VEGETATION CONSERVATION: THE PLANNING SYSTEM AS A VEHICLE FOR THE REGULATION OF BROADACRE AGRICULTURAL LAND CLEARING

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[*The conservation of native vegetation is currently one of the most significant environmental issues in Australia. There are a growing number of legal regimes in the Australian States and Territories designed to regulate agricultural land clearing on land in private ownership. This article focuses upon those which have attempted to use the land use planning system as the vehicle for imposing controls. Recent initiatives in Victoria and New South Wales are examined in some detail in light of the detailed statutory provisions. The conclusion reached is that the provisions adequately resolve these issues and will survive legal challenge. In light of this, the possibility of using planning systems in the other Australian jurisdictions as a vehicle for regulating the destruction of native vegetation is considered. Broader policy questions are considered and a number of limitations associated with the use of planning systems are noted.*]

INTRODUCTION

Public attention has for some time now been focused on the issue of vegetation conservation on land which is already in public ownership — more specifically, the conservation of native forests. The legal and policy questions which have arisen have been concerned with the ambit and exercise of the powers of the Commonwealth Parliament under the Constitution[1] and, in New South Wales, the law and practice of environmental impact assessment.[2] Conservation of public lands can never be more than a partial solution, however, to the broader problems posed by the destruction of native vegetation in Australia. Policy makers in a number of Australian jurisdictions are thus turning their attention to the larger issue of vegetation conservation on private land.

There are a number of different dimensions to this question. This article will focus specifically upon legal measures currently being taken to protect native vegetation from the threat of agricultural land clearing, for the purposes of either

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[1] *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1; *Richardson v. The Forestry Commission of New South Wales* (1988) 62 A.L.J.R. 158; *Queensland v. Commonwealth* [1989] 167 C.L.R. 232; *Australian Conservation Foundation and Harewood v. The Minister of Resources and Harris-Daishowa (Australia) Pty Ltd*, unreported, Federal Court of Australia, 20 December 1989.

[2] *Kivi v. The Forestry Commission of New South Wales* (1982) 47 L.G.R.A. 38; *Prineas v. The Forestry Commission of New South Wales* (1983) 49 L.G.R.A. 402; (1984) 53 L.G.R.A. 160; *Jarasius v. The Forestry Commission of New South Wales* (1990) 71 L.G.R.A. 79; *Bailey v. The Forestry Commission of New South Wales* (1989) 67 L.G.R.A. 200.

nature conservation or land conservation, or an amalgam of the two. In so doing, however, it will necessarily touch upon the matter of timber getting from privately owned land, given the fact that in many instances there is a market for cleared timber as woodchip even though the primary motivation may be to clear land for agricultural purposes. Indeed, where this market is present it may play a vital role in ensuring that clearing occurs by providing finance for the operation.[3]

Although broadly drafted clearing controls may also bear upon sustainable forestry activities, this raises particular problems for legal regulation which are not touched upon here. Nor are we here concerned with the tensions between the claims of nature conservation and those of sustainable forestry. These have occupied the attentions of policy makers and the courts with regard to land in public ownership, but a recent Tasmanian attempt to protect forestry operations on private land from demands for nature conservation should be noted.[4]

Pursuing vegetation conservation objectives on land in private ownership raises fundamental questions about the rights of user associated with private property. Then there is the separate question of what policy initiatives are best designed to realize these objectives, bearing in mind that landholders aggrieved by definitions (or redefinitions) of private property seem likely to make poor conservationists. This becomes a vital consideration once it is recognized that vegetation conservation is as much about the ongoing management of land as the initial imposition of restrictions on land use.[5]

FORMS OF REGULATION

Tensions between definitions of private property and the practical realities of vegetation conservation policy are reflected in the very different approaches which can be taken to the problem of how to go about inducing rural landholders to manage their land in a way which is consistent with conservation objectives.[6]

[3] Note that in Victoria there is a proposal to introduce specific controls relating to timber production on private land, including harvesting timber from native forests, in addition to the clearing controls to be discussed below. This takes the form of an amendment to the State section of all planning schemes requiring a permit to be obtained for such activities. If the area in question exceeds 10 hectares, applications must be referred to the Director-General of Conservation, who has a power of veto under s. 61(2) of the Planning and Environment Act 1987 (Vic.). In practice, the intention is that, where appropriate, one permit will be issued to cover both regulatory regimes. Whether or not a permit is required, timber production activities will have to comply with the Code of Forest Practices for Timber Production (Revision No. 1 May 1989). Although this requires landholders to carry out management activities to ensure regeneration, there is a significant exception where 'the land is to be used for a purpose for which native vegetation is not required' (cl. 3.1.1.1). This would, therefore, exclude those clearing land for agricultural purposes.

[4] Part II of the Forest Practices Act 1985 (Tas.) allows landholders to apply to have their land declared a private timber reserve. The inducement offered is found in s. 759 of the Local Government Act 1962 (Tas.), which makes it clear that the management of land as a private timber reserve is a lawful use of the land and therefore gains existing use protection against any later attempt to regulate timber getting activities through a planning scheme (*e.g.* for nature conservation purposes).

[5] See Farrier, D., 'Regulation of Rural Land Use: Coercion or Consensus?' (1990) 2(1) *Current Issues in Criminal Justice* 95.

[6] *Ibid.* where I discuss the approaches taken in the United Kingdom, South Australia and New South Wales; Fowler, R. J., 'Vegetation Clearance Controls in South Australia — A Change of Course' (1986) 3 *Environmental and Planning Law Journal* 48; Gardner, A., 'A Consensus System of Planning and Management for Land Conservation: A Grassroot's Solution to a Natural Problem' (1989) 6 *Environmental and Planning Law Journal* 249; O.E.C.D., *Agricultural and Environmental Policies: Opportunities for Integration* (1989), Annex 1; O.E.C.D., *Country Approaches to the Integration of Agricultural and Environmental Policies* (1988).

The strategies available represent different forms of regulation. These will not necessarily take a legal form. They may, for example, rely on education or peer pressure. Legal forms of regulation may utilize civil or criminal law mechanisms.[7] It is possible to identify four broad strategies:

(i) *simple coercive strategies*

These ordinarily take the form of absolute prohibitions on certain land uses or, more usually, prohibitions which are qualified by provision for individualized approvals, licences, permits or consents to be granted, with site-specific conditions attached. Rarely do we find a requirement that landholders carry out positive management activities: the emphasis is negative and restrictive. Traditionally, these prohibitions have been backed up by criminal sanctions, but civil injunctions are increasingly being seen as an alternative.[8]

(ii) *compulsory acquisition strategies*

As with coercive strategies, land use restrictions are imposed upon landholders, but at the same time compensation is provided if the prohibition bites, or if onerous conditions are attached to any approval given. The land is not taken into public ownership: it is the restriction on land use which is compulsorily acquired rather than title. It is important to distinguish these strategies from those which take the simple coercive form combined with a voluntary arrangement whereby the landholder agrees to carry out positive management activities in relation to retained vegetation, in return for payment. In this case, the money handed over represents a fee for services rendered rather than compensation for reduced land values resulting from the imposition of land use restrictions.

(iii) *consensus strategies*

The distinctive feature of consensus strategies is their apparently voluntary nature. They include, at one extreme, the generalized provision of financial incentives through the taxation system,[9] but individual contracts between landholder and government agency allow more careful targeting and create enforceable legal obligations. They may seek to do no more than restrict land use, but they could also take the further step of requiring the landholder to undertake management activities. What is needed to induce landholders to enter into agreements will vary, ranging from gentle persuasion to substantial financial inducements. But in the long-term these agreements are vulnerable to changes in ownership, so more recently we have witnessed the translation of contractual rights into proprietary rights which run with the land and thus bind those who purchase title from the original covenantor. This is a statutory extrapolation of the equitable

[7] See Brown, D., Farrier, D., Neal, D. and Weisbrot, D., *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (1990), ch. 1.

[8] Ultimately, of course, even injunctions rely on the threat of criminal proceedings for their efficacy.

[9] Commonwealth, Department of Arts, Heritage and the Environment, *Fiscal Measures and the Environment: Impacts and Potential* (1985); Commonwealth, House of Representatives Standing Committee on Environment and Conservation, *Fiscal Measures and the Achievement of Environmental Objectives* (1987).

doctrine of restrictive covenants.[10] The agreements which produce such rights are variously known as conservation or heritage agreements or covenants.[11] Even though consensus strategies begin their lives with an agreement, those who are party to them may expose both themselves and future landholders to legal coercion if they fail to comply.

(iv) *polluter pays strategies*

These are ordinarily associated with industrial pollution control rather than the regulation of land use in rural areas. From a strict economic efficiency point of view the decision whether it is cheaper to pollute and pay the charges or to reduce discharges should rest with the polluter but in practice they will usually be combined with a simple coercive strategy which fixes base-line standards.[12] It would probably be going too far to suggest that the destruction of native vegetation is in itself a form of pollution, upon which charges should be levied. In so far, however, as vegetation clearance results in soil erosion and consequent sedimentation of watercourses, a 'polluter pays' strategy would in theory be directly applicable here. In practice, however, it would be impossible to implement because charges are ordinarily based on quantity or quality of point-source discharge or both. Pollution stemming from soil erosion is diffuse and hard to measure. Apart from this, the 'polluter pays' strategy assumes that certain levels of pollution are acceptable. This may prove to be an unacceptable assumption in relation to the conservation of native vegetation when frequently other values, apart from pollution prevention, are at stake.

These different strategies reflect fundamentally different political and philosophical assumptions about the nature of rights associated with private property. Both compulsory acquisition and consensus strategies assume that the landholder has broad rights of user until bought out by the state or persuaded to cede them, whereas coercive and polluter pays strategies assume that the state has the right to modify land uses from time to time in accordance with its perceptions of public welfare.

THE PLANNING SYSTEM AND VEGETATION CONSERVATION

The objective here is to examine in some detail the problems which may arise when provisions aimed at the conservation of native vegetation are tacked on to an existing form of regulation — 'planning' — which has established parameters and an operational culture which evolved in a very different context. Planning systems have traditionally focused on urban land use issues and have been

[10] See Bradbrook, A. J. and Neave, M. A., *Easements and Restrictive Covenants in Australia* (1981) paras 1406-49.

[11] See, for example, South Australian Heritage Act (1978) (S.A.) Part IIIA: heritage agreements; National Parks and Wildlife Act 1974 (N.S.W.) Part IV, Division 7: conservation agreements; Wildlife and Countryside Act 1981 (U.K.): management agreements.

[12] See, for example, the N.S.W. Water Board's *Trade Waste Policy and Management Plan* (November 1988, as amended in January 1990). See also Barker, M. L., 'Environmental Quality Control: Regulation or Incentives?' (1984) 1 *Environmental and Planning Law Journal* 222; Baumol, W. J. and Oates, W. E., *Economics, Environmental Policy and the Quality of Life* (1979); Seneca, J. L. and Taussig, M. K., *Environmental Economics* (3rd ed. 1984); Common, M., *Environmental and Resource Economics: An Introduction* (1988).

primarily concerned with regulating the erection and use of structures rather than land use *per se*.[13] Farming has been conceived of as an undifferentiated whole, and no attempt to distinguish between arable and pastoral land uses has been made. No distinction has been drawn between land used for rough grazing and land used for the intensive cultivation of irrigated crops, to take the two extremes.[14] Both have been traditionally regarded as equally inoffensive and permitted unconditionally under the provisions of plans. The new breed of vegetation conservation provisions constitutes a direct challenge to these assumptions about the proper scope of planning but they do so by indirect means. They do not seek to regulate changes of land use directly, as planning systems have traditionally done. Agriculture, in general, remains an unregulated use under the provisions of the plan. But land use is indirectly regulated. Prohibitions on the removal of vegetation effectively prevent conversion of pastoral into arable land — or even the improvement of pastures.

Australian planning systems have traditionally responded to the issue of land use rights in two ways. The right to continue the 'existing' use is guaranteed. Faced with this protection, the only option open to the planning authority is to attempt to purchase a use restriction in the free market where legislation provides for this[15] or to go beyond use restrictions and purchase voluntarily, or acquire compulsorily, the landholder's title, in particular the fundamental right associated with private property — the right to exclude others from use and enjoyment.

