



Submission to the Agriculture and Environment Committee relating to the Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016

Darcy Allen
Research Fellow

Chris Berg
Senior Research Fellow

Simon Breheny
Director of Policy

April 2016

www.ipa.org.au

 **Institute of
Public Affairs**
THE VOICE FOR FREEDOM
ESTABLISHED - 1943

Executive Summary

Proposed changes to vegetation management law in Queensland are burdensome red tape, an erosion of the right to property, and breach a fundamental principle of the rule of law.

These changes are representative of a red tape trend in Queensland and across Australia hindering our economic growth, prosperity and development.

The *Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016* should not proceed.

Introduction and context

The *Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016 (Qld)* has been referred to the Agriculture and Environment Committee for consideration.¹ The calling of this Committee (due to report to the House by 30 June 2016) is the culmination of underlying tensions between an environmentally-centred left and a growth-centred right. Indeed:

*Land clearing has a tortured history in the state. There's no other issue in Queensland politics that so clearly highlights the often bitter ideological divide between Brisbane and the bush.*²

The Queensland minority government requires cross-bench support to implement the changes which make the clearing of vegetation more difficult for land owners. This controversial bill is the fulfilment of promises and preference deals throughout the recent election,³ and commitments under agreements such as the *Reef 2050 Long-Term Sustainability Plan*.⁴

The controversy over land clearing in Queensland has a long history. Indeed, laws focused on vegetation clearing in Queensland have been contentious for well over a decade, stemming back to Labor Premier Peter Beattie, and other states.⁵

Prior to the 1990s there were very few controls over land clearing across Queensland.⁶ A joint understanding existed between regulators and farmers that clearing was necessary for development, and that farmers are those most interested in conserving their own land for future generations.

But, as the ground swell of environmental regulation emerged in the mid-1990s, there were increasing calls for vegetation-related regulations. Restrictive changes in 1999 led to substantial 'panic clearing' (peaking in 1999-2000). Additional major changes passed in 2004—following 'successive public campaigns by the conservation sector'⁷—sought to phase out broadscale land clearing by 31 December 2006.

¹ See Queensland Parliament Agriculture and Environment Committee website. Accessed 7 April 2016. Available at: <https://www.parliament.qld.gov.au/work-of-committees/committees/AEC/inquiries/current-inquiries/11-VegetationMangt>

² Elks, S. (2016). To clear or not to clear: farmers in the dark on new laws. *The Australian*, 19 March 2016, Available at: <http://www.theaustralian.com.au/news/inquirer/to-clear-or-not-to-clear-farmers-in-the-dark-on-new-laws/news-story/a24bfd12faf4057c1a2086f21b140b93>

³ Phelps, M. (2016). Parliament deadlocked on tree laws. *Queensland Country Life* 17 March 2016, Available at: <http://www.queenslandcountrylife.com.au/story/3798647/parliament-deadlocked-on-tree-laws/>

⁴ Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016 Explanatory Notes.

⁵ McCarthy, M. and Sexton-McGrath, K. (2016). Tree clearing: Indigenous leader Noel Pearson hits out at changes to Queensland's Native Vegetation Act, *ABC News* 9 March 2016, Available at: <http://www.abc.net.au/news/2016-03-09/indigenous-leader-hits-out-at-qld-land-clearing-laws/7230726>

⁶ McGrath, C. (2007). End of broadscale clearing in Queensland. *Environmental and Planning Law Journal*, 24, 1-10.

