BEYOND A WALK IN THE PARK: THE IMPACT OF INTERNATIONAL NATURE CONSERVATION LAW ON PRIVATE LAND IN AUSTRALIA

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[Australia's nature conservation paradigm has traditionally confined protected areas, such as national parks, to icon areas on land in public ownership, excluding private land. International environmental law poses a challenge to this paradigm. Over the past three decades it has evolved to embrace a landscape-wide approach to nature conservation, as encapsulated in the Biodiversity Convention. *Even those older agreements with an ostensible icon focus, such as the* World Heritage *and* Ramsar Conventions, *have also shifted their emphasis to incorporate much broader conservation perspectives. While they centre on setting aside special areas, there is nothing in them which prevents the incorporation of private land into the listed sites. This paper examines the impact of