As well as this existing use protection, restraints on potential land uses have attracted compensation (albeit in very limited circumstances) under provisions dealing with 'injurious affection'. In terms of the broad regulatory strategies identified above, Australian planning systems have been an amalgam of simple coercion and compulsory acquisition. They have asserted a broad entitlement to control prospective land use either by absolute prohibitions or individual approvals, and in a limited range of cases the imposition of controls has to be accompanied by the payment of compensation.

Existing use provisions and compensation provisions are part of the stock in trade which planning systems bring with them to the regulation of any new area of land use planning. This article seeks to explore the implications which these regulatory inhibitions have for attempts to use the planning system to regulate the destruction of native vegetation on privately owned land. It also considers the logically prior question of whether provisions which authorize the making of plans allow the regulation of interference with native vegetation. While this may create few problems in the context of the new environmental planning systems, it

[13] Boss, A., *Landforming Practices — The Role of Local Councils*, Department of Environment and Planning (N.S.W.) (1983).

[14] See Environmental Planning and Assessment Model Provisions 1980 (N.S.W.), cl. 4. The definition of agriculture used here harks back to section 514A of the Local Government Act 1919 (N.S.W.) where it is defined to include: 'horticulture and the use of land for any purpose of husbandry, including the keeping or breeding of livestock, poultry, or bees, and the growing of fruit, vegetables, and the like'.

[15] For example, Conveyancing Act 1919 (N.S.W.) s. 88E, surmounts the limits placed on the equitable principles relating to restrictive covenants by such cases as *Haywood v. Brunswick Permanent Benefit Building Society* (1881) 8 Q.B.D. 403 and *London City Council v. Allen* [1914] 3 K.B. 642.

is a live issue when it comes to those planning systems resting on much older legislation, based on earlier conceptions of town and country planning.

Whatever the intentions of policy-makers, will planning provisions regulating the destruction of native vegetation, when set in the context of the total planning package existing in any particular jurisdiction, mandate a coercive or a compulsory acquisition strategy? Or will they founder altogether on the shoals of existing use? To what extent have the new environmental planning regimes insulated themselves from these problems, and what are the prospects of those jurisdictions which rely upon what are still town and country planning regimes being able to use them as a vehicle for regulating the destruction of native vegetation?

THE NEW INITIATIVES

Victoria

Under s. 6(1)(b) of the Planning and Environment Act 1987 (Vic.), planning schemes can, *inter alia*, 'make any provision which relates to the use, development, protection or conservation of any land in the area'. On 30 October 1989, the Minister for Planning and Environment, as planning authority,[16] amended the State section of all Victorian planning schemes[17] to introduce vegetation controls. Amendment S4 came into effect without prior public notice and opportunity to comment.[18] In broad terms it required a permit to be obtained before native vegetation could be removed, destroyed or lopped on areas of land over 0.4 hectares. There were a number of exemptions (for example, timber harvesting under licence) and these were later expanded by Amendment S6.[19] However, these provisions only operated on an interim basis until 28 February 1990. Meanwhile the proposals in the form of Amendment S5 were placed on exhibition for public comment.[20] On 4 February 1991 the panel set up under s. 153 of the Planning and Environment Act to consider the submissions and the future of the proposed amendment reported.[21] Although it supported the maintenance of the controls, it emphasized the need to see vegetation retention 'as but one facet of a long-term multi-faceted conservation strategy' in which controls 'should form part of a land management program based on the sustainable capacity of the land'.[22] To this end, it recommended additional exemptions from the requirement to obtain a permit, to cover situations where there was an

16 Planning and Environment Act 1987 (Vic.) ss 8(1) and 9.

17 *Ibid.* s. 7(1)(a).

18 The Minister can exempt himself or herself from these requirements on the grounds that compliance is 'not warranted or ... the overriding interests of Victoria necessitate exemption': s. 20(4).

19 13 December 1990.

20 Planning and Environment Act 1987 (Vic.) ss 17-9; 21-8. For a history of the introduction of the controls and coverage of the controversy which they raised, see 'Native Vegetation Clearance Controls' *Report of a Panel pursuant to Section 153 of the Planning and Environment Act 1987*, 4 February 1991; Trompf, 'Legal Bid on Trees' *The Weekly Times* (Melbourne) 21 March 1990; Henderson, 'Rebel Navros wins support' *The Weekly Times* (Melbourne) 28 March 1990 and *Countrywide*, ABC television, 22 June 1990.

21 *Ibid.*

22 *Ibid.* 82.

approved land management plan or an approved works program.[23] The general aim of these recommendations was accepted by the Government which accordingly amended Amendment S5. Those who wished to clear in accordance with a management plan or a works program were initially to be required to obtain a permit, but, if approved, no further permits would be needed to clear land in accordance with the plan or program.[24] There was a built-in incentive to take advantage of these provisions stemming from the fact that many of the specific exemptions ceased to operate after five years. These included, for example, grazing by domestic stock; clearing of regrowth less than ten years old to re-establish cultivation or pasture; destruction for the purpose of constructing buildings and noxious weed control.[25]

Although this version of the amendment came into force, when it was laid before both Houses of Parliament[26] it was revoked by resolution of the Legislative Council, which is controlled by opposition parties. The Liberal Party has since announced its commitment to some form of control over the destruction of native vegetation; the dispute is over the precise details.

Another version of the controls has now come into operation[27] and, at the time of writing, awaits the reaction of the Parliament. The most significant change is that there is no longer a five year limit on any of the exemptions. This removes the immediate incentive to carry out whole farm planning exercises, although those who do so will still be able to avoid repeat applications for permits.

The position now is that a permit must be obtained to remove, destroy or lop native vegetation on areas of at least 0.4 hectares, unless there is an exemption covering the activity. All applications to clear areas of 10 hectares and above must be referred for comment to the Director-General of Conservation and Environment.[28] If the Director-General objects to the grant of a permit the legislation requires the municipal council to reject the application.[29] Both applicants and objectors have a right of appeal to the Administrative Appeals Tribunal against the council's decision. The Director-General is made a party to the appeal where he or she has objected to the grant of a permit.[30]

The operation of the vegetation control provisions can be excluded by provisions in the regional or local section of the planning scheme. This may, for example, incorporate more restrictive provisions.[31]

23 *Ibid.* 87.
24 Amendment S5, 26 February 1991, cl. 7-2.4.
25 *Ibid.* cl. 7-2.1.
26 As required by s. 38(2) of the legislation.
27 Amendment S15, *Victoria, Government Gazette*, 17 April 1991.
28 Clause 5A-1 and Planning and Environment Act 1987 (Vic.) s. 55.
29 *Ibid.* s. 61(2).
30 *Ibid.* ss 77, 82 and 83.
31 Amendment S15 cl. 7-3. Sherbrooke Shire Council, for example, has a blanket prohibition on damage to or destruction of protected vegetation within 30 metres of a watercourse and on land with a slope in excess of twenty per cent in a number of zones, including Rural (General Farming). In other areas, a permit to allow clearing can only be granted when Council is satisfied about a number of things — in other words there are preconditions rather than mere factors for consideration. They include, for example, that there is a demonstrated need for the removal of protected vegetation associated with an approved development or a farming use.

New South Wales

Under the Environmental Planning and Assessment Act 1979 (N.S.W.) environmental planning instruments can provide for 'protecting, improving or utilizing, to the best advantage, the environment'. More specifically, they may include provisions 'protecting or preserving trees or vegetation'.[32] These provisions clearly envisage the possibility of broadacre clearing controls being introduced through planning instruments, and not simply the traditional tree preservation order. In practice, vegetation protection initiatives have been taken in State environmental planning policies and local environmental plans.

Under State Environmental Planning Policy 14, coastal wetlands have been mapped in a number of local government areas and land clearing, *inter alia*, requires both development consent and the concurrence of the Director of Planning. It is also classed as 'designated development', which means that an environmental impact statement 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.[33]

Under State Environmental Planning Policy 26, areas have been identified on special maps as littoral rainforest and in these areas development consent must be obtained before, *inter alia*, land can be used for any purpose or native flora can be disturbed, removed, damaged or destroyed. Again, these activities are classed as 'designated development'. Within 100 metre buffer zones, development consent is required where native flora is to be disturbed, removed, damaged or destroyed.[34] In both cases, the concurrence of the Director of Planning is required.

In many local environmental plans, provisions regulating land clearing can be found in environmental protection zones.[35] The more recent thinking of the Department of Planning can be found in the Sample Draft Rural Local Environmental Plan, issued as a background framework for rural councils to work to when revising their plans.[36] This provides for the identification of areas of environmentally sensitive land and imposes a development consent requirement where trees are to be destroyed on whichever is the less of:

- more than one hectare of environmentally sensitive land of an existing holding; or
- more than 5 per cent of the area of an existing holding where that 5 per cent comprises environmentally sensitive land.[37]

'Destruction' is broadly defined and 'trees' include saplings and shrubs, which would cover vegetation such as saltbush and mallee associations, but not scrub.[38]

32 Planning and Environment Act 1987 (Vic.) s. 26(a), (e).

33 *Ibid.* ss 77(3)(d) and 98.

34 There are only very limited exemptions.

35 Farrier, D., *Environmental Law Handbook: Planning and Land Use in New South Wales* (1988) 205.

36 See also the Sample Draft Rural Local Environmental Plan for Councils within the Western Division, which contains similar, but not identical provisions.

37 *Ibid.* cl. 21(2).

38 In practice it would rarely make any economic sense to clear 'scrub' selectively on wooded areas. Compare the definitions of 'tree' in the Soil Conservation Act 1938 (N.S.W.) s. 3: 'includes sapling, shrub and scrub'; and the Western Lands Act 1901 (N.S.W.) s. 18DB(2): 'includes a sapling or seedling of a tree', both of which also regulate the destruction of vegetation in certain contexts.

A council must not grant consent unless satisfied that the clearing will be carried out in a manner which 'minimises':

(a) the risk of soil erosion or other land degradation;

(b) the loss of scenic amenity; and

(c) the loss of important vegetation systems and natural wildlife habitats.[39]

Other provisions in this sample plan allow for the designation of conservation areas, which can cover areas of significance for nature conservation containing important species of trees such as river red gum, remnant forests and wildlife habitats of local ecological heritage significance. In these areas the destruction of nominated species of trees again requires development consent.[40]

EXISTING USE AFTER DORRESTIJN v. SOUTH AUSTRALIAN PLANNING COMMISSION

A majority of the High Court in *Dorrestijn v. South Australian Planning Commission*,[41] overturned the decision of the Full Court of the Supreme Court of South Australia,[42] and held that the existing use provisions then contained in the Planning Act 1982 (S.A.) undermined planning provisions intended to regulate the clearance of native vegetation. The precise wording of the legislation, however, could hardly be regarded as unambiguously requiring this result.

The prime factors influencing the majority were the desire to ensure that no provision of the legislation was superfluous and 'the principle of construction that statutory provisions designed to protect and preserve existing use rights should be as liberally construed as the language in its context allows'.[43]

The definition of 'development' in s. 4(1) of the Planning Act referred, *inter alia*, to:

- a change in the use of land; and
- activities declared by regulation to constitute development.

By an amendment to the regulations promulgated on 12 May 1983, the clearance of native vegetation, excluding five year regrowth, was brought within the definition of development. Under s. 47(1) of the Act, the general position was that 'development' could not be undertaken unless development consent was first obtained, although this could be varied by provisions of the Development Plan either by permitting development, absolutely or conditionally, or prohibiting it.[44]

[39] *Op. cit.* n. 36, cl. 21(3). The explanatory notes to the sample plan suggest this provision means that Council cannot grant consent unless it believes the clearing will not have any of these impacts, but this is far too optimistic in interpretation of the word 'minimises'.

[40] *Ibid.* cl. 26.

[41] (1984) 59 A.L.J.R. 105. For discussions of the case and related developments see Fowler, *op. cit.* n. 6; Note, 'Much Interpretation and Much Amendment' (1985) 2 *Environmental and Planning Law Journal* 330; Note, 'From Schemes to Scheming' (1985) 2 *Environmental and Planning Law Journal* 65, 69-70; Editorial, 'Vegetation Clearance Crisis in South Australia' (1984) 1 *Environmental and Planning Law Journal* 125.

[42] (1984) 53 L.G.R.A. 203.