⁷ Environmental Defenders Office (2016). The urgent issue of vegetation protection in Queensland. *Environmental Defenders Office News* 18 March 2016. Available at: <http://www.edoqld.org.au/news/vegetation-protection-in-qld/>

In 2013, however, the then Newman government introduced changes to the burdensome Vegetation Management Act with the *Vegetation Management Framework Amendment Bill 2013*.⁸ Those changes slightly relaxed the laws, dictating, among other things, what native vegetation could be cleared in Queensland. The 2013 changes introduced additional ‘relevant purposes’ which allowed the clearing of high-value agricultural land – where the land must be proved to be economically viable and the environmental effects minimised before clearing.⁹

In 2016, however, the Labor government is seeking to reverse the slight relief afforded to farmers under the previous government. Last year the government vowed to tighten land clearing legislation.¹⁰ Since, the laws have been proposed which Deputy Premier Jackie Trad suggests close the ‘loopholes’ created by the previous government.¹¹

We specifically oppose the following proposals in the bill:

- (1) the removal of relevant clearing purposes for high value agriculture and irrigation clearing;
- (2) reversal of the onus of proof;
- (3) a lack of compensation for erosion of property rights; and
- (4) retrospective implementation back to 17 March 2016.¹²

The first applies additional red tape to the most potentially economically productive farmers in Queensland. The second is a significant breach of one of our most basic rights. The third sits in a worrying trend of governments placing the costs of achieving their policy objectives onto Australian citizens without compensation for the added burden. And the fourth, in an attempt to prevent a flurry of clearing, will significantly increase the uncertainty for farmers over the following months, and thus distort their business decisions.

Productive clearing of high value land

Removing the pathway for high value agriculture and irrigation hinders the property rights, productivity and growth prospects of Australian farmers – preventing them from most efficiently operating their land.

⁸ Remeikis, A. (2013). New vegetation management scheme now all but law. *The Brisbane Times*, 14 May 2013, Available at: <http://www.brisbanetimes.com.au/queensland/new-vegetation-management-scheme-now-all-but-law-20130514-2jk5c.html>

⁹ Motti, I. and Laing, A. (2013). A clear path ahead? Navigating Queensland’s vegetation management framework. *Clayton Utz Insights*, 4 July 2013. Available at http://www.claytonutz.com/publications/edition/4_july_2013/20130704/a_clear_path_ahead_navigating_queenslands_vegetation_management_framework.page

¹⁰ Gribbin, C. (2015). Queensland government vows to tighten land clearing legislation amid 35 illegal cases. *ABC News*, 4 July 2015. Available at: <http://www.abc.net.au/news/2015-07-04/queensland-government-vows-to-tighten-land-clearing-legislation/6594078>

¹¹ Wiggins, N. (2016). Queensland to introduce new vegetation laws to stop land clearing. *ABC News*, 18 March 2016. Available at: <http://www.abc.net.au/news/2016-03-17/new-vegetation-laws-for-queensland-to-stop-land-clearing/7256310>

¹² A ‘flurry of clearing’ occurred in 1999 prior to the implementation of new vegetation laws by the then Peter Beattie led government.

In 2013 three new relevant clearing purposes were included allowing vegetation clearing applications to be heard. Our focus is on the two following relevant purposes which were added into 22A of the *Vegetation Management Act*:

- High value agriculture clearing – ‘clearing carried out to establish, cultivate and harvest crops, other than clearing for grazing activities or plantation forestry’
- Irrigated high value agriculture clearing – ‘clearing carried out to establish, cultivate and harvest crops, or pasture, other than clearing for plantation forestry, that will be supplied with water by artificial means’¹³

While no widespread clearing for agricultural purposes were permitted from 2006 to 2013, from 2013 to present around 112,400 hectares have been cleared. That period enabled approximately 107,000 hectares of high-value agriculture and 5,000 hectares of irrigated high-value agriculture to be released, opened, and freed.¹⁴

Environmentalists usually point to the carbon emissions associated with this clearing. But there is also an associated benefit with agricultural clearing: economic progress and prosperity. The difference between these shows the ideological divide at the heart of the current debate:

One side sees this almost exclusively in terms of greenhouse gas emissions, or damage to wonderful resources such as the Great Barrier Reef. For instance, in the public hearing of the current Committee, this is viewed as the ‘release of around nine million tonnes of carbon emissions’.

