

TOPIC WEEK 8

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An analyses of the Soil Conservation and Land Care and the Pastoral Land Management and Conservation Acts from legal, economic, scientific and value perspectives.

INTRODUCTION

The management of agricultural lands throughout Australia has been a complex combination of "law", "economics", "science" and "values". However, the starting point should be "values" as generally, the law is a result of society's value consensus or psyche.

Australians have had an ambivalent attitude to land management. On the one hand they have allowed almost total "laissez faire" land use of the better agricultural regions of Australia but have, since the turn of the century, been greatly concerned with the degradation of pastoral lands - see NSW Royal Commission, 1901. That is, society's "values" have treated the arid regions with greater respect, awe and reverence than that accorded to the better agriculture regions.

In general terms the Soil Conservation and Land Care Act 1989 (the Soil Act), and the Pastoral Land Management Act 1989 (the Pastoral Act) have as their objects a statement of a preferred human relationship with the land and its soil, vegetation and water (Leopold quoted in Nash, 1989, 67).

The relationship or ethic contains many constituent parts including the need to recognise past degrading land use practices, that such practices are no longer acceptable, the present importance of land and that the land must be conserved for the benefit of the people of the state - s6, Soil Act, s4, Pastoral Act.

However, all land management legislation should include in their objectives the prevention of land being used beyond sustainability and the restoration of degraded land. Both acts provide for this in their "objects and duties" and include the good management practice of "feedback" by requiring the monitoring of the acts' progress over time.

However, neither "sustainable use" nor "capability" is defined even though both are central to the acts. However, the definition of "capability" in the Soil Conservation Act is a good definition and should be used in the Pastoral Act.

"Degradation" has the more appropriate wide meaning as it includes not only soil - s3 Pastoral Act.

The general thrust of both acts is that land must be seen not as the sole domain of the landowner but as a resource that belonging to the public "at large". It is not a right or interest in the classical sense but a duty or responsibility to the land.

VALUES

THE CONSERVATION ETHIC: It is clearly arguable that it is the idea of a "conservation ethic" that underpins both acts, more so than any scientific, economic or legal basis particularly, the Soil Act.

"Values" refers to beliefs held by an individual or group of individuals particularly relating to land use. It refers to how a landowner perceives his/her activities in relation to the past, present and future uses of the land. If an abstract model can be considered, values would be the rationale behind all decisions if no institutional or external constraints existed.

Values are an important part of achieving the objects of the acts. For example, object s6(a), Soil Act and s4(a) Pastoral Act are values as they merely state that land must be seen as a crucial natural resource. Similarly objects ss6(b) and (c), Soil Act and ss4(b) and (c), Pastoral Act are concerned with recognition of past and future degrading activities and which obviously, requires appropriate values.

Although both acts assume "values", it is clear that legislation relying solely on such values would be useless. For example, if the respective acts "ended" at s6, and s4 they would have little substantive or practical effect. This is due to the fact that values are not the sole determinant of behaviours, as has been pointed out in relation to land use practices.

We do not live in an ideal world and empirical evidence such as CSIRO's rangeland research has shown

that landowner attitudes do not determine behaviour relating to the land.

Values are a vital part of the operation of land care legislation due to the nature of our democratic system. However, as many researchers have shown, landowners with near uniformity espouse a conservation ethic and have done so for decades yet have continued (and may well continue) to pursue unacceptable land care practices (Lovejay and Napier, 1987).

The Soil Act provides a clear example of the use of values as a basis for land management. The Pastoral Act mirrors this reliance but to a lesser extent.

In terms of the actual practical operation of the Soil Act, the reliance on values may be classified as follows:

* COMMUNITY INTEREST: Emphasises the need for community involvement. The Soil Act relies more on this than the Pastoral Act. For example, the composition of the Soil Council (s14) comprises a diverse group of people including farmers, environmentalists, ecologists and academics and therefore, is supposed to reflect diverse concerns.

* DUTY TO THE LAND: S8, Soil Act and s7, Pastoral Act states that there is a general duty to the land owed by all landowners including the Crown. Note that it is THE land, not THEIR land. S43(1) and 45(3), Soil Act and s43 Pastoral Act ("destocking orders") strengthens this duty by providing that soil conservation orders and voluntary properly plans run with the land against all successors in title. This effectively quashes any idea that landowners and pastoralists have absolute control over land upon reception of legal title.

* PROVISION FOR CO-OPERATION AND VOLUNTARY ACTION: This refers to the idea that legal enforcement must be utilized only as a last resort and is paramount in the Soil Act but not in the Pastoral Act. S13, Soil Act states that the Minister may either aid landowners in conservation programs (financial aid) or else help in the actual carrying out of the program(s).

S22(3) requires the Soil Council to consult with local landowners and local government prior to any recommendations to the Minister.