[43] *Parramatta City Council v. Brickworks Ltd* (1972) 128 C.L.R. 1, 25; *Dorrestijn v. South Australian Planning Commission* (1984) 59 A.L.J.R. 105, 108.

[44] Planning Act 1982 (S.A.) s. 47(3),(5),(6). The approach appears an unusual one, the usual position being that development is unregulated until a regulatory regime — a requirement to obtain consent or an outright prohibition — is imposed by a planning instrument. But see Barker, M. L., 'Recent Developments in West Australian Town Planning Law: With Particular Reference to the

The appellants commenced clearing operations of mallee on their land as part of their farming activities. The Commission applied for an order under s. 36 of the Act restraining the appellants from clearing the land without first securing development consent. It conceded that the appellants' activities did not amount to development by virtue of a change in the use of the land: it continued to be used for farming purposes. But it argued that they had carried out a distinct type of development, specifically declared as such by regulation.

S. 56(1) of the Act provided:

> Notwithstanding any other provision of this Act, *no provision of the Development Plan* shall —
> (a) prevent the continued use, subject to and in accordance with the conditions (if any) attached to that use of land for the purposes for which that land was lawfully being used at the time the provision took effect;
> (b) prevent the carrying out or completion of a development, subject to and in accordance with the conditions (if any) affecting the development, for which every consent, approval or authorization required under any act authorizing or permitting the development had been obtained and was current when the provision took effect (emphasis added).

At first sight, the provision in s. 56(1)(a) appeared redundant because continued use of land did not need any special protection from the regulatory provisions of s. 47. It did not fall within these provisions simply because it did not constitute 'development'. Only a change in use constituted 'development'. To avoid this superfluity, the majority of the High Court gave the provision an extended meaning and in doing so took the first step (or leap of imagination) towards dramatically extending the existing use protection offered by the legislation.[45] It held that s. 56(1)(a) protected more than just the 'continued use'. It also protected 'such developments as would necessarily, if not ordinarily, be involved in the use of land for the particular purpose for which it continues to be used', and this included the clearance of native vegetation.[46] Note that this does not represent an attempt to give a generous interpretation to the word 'use'.[47] In the South Australian context, there was no way of circumventing the express designation by regulation of the clearance of native vegetation as 'development' which was distinct from change of use. Even as such, however, the High Court held that it was still protected by the existing use provisions. Furthermore, necessary development, within the High Court formula, is expressly recognized as going beyond that 'ordinarily' associated with the land use. The implications of this were considerable and amending legislation following the decision was inevitable. According to Brennan J. (dissenting with Murphy J.)

> it would authorize the division of land into allotments, the demolition of an item of State heritage or the erection of buildings — to mention some of the acts defined as 'development' — provided that the act in question was involved in using the land for an unchanged purpose. Such a construction would emasculate the planning regime which the Act creates.[48]

Decisions of the Town Planning Appeal Tribunal' (1986) 16 *University of Western Australia Law Review* 359, 369-72 arguing that as a result of the decisions in *University of Western Australia v. The City of Subiaco* (1980) 52 L.G.R.A. 360 and *Aboriginal Boomerang Council of W.A. Inc. v. Town of Geraldton (No. 2)* (1982) 5 A.P.A. 1, all development, as distinct from use, requires consent.

[45] This is referred to from now on as the 'redundancy argument'. On its significance to the decision, see *Baulkham Hills Shire Council v. O'Donnell* (1987) 62 L.G.R.A. 7, 16 *per* Bignold J.

[46] *Supra* n. 41, 108.

[47] Compare the approach taken by Reynolds J. A. in *C. B. Investments Pty Ltd v. Colo Shire Council* (1980) 41 L.G.R.A. 270, 275, where he stated that the notion of carrying out a 'work' within the definition of 'development' in the N.S.W. legislation might have to be read down 'so as to exclude the ordinary and normal pursuit of an existing land use'.

[48] *Supra* n. 41, 110.

But this expanded meaning of 'continued use' was only the first step in the reasoning of the majority. There was still s. 47(1) to circumvent. This required consent to be obtained for all development, regardless of whether or not it was an aspect of continued use. The protection offered by s. 56(1)(a) was only against provisions of the Development Plan, not provisions of the legislation itself such as s. 47(1).

The effect of s. 47(1) could, however, be modified under s. 47(3). This provided, *inter alia*

> Where development of a particular kind is permitted absolutely or conditionally by the principles of development control in a particular area, zone or locality, without the consent of a planning authority, then ... that development may be undertaken without the consent of a planning authority, but subject to the conditions (if any) under which it is permitted by the principles of development control.

The 'principles of development control' are embodied in the Development Plan.[49] But there had been no modification in the Development Plan of the consent requirement for clearance of native vegetation imposed by s. 47(1). The Court found the necessary modification in s. 56(1)(a). After elaborating the relationship between s. 56(1)(b) and s. 47(3),[50] it extrapolated from this, in determining the relationship between s. 56(1)(a) and s. 47(3), concluding that development protected by s. 56(1)(a) was permitted absolutely by the principles of development control pursuant to s. 47(3).[51] Consequently, the requirements of s. 47(1) were by-passed.

As Brennan J. pointed out

> [a]n attempt is made in the present case to convert the negative words in s. 56(1)(a) ('no provision of the Development Plan shall ... prevent the continued use ... of land') into a positive permission to do, absolutely or conditionally, what s. 47(1) prohibits.[52]

Section 56(1)(a) did not simply operate negatively by neutralizing any specific provision in the Development Plan which might otherwise have restricted development associated with continuing use. It also operated positively by, in effect, incorporating a provision into the Development Plan which freed such development from the need to get development consent.

By this circuitous route the majority avoided having to take the 'drastic step' originally suggested by the appellant of reading the opening words of s. 56(1)(a) ('no provision of the Development Plan shall ...') as referring to 'no provision of the Act',[53] but they achieved exactly the same result nevertheless. One is left to wonder why those who drafted the legislation did not substitute 'Act' for 'Development Plan' in s. 56(1)(a) if this was the intent.[54]

The two steps in the reasoning of the majority of the High Court can be summarized thus:

(i) Section 56(1)(a) was not redundant because it protected not only continued use but development which was necessarily involved in the continuation of an existing use.

49 Planning Act 1982 (S.A.) s. 4(1).

50 *Ibid.* s. 56(1)(b) dealt with developments, now inconsistent with the provisions of a new Development Plan, but which were already authorized when the Plan came into operation.

51 See *The Queen v. South Australian Planning Commission; Ex Parte Balquhidder Pty Ltd* (1985) 39 S.A.S.R. 455, 463 *per* Jacobs J.

52 *Supra* n. 41, 110. See also *ibid.* 458 *per* King C.J.

53 *Ibid.* 108.

54 *Supra* n. 42, 215, 218 *per* Cox J. with whom King C.J. agreed.

(ii) Development protected by s. 56(1)(a) was permitted by the principles of development control without consent being required within s. 47(3).

It would, however, have been quite possible for the majority to have taken step (i) — thus ensuring that s. 56(1)(a) had a role to play — without taking step (ii). In this situation, s. 56(1)(a) would have protected development necessarily involved in the continuation of an existing use from provisions in the Development Plan which imposed *more stringent* regulatory requirements than those contained in s. 47(1) — *i.e.* prohibition under s. 47(5).[55] As intimated by its introductory words, s. 56(1)(a) would then only have modified provisions in the Development Plan and not affected provisions of the Act. The result, on the facts of *Dorrestijn*, would have been that the consent requirement imposed on the clearance of native vegetation would have survived.

THE RATIONALE UNDERLYING DORRESTIJN v. SOUTH AUSTRALIAN PLANNING COMMISSION

The decision cannot be justified in terms of the policy underpinning existing use provisions. Wilcox has argued that the purpose of these 'is to permit the gradual and controlled adaptation of present uses to that desirable use envisaged in the scheme'.[56] The destruction of native vegetation, followed by intensive cropping which destroys the seed-bed, is irreversible. Even where the seed-bed is left intact, wildlife habitat will be destroyed in the short-term, and in some instances this may threaten species with extinction. Apart from this the regrowth will be of uniform age and this in itself will constitute a radical change to the environment. In these circumstances, it makes no sense to talk of 'gradual and controlled adaptation'. Clearing will either destroy the desired use or modify it beyond all recognition.

In justification of existing use provisions, Fogg has suggested

> some measure of protection is inevitable, arising from notions of fair dealing, economic commonsense, rights to compensation and sheer political necessity. Democracies will become dictatorships if, at the stroke of the legislative pen, numberless existing commercial and industrial uses can be made untenable and unsaleable and their owners liable to criminal prosecution for breach of a scheme.[57]

Fogg's comments in the first sentence must be set in the context of those in the second. The situation he is addressing is one where existing commercial and industrial uses are actually shut down. The equivalent situation in the farming context would be one where clearing controls purport to define continuing rough grazing by sheep and cattle as vegetation destruction within the land use regulations.[58] This would impinge directly on the current use to which land is

[55] Prohibition is not outright. Consent can still be given to prohibited development if specified concurrences are obtained.

[56] Wilcox, M., *The Law of Land Development* (1967) 260. See also Fogg, A. S., *Australian Town Planning Law* (1974) 198.

[57] Fogg, A. S., *Land Development Law in Queensland* (1987) 666.

[58] See N.S.W. State Environmental Planning Policies 14 and 26, discussed at nn. 26-7 in the text. The former requires development consent to be obtained before land in certain areas can be cleared and defines clearing to mean 'the destruction or removal in any manner of native plants growing on the land', subject to limited exceptions not here relevant. The latter requires consent before certain land can be used for any purpose or native flora can be disturbed, removed, damaged or destroyed.

being put and squarely attract the justifications advanced by Fogg for existing use protection. So too would provisions seeking to regulate the clearing of regrowth threatening to overwhelm grazing species and attenuate existing carrying capacity. In both of these situations, the controls interfere with the existing operation. Where regulations seek to prevent the conversion of rough grazing land to improved pasture, it might still possibly be argued that they are impinging upon this existing enterprise because the changes of land management contemplated are changes in the degree rather than the nature of the use. But this argument is certainly not available where the proposal is to clear land for the purposes of cultivation. Here we are talking about quite a different operation.

In addition, assumptions which underpinned town and country planning should not be transferred to new environmental planning regimes. The focus here is necessarily upon the environmental impact of activities upon land and changes in environmental impact wrought by changes in those activities, rather than the abstracted use-classification systems under town and country planning regimes which try to determine whether or not there has been a change of use by resorting to 'ordinary terminology'.[59]

Nor can Fogg's appeal to 'economic commonsense' as a rationale for existing use protection justify the decision in *Dorrestijn*. It may well be that the existing pastoral operation is no longer seen by the landholder as providing an adequate return. In many cases it may well have become quite marginal, as markets have changed or the land has degraded. But these could hardly be and have never been regarded as sufficient justification for permitting change of user. Beyond this it is now being increasingly acknowledged by economists that any cost-benefit analysis should seek to take into account values associated with the conservation of vegetation which cannot be reduced to simple monetary equivalents, especially where loss of such values is irreversible.[60] In this broader context, it is highly unlikely that the decision in *Dorrestijn* could be justified in terms of 'economic commonsense'.

Assessments of 'political necessity' are best left to politicians. They vary over time, but currently the conservation lobby appears to be an extremely powerful one and the clearance of native vegetation is an issue which is high on the political agenda. There remains only Fogg's appeal to 'notions of fair dealing'. This raises fundamental questions not about the economic efficiency of imposing restrictions on prospective land uses, but about whether this is equitable. It is sufficient to point out here that this issue, as it has arisen within planning systems, has traditionally been dealt with through compensation provisions, not those dealing with existing use. Existing use protection, as the name suggests, is not concerned with the protection of expectations. My argument is that the majority of the High Court in *Dorrestijn* neglected this fundamental truth.

[59] *Shire of Perth v. O'Keefe* (1964) 110 C.L.R. 529, 535. See also *City of Nunawading v. Harrington* [1985] V.R. 641, 644-5.

[60] Krutilla, J. V., 'Conservation Reconsidered' [1967] *American Economic Review* 777; Krutilla, J. V. and Fisher, A. C., *The Economics of Natural Environments* (1975); Resource Assessment Commission, *Australia's Forest and Timber Resources*, Background Paper No.1 (March 1990) para. 5.4.