*Farmers and land owners, however, see this clearing as a necessity to continue productive agribusiness. The clearing, in their eyes, is the release of otherwise government-stymied land for the benefits of themselves and the nation.*¹⁵

Indeed, rather than reading the cleared land since 2013 as a step backward in environmental protection, an alternate perspective suggests the importance of the exception for clearing of high value land for agriculture, within its limits:

*Matters relevant to a decision on a clearing application for ‘high value agriculture’ include whether the relevant land is suitable for cropping, whether there is no suitable alternative site that has been cleared, and, for ‘irrigated high value agriculture’, whether sufficient water can be secured and, generally, that any restrictions imposed in ‘high value agricultural areas’ are observed.*¹⁶

The clearing of land—especially where individuals can prove its economic viability—is crucial for economic production in Queensland. Indeed:

*Clearing for High Value Agriculture produces high value food and fibre, and enables production diversity to address climate variability.*¹⁷

¹³ Vegetation Management Act 1999 Schedule Dictionary.

¹⁴ Agriculture and Environment Committee Public Briefing, 22 March 2016, Brisbane.

¹⁵ Allen, D. (2016). Why the proposed tree laws are the very worst kind of red tape. *Queensland Country Life*, 7 April 2016. Available at: <http://www.queenslandcountrylife.com.au/story/3835106/opinion-why-the-proposed-tree-laws-are-the-very-worst-kind-of-red-tape/>

¹⁶ Austin, M. (2013). Vegetation clearing reforms to boost agribusiness in Queensland. *King&Wood Malleons*, 26 March 2013. Available at: <http://www.kwm.com/en/au/knowledge/insights/vegetation-clearing-reforms-to-boost-agribusiness-in-queensland-20130326#>

¹⁷ AgForce (2015). *Sustainable Vegetation Management by Queensland Producers*. September 2015. Available at: <http://www.agforceqld.org.au/intranet/file.php?id=4266>

The current government's changes, especially in reversing this process, will hurt the most productive of Queensland's farmers. Removing the exception clause will impede the growth and efficiency of agriculture in Queensland.¹⁸

Reversing the burden of proof

The Palaszczuk government's proposed amendments to the *Vegetation Management Act 1999* include a provision that reverses the burden of proof (clause 6).

A centuries-old feature of the English common law inherited by Australia is that a person is presumed innocent until proven guilty. The legal mechanism used to achieve this presumption is the placement of the burden, or onus, of proof on the party that initiates legal proceedings. This means that the initiating party can only be successful in making out a legal case if they can produce evidence proving the elements of their claim to the requisite standard. As Gibbs CJ noted in *Sorby v The Commonwealth*: "It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person..."¹⁹

Reversing the burden of proof also reverses the underlying presumption – a defendant becomes guilty until proven innocent. In the case of the proposed changes to the *Vegetation Management Act*, farmers accused of breaching these laws will be presumed to be guilty unless they are able to rebut the presumption through the production of sufficient evidence.

The government's justifications for reversing the burden of proof are utterly insufficient. From the explanatory notes to the bill:

Clause 6 reinstates reverse onus of proof offence provision, which existed prior to the 2013 legislative amendment to the Vegetation Management Act. The provision placed the responsibility for unlawful clearing with the 'occupier' of the land, such as the owner or lessee, in the absence of evidence to the contrary. While this provision potentially breaches FLPs, reinstating this provision is justified for the following reasons:

- *Unlawful clearing often occurs in remote areas, meaning that in many cases there is a lack of evidence available to the government (e.g. direct witnesses, copies of contracts as they are commercial in confidence), to establish who undertook the clearing.*
- *Due to the expense of clearing, it is highly unlikely that an unknown third party would undertake clearing on someone else's property without the occupier's invitation or consent.*
- *The landholder may still provide evidence to prove their innocence, using evidence that would be readily accessible to the landholder but not the government (e.g. where a contract may be commercial in confidence the contract does not need to be disclosed to government during its investigation).*
- *The state is still responsible for establishing and proving that a vegetation clearing offence has occurred.*²⁰

¹⁸ Queensland Farmers Federation (2015). Labour plans would impede agriculture. Media Release, 21 January 2015, Available at: <http://www.qff.org.au/labor-plans-would-impede-agriculture/>

¹⁹ *Sorby v The Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ).

