
TRACK D: BIODIVERSITY, ECOSYSTEMS AND ENFORCEMENT

THE FORMAL AND INFORMAL ORDERS IN LAND CLEARANCE REGULATION IN AUSTRALIA

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SUMMARY

Regulation of land clearance in Australia is attempting to curtail the big three environmental threats facing humanity: the enhanced greenhouse effect, biodiversity losses, and land degradation/desertification. This paper will review the current legislative regimes in place to reduce the rates of land clearance and some of the reasons why they have fallen short of generating compliance and, therefore, regulatory success. Chief amongst these are the “disconnects” between the “informal” codes or orders of behaviour upheld by norms within the regulated community, as well as the regulators, and the “formal” order of norms promoted by legislation. This paper will also describe how past regulatory failures may herald a future of regulatory success resulting from the development of a culture of learning and professionalism within agencies charged with implementation and enforcement. As a consequence, the narrowing of the gap between the formal order of the law and the informal order of society will likely occur.

1 INTRODUCTION

One of the major problems threatening Australia’s environmental quality and security of ecosystem benefit provision is clearance of native vegetation, resulting from the lack of effective land regulation.¹ Australia is the fifth highest land clearing nation in the world, following only Brazil, Indonesia, the Democratic Republic of Congo, and Bolivia.² Past and continuing clearance of native vegetation has dire consequences for the sustainability of natural environments and production landscapes. Land clearance is linked causally to water and land degradation, biodiversity losses, increases in greenhouse gas emissions, and threats to the viability of agricultural industries. The term “desertification” is readily applied to similar circumstances internationally. While land clearance in Australia is not a new phenomenon, clearance rates have been greatest in the last 50 years, with the area cleared equal to that cleared in the first 150 years of white

settlement.³ Government intervention in recent decades has reversed a historic preference for clearance, which satisfied the growth agenda of the colonizers and agricultural production, and made most acts of land clearance on private land illegal without a permit. Government agencies are responsible for implementation, administering permit allocations, and monitoring and enforcement of clearance activities.

2 REGULATORY EVOLUTION

Australia has been governed through a Federal system since 1901, with a central seat of power controlling areas of national importance, such as defence. Additionally, six states and two territories have broad jurisdiction within their own boundaries. In the century since establishment of a federal system of government, the original demarcation of control has been eroded in favour of the national government, which increasingly intervenes in state matters. Regardless, the state governments remain in general control of natural resource management and in particular control of land clearance.

In the states of South Australia and Victoria land clearance legislation dates from the 1980s, with the remaining states introducing controls from the mid-1990s (see Table 1). Regulation in most states is increasingly:

- Command and control in approach with regard to monitoring, enforcement, and penalties;
- Technologically advanced, satellite imagery dependant, information intensive, and reliant on vegetation maps classifying areas as deserving of different levels of protection and requiring different levels of control;
- Adoptive of new approaches; for example, off-set arrangements where clearance of one area may be made conditional on the saving of a similar or greater area from clearance; and
- Adaptive and responsive to local conditions, with increasing devolution to communities and “grass-roots” governance.

Table 1: Timeline and Selected Features of Land Clearance Regulation in Australia*

STATE	LEGISLATION	Recent reforms
New South Wales	Native Vegetation Act 2003 (took effect 2005) and Regulations 2005	Maximum penalty for unpermitted clearance is \$1.1 million. Regionally-based Catchment Management Authorities (CMAs) are the permit authorities and can not permit broad-scale clearance unless the overall effect is to improve or maintain the environment. All permits are conditional upon 15 year Property Vegetation Plans.
	Native Vegetation Conservation Act 1997	
	State Environment Planning Policy (SEPP) 46 1995 (Protection and Management of Native Vegetation Policy)	
South Australia	Native Vegetation Act 1991 South Australia (as amended 2002)	Amendments in 2002 increased the maximum penalty from \$40,000 to \$100,000, made permits conditional on achieving a significant environmental gain; and placed the cost of data provision for determining applications on the landholder.
	Planning Act 1982	
Victoria	Native Vegetation Management Framework: A Framework for Action (DNRE, 2002)	In 2002 an earlier policy aim of no net loss of vegetation was replaced with that of achieving a net gain. Vegetation is classified through a "habitat hectare" system of quality assessment, which includes measures of a particular site's condition and landscape context which is used to assess and compare areas.
	Native Vegetation Retention Planning Control program 1989	
Western Australia	Environmental Protection (Clearing of Native Vegetation) Regulations 2004	Amendments in 2004 raised the maximum penalties from \$3,000 to \$250,000 for individuals and \$500,000 for corporations.
	Soil and Land Conservation Act 1945 (included land clearance since 1986)	
Queensland	State Policy for Vegetation Management, May 2004, amended Nov 2006 Vegetation Management Regulation 2000	Reforms have introduced an offsets policy, on-the-spot fines, a minimum penalty scale, removed the privilege against self-incrimination and added presumptions of landholder responsibility for clearance and satellite data accuracy. Vegetation across the state has been classified as either remnant or non-remnant and a complete phase out of broad-scale clearance of remnant vegetation is the current aim. All applications to clear require a property vegetation management plan (PVMP) which must meet the performance requirements of the regional vegetation management codes.
(free-hold)	Freehold land regulation - Vegetation Management Act 1999 (freehold regulations introduced 2000)	
(lease-hold)	Land Act 1994 (leasehold regulations introduced in 1995)	
Tasmania	Forest Practices Act 1985 (commercial forestry restrictions extended to private forestry in 2002)	Tasmania has lagged behind the other states in having no state-wide legislation until 2002