One hypothesis is that the tortuous path pursued by the majority can only be understood in terms of its espousal of what McAuslan has identified as the ideology of private property

> the principles of protection and defence of the rights of property-owners, the necessity to keep governmental powers within their proper limits (limits not defined by reference to the dictionary meaning of words but by reference to the judges' beliefs and assumptions, their ideology) are a, if not the, major concern of the courts in planning law.[61]

This ideology is reflected in the principle that

> a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.[62]

In *Dorrestijn* it manifested itself in the apparent corollary that 'statutory provisions designed to protect and preserve existing rights should be as liberally construed as the language in its context allows' (given that if they were not, rights to compensation were heavily restricted, see *infra*). But this extrapolation neglects another fundamental theme in judicial reasoning on the concept of private property. This is that a clear distinction must be made between government initiatives which interfere with the right to exclude others from use and enjoyment, and those which merely restrict rights of user. So, for example, it has been held that the position at common law is that even if there is a rule which requires compensation to be paid where the state takes a subject's property, it only applies where it is taken possession of, used by or placed at the state's disposal, not to cases where there is a negative prohibition which involves interference with an owner's enjoyment.[63] In *Belfast Corporation v. O. D. Cars Ltd*,[64] the House of Lords was faced with the task of interpreting s.5(1) of the

61 McAuslan, J. P. W. B., *The Ideologies of Planning Law* (1980) 4.

62 *Colonial Sugar Refining Co. v. Melbourne Harbour Trust Commissioners* [1927] A.C. 343, 359 *per* Lord Warrington of Clyffe.

63 *France Fenwick and Co. Ltd v. The King* [1927] 1 K.B. 458, 467; *Folkestone v. Metropolitan Region Planning Authority* [1968] W.A.R. 164, 166. See also United Kingdom, *Final Report of the Expert Committee on Compensation and Betterment* Cmd 6386 (1942), para. 32:

> Ownership of land involves duties to the community as well as rights in the individual owner. It may involve complete surrender of the land to the State or it may involve submission to a limitation of rights of user of the land without surrender of ownership or possession being required. There is a difference in principle between these two types of public interference with the rights of private ownership. . . . Where property is taken over, the intention is to use those rights, and the common law of England does not recognise any right of requisitioning property by the State without liability to pay compensation to the individual for the loss of his property. . . . In the second type of case where the regulatory power of the State limits the use which an owner may make of his property, but does not deprive him of ownership; whatever rights he may lose are not taken over by the State; they are destroyed on the grounds that their existence is contrary to the national interest. In such circumstances no claim for compensation lies at common law. Cases exist where this common law principle is modified by statute and provision is made for payment of compensation. The justification is usually that without such modification real hardship would be suffered by the individual whose rights are affected by the restrictions, but there is no right to compensation unless that right is either expressly or impliedly conferred by statute. (Footnotes omitted.)

See also *Westminster Bank Ltd v. The Minister of Housing and Local Government* [1970] 1 All E.R. 734, where the House of Lords refused to apply the principle enunciated by Lord Warrington of Clyffe, *ibid.*, to a case where an authority refused planning permission in order to prevent development on land adjacent to a street required for road widening. On this construction of the issue the authority did not have to pay compensation. In upholding the approach adopted by the authority, Viscount Dilhorne stated that there was no question of the owner of the land being deprived of it without being paid compensation. What it had lost was the right to the development of the land as it wished.

64 [1960] 1 All E.R. 65.

Government of Ireland Act 1920 which outlawed laws allowing the taking of property without compensation. It held that a provision in legislation which in essence stated that compensation was not payable where zoning restrictions prevented development from taking place did not constitute such a taking. Viscount Simonds reminded himself of the 'broad principle of law' that

> from the earliest times the owner of property, and in particular of land, has been restricted in his free enjoyment of it not only by the common law maxim *sic utere tuo ut alienum non laedas* but by positive enactments limiting his user or even imposing burdens on him.[65]

A principle of construction which requires that provisions protecting existing uses from new regulations should be interpreted liberally is by no means inconsistent with a refusal to compensate in those situations where the regulations are allowed to operate. But there comes a point when this principle of construction begins seriously to compromise the principle which allows uncompensated regulation of land use. Arguably, this point has been reached by the majority decision of the High Court in *Dorrestijn*.

Of course, it could be argued that in *Dorrestijn* the State was going further than simply imposing restrictions on use and enjoyment, even if it was not exactly going as far as to place the land at its disposal. But these tensions and distinctions were not even mentioned by the High Court.

The meaning of private property is not fixed but constantly changing. It is both historically and culturally relative.[66] It evolves as the needs which the institution of private property must meet change over time.[67] In *Dorrestijn* a majority of the High Court, under cover of a principle of statutory interpretation, upheld a concept of private property which is by no means inevitable or immutable. It may well be out of step with the current needs of society.

EXISTING USE IN VICTORIA AND NEW SOUTH WALES

In neither Victoria nor New South Wales is there any equivalent of the provision in s. 47(1) of the Planning Act 1982 (S.A.) imposing a blanket consent requirement for development, subject to modification in individual plans. Those seeking existing use protection from native vegetation controls, therefore, only need protection from regulatory requirements imposed by environmental planning instruments in New South Wales or planning schemes in Victoria.[68] There is, then, no question of a court confronted by these provisions having to consider taking the second step taken by the High Court in *Dorrestijn*.

In New South Wales there are two separate provisions dealing with the general question of nonconforming uses: one protecting continued use from the need to comply with a requirement to obtain development consent imposed by a new environmental planning instrument;[69] the other protecting continued use from a

65 *Ibid.* 69.

66 MacPherson, C. B., *Property: Mainstream and Critical Positions* (1978) ch. 1.

67 The current article is part of a much larger project which includes an investigation of the evolution of the concept of private property in philosophical literature, and more recent attempts to adapt it to a context where ecological and other environmental considerations are increasingly important.

68 Environmental Planning and Assessment Act 1979 (N.S.W.) ss 26(b) and 76; Planning and Environment Act 1987 (Vic.) ss 6(2)(b) and 47.

69 Environmental Planning and Assessment Act 1979 (N.S.W.) s. 109.

newly imposed outright prohibition.[70] The latter is specifically designated as an 'existing use' whereas the former is somewhat misleadingly referred to as an 'existing consent'. In the present context, we are concerned primarily with so-called 'existing consents', given that controls over the clearing of native vegetation have usually taken the form of a consent requirement rather than outright prohibition. Following amendments to the legislation in 1985, however, the two sets of provisions are now in line with each other so far as the statutory elaboration of what it means to continue a use is concerned. For present purposes they are referred to collectively as 'existing use provisions'.

In terms of the High Court's analysis in *Dorrestijn*, the primary issue is whether existing use protection extends beyond mere continuance of a use to include 'such developments as would necessarily, if not ordinarily, be involved in the use of land for the particular purpose for which it continues to be used'.[71]

Both the New South Wales and Victorian legislation allow plans to regulate mere use of land, as distinct from change of use. The existing use provisions therefore have a crucial role to play in protecting continuing uses from potential regulatory requirements and are not vulnerable to the redundancy argument employed by the majority of the High Court in *Dorrestijn*.

In Victoria, the definition of 'development'[72] does not include mere use — or even change of use — but planning schemes are specifically authorised to 'regulate or prohibit the use or development of any land'.[73] The relevant existing use provision in the context of vegetation clearance controls is found in s. 6(3)(a). This protects

> the continuance of the use of any land upon which no buildings or works are erected for the purposes for which it was being lawfully used before the coming into operation of the scheme or amendment (as the case may be).[74]

There can, therefore, be no argument that this provision is redundant and should be given a role to play by extending its protection to include development necessarily associated with the continuing use. However, 'use' is broadly defined to include 'use or proposed use for the purpose for which the land has been or is being or may be developed'.[75]

In *Nancy Shetland Pty Ltd v. The Melbourne and Metropolitan Board of Works*,[76] the High Court rejected the suggestion that the identical definition of 'use' in the previous legislation[77] included 'development' (here, the subdivision

70 *Ibid.* ss 106-7.
71 *Supra* n. 41, 108 *per* Mason A.C.J., Deane and Dawson JJ.
72 Planning and Environment Act 1987 (Vic.) s. 3.
73 *Ibid.* s. 6(2)(b).
74 Note that, following the insertion of s. 6(4A) by the Planning and Environment (Amendment) Act 1989, this existing use protection is subject to the qualification that it must comply with any Codes of Practice made under Part 5 of the Conservation, Forests and Lands Act 1987 (Vic.) and ratified by Parliament. Among other things, Codes of Practice can specify '[c]onservation practices for land management including specifying management practices for avoiding or minimising soil deterioration, erosion and salination' (s. 32(2)). Even if, therefore, clearing operations could go ahead under the guise of existing use (as to which, see below in the text) certain restrictions could be placed upon the way in which they were carried out by the implementation of an appropriate Code of Practice. *Cf.* the Code of Forest Practices for Timber Production (Revision No. 1 May 1989) which is about to be applied to the harvesting of native forests on private land, including the continuance of existing uses, by an amendment to the state section of all planning schemes.
75 *Supra* n. 72, s. 3, emphasis added.
76 (1974) 48 A.L.J.R. 448.
77 Town and Country Planning Act 1961 (Vic.).

of land), and that therefore development of the land for the purpose for which it continued to be used was protected by existing use provisions. Morris, Barker and Bryant[78] argue that the content of the new legislation remains substantially the same as that considered in *Nancy Shetland*, and state categorically that development is not protected by this provision. The distinction between 'development' and 'use' is clearly fundamental to the structure of the legislation.

The legislation specifically defines 'works' as including

> any change to the natural or existing condition or topography of land including the removal, destruction or lopping of trees and the removal of vegetation or topsoil.[79]

The 'carrying out of works' constitutes 'development'.[80] Given the distinction drawn in the legislation between use and development and the non-availability of the redundancy argument employed in *Dorrestijn*, it seems clear that the existing use provisions will not protect landholders from provisions in planning schemes which seek to regulate the clearance of native vegetation by first requiring a permit to be secured.

In New South Wales, no sharp distinction is drawn between 'use' and 'development'. Environmental planning instruments can, *inter alia*, control development, but development is defined to include the mere use of land.[81] This means, then, that the existing use provisions again have a crucial role to play in limiting the impact of this broad definition of development so as to restrict regulation through planning instruments to changes of use. As in Victoria, the redundancy argument, which played such a major part in the reasoning of the majority of the High Court in *Dorrestijn*, cannot be advanced here with a view to expanding the protection afforded by the existing use provisions to development necessarily associated with continued use.

The New South Wales legislation does not, unlike the Victorian legislation, clearly define vegetation clearance as a type of development distinct from the use of land. One argument might be that vegetation clearance is simply an aspect of use. The question which then arises is whether vegetation clearance can be distinguished as a development separable from use on the grounds that it constitutes the carrying out of a work on the land, within the definition of development. If it does, it would then fall outside the protection offered to continuing uses by the existing use provisions.

'Work' is not defined in the New South Wales legislation. The decision of the High Court in *Parramatta City Council v. Brickworks Ltd*[82] affords some of the earliest judicial guidance on the meaning of the concept. There the High Court held that a quarry was 'an existing work' within the existing use provisions in a planning scheme ordinance made under earlier New South Wales legislation. Gibbs J. (with whom Barwick C.J. and Owen J. agreed) stated that it referred to 'the physical product of labouring operations' and included 'something which

78 Morris, G., Barker, M. and Bryant, T., *Planning and Environment Service* (Victoria), Planning Volume, para. 22,036.

79 *Supra* n. 72. *Cf.* the decision in *Logan v. Miller* (1987) 62 L.G.R.A. 241 under the previous legislation.