The above provisions make it clear that the aim of the Soil Act is co-operation between administrators and landowners, to have landowners accept the underlying ethic without legal compulsion.

LAW AS DEVELOPING APPROPRIATE VALUES

The Royal Commission (NSW) and inquiries (SA) into pastoral land management resulted in legal controls on pastoral lands use. The two most important controls are the allowance of leaseholds only and limitations on stock carrying capacities.

However, the question arises whether or not law can effectively determine land use. Research would tend to indicate yes, as there is a clear difference between pastoral land uses on the South Australian side of the border compared to the NSW side (Young, 1979). The NSW side is much more intensively developed and has been more subject to overstocking and subsequent degradation caused largely by the smaller holdings in the Western Division of NSW through the use of the "home maintenance area" concept.

Law cannot "create" a value acceptable to the general community. It may force people to respect a principle by threat of retribution, yet this is not a value in the sense that it is held by a majority of the community voluntarily. Rather, law is designed primarily to regulate behaviour by various means for example, economic incentives.

The nature of state legislative power is that it may "define" those values upon enactment of law (Bradsen). This is clearly a role that has a great deal of relevance in relation to soil degradation. Law cannot create a soil conservation ethic but it can (and should) DEVELOP that pre-existing ethic by definition of its content, prioritising its importance and most importantly, requiring that behaviour accompanying the ethic.

ECONOMICS

The use of economics as a tool of environmental protection assumes that certain environmentally unsound activities can only be conducted at the economic cost to the landowner. For example, a farmer may over-crop his /her land only if he/she is willing to pay extra costs to do so.

Economic theory presupposes the ability to price and the landowner paying the price to treat the problem. However, this approach fails to recognise a number of important points:

- * Pollution and land degradation is not site specific; economic regulation assumes a landowner being able to pollute his/her area ONLY, without affecting other land.

- * It is difficult to fully cost and with any degree of certainty due to the nature and interdependence of the natural environment. For example, to assess the environmental cost of clearing a thousand trees would involve not only aesthetic value and the cost of replanting, but also a consideration of the multitude of species currently existing in those areas or relying upon them for food or habitat.

- * Economics assumes a "perfect market" whereby the "invisible hand of the market" operates to allocate resources in an efficient and wealth maximising manner. However, such a perfect market does not exist to the extent relied upon by many economists, especially in the area of environmental protection.

Neither act relies on economic regulation to any real extent for example, there is no significant reliance on "degradation taxes" or other financial incentives not to degrade the land.

The definition of "capability" in s3, Soil Act mentions the "future productivity" of the land implying that land quality does depend to a small degree on economic measures of output. S13 empowers the Minister to give financial assistance to landowners in the carrying out of conservation programs, this being the clearest example of the use of economic incentives in that Act.

Economics also relates to "penalties" for non compliance with district property plans and voluntary property plans (Soil Act) and farm plans (Pastoral Act). Neither contain any specific provision for penalty in relation to non compliance of the plans and would therefore appear to rely on some notion of market forces dictating the manner in which landowners will be penalised for non-compliance. The implicit idea is that it is in the landowner's best economic interest to comply with district and property plans.

However, under the Pastoral Act there are strong controls on the future terms and conditions of leases which can be used as a penalty for noncompliance on renewal or "rollover" of the lease term every 14 years ss22, 26 and 19.

It is submitted that it would be preferable to ensure compliance with such plans by way of specific penalties rather than to assume some form of "market penalty" or the variation of lease terms. The idea that the market will correct such failures by landowners is clearly open to question, the most dangerous potential consequence being further land degradation.

RENT: the rent being paid for a pastoral lease should be a true market rent and not a subsidised rent. Good land management dictates that a true price be paid for public resources particularly in the case of pastoral lands, where there are now a number of competing land uses.

The practical method now being used by the department in determining rent results in a rent which is far too low, less than market rent, and as well the lessee enjoys payment in arrears - s22. The user of public resources should pay the full price for the use of that land and therefore, the rent should be a straight market rent.

SCIENCE

A clear definition of "science" is required. In so far as science refers to the scientific method and Newtonian mechanics, then it cannot be used as a basis of controlling and preventing land degradation. The reason is that such an approach presupposes the divisibility of the problem of land degradation into distinct constitute parts, each of which is open to investigation and ultimate solution (Capra, 1982).

This ignores the complexity and interdependence of the natural environment. This Newtonian approach also leads to the humanist assumption that individual problems will be solved by human technology (Ehrenfield, 1978).

The better definition of science is that which sees it not as method but as embodying a set of virtues including objectivity, selflessness, intellectual honesty and openness of mind (Sagoff, Economy of the Earth). In this sense science has a valuable part to play in achieving the objects of both acts, especially pertaining to s6(d) (Soil Act) and ss 6, 41, 44 Pastoral Act providing for a system of land degradation inquiry and monitoring.

