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

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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. 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.

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, and commitments under agreements such as the Reef 2050 Long-Term Sustainability Plan.

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.

Prior to the 1990s there were very few controls over land clearing across Queensland. 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’—sought to phase out broadscale land clearing by 31 December 2006.

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


In 2013, however, the then Newman government introduced changes to the burdensome Vegetation Management Act with the *Vegetation Management Framework Amendment Bill 2013.* 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 forth, 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.

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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 pastures, 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.*\(^{17}\)

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\(^{13}\) *Vegetation Management Act 1999 Schedule Dictionary.*

\(^{14}\) *Agriculture and Environment Committee Public Briefing, 22 March 2016, Brisbane.*


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.\textsuperscript{18}

\section*{Reversing the burden of proof}

The Palaszczuk government’s proposed amendments to the \textit{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 \textit{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…”\textsuperscript{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 \textit{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:

\textit{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.\textsuperscript{20}

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\textsuperscript{19} \textit{Sorby v The Commonwealth} (1983) 152 CLR 281, 294 (Gibbs CJ).

\textsuperscript{20} Explanatory Notes, \textit{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

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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’. 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._

**Conclusion**

We can have both a productive and growing agriculture sector as well as sufficient environmental outcomes. 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.

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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.