80 *Ibid.*

81 Environmental Planning and Assessment Act 1979 (N.S.W.) ss 26(b) and 4(1).

82 (1972) 128 C.L.R. 1.

has been carried out on land, and is situated on land'.[83] It referred 'not to a process but to the physical result of labour done on land'.[84] From this it appears that a 'work' is an actual entity which has been produced by somebody. At first sight land clearing, like demolition,[85] looks much more like a process than a product — 'work' rather than 'a work'. But is not an area of land cleared for agricultural purposes as much a product as an area which has been filled and levelled for agricultural purposes? Aside from this, Gibbs J. was at pains to point out that the concept 'is not of fixed connotation, but elastic or indefinite, and its meaning must depend on the actual language and context of the statutory provision in question'.[86] In *Parramatta City Council v. Brickworks* the concept was qualified by the word 'existing', and 'an existing work' could be 'maintained', 'altered', 'enlarged', 'rebuilt', 'extended' or 'added to'. In light of this, it is easy to understand why Gibbs J. viewed it as connoting an end-product rather than an activity such as land clearing or demolition, which can be both destructive as well as constructive.

Since *Parramatta City Council v. Brickworks Ltd* it has been held that, apart from quarries,[87] land-filling operations can also constitute works, although once again in the context of a now defunct concept of planning.[88] Much, however, depends on the scale of the particular activity — 'the quantity of the filling as well as its significance in relation to the site'.[89] In *Kiama Municipal Council v. French*,[90] McClelland C.J. held that the dumping of fill on land, which had the effect of raising it by no more than 10 centimetres, with the intention of improving the quality of vegetation for grazing, did not amount to 'a work' because

> [i]t was merely what a prudent farmer would normally undertake to maintain and improve the quality of the vegetation on his land for the benefit of the animals which graze thereon and which provide him with a living. In short, it fell within the description of 'cultivating fodder' which is an agreed existing use of the premises.[91]

By analogy, it might be argued that the removal of canopy vegetation to prevent its inhibiting effect on the understory of native vegetation used for grazing purposes is simply an aspect of the existing use rather than a separate work. In *C. B. Investments Pty Ltd v. Colo Shire Council*,[92] Reynolds J.A. argued that the very width of the phrase 'the carrying out of any work' may require that it be read down so as 'to exclude the ordinary and normal pursuit of an existing land use'. The situation may well be different where all native vegetation is to be removed and the land converted from pastoral to arable. This was the approach apparently taken by Waddell J. in the only New South Wales

83 *Ibid.* 24.
84 *Ibid.* 25.
85 Nott, A. J., *Environmental Planning and Development Law (NSW)* (1984) 11.
86 *Supra* n. 82, 24.
87 *C. B. Investments Pty Ltd v. Colo Shire Council* (1980) 41 L.G.R.A. 270, 275.
88 *Parramatta City Council v. Shell Company of Australia Ltd* (1972) 26 L.G.R.A. 25, 31-2 *per* Street J. The decision was reversed on appeal by the Court of Appeal, but no decision was made on this point: [1972] 2 N.S.W.L.R. 632, 638.
89 *Ibid.* 31.
90 (1984) 54 L.G.R.A. 42.
91 *Ibid.* 45.
92 *Supra* n. 87, 275.

case dealing directly with the question of native vegetation clearance: *Warringah Shire Council v. May*.[93] There he held that the clearing of all vegetation from land and the levelling of the land for the purpose of building two landing strips, one 2,150 feet long and the other 1,600 feet, did amount to a 'work', given that the purpose of these operations was 'the creation of a substantial change in the physical nature of the land'.[94]

Ultimately, the status of land clearing will now turn on the meaning of the concept of 'a work' as it is used in the Environmental Planning and Assessment Act 1979 (N.S.W.). The definition of 'development' still refers to 'the carrying out of a work in, on, over or under that land'.[95] Beyond this, s. 4(2)(c) provides that

> a work includes a reference to any physical activity in relation to land that is specified by a regulation to be a work for the purposes of this Act.

This may be taken as suggesting that the concept is now free from the awkward distinction drawn between process and product in *Parramatta City Council v. Brickworks*, but one interpretation of this provision is that this can only be achieved by specific regulations, none of which have been made so far.

Even if land clearing is not defined as a work and, as such, as a separate development, but as merely an aspect of use, that is by no means the end of the matter so far as existing use protection is concerned. For s. 109 of the Environmental Planning and Assessment Act 1979 (N.S.W.) imposes limits on the protection it gives to the continuance of a use. It does not, for example, allow

> any increase in the area of the use made of . . . land from the area actually physically and lawfully used immediately before the coming into operation of the instrument.[96]

This provision was designed to abrogate the principle stemming from *Parramatta City Council v. Brickworks Ltd* and applied in *Eaton & Sons Pty Ltd v. Warringah Shire Council*,[97] that while the use protected must be a present use and not merely one which is contemplated or intended, the whole of an area of

93 (1979) 38 L.G.R.A. 424. In the Victorian case of *Logan v. Miller* (1987) 62 L.G.R.A. 241, decided under the previous Victorian legislation, Marks J. held that the clearing of vegetation did not amount to the *construction* of works and he went on to doubt whether it could be said to be the *carrying out of works*. He also thought that a definition of 'works' which referred to 'any alteration of the natural conditions and topography of land' might require a distinction to be drawn between things done to the land itself and things done to what was growing on the land.

94 (1979) 38 L.G.R.A. 424, 429. The High Court decision in *Parramatta City Council v. Brickworks* was not cited by Waddell J. The *May* case was not directly concerned with delineating the line between agricultural use and works which go beyond mere use, but with whether there had been any development at all, and, if so, whether this was for a purpose which did not require development consent. The activity of clearing was not itself directly regulated by the plan.

95 *Supra* n. 81, s. 4(1).

96 *Ibid.* s. 109(2)(b); s. 107(2)(b) is to the same effect.

97 (1972) 25 L.G.R.A. 369. See *Baulkham Hills Shire Council v. O'Donnell* (1987) 62 L.G.R.A. 7, 24-5 *per* Bignold J. and (1990) 69 L.G.R.A. 404, 412-4 *per* Meagher J.A.; *The Anson Bay Co. (Australia) Ltd v. Bob Blakemore Excavations*, Unreported, Land and Environment Court, 29 August 1989. See also *Aquatic Airways Pty Ltd v. Warringah Shire Council* (1991) 71 L.G.R.A. 10, 18-19, where the New South Wales Court of Appeal refused to follow the decision in *Dorrestijn* in interpreting another of the s. 109(2) qualifications to the protection of continued use (preventing the rebuilding of a building or work). It acknowledged that these qualifications could on one interpretation greatly 'limit or even destroy the right conferred under subs. (1)'. *Cf.* the decision of Stein J. of the Land and Environment Court in *Mobil Oil v. Ku-ring-gai Municipal Council* (1990) 70 L.G.R.A. 419, 421-2.

land may still be held to have been used for a particular purpose although only part of it was physically used for that purpose.

If, then, the land to be cleared has not previously been used for farming purposes, s. 109 will not allow extension of the protected use to this uncleared area. This is, however, an unlikely scenario. The likelihood is that it will at least have been used for rough grazing or drought refuge, with the intention now being either to improve pasture or to cultivate.[98]

There remains, however, a further argument that the clearing operation does not fall within existing use protection. Section 109(2)(c) provides that this does not authorize 'any enlargement or expansion or intensification of the use'.[99]

Once again this represents a departure from the previous position whereby intensification of use — consisting of increased production and use of heavy machinery — did not necessarily result in a loss of existing use protection.[100]

Clearing with a view to improving pastures for more intensive grazing or cultivation would appear to constitute an intensification of the use within s. 109(2)(c), thus falling outside the protection currently offered to existing uses in New South Wales.

COMPENSATION ISSUES

Issues of existing use are connected to questions of compensation. In jurisdictions where existing uses are not protected, interference with them through the planning system will be treated as 'injurious affection' and attract compensation on this basis.[101] Where the continued use of land for its existing use is guaranteed by legislation, the only viable options open to a planning authority determined to end the use are purchase of title or restrictive covenant[102] in the free market or, in

98 Suppose that instead of imposing a requirement to obtain development consent on land clearing, the new plan imposed such a requirement upon agriculture directly. Could it be argued that the protected existing use extends only to the existing pastoral enterprise and not the proposed arable farming, even though both would currently fall within the broad definition of 'agriculture' used in plans in New South Wales (Environmental Planning and Assessment Model Provisions 1980 (N.S.W.) cl. 4)? The first point to be made is that the use categories in the plan do not determine the ambit of the protected existing use: *Shire of Perth v. O'Keefe* (1964) 110 C.L.R. 529; *City of Nunawading v. Harrington* [1985] V.R. 641, 644-5; Morris, G., Barker, M. and Bryant, T., *op. cit.* n. 77, para. 22,056; Fogg, A. S., *op. cit.* n. 56, 674-7. According to *Shire of Perth v. O'Keefe* the issue is what 'according to ordinary terminology' is the best way of describing the purposes for which land or premises are being used, and there is a long historical and cultural tradition in Australia which draws a deep divide between the 'farmer' and the 'grazier'. In some circumstances, however, the arable use may be simply ancillary to the pastoral activity, rather than a change of use — for example, where the cultivation is designed to get rid of woody weed, or even where the aim is to produce cattle feed.

99 Environmental Planning and Assessment Act 1979 (N.S.W.) s. 107(2)(b1) is to the same effect.

100 *Norman v. Gosford Shire Council* (1975) 132 C.L.R. 83. See the comments in *Lane Cove Municipal Council v. Lujeta Pty Ltd* (1986) 58 L.G.R.A. 157; *Baulkham Hills Shire Council v. O'Donnell;* and *Aquatic Airways v. Warringah Shire Council, supra* n. 96. *Cf. Associated Minerals Consolidated Ltd v. Wyong Shire Council* [1975] A.C. 538, 557.

101 Town Planning and Development Act 1928 (W.A.) s. 12(2a)(b)(ii). In practice individual planning schemes will usually incorporate their own provisions protecting existing uses. See also Local Government Act 1919 (N.S.W.) s. 342AC(2)(e), now repealed. Even where existing use protection is available, this does not automatically exclude a claim for compensation for injurious affection: *Lamb v. Maryborough City Council* (1980) 1 A.P.A. 365 discussed by Fogg, A. S., *op. cit.* n. 57, 737.

102 *Op. cit.* n. 15.

appropriate cases, compulsory acquisition of title.[103] In South Australia, following the generous interpretation given to the existing use right protection by the High Court in *Dorrestijn*, special legislation was introduced empowering the Native Vegetation Management Authority to acquire compulsorily restrictions on existing land uses.[104]

Even where a contemplated use falls outside of existing use protection it does not follow that planning authorities are necessarily able to regulate it without regard to the financial cost of doing so. All Australian planning regimes have traditionally offered some degree of protection to landholders going beyond a guarantee of their being allowed to continue existing use rights, and extending into the domain of protecting mere expectation. This, however, has always taken the form of an offer of compensation and to this extent differs fundamentally from the approach ordinarily taken to the protection of existing use rights.

Historically, there have been sweeping statutory declarations of a right to compensation for 'injurious affection' resulting from the coming into operation of plans or restrictions imposed under plans, but these have been substantially undermined by a series of exceptions.[105] Recent provisions in Victoria abandon this symbolic deference to the need to compensate for land use restrictions and simply spell out the very limited circumstances in which compensation is payable.[106] In the context of a discussion of vegetation clearance controls, one must consider whether land subject to regulations requiring a permit to be obtained before clearing takes place is 'reserved for a public purpose under a planning scheme'. If so, compensation is payable for 'financial loss suffered as the natural, direct and reasonable consequence'. Even if the provisions of the scheme are not to be regarded as constituting a reservation for public purposes, compensation is payable if a permit to use or develop the land is refused 'on the ground that the land is or will be needed for a public purpose'.

In New South Wales, there are no longer any provisions for compensation for injurious affection under the Environmental Planning and Assessment Act 1979 (N.S.W.), but similar questions to those in Victoria are raised in practice because of the provision that environmental planning instruments must make arrangements for the acquisition of title to land which has been reserved 'exclusively' for a range of public purposes, the most relevant of which in the present context is 'open space'.[107]

The first question which arises under both sets of provisions is whether they only operate when the plan in question actually makes use of the concept of 'reserve' or 'reservation'. Can a provision which proclaims itself as being concerned with zoning arrangements ever be a reservation for public purposes?

[103] See, for example, Local Government Act 1962 (Tas.) s. 756.

[104] Native Vegetation Management Act 1985 (S.A.). See Farrier, D., *op. cit.* n. 5; Fowler, R. J., *op. cit.* n. 6.