* Note that Australia is a Federation and land clearance is in the control of the States.

3 REGULATORY FAILURE

The regulatory reforms outlined above have been enacted in response to regulatory failures that have been evidenced through continuing high rates of land clearance and poor implementation. Several studies, including those performed by this author, have attributed these regulatory failures to a suite of difficulties.⁴ A lack of political will and inadequate resourcing at a government level are often identified problems, but there may also be inadequate “back up” of the law by appropriate penalties and court sentencing.

At an agency level there may be a lack of agency personnel with the skill sets and culture conducive to enforcement, education, or implementation generally, which may be compounded by inadequate monitoring, knowledge, and information. In the past, agencies have been accused of complicity in non-compliance, due to their lax monitoring and poor enforcement.⁵ This is changing and is further discussed below.

Amongst those being regulated there may be inadequate norm activation or moral agreement with the law, along with various conflicts of interests between sectors of the community. There are also perceived, and actual, inequities in the application of the regulations, and the costs imposed on the regulated may be unable to be borne. Additionally, market failures exist along with perverse incentives to break the law.⁶ While maximum statutory penalties may be high, actual fines are often low and of little deterrent value. In parallel, sentences also a lack of appreciation of the seriousness of contraventions within the judicial, and also wider, community.

4 THE FORMAL AND INFORMAL ORDER OF LAW

The function of criminal law is to declare standards of moral conduct and mete out punishment for violations, but Australian land clearance laws have been accused of lacking the prerequisite moral repugnance and for attracting mainly administrative penalties. Sentences that are imposed are inadequate, which indicates that violation of land clearance laws is acceptable.

Certain sectors of society may perceive environmental crimes, such as land clearance, as “not really crime.” However, the argument that environmental violations are legitimate crimes deserving punishment is achieving more prominence; perhaps especially as global fears for human-induced climate change become more mainstream. Such divergence of opinion is not unexpected, particularly considering that land clearance was previously promoted by governments and central to the vision of Australia held by European settlers.

The norms and cultures which exist within society may or may not be mirrored by the “official” norms codified in legislation. The degree of convergence between the “formal” and “informal” orders of law is important for raising compliance, especially voluntary compliance, on which the efficacy of the regulatory system

relies. According to Teubner, the efficacy of a law may be compromised where there is a value conflict between the regulations, the regulators and those being regulated, and also where there is a conflict between the norms underpinning the legal system and other social systems.⁷ However, Teubner also recognises that regulation may still succeed if avenues of implementation are adopted that work with internal motivators rather than against them.

5 COMPLIANCE MODELS AND MOTIVATIONS

Compliance has been traditionally sought via deterrence. However, deterrence-based options have increasingly been strengthened in an attempt to trigger the change in behaviour required. The “Benthamite” factors of deterrence may have particular weight in encouraging compliance as land clearance occurs primarily for agricultural expansion; therefore, the clearance is economic in motivation.

Other mechanisms of behavioural change must also be utilised so that voluntary compliance with land clearance laws increases. Compliance motivations include both the economic incitements and social influences. Social actor models demonstrate the importance of social methods of enforcement (known as informal sanctions), such as disapproval, approval, shame, and conferring of status, that provide socially meted incentives and disincentives for behaviour. Social actor models further suggest that deterrence efforts may be counterproductive when the values underpinning the aims of the legislation are not shared by the community because resistance to change will become socially galvanised (as groups identify as anti-regulation or anti-government this becomes self-supporting of anti-regulation behaviour).⁸ Members of the regulated community may indeed adopt what is termed a “motivational posture” that is purposively non-compliant and resistant to regulation.⁹ While such a posture may be adopted individually, a shared posture will be stronger due to the informal sanctions operating amongst social groups, it also becomes politically volatile in a democracy.