Such provisions similarly presuppose some scientific inquiry. It is to be noted that the reliance on science in the Soil Act is not as explicit as in the Pastoral Act.

S6, Pastoral Act refers to the use of scientific principles in relation to pastoral lands but without defining "scientific". For reasons stated above, it is submitted that this should be seen as referring to the virtues of science as enabling a proper investigation of the problem.

The limitation of science here is that it should be seen as embodying the virtues of inquiry into the land degradation problem and possibly considering available ways of reducing further degradation yet should not be seen as providing the ultimate solution to land degradation. Human behaviour existed prior to land degradation and human behaviour will be the only sure way of aiding the rehabilitation of land (Lovejoy and Napier, 1986).

LAW

The Pastoral and Soil Acts make interesting comparison in that the Pastoral Act basically, uses compulsion to achieve it's objectives whereas the Soil Act uses encouragement.

It is the role of law that has often been the most contentious issue in environmental protection generally. Some have argued that law should not play a major part in land degradation programs due to a number of reasons:

* Traditionally private ownership of land brought with it near absolute control over use and management of that land. The liberalist idea was that a person had rights to the land excluding all others including the state, with some minor exceptions such as nuisance and waste (Bradsen and Fowler, 1987, 130).

This however is to confuse the concept of property (a legal fiction created by society) and land (the natural or physical reality) (Wilkinson, 1987, 310). Property rights are not to be thought of as encompassing the right to degrade land. No one "owns" land; the land was there before the "owner" and will continue to be there after the owner moves on.

* Law is said to prevent the necessary co-operation between landowners and administrators due to resentment on the part of landowners (Bradsen, 1991, 24). This however, assumes draconian laws and administrators as well as stubborn and ill-informed landowners. Clearly this is an unjustified assumption, for if a landowner is supposed to be willing to adopt proper land care practices on the basis of voluntary self interest (see below), why would this attitude change if the same practices become law?

The law need not be blunt and uncompromising for this would defeat the underlying purpose.

* Law is said to be unnecessary because once alerted to the problems of land degradation, landowners will adopt proper land care practices as it is their own best interests to do so. This idea has clearly been proven incorrect on the basis of experience of voluntary land care programs, even when landowners have all the requisite knowledge (Lovejoy and Napier, 1987, 306).

These reasons basically underpin the voluntary approach to land degradation issues in the post World War II era. The fact that the problem is still with us reflects the failure of the voluntary/educational approach and the dubious nature of the underlying rationale.

Under the specific objects of the acts law does have a role to play. For example, objects ss6(a) and (b) Soil Act, dealing with recognising the importance of land and the nature of past land use practices, require law to show that the State is exercising its power under a democratic mandate to declare certain practices unacceptable.

Overstocking of pastoral lands have been recognised as a problem from the turn of the century for example, the NSW Royal Commission which lead to the Western Lands Act 1901. If pastoral lands are to be continued as a pastoral use compulsion or effective legal controls are necessary. Further powers are "cancellation of lease" or the "imposition of fines" in s37. However, the effect of s37 is somewhat mitigated by s39's "compensation" provisions.

Stocking rates are still the most important single control and is enforced under s43 "notices to destock or take other action". However, "values" and "economics" come into play in the form of enforcement of stocking rates because of the expense and difficulty of mustering all stock within a reasonable time, the necessary allowance of stocking rates over the recommended maximum because of seasonal factors, the mobility of stock today and that fact that most pastoralists run their pastoral lease in conjunction with other properties (Bowden, 1991).

There are three important methods of land use control (after Bradsen, 1991):

PLANNING: Freehold tenure could be allowed but with land control achieved by zonings and compulsory management plans similar to the Mount Lofty Ranges management plan. This option is not recommended because of the basic unsustainability of the region and leasehold tenure does tend to advertise that pastoral land uses are a "privilege" rather than a "right".

LICENSING: The concept of licensing the individual is a good concept. This would require the pastoralist and landowner to complete an appropriate course of instruction which could include new farming methods such as sustainable

agriculture and perhaps require a certain amount of practical experience.

DIRECT REGULATION: The law focuses on the activity rather than the person as direct regulation controls anybody engaged in the a particular land use.

This best describes the current focus of the acts but the strong wording and powers in the Pastoral Act are undermined by "value" that is, non enforcement. For example, there has been only one s43 notice to destock since the inception of the act .

In the western world where social and tribal mores are no longer applicable, the law is essential to modify behaviour. "... (L)aws tend to reflect rather than establish general social values" (Bradsen, 23). The law is used to stimulate and guide social reform.