[105] See, for example, Local Government Act 1919 (N.S.W.) s. 342AC, now repealed; Local Government Act 1936 (Qld) s. 33, now repealed; Local Government Act 1962 (Tas.) s. 735. See Fogg, A. S., *op. cit.* n. 56, ch. 15.

[106] Planning and Environment Act 1987 (Vic.) s. 98.

[107] Environmental Planning and Assessment Act 1979 (N.S.W.) ss 26(c) and 27(1). These provisions deprive the State of the option which exists in Victoria of compulsorily acquiring a land use restriction, as distinct from title. To this extent the position is the same as that noted above in relation to existing uses.

In the Victorian case of *Van Der Meyden v. Melbourne and Metropolitian Board of Works*,[108] Anderson J. was faced with the question of whether land in a Conservation Zone was 'reserved for a public purpose' under the compensation provisions of the previous Victorian planning legislation.[109] Only agriculture and bee keeping were permitted without restrictions. A detached house could be built provided that the site was less than 100 acres in area and a flat only under severe restrictions. But if this necessitated any clearing, consent would have to be sought because there was a blanket ban on the clearing of native vegetation without permission. Other development which could be carried out with permission included afforestation, car parks, roads, soil removal and minor utility installations. In justifying the inclusion of this land within a Conservation Zone, the planning authority specifically acknowledged that its objective was to benefit an adjacent national park. The National Park Service was not interested in purchasing the land.

Anderson J. ultimately took a formalistic approach to the question of whether the land was reserved for a public purpose, holding that the precise language used in the legislation indicated that a specific reference to the land being reserved was required in the plan. At the same time, however, he drew attention to the fact that all zoning regulations were for the public benefit and, once this was acknowledged, it was impossible to draw any meaningful line between them in order to identify those which might be treated as reservations.

Anderson J. also argued that the notion of reservation for a public purpose went beyond the mere imposition of land use restrictions, connoting *occupation and use* for the public purpose.[110] Taken to its logical extreme this approach would allow landholders no more than their existing use rights. All other potential uses could be restricted or prohibited altogether without attracting compensation. Only in circumstances where there was an intended occupation would there be a compensable reservation. If this was the case, it would be more equitable to require the authority to take early steps to acquire title to the land in question, as in New South Wales.

The New South Wales provisions were considered by the Court of Appeal in *Carson v. Department of Environment and Planning*.[111] There are two other important distinctions between these provisions and those found in the Victorian legislation. The first is that only reservations for specified public purposes are covered by the New South Wales provisions. The only relevant ones in the present context are 'open space' and 'public' reserve.[112] Nature conservation, for

[108] [1980] V.R. 255.

[109] Town and Country Planning Act 1961 (Vic.) s. 41(1)(c)(i). These provisions are, for all intents and purposes, identical to those now found in s. 98 of the Planning and Environment Act 1987 (Vic.).

[110] [1980] V.R. 255, 261-2.

[111] (1985) 57 L.G.R.A. 390.

[112] 'Public reserve' is defined in s. 4 of the Local Government Act 1919 (N.S.W.) to mean:

> public park, any land convened [sic] or transferred to the council pursuant to section 340A, any land dedicated or deemed to be dedicated as a public reserve pursuant to section 340C or 340D, any land vested in the council, and declared to be a public reserve, under section 37AAA of the Crown Lands Consolidation Act, 1913, and any land dedicated or reserved from sale by the Crown for public health, recreation, enjoyment or other public purpose of the like nature, but does not include a common.

example, is not specified as a public purpose.[113] Second, only reservations of land exclusively for such purposes fall within the New South Wales provisions.

In *Carson*, the provisions in question were once again zoning regulations. One of the zones was an open space protected zone (proposed future national park extension area). Only certain agricultural uses and national parks development were permitted without consent. Forestry, roads, utility installations and the erection or use of buildings or carrying out of works for agricultural purposes required development consent. Implicitly, this included only selective clearing of vegetation for forestry and agricultural purposes because clear felling was absolutely prohibited.

The title of the zone itself suggested that the National Parks and Wildlife Service had a very definite interest in purchasing the area some time in the future. To this extent the case is a stronger one in terms of the criteria of envisaged occupation and use referred to by Anderson J. in *Van Der Meyden*. Anderson J. would nevertheless ultimately have concluded that there was no reservation on these facts because of the absence of the magic word 'reserve'. The Court of Appeal applied a very different set of considerations.

Mahoney J.A. specifically rejected the argument accepted by Anderson J. that zonings were to be distinguished on a purely formal basis from reservations: a zoning could in particular circumstances constitute a reservation for public purposes.[114] Samuels J.A. stated that 'reserve' meant 'to set apart',[115] but he went on to consider the details of the restrictions imposed rather than the nature of the language used.

In the end, both judges agreed that the fact that one permissible use of the land was for a commercial purpose — utility undertakings could be carried out not only by government but by private trading companies — meant that it was impossible to regard it as being reserved exclusively for public purposes.[116] According to Samuels J.A.:

> It is evident that the purpose of the compulsory acquisition provision is to protect a land owner against the event that his land is zoned is [sic] such a way as to preclude his exploiting it to his economic advantage. That rationale cannot apply where there are uses available which have an obvious commercial potential. It is not to the point to argue that the uses may be pursued only with the consent of the council ... The necessity to obtain the consent of a responsible authority is a familiar requirement of all planning schemes and cannot be regarded as inconsistent with the capacity of the land to earn income.[117]

113 Other public purposes can be prescribed by regulation: Environmental Planning and Assessment Act 1979 (N.S.W.) s. 26(c). See the comments by Jacobs and Asprey JJ.A. on the earlier provisions in s. 342AC(2)(h) of the Local Government Act 1919 (N.S.W.) in *Chapman v. The Minister* (1966) 13 L.G.R.A. 1, 16-7.

> In our opinion the exercise of the power not to specify a particular purpose, which is in fact a public purpose, as a public purpose for the purpose of the subsection in order thereby, not to determine conclusively that the purpose is or is not a public purpose, but to take away the right to compensation intended to be given in the case of zoning or reservation for a public purpose would be an abuse of the power. In practice it might be very difficult to obtain relief against such an abuse of power.

114 *Supra* n. 12, 400. Note that s. 342AC(2)(h) of the Local Government Act 1919 (N.S.W.) specifically included zonings in addition to reservations.

115 *Ibid.* 395.

116 *Ibid.* 396, 400-1.

117 *Ibid.* 395.

Both judges focused on the range of permissible uses in the zoning table. Neither paid any attention to the commercial viability of the protected existing use. Implicit in the decision is an acknowledgement that if all uses other than the existing use are absolutely prohibited, then, regardless of the commercial viability of the existing use, the land is exclusively reserved for public purposes — albeit not necessarily for one of the public purposes which mandates the making of arrangements for acquisition. This is not so if the plan simply imposes a consent requirement for any and all development, even though consent may be difficult to obtain in practice.

Suppose that only agricultural land use is permitted. Both judges raised this issue but did not have to reach any conclusion. Samuels J.A. questioned whether this would constitute a relevant public purpose within the legislation — the only possibility was the purpose of 'open space'.[118] Mahoney J.A. was more confident, suggesting

> it may be that, notwithstanding the right to erect incidental structures for the purposes of agriculture, use of it for such a purpose would effectively be use as open space, in the ordinary sense of the term.[119]

Where clearing regulations are imposed, however, they will rarely take the form of absolute prohibitions which have the effect of confining land use to agricultural purposes, more specifically rough grazing. The typical scenario will involve the imposition of a consent requirement for specified uses. After *Carson* it is at least clear that in New South Wales, provided that this contemplates the possibility of some commercial use other than agriculture, it will not constitute a reservation exclusively for public purposes.[120]

The fact that in practice consent may not be given for such a commercial use does not appear to be a relevant consideration.[121] In deciding whether or not the land is exclusively reserved for public purposes, the possibilities presented by the planning instrument are determinative. Again, there is here a point of distinction between the New South Wales and the Victorian provisions. As noted earlier, the latter provide that even if land is not reserved for a public purpose, compensation must still be paid if a permit is refused on the ground that the land is or will be needed (previously the term was 'required'[122]) for a public purpose. If Anderson J.'s approach is followed in Victoria, however, this will not have any effect on the points made above. For Anderson J., land required for a public purpose, as with land reserved for a public purpose, was required for use, in the sense of

118 *Ibid.*

119 *Ibid.* 400.

120 The later decision in *Bergman v. Holroyd Municipal Council* (1988) 66 L.G.R.A. 68, 77, interpreting s. 116 of the Environmental Planning and Assessment Act 1979 (N.S.W.) (determination of value of reserved land for the purposes of compulsory acquisition) emphasizes the significance of the word 'exclusively' in s. 27.

121 *Cf.* the Local Government (Planning and Environment) Act 1990 (Qld) s. 3.5(2)(a) under which compensation is payable where 'the only permitted use of the land (other than the continuance of the use to which the land was lawfully being put at the time of the coming into force of the planning scheme and *other than a permissible use of the land*) is a use for a public purpose . . .' (emphasis supplied). A 'permitted use' is defined as one which does not require approval and a 'permissible use' as one which does: s. 1.4.

122 S. 42(1)(c)(ii) of the Town and Country Planning Act 1961 (Vic.), interpreted in *Van Der Meyden.*

occupation and use. Even though use of the land was restricted for the amenity of the neighbourhood, including the national park, this did not mean that it was required for a public purpose.

In practice, therefore, on the evidence of the approach taken by the courts thus far, the zoning of land so as to impose a consent requirement for the clearing of native vegetation will not require the payment of compensation in Victoria. In New South Wales the position is less certain, but what is clear is that carefully drafted provisions, which at least allow for the possibility of a commercial use, can avoid the need to make arrangements for the purchase of title. This does not mean that planning authorities can have their cake and eat it. Conservation is at least as much to do with land use management as with land use restrictions, and strategies need to be devised to ensure that land in private hands is adequately managed.[123]

Underlying the decisions in *Van Der Meyden* and *Carson* are very different conceptions of private property. *Van Der Meyden* draws a distinction between mere restrictions on use, however severe, imposed by a planning authority, and the intended assumption of rights of occupation by that authority. Here we can see a commitment to the view that the essence of private property lies not in rights of user but in the right to exclude others from use and enjoyment. This is in turn equated with a right to exclude others from occupation. Once this is interfered with, then the loss must be compensated. This criterion has the advantage of being an easy one to operate in practice, but the problem is that it is by no means an accurate indicator of public use and enjoyment. Underlying the approach of Anderson J. in *Van Der Meyden* is a limited conception of 'use'. The fact is that we can use and enjoy land without occupying it. The most obvious example is our enjoyment of landscapes. But we also enjoy, at least indirectly, land which is the habitat of threatened species of flora and fauna. The economist would draw the net of public benefit derived from privately owned land much wider.[124] If land use restrictions short of actual occupation ensure that such benefits continue, the argument which can then be advanced is that they constitute an interference with the landholder's right to exclude others from such benefits and thus constitute an attack on the essence of private property — not because they involve restrictions on use but because they undermine the landholder's right to exclude others. The issue then is when do restrictions on use amount to an interference with the right to exclude others from use and enjoyment?[125]

123 Farrier, D., *op. cit.* n. 5.

124 See the discussion of 'option values' in Krutilla, J. V., and Fisher, A. C., *op. cit.* n. 60.

125 There is an extensive literature on this issue in the United States involving the Fifth Amendment to the United States Constitution. For recent decisions of the Supreme Court see: *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California* 107 S.Ct 2378 (1987); *Keystone Bituminous Coal Association v. Nicholas De Benedictis, Secretary, Pennsylvania Department of Environmental Resources* 107 S.Ct 1232 (1987); *James Patrick Nolan et ux v. California Coastal Commission* 107 S.Ct 3141 (1987). For a decision bearing directly on some of the issues raised in this paper, see: *Just v. Marinette County* 201 N.W. 2d 761 (1972). For an analysis of the decisions see Large, D. W., 'The Supreme Court and the Takings Clause: The Search for a Better Rule' (1988) 18 *Environmental Law* 3. See also Sax, J. L., 'Takings, Private Property and Public Rights' (1971) 81 *Yale Law Journal* 149.

