cases brought to its attention the Board issues formal warning letters rather than prosecuting. Where the field officer has not managed to persuade an offender to carry out remedial work, these will be accompanied by a s. 21CA notice. In some cases the letter will take the further step of requiring recipients to show good cause why they should not be prosecuted. The Western Lands Commissioner also uses warning letters and s. 47 notices, and we have already noted the informal warnings given by field staff. Hawkins found that his pollution control officers used a serial and incremental enforcement strategy, beginning with a conciliatory approach based on advice and warnings but becoming increasingly more coercive if this failed, and culminating in the threat of prosecution and ultimately prosecution.[158] But the various responses used by the Board and the Commission are not used in the sequential and incremental fashion noted by Hawkins. So, for example, under the *Western Lands Act*, an incursion of fifty metres into the three hundred metre uncleared buffer zone required to be left along boundary fence-lines will probably result directly in a s. 47 notice requiring that this area be left to regenerate. Carelessness in the clearing pattern on the other hand will probably be dealt with by an informal warning from field staff. But some breaches of conditions may result directly in prosecution as well as a s. 47 notice - for example, exceeding the area allowed to be cleared or clearing sand hills. Clearing a significant area without obtaining a licence at all will also lead to prosecution.

The decision whether or not to prosecute turns on the perceived seriousness of the breach in terms of environmental impact. This is largely determined by the size or the sensitivity of the area involved. Arguments based on an absence of fault stemming from a misunderstanding of the licence conditions are not easy to sustain. Nor will the Commissioner listen to arguments based on ignorance of the law in light of the extensive efforts he has made to publicise the existence of the provisions, including a newsletter mailed to all lessees.

The Catchment Areas Protection Board, on the other hand, does take into account no-fault excuses based on ignorance of the law. The protected land provisions cover the whole of New South Wales and there is no equivalent of the communication network which exists between the Western Lands Commissioner and lessees in the Western Division arising from the landlord-tenant relationship. A harder line is, however, taken with ignorance of the law excuses relating to the provisions protecting prescribed watercourses, which have been in force since 1946, in comparison with those relating to steeply sloping land in catchment areas which came into force in 1972. Other factors taken into account reflect the Western Lands Commissioner's concern with the seriousness of the environmental impact of the breach. These include the number of trees destroyed, the likelihood of erosion and whether the offender would have been issued with an authority if one had been applied for.

158 Hawkins, **op.cit. supra** n.6 p 130

How then can we characterise the enforcement strategies pursued by these two agencies? Neither places any emphasis on bargaining and compromise when it comes to law enforcement. The primary aim is, nevertheless, to ensure that damage caused by the particular breach is remedied. Prosecution cannot achieve this. At most, the court's ability to fine offenders will deter for the future but do nothing for the past. A formal notice backed by the threat of criminal sanction is the most authoritarian way of remedying the situation, but both bodies resort to less formal approaches, depending on the seriousness of the breach. Remedial measures do not involve interfering with an ongoing productive process and so the situation is very different to the one faced by pollution control agencies. At most the breach involves bringing land into productivity or greater productivity. If soil conservation is the priority and the situation can be remedied by planting pasture, this is unlikely to meet with much resistance from the landholder. In other situations, the requirement will simply be to leave the land to regenerate. Only in the unlikely event that the landholder is ordered to revegetate the land is a situation created which is ripe for bargaining. This remedial response would in fact be the most punitive and offer the most significant deterrent given the cost involved.

Prosecution is reserved for the most serious cases. This is determined largely by the degree of damage to the environment, although the Catchment Areas Protection Board also takes account of culpability as reflected in awareness of the legal provisions. There is a significant element of general deterrence involved here. The Board makes attempts to publicise successful prosecutions in local newspapers, although a Western Lands Commission officer bemoaned the reluctance of the country press to report prosecutions. Nor do magistrates appear to be cooperating. Most prosecutions involving protected lands are disposed of in Local Courts under s. 556A of the *Crimes Act* without any conviction being recorded. The suggestion made is that magistrates do not understand soil conservation and regard the landholder as the owner of the trees. The fines resulting from prosecutions so far undertaken by the Commission are also perceived as inadequate. In these circumstances the danger is that prosecutions may in fact be counter-productive, with the landholder seen to be "let off" by the court.