²⁰ Explanatory Notes, *Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016*, 17 March 2016, Available at:

The argument there may be relevant evidence that is not readily accessible to the government in some cases is obviously true. However, the same justification can be used of any legal case. There is no doubt the task that befalls regulators and prosecutors would be made easier if we abandoned the presumption of innocence, and those accused of wrongdoing had to produce evidence to prove their own innocence. But the quality of a legal system should not be assessed by the ease with which the state can enforce the law, but rather whether the system produces just outcomes. And, on the issue of just legal outcomes, William Blackstone famously wrote in 1765, ‘it is a maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer’.²¹

The explanatory notes also state, ‘There is likely to be a reduction in compliance costs by reinstating reverse onus of proof and removing mistake of fact defence provisions.’ This reasoning demonstrates that the Queensland government sees the rule of law as an expendable and unnecessary expense. Doing away with fundamental legal rights on the basis they increase compliance costs is Orwellian, and is a legislative approach which is best avoided in jurisdictions that wish to maintain their status as a first world legal system.

Allowing the burden of proof to be reversed in this legislation would add to an already significant problem Australia has in maintaining the rule of law. A recent report by the IPA’s Simon Breheny and Morgan Begg found there are 47 provisions in Commonwealth law, which overturn the presumption of innocence.²² Their research found that by the end of 2015 there were a total of 290 Commonwealth provisions that breach legal rights, up from 262 at the end of 2014.

Other issues: compensation and retrospectivity

Eroding what farmers can do with their land is only the latest move in a trend of governments regulating their policy objectives while forcing those responsible to pay for the costs of implementation and distortion.

The bill includes no compensation for the erosion of property rights that it entails. Although such compensation is not necessary under states, the erosion of one of our most basic human rights—the right to own property—warrants just compensation.²³

As Professor Suri Ratnapala wrote in the *IPA Review* back in 2004:

*... property values diminish because the State is limiting its use and enjoyment to serve what it considers to be the public interest in conservation. The State thus converts private property to public use and hence should compensate the owner.*²⁴

[https://www.legislation.qld.gov.au/Bills/55PDF/2016/B16_0035_Vegetation_Management_\(Reinstatement\)_and_Other_Legislation_Amendment_Bill_2016E.pdf](https://www.legislation.qld.gov.au/Bills/55PDF/2016/B16_0035_Vegetation_Management_(Reinstatement)_and_Other_Legislation_Amendment_Bill_2016E.pdf).

²¹ Blackstone, W. (1796). Commentaries on the Laws of England.

²² Begg, M. and Breheny, S. (2016). Legal rights audit 2015. Available at: <http://www.ipa.org.au/portal/uploads/Legal-rights-audit-2016-final.pdf>.

²³ Berg, C. (2010). Lost property: home in deed but not in fact. *The Age* 10 January 2010. Available at: <http://www.theage.com.au/it-pro/lost-property-home-in-deed-but-not-in-fact-20100109-lzs0.html>

²⁴ Ratnapala, S. (2004). Vegetation Management in Queensland: A Case of Constitutional Vandalism, *IPA Review December 2004*, p 11. Available at: <https://www.ipa.org.au/library/56-4-Vegetation%20Management.pdf>

A further issue is the retrospective nature of the changes, which will apply back to the 17 March introduction of the bill. The purpose of this is to 'address the risk of panic clearing'.²⁵ In reality, however, this will only make farmers more uncertain over their regulatory environment until the Committee reports and the bill succeeds or fails:

*Only compounding these matters is the retrospective implementation of the bill in an effort to 'reduce the risk of panic clearing'. The government is worried that farmers will go out and clear large tracts of their land under the current laws before the new ones come in. To farmers this means large tracts of private land will remain uncertain until at least the current Agriculture and Environment Committee reports in June this year.*²⁶

Conclusion

We can have both a productive and growing agriculture sector as well as sufficient environmental outcomes.²⁷ There is a balance where both objectives can be met. We cannot, however, continually push to shut down all progress on Queensland's agriculture sector.