With these approaches to the issue of compensation, we can compare the pragmatic approach taken in *Carson*. In essence the question becomes what is a 'reasonable exploitable scope'[126] beyond the existing use? Peculiarly though, this is determined by looking no further than the face of the plan, as distinct from its implementation. The emphasis is on the issue of appropriate rights of user and the benefit derived by the landholder, as distinct from the indirect benefits derived by other members of society from the land use restrictions. The implication is that the landholder is to be guaranteed an income from the land, regardless of its consequences for the environment, unless society steps in and purchases title. But if this is the underlying rationale, then it is essential to look at the actual implementation of the plan to see if in practice consent is given to a reasonable exploitable use of the land. On the other hand, it is unclear why we should not at least start by looking at the existing use to which land is being put in determining whether or not the landholder can '[exploit] it to his economic advantage'.[127] This would not, however, be an easy question to answer in the farming context given the vulnerability of such activities to weather, market fluctuations, both short and longer term (the impact of which on particular individuals will depend on skill, luck and capital) and the acknowledgement that the rewards of such activities lie at least in part in quality of life as in cash in hand.

THE POSITION IN OTHER AUSTRALIAN JURISDICTIONS

I now highlight some of the legal problems likely to be faced by the other Australian jurisdictions if they attempt to utilise their planning systems to regulate the clearance of native vegetation.

The Scope of Planning Powers

The first question which arises is whether the relevant legislation enables plans to be made for these purposes. In other words, does it give planning authorities the relevant powers? In both New South Wales and Victoria, I have shown that the legislation has espoused a broad conception of environmental planning, with an emphasis placed as much on the protection and conservation of land as on its use and development. This has necessarily led to a new interest in planning outside of urban areas, while in some of the other Australian jurisdictions the legislation itself mandates a heavy emphasis on urban planning. Prior to the Local Government (Planning and Environment) Act 1990 (Qld), this was most obviously true in Queensland where the Local Government Act 1936 (Qld) authorized the preparation of 'a town planning scheme'.[128] This was unhelpfully defined as '[a] scheme for town planning',[129] but 'town planning' was further defined as including

126 (1985) 57 L.G.R.A. 390, 395 *per* Samuels J.A.
127 *Ibid.*
128 S. 33(2)(a).
129 S. 33(1)(i).

all matters necessary or expedient for securing the improvement, development, healthfulness, amenity, embellishment, convenience, or commercial advancement of the Area.[130]

Not only was this a clear indication that planning had no concern with rural areas, but there was a strong emphasis on utilizing the environment as distinct from conserving it. Even the references to 'healthfulness' and 'amenity' focused on short-term anthropocentric ideals, which might possibly have supported vegetation controls concerned with soil conservation but would probably not have stretched to those which had habitat protection as their primary focus.

Following the enactment of the new legislation the position has almost certainly changed. Although it is still in terms of 'town planning' the definition of this has been extended to include a specific reference to 'all matters necessary or expedient for securing the ... conservation ... of an Area'.[131] This would support vegetation controls.

In Tasmania, in the Local Government Act 1962 (Tas.), Part XVIII is entitled 'town and country planning' and Division 2 refers to 'town and country planning schemes'. Schedule 7, which spells out the matters which may be dealt with[132] is heavily urban in orientation except for references to 'the preservation of objects of ... natural beauty' or 'the reservation of land ... for recreation grounds, ... parks, ... and other open spaces'. The emphasis here is on a limited range of short-term anthropocentric concerns, which would include landscape conservation but not habitat protection. There is, however, a broad catch-all-category which refers to 'the definition of areas to be used exclusively or principally for specified purposes or classes of purposes'. This would allow for provisions in schemes setting aside areas for vegetation conservation purposes but may not support vegetation controls falling short of this.[133]

Like the Queensland legislation, the West Australian Town Planning and Development Act 1928 talks in terms of 'town planning schemes' but these are defined to include 'rural planning and development'.[134] Furthermore, among a detailed list of matters which can be dealt with by a planning scheme is the preservation of

- particular trees;
- trees of a particular species;
- trees of a particular height or girth or both;
- trees belonging to a particular group of trees.

Particular town planning schemes can go further and declare shrubs or other

130 *Ibid.* See also the definitions of 'strategic plan' and 'development control plan', which are both oriented towards development and growth.

131 Local Government (Planning and Environment) Act 1990 (Qld) s. 1.4.

132 *Ibid.* s. 725.

133 'Interim orders' can be made by municipalities where they have resolved to prepare a scheme or where they are obliged to prepare one — for example, where the operation of a scheme has been suspended (s. 734(1A)). These are further limited in the matters they can cover because they can only regulate the 'development' of land with respect to the matters spelt out in Schedule 7 (s. 734(2)(a)). 'Development' is not defined.

134 S. 2(1). Gardner has commented that in practice plans have dealt mainly with urban issues and only recently have they begun to address rural land use: Gardner A., 'Legislative Implementation of Integrated Catchment Management in Western Australia' (1990) 7 *Environmental and Planning Law Journal* 199, 205.

perennial plants of a specified species to be trees.[135] In light of these specific references, potentially covering all forms of vegetation, it is possible that other enabling provisions, which are on their face broad enough to encompass vegetation controls, will be read down by the courts.[136] If this is the position, then any vegetation controls will have to be carefully targeted. This special provision would not allow generalized clearing controls to be imposed, such as those found in Victoria. The clause which allows the broadest scope is that which refers to the preservation of 'trees belonging to a particular group of trees', but this would at least require a detailed mapping exercise, and even that might be to treat the concept of 'group' too generously. When it comes to other vegetation, much greater specificity is required because in declaring shrubs or perennial plants to be trees, the species must be identified. Although in practice a clearing operation could be made impractical by regulating a species which was widespread and impossible to single out, this is clearly not what those responsible for the legislation had in mind, and would be politically unacceptable.

Under s. 34(1) of the Northern Territory Planning Act 1979, planning instruments can control both the use of land and the carrying out of any development on or in relation to land. The 'cutting down, topping or lopping of trees' is specifically defined as 'development'.[137] One problem here is that only certain methods of interfering with trees are designated. Clearing by chaining is not specifically mentioned, although it might be argued that it constitutes 'cutting down'. Ringbarking and poisoning are certainly not covered but these are frequently not economical methods of clearing land. Then there is the question of the status of vegetation other than trees. Even though not specifically addressed by the legislation it could be argued that this is regulable as an aspect of land use,[138] or alternatively, as the carrying out of a 'work',[139] which the legislation specifically defines as a separate development.

Existing Use

All four of the jurisdictions discussed above have provisions protecting continuing lawful uses of land.[140] The West Australian provisions, however, only protect continuing uses regulated by interim development orders as distinct from town planning schemes. There are provisions in this legislation requiring compensation to be paid where continuing uses are regulated by schemes,[141] but

135 First Schedule, cl. 11A(1), (3).

136 See s. 6 of the Act ('making suitable provision for the use of land for building or other purposes') and First Schedule, cl. 10.

137 S. 4(1).

138 S. 34(1).

139 S. 4(1). See the discussion of the meaning of the concept of 'work', *supra.* n. 93 and accompanying text.

140 Local Government (Planning and Environment) Act 1990 (Qld) s. 3.1; Local Government Act 1962 (Tas.) s. 759; Planning Act 1979 (N.T.) s. 68(1); Town Planning and Development Act 1928 (W.A.) s. 7B(1)(b).

141 S. 12(2a)(b)(ii).

in practice the schemes themselves will circumvent this by inserting their own existing use provisions.[142]

In the Northern Territory, there is no room for the redundancy argument employed in *Dorrestijn* to operate so as to justify an expansive interpretation of existing use protection. Although 'development' is defined to include only a change in the use of land,[143] the plan enabling provisions, as we have seen, allow plans to regulate not only development but the use of land and thus the provision protecting existing uses has a crucial role to play. Similarly in Western Australia, interim development orders can regulate 'development' but this is defined to include 'the use or development of any land',[144] while planning schemes can make 'suitable provision for the use of land for building and other purposes'.[145] In Queensland 'planning schemes' are defined as schemes for 'town planning' and this is defined broadly enough to include control over continuing uses were it not for specific existing use protection. In Tasmania, on the other hand, there is no clear indication either way as to whether or not plans can control mere continuing uses and thus give the existing use provisions a real role to play without having to resort to the *Dorrestijn* extension.[146]

This, however, is only part of the story. Even if the redundancy argument is not available, there still remains the argument, considered above in the context of the discussion of the New South Wales legislation, that vegetation clearance should be defined as simply an aspect of the protected continuing use rather than as a separate development or 'work' falling outside of existing use protection. If this is the case, the High Court decisions in *Parramatta City Council v. Brickworks Ltd*,[147] *Eaton & Sons Pty Ltd v. Warringah Shire Council*[148] and *Norman v. Gosford Shire Council*[149] would appear to offer the landholder a good deal of leeway when it comes to the enlargement of the area used and the intensification of the existing use[150] through land clearing activities, because there is no equivalent in any of the jurisdictions to the provisions in the New South Wales legislation abrogating these principles.

In Queensland, the concept of 'use' is in fact defined generously in the

142 See Model Town Planning Scheme Provisions (1986). Fogg points out that in Queensland also, existing use provisions are to be found in individual planning schemes and that these are generally of greater practical significance: *Land Development Law in Queensland* (1987), 667 *et seq*. But it is clear that the provisions in the schemes cannot reduce the protection for nonconforming uses afforded by the provisions in the legislation itself. They could actually increase it, but the discussion which follows suggests that land clearing would be already substantially protected by the statutory provisions.

143 Planning Act 1919 (N.T.) s. 4(1).

144 Town Planning and Development Act 1928 (W.A.) ss 7B(5)(a)(ii) and 2(1).

145 *Ibid*. s. 6(1). See also First Schedule cl. 10 and s. 12(2a)(b)(ii).

146 There is a definition of 'development' in s. 733A of the Tasmanian Local Government Act 1962, which only includes material changes of use, but this definition is limited in its application and has no bearing on the coverage of schemes. Note that s. 759 of this legislation protects existing uses from provisions in interim orders as well as those in planning schemes.

147 (1972) 128 C.L.R. 1.

148 (1972) 25 L.G.R.A. 369.

149 (1975) 132 C.L.R. 83.

150 There is an argument that the principle in *Norman*'s case may not allow land clearing for the purposes of cultivation as distinct from more intensive grazing, because this represents a change of use. *Cf*. n. 98.

legislation to include what would clearly be regarded as 'works' in other jurisdictions. The use of land includes

> the carrying out of excavation work in or under land and the placing on land of any material or thing which is not a building or other structure.[151]

Although this does not refer to land clearing specifically there is a very strong indication that 'use' is otherwise to be interpreted broadly. This is further reinforced in that the definition takes the further step of embracing 'any use which is incidental to and necessarily associated with the lawful use of the land in question'. In light of this, even if plans in Queensland were empowered to regulate land clearing activities, these would probably be regarded as an aspect of continued use protected by the existing use provisions.[152]

The position in Tasmania is unclear. There is no reference to the concept of a 'work' and the concept of 'use' in the existing use provisions is undefined.

In the Northern Territory and Western Australia, on the other hand, the fact that certain activities involving the destruction of vegetation are specifically identified as being appropriate subject-matter for regulation alongside separate references to the use of land strongly suggests that these activities are to be treated as distinct and therefore outside of existing use protection.[153]

In the Northern Territory, however, not all types of vegetation are identified in the specific enabling provision. It then becomes a question of whether clearing activities involving vegetation other than trees can be defined as the carrying out of 'works' within the definition of 'development' and, as such, separable from the continued use. 'Work' is defined as 'any operation in relation to land, other than mining'.[154] The reference to 'operation' would seem to free the concept from the limits imposed by Gibbs J. in *Parramatta City Council v. Brickworks Ltd*[155] so as to allow it to incorporate land clearing. There remains, though, the possibility that, because certain activities with regard to trees are specifically included within the definition of 'development', other activities are by inference excluded, and are simply aspects of land use. In response it might be argued that the specific reference to the 'cutting down, topping or lopping of trees' is to be accounted for in that it is designed to cover activities which are of insufficient scale to amount to the carrying out of a 'work'.