The pastoralists and landowners generally, are more concerned with property rights having little concern with competing uses such as recreation and tourism (Bowden, 1991). Their main objective is to achieve freehold tenure with no land use control. From Bowden's study there is a large gap in the values of the pastoralists and that of society.

Because there is such a gap it is necessary to have strong law and enforcement of society's values concerning particularly, arid lands. In recent years the "rules of the game" have changed and where before, the only persons interested in arid lands were pastoralists, today there are a large number of groups who have laid some claim to arid lands.

In the Hopgood Report, thirty one different bodies made representations concerning the pastoral lands which underlines the proposition that pastoral land uses today should be "multiple land uses".

Voluntary farm plans such as those promoted in the Soil Act lack coordination and expertise being merely a "vague moral obligation". On the other hand, the Pastoral Act is much more powerful. Once prepared, such plans must be followed by the pastoralist. Enforcement and control is obtained through the use of leasehold tenure with review of terms and conditions being largely subject to the success or not the farm management plan.

CONCLUSION

The two acts have different value and economic underpinnings which in turn, influences the type of law and enforcement provisions. The Pastoral Act is much more forceful than the Soil Act making compliance with the farm plans mandatory. The Soil Act on the other hand is basically, discretionary in both the operation and enforcement of farm plans.

The Soil Act therefore, is less effective than the Pastoral Act and it is recommended that the law be made stronger by making farm plans compulsory for all landowners and effective penalties for non compliance.

The Pastoral Act has commendable flexibility in allowing and encouraging "multiple land uses" for example, "public access routes" in s45 and non pastoral activities when leases fall due for extension and variation - s25, s26.

REFERENCES

- J Bradsen, "Perspectives on Land Conservation", Environmental Planning and Law Journal, March, 1991, 16-40.
- M A Bowden, "Pastoral Land Management", unpublished dissertation, Uni SA, 1991.
- M.D. Young, "Pastoral Land Tenure Options in Australia", Australian Rangeland Journal 7(1) 1985.
- M. Gibbs, "Studying Pastoral Property Management in the Arid Zone", Australian Rangeland Journal 7(1) 1985.
- K.O.Campbell, "Australian Agriculture, Reconciling Change and Tradition", Longman Cheshire Pty. Limited, 1980.
- M. Gibbs, "Property Management in the North East Pastoral Region of South Australia", Report of a Survey Conducted in 1980, C.S.I.R.O. Division of Wildlife and Rangelands Research, Project Report No. 2..
- K.O. Campbell , "Agriculture in the Australian Economy", Edited by D.B. Williams, "Land Policy", 1982, Sydney University Press.
- K.D. Cocks and C. Parvey, "Prospects for Land Use Planning in Arid Australia", Australian Rangeland Journal 7(1), 1985.
- G.N. Harrington (ed), "Management of Australia's Rangelands", A.D.Wilson, M.D. Young, Authors - I.F. Beale, K.D. Cocks, G.M. Cunningham, B.D. Foran, M.H. Friedel, M. Gibbs, R.D. Graetz, G.F. Griffin, G.N. Harrington, K.C. Hodgkinson, W.E. Holmes, G.G. Jons, G.M. Lodge, D.M.D. Mills, J.G. Morrissey, J.J. Mott, W.E. Mulham, J.C. Noble, D.M. Orr, G. Pickup, A.J. Pressland, G.G. Robinson, D.J. Tongway, J.C. Tothill, P.A. Walker, R.D.B. Whalley, A.D. Wilson, G.R. Wilson, M.D. Young., C.S.I.R.O. 1984.
- M.D. Young, "Differences Between States in Arid Land Administration", (1979),C.S.I.R.O. Management Series No. 4.
- The Vickery Report , Arid Zone Land & Renewable Resources Management Review 1983.

B R Davidson, "Australia Wet or Dry?", Melbourne University Press, 1969.

D J Hopgood, "Arid Zone Land and Renewable Resources Management Review" - Volume 1, 1983, SA Government, 1983.

F Capra, "The Turning Point", Fontana, London, 1983.

D Sagoff, "The Economy of the Earth", Cambridge, CUP, 1988.

S B Lovejoy and T L Napier, "Conerving Soil: Sociological Insights", Journal of Soil and Water Conservation, Sept-Oct, 1986.

C F Wilkinson, "Soil Conservationists and the Use of Land", Journal of Soil and Water Conservation, Sept-Oct, 1987.

R Nash, "The Rights of Nature", Leichhardt, NSW, Primavera Press, 1989.

J Bradsen and R Fowler, "Land Degradation: Legislation and Institutional Constraints", in A H Chisholm (ed), "Land Degradation Problems and Policies", Cambridge, CUP, 1987.

Ehrenfield, "Arrogance of Humanism", NY, OUP, 1978.