The proposed changes to vegetation management laws in Queensland should not proceed. Among other things, these changes will stifle our most productive farmers, distort economic activity, breach principles of the rule of law, and increase business uncertainty for our agriculture sector.

²⁵ Trad, J. and Miles, S. (2016). Queensland Governments moves to reinstate habitat protection measures axed by the LNP. *Media Release* on 18 March 2016. Available at:

<http://statements.qld.gov.au/Statement/2016/3/18/queensland-government-moves-to-reinstate-habitat-protection-measures-axed-by-the-lnp>

²⁶ Allen, D. (2016). Why the proposed tree laws are the very worst kind of red tape. *Queensland Country Life*, 7 April 2016. Available at: <http://www.queenslandcountrylife.com.au/story/3835106/opinion-why-the-proposed-tree-laws-are-the-very-worst-kind-of-red-tape/>

²⁷ Burke, C. (2013). AgForce Queensland. Brisbane Public Hearing Transcript 17 April 2013.

About the Institute of Public Affairs

The Institute of Public Affairs is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom.

Since 1943, the IPA has been at the forefront of the political and policy debate, defining the contemporary political landscape. The IPA is funded by individual memberships and subscriptions, as well as philanthropic and corporate donors.

The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy.

Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

The IPA's specific research areas include the environment, deregulation, workplace relations, energy, political governance, intellectual property, telecommunications, technology, housing, education, health and agriculture.

The IPA publishes a wide variety of research papers and supporting opinion pieces, as well as hosting conferences and lectures across the country. The IPA also publishes the IPA Review, Australia's longest running political magazine. In 2008, the IPA Review was awarded the Sir Antony Fisher Memorial Award for best magazine.

Authors

Darcy Allen is a Research Fellow at the Institute of Public Affairs, and a PhD Candidate in Economics at RMIT University.

At the IPA, his current work focuses on regulation and red tape, innovation and entrepreneurship, and the relationship between regulation and emerging industries. At RMIT, his PhD dissertation is a theoretical and empirical analysis of the institutions of innovation.

Chris Berg is a Senior Fellow at the Institute of Public Affairs. He is a regular columnist with ABC's *The Drum*, and an award-winning former editor of the *IPA Review*.

He is author of *Liberty, Equality & Democracy* (2015), *Magna Carta: The Tax Revolt That Gave Us Liberty* (2015, with John Roskam), *In Defence of Freedom of Speech: from Ancient Greece to Andrew Bolt* (2012), and *The Growth of Australia's Regulatory State* (2008). He is also the editor of *100 Great Books of Liberty* (2010, with John Roskam) and *The National Curriculum: A Critique* (2011).

Simon Breheny is Director of Policy at the Institute of Public Affairs.

Simon has been published in *The Australian*, the *Australian Financial Review*, the *Sydney Morning Herald*, *The Age*, the *Daily Telegraph*, the *Herald Sun*, the *Courier Mail*, the *Canberra Times*, the *Sunday Tasmanian* and *The Punch*. He is regularly interviewed on radio around the country in relation to legal rights, the rule of law, civil liberties and the nanny state, and has appeared on ABC's *Q&A*, *Lateline*, *News Breakfast* and ABC News 24, Channel 7's *Weekend Sunrise* and Sky News' *The Nation*, *AM Agenda*, *Lunchtime Agenda* and *PM Agenda*.

Simon has also appeared as a witness to give expert evidence before the Senate Standing Committee on Environment and Communications, NSW Legislative Council Standing Committee on Law and Justice, Senate Legal and Constitutional Affairs Legislation Committee and the Parliamentary Joint Committee on Intelligence and Security.