Compensation

The question of compensation only arises if the plan enabling provisions allow vegetation controls to be imposed while existing use protection against these

151 Local Government (Planning and Environment) Act 1990 (Qld) s. 1.4.

152 The argument against this position is that land clearing should be regarded as a separate work rather than an incidental use and that, as such, it is not identified specifically as a work within the definition of 'use'.

153 Town Planning and Development Act 1928 (W.A.) s. 6(1); Planning Act 1979 (N.T.) s. 4(1). The position in relation to interim development orders in Western Australia is unclear. It turns on the question of whether land clearing falls within the ambit of 'carrying out . . . other works on any land': ss 2(1) and 7B(5)(a)(ii). See the discussion of the meaning of the concept of 'work', *supra.* n. 93 and accompanying text.

154 Planning Act 1979 (N.T.) s. 4(1).

155 See text at n. 82ff.

controls is denied. From the above analysis it appears that in Queensland controls are likely to run up against the obstacle of existing use provisions even though plans can now validly provide for the conservation of native vegetation.[156] In Tasmania it is difficult to offer any firm opinion about either the ambit of the plan enabling provisions or the limits of existing use protection. What is at least clear here is that compensation is not payable in respect of 'any provision of a scheme . . . regulating . . . the use of land',[157] even, it would appear, where the effect of this is that only public purposes are permitted.

In the Northern Territory and Western Australia, limited and carefully targeted controls will survive legal challenge, but the position of broadacre clearing controls which purport to regulate the destruction of vegetation in general is much more doubtful. As for the question of compensation, the situation in Western Australia is that it would only be payable if vegetation controls had the effect of permitting development 'for no purpose other than a public purpose'.[158] In essence this asks the same question as the New South Wales legislation. There are no provisions in the Planning Act 1979 (N.T.) requiring compensation to be paid for the imposition of land use restrictions in the Northern Territory. Section 50(2) of the Northern Territory (Self Government) Act 1978 (Cth) does provide that the acquisition of any property in the Territory must be made on just terms where it would otherwise have fallen within para. 51(xxxi) of the Constitution, had the property concerned been in one of the States. It seems, however,

156 Because of this conclusion the compensation question is not dealt with in any detail. The basic position is now found in s. 3.5 of the Local Government (Planning and Environment) Act 1990 (Qld). (See previously Local Government Act 1936 (Qld) ss 33(11)(a)(iv) and 33(10)(b), discussed by Fogg, A. S., *op. cit.* n. 57, ch. 12). Compensation is payable for injurious affection if land is 'included in a zone wherein . . . the only permitted use of the land (other than the continuance of the use to which the land was lawfully being put at the time of the coming into force of the planning scheme and other than a permissible use of the land) is use for public purposes' (s. 3.5(2)). 'Public purpose' is defined to include: uses conducted by a Government Department, Local Authority or any statutory corporation; public utility installations and emergency services; parks (s. 3.5(3)). 'Permitted use' is defined as a use which does not require approval and 'permissible use' as one which does: s. 1.4. It is at least clear from this that *zonings* can attract compensation in certain circumstances. The argument would then be that the imposition of clearing controls could on occasion effectively constitute a zoning for public purposes as being a use by a Government Department (nature or land conservation). As in New South Wales, the use would have to be an exclusive one. But in determining this the only issue is what uses are *permitted as of right*. In other words, compensation may still be required even where the zoning permits non-public uses (such as commercial uses) with the consent of the local authority and to this extent the position differs from that taken in *Carson v. Department of Environment and Planning*. On the other hand, provided that a non-public purpose use, such as agriculture, is permitted as of right, in addition to a specified use for a public purpose, compensation will not be payable. This will be the position even where the landholder has very limited commercial options open because the existing use is also for agricultural purposes.

Apart from this, the general position is that compensation is not payable 'where an interest in premises is affected by a planning scheme which by its operation prohibits or restricts the use of land . . . for a particular purpose' (s. 3.5(4)(d)). There is, however, one other exception. Compensation is payable if the applicant can prove the existence of 'a legal right immediately before the provision in question of the planning scheme came into force to use the land . . . for the particular purpose' prohibited or restricted (s. 3.5(4)(a)). The legal right exists even where it depended upon a favourable consent decision by a local authority if it is reasonable to expect that the exercise of discretion would have been a favourable one had consent been sought. An argument which could be advanced is that where clearing controls are introduced for the first time in an area where up till that point agricultural land uses had been unregulated, a legal right to use the land for agricultural purposes existed prior to the introduction of the controls and compensation must be paid. One possible technical response to this is that clearing controls do not directly regulate land use. Even after their introduction the right to use the land for agricultural purposes remains, albeit indirectly restricted by the controls.

157 Local Government Act 1962 (Tas.) s. 735(2)(b).

158 Town Planning and Development Act 1928 (W.A.) s. 12(2a)(b)(i).

that the current approach of the High Court will be to adopt a narrow interpretation of the concept of 'acquisition'. In *Commonwealth v. Tasmania*[159] three members of the High Court made it clear that the severe restrictions on the user imposed on the land in that case by the World Heritage Properties Conservation Act 1983 (Cth) did not constitute such an acquisition.[160] According to Mason J.:

> In terms of its potential for use, the property is sterilized, in much the same way as a park which is dedicated to public purposes or vested in trustees for public purposes, subject, of course, to such use or development as may attract the consent of the Minister. In this sense, the property is 'dedicated' or devoted to uses, i.e. protection and conservation which, by virtue of Australia's adoption of the convention and the legislation, have become purposes of the Commonwealth. However, what is important in the present context is that neither the Commonwealth nor anyone else acquires by virtue of the legislation a proprietary interest of any kind in the property. The power of the Minister to refuse consent under the section is merely a power of veto. He cannot positively authorise the doing of acts on the property.[161]

EVALUATION OF THE ROLE OF PLANNING SYSTEMS

Planning systems, as vehicles for legal regimes concerned with vegetation conservation on private land, have a number of attractive features. They are already up and running. They can be redirected along new paths through plans made under delegated powers, provided of course that in their inception they were broadly conceived in the enabling legislation and empowered to consider broad environmental, as distinct from narrow town and country planning, concerns. In these circumstances, there is no need to go through the legislative process, with the early warning of impending intervention that this inevitably gives, and the ensuing risk of panic land clearing. Apart from this, provisions contained in plans do not have to be imposed on a blanket basis. They can be targeted at particular areas for particular reasons after careful assessment of the needs of particular environments. It is impossible to do this through legislation. Blanket provisions risk overkill, although in practice they are probably more likely to underachieve.

Environmental planning regimes, unlike those concerned with soil conservation or the protection of endangered species, can appeal to a range of justifications for legal intervention, including landscape conservation and, more recently, the prevention of the greenhouse effect.[162] Because of this, regulations can, if necessary, be introduced in the absence of the careful survey and assessment work needed, for example, to justify legal intervention to protect what is alleged to be the habitat of a species which is alleged to be endangered.[163] As well, in spite of the dramatic new directions which they are taking in relation to the regulation of rural land use, planning systems can still claim a degree of legitimacy from an established tradition which has long since modified the position at common law in relation to land use control. In some jurisdictions, such as New South Wales, agricultural activities have never been formally excluded from regulation, although in practice they have been exempted on an *ad*

159 (1983) 158 C.L.R. 1.
160 *Ibid.* 144-6 *per* Mason J.; 181-2 *per* Murphy J.; 246-8 *per* Brennan J. Deane J. disagreed, 282-92.
161 *Ibid.* 145-6.
162 See for example Amendment S15 to all planning schemes in Victoria.
163 See for example the requirements under the Flora and Fauna Guarantee Act 1988 (Vic.) before he destruction of vegetation can be regulated.

hoc basis in individual plans. In this context, new regulatory initiatives can be legitimated on the basis that they are simply adaptations, in light of new information, of a system which applies equally to all landholders, including all of those who use land as a source of livelihood, whether for industrial uses in urban areas or agricultural uses in rural areas.

Finally, planning systems do have something to offer landholders, in the form of existing use protections and limited compensation provisions or their equivalent. Indeed, the previous existing use provisions in South Australia, as interpreted by the High Court in *Dorrestijn*, gave farmers more protection than they could reasonably have hoped for. But even in New South Wales and Victoria where, if the above analysis is accepted, the protection is very much more limited, it is more than is guaranteed under some other legal regimes bearing on rural land use. In Victoria, the Flora and Fauna Guarantee Act 1988 offers no protection for existing uses, although there is provision for compensation for those suffering financial loss as a result of the making of an interim conservation order.[164] Under the provisions of Part VIII of the Water Act 1912 (N.S.W.), which is concerned with the regulation of works such as levees and embankments which could affect the distribution of flood waters, the Water Corporation can arrange for the removal or alteration of existing works if it is satisfied that they are likely to have a substantial adverse impact on the distribution of flood waters in the vicinity.[165] The Soil Conservation Act 1938 (N.S.W.) has traditionally regulated the removal of vegetation from land adjacent to water courses and steeply sloping areas but it has recently been extended to cover land mapped as being environmentally sensitive, including land containing rare or endangered fauna or flora or bird breeding grounds, wetlands and areas of scenic beauty. There is no existing use protection here. Nor is there any provision for compensation.

There is also a debit side to the equation, whereby some of the factors identified above as positive features of regulation through planning systems may also have a downside. Controls which are carefully targeted at particular areas for good scientific reasons may be perceived as inequitable by the uninitiated. These perceptions will be magnified where justifications are more obviously value-laden, such as when it is argued an area has valuable landscape qualities.

If controls are not carefully and specifically justified, they are inevitably more vulnerable. Even if they survive the argument that they are an unjustifiable interference with private property rights and should be totally abandoned, they may still be substantially undermined on a case by case basis by the granting of specific approvals, and as a result become largely symbolic. There is a presumption within the community, if not at law, that if development is permissible with consent, as distinct from being absolutely prohibited, some kind of approval will be forthcoming and that the main issue will be about the precise form it takes. Local councils in rural areas will find such pressures difficult to resist, lacking expertise in issues of nature conservation and therefore wanting confidence in their ability to make the right decisions, while being too close to the community

164 Part V, Division 1, s. 43.
165 Water Act 1912 (N.S.W.) s. 179.

which they must regulate. Decentralized decision-making by unrelated bodies will be difficult to monitor. Yet planning systems have traditionally given local councils, as distinct from specialized agencies, a substantial amount of responsibility when it comes to development control decisions, although this is by no means inevitable. The compromise inherent in a conditional approval, as distinct from an outright rejection, may be appropriate as a general operational principle in the context of the renewable built environment. Where the concern is the prevention of soil erosion, such an approach in relation to the natural environment can also be justified. This is not so, however, if the aim is to conserve habitat generally, or threatened species in particular, and the proposal is to clear land for cultivation. Any compromise will usually either render the proposal uneconomic or the natural resource non-renewable.

The existing use provisions in planning systems may compromise the conservation objectives of clearing controls, even when these provisions take the attenuated form which the discussion above suggests those in New South Wales and Victoria currently take. They protect existing pastoral operations, including present grazing patterns, even though these may be having devastating effects on the habitats of flora and fauna. They would also allow the clearing of regrowth to maintain the existing operation.

Finally, planning systems have typically been negative in their orientation. They have focused on the control of development. Even where development consent is given, there has been a reluctance to impose conditions which require continuing supervision and enforcement once the development is up and running, and there is certainly no tradition of requiring developers to conduct ongoing management planning exercises.[166] If, on the other hand, development consent is refused, there is no longer any lever available to ensure that the undeveloped resource is properly managed. The retention of native vegetation by the imposition of negative controls is only part of the story. These areas must also be managed to keep down weeds and pests and to control wildfires. They may need to be fenced to keep off domestic stock. It is one thing for governments to restrict land use without offering anything in exchange. If, however, we want landholders not simply to forego development but to manage the land in a positive fashion for purposes which offer no immediate economic return to them, we must provide inducements, for reasons of practical necessity if not considerations of equity. It is at this point that regulation through the planning system, or any more specialized regulatory regime, needs to be supplemented by provision for heritage or conservation agreements in which landholders commit themselves to manage the land in an appropriate manner.

166 But *cf.* S.E.P.P. 19 in N.S.W. which allows councils to make management plans for areas zoned or reserved for public open space purposes, spelling out positive measures to be undertaken to, among other things, prevent degradation of bushland and to restore and regenerate degraded areas.