Therefore it is crucial that attempts to strengthen the deterrence approach are not counterproductive. This is especially important as the empirical evidence increasingly suggests that the adoption of a mix of implementation tools, including punishment and persuasion, is vital in building compliance, as is building trust between those being regulated and the regulators.¹⁰

There are some salutary lessons to be learned from the (imperfect) adoption and application of regulatory compliance models. For example, one model for improving social regard for regulation is public participation. Devolution of regulatory responsibilities in the environmental arena to regional communities and community overseership of administrative functions has been adopted by several states and is federally supported.¹¹ It is seen as a move towards more geographically and socially responsive regulation, increasing biophysical appreciation and social acceptance and understanding. However, such regulatory models may suffer if inadequately resourced and if governance processes are

not well established. Certainly public participation may have great benefits, as research has shown that if people are involved in the process of rule creation then they may be more likely to accept rule application.¹²

For example, previous legislation in the state of New South Wales established Regional Vegetation Management Committees to produce regional plans outlining where land clearance could occur and what types of conditions and permit requirements would be required for clearance. The system was intended to decentralise the assessment process to the regions, with each operating under a community-built and designed plan particular for each region. Additionally, an attempt was made to democratise the administration by including representatives from all major stakeholder, industry, and conservation groups within each committee, along with representatives from the government departments involved. Unfortunately, those appointed from each of the more "farmer-friendly" groups formed coalitions and produced "majority" reports opposing the conclusions of the reports produced by alliances formed between the environmentalist and scientific representatives. The committees also became paralyzed by a lack of adequate data, and were completely undone by the basic conflict of values inherent in competing views about land use. The Regional Vegetation Management Committees have been disbanded and have been replaced under legislation by Catchment Management Authorities which are charged with the management of water as well as native vegetation. Similar to Regional Vegetation Management Committees in make-up, they are designed to be representative of all the interests. It is too early to say how they will fare, but the story of their antecedents, combined with other failures, has reflected badly on government agencies and damaged public trust. Agencies have been accused of heavy handedness and inflexibility by one side, while at the same time being accused by others of being hands-off and ineffectual. Any model of improving regulatory compliance must generate acceptance, behavioural change, and voluntary compliance amongst those being regulated. Additionally, and possibly most importantly, the compliance regime must be understood, adopted, implemented, and evaluated by agencies existing in an often politically unpredictable and resource poor environment (especially at the state-level in Australia). One optimal way for this to happen is for agencies to develop cultures of professionalism and learning so that past experiences of regulatory failures and successes are learned by agencies and disseminated within and across state boundaries to other natural resource management agencies experiencing similar issues. While perhaps the most important lesson to be learned about regulatory success is its dependency on context (social, economic and environmental) it is the development of a culture of learning that can truly enable agencies to develop the skills necessary to appreciate the lessons of contingency.

6 AGENCIES AS CHANGE AGENTS

Many Australian agencies now charged with enforcement functions have historically held, and may continue to hold, extension and support functions. Often, these agencies regulate communities that possess norms counter to the

regulations, or who may be resistant for other reasons. There are often informal orders within agencies as well, which are not immutable to change. Some agencies have adopted more strategic approaches and recruited and retrained personnel appropriate to enforcement tasks. They have begun to evaluate and audit implementation activity.

From “humble” beginnings as an informal network between several agency staff, a network of environmental enforcement agencies, called the Australian Environmental Law Enforcement and Regulators Network, was established in 2003. This network provides a forum and support for cross-border enforcement issues, awareness-raising, and professional development. As a result, agency personnel are increasingly taking more proactive means to ensure that agency activity is conducted in a professional manner with the requisite technical capacity and expertise. The network promotes moves toward identifying and adopting best practice; for example, to secure effective elements of deterrence as well as informal coupling with social enforcement mechanisms. Most importantly, the network provides a counter to the more traditional bureaucratic “silo” mentality of some agencies and has assisted in developing within agencies cultures which enable and promote learning.¹³ Agencies are developing “cultures” of professionalism, learning, and engagement, both with other agencies within and across jurisdictions, as well with those being regulated. This evolution of agency style means that agencies will be more effective in the analysis and development of regulatory practice as well as more effective “on the ground” to attain environmental goals, build and regain public trust, and provide public benefits.

7 CONCLUSION

Past regulatory failures in the land clearance context in Australia may be signs of the current problematic regulatory approach occurring in the country. However, these failures, once learnt from, will likely contribute to the eventual successful enforcement of environmental compliance in Australia. For example, the environmental consequences of regulatory failures are raising the moral and political imperatives for change. These are being felt and responded to, both by those being regulated and within regulatory agencies and government.

Government, government agencies and regulated communities are all “reflexive” to current conditions and, existing norms are being challenged and replaced with alternatives more conducive to increasing the efficacy of environmental regulation. The culture within implementing agencies is changing, which is critical for ensuring regulatory success.

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