CONCLUSION

It is of fundamental importance that any examination of the implementation of formally coercive legal regulation of vegetation destruction looks at the question of law enforcement, and prosecution policy in particular, not in isolation but as one aspect of the total implementation process. There may, for example, be what looks very much like "regulatory failure" at what has been identified as the level of delegated "law-making" - the failure of Ministers and agencies to exercise their statutory powers to apply general protective provisions to particular instances. We need also to examine closely the licensing policy adopted, for this is likely to have a crucial bearing on the amount and type of criminality to which the agency has to respond at the level of law enforcement. We have not yet witnessed in New South Wales the impact of a restrictive licensing policy which makes heavy use of outright refusals, as distinct from conditional approvals. The effect of the recent moves by the Western Lands Commission to confront the problem of dryland salinity in the

Murray Geological Basin will need to be closely monitored. But it is important to remember that this is Crown leasehold land where there has, at least in theory,[159] been a longer tradition of legal regulation, and arguments based on land use rights associated with loose notions of "private property" are necessarily weaker (although nevertheless strong).

Moreover, it is easier to justify the use of coercive legal regulation to prevent dryland salinity "spillovers" on to common property and neighbouring land than it is to justify its use to preserve wildlife habitats and vegetation communities. But these are emerging problems in New South Wales. As yet there has been no concerted attempt to deal with them. A concern with these broader issues has been grafted on to existing legislation administered by the Catchment Areas Protection Board and the Soil Conservation Service by Part V of the *Environmental Planning and Assessment Act* but these bodies lack both the expertise and the motivation to pursue them with any vigour. The National Parks and Wildlife Service, which at least should have the expertise, has, effectively, neither the legal power to coerce nor to induce vegetation conservation on private land on any significant scale. That leaves us with the limited initiatives of what is now the Ministry of Planning through heritage conservation orders and State Environmental Planning Policies 14 and 26, and the so far unquantified attempts of local councils to regulate the destruction of vegetation through local environmental plans.

We cannot, then, conclude that coercive legal regulation of vegetation destruction to protect wildlife habitats and plant communities has failed, because such a policy has never been fully implemented. It is fair to assume, however, that it would meet with considerable resistance from landholders. If this spilled over into open defiance, it would severely test the nerve both of the licensing and enforcement agency and the courts, and there is evidence that the courts, at least, have so far failed the test in the related areas discussed in this paper. But it is by no means clear that landholders would respond in ways that brought them into open conflict with the law. The little evidence we have from the Western Division suggests that the vast majority of lessees, at least, are much more likely to seek relief from restrictions through political channels than by overt or covert defiance of the law.

Nevertheless, resort to coercive legal regulation to deal with these issues is by no means the obvious response. What of the alternatives? The limited response to the initial offer of voluntary heritage agreements in South Australia and the experience with management agreements in the United Kingdom indicates that, in the short-term at least, the majority of landholders are only going to bind themselves voluntarily to a regulatory regime if significant financial inducements are offered. Once-off compensation for any fall in land value may not be sufficient to secure agreement. But a system based on continuing payments offers no guarantee of conservation in the long-term. Nor has the "voluntary approach" anything to recommend it in terms of savings in implementation costs. The time and man-power

159 But see the Second Report of the Joint Select Committee of the Legislative Council and Legislative Assembly to Enquire into the Western Division of New South Wales, Session 1983-84, P.P.163, especially at pp 36-37; 46-47

devoted to the negotiation of agreements have proved to be very significant in the UK.[160] And if payments are made to the existing landholder on a once-off basis, there may well be law enforcement costs, both at the levels of detection and institution of civil proceedings for breach of covenant, after the land changes hands in the future. It also appears that even the level of continuing payments available in the UK is insufficient to induce landholders to enter into agreements providing for the carrying out of positive management activities. Finally, the argument which apparently underpins the "voluntary approach" in the UK - that farmers are the very people who created the landscape which is now to be conserved - has no persuasive force in the Australian context where the areas sought for conservation are precisely those areas where human interference has been minimal.

The current South Australian approach consists of coercion with a sweetener. But it remains to be seen whether in the long run, as land changes hands, it will offer any significant relief from the costs of enforcement associated with the traditional coercive approach. There is no obvious inducement to future landholders to become more sympathetic to conservation concerns even if the one-off compensation is sufficient to persuade the existing landholder that conservation has some benefits.

A significant adjustment to the South Australian approach would see financial payments based not on the loss in market value resulting from restrictions imposed but on positive management activities performed - for example, weed and feral animal control and perhaps even basic resource inventory work. These payments would be for services rendered and would therefore be available on a continuing basis. In return the landholder would be required to engage directly in conservation activities and as a result would hopefully develop a greater appreciation of the environment with which he or she is dealing. It would provide a useful source of income in the case of marginal enterprises as well as making use of the landholder's intimate knowledge of the land. In the New South Wales context such a scheme could be introduced gradually as resources become available. It avoids the minefield of compensation for land use restrictions while still providing a limited inducement. This would hopefully pave the way for greater acceptance of a more extensive use of the State's right to regulate land use in order to preserve vegetation communities and wildlife habitats for future generations.

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160 Adams, **op.cit. supra** n.71 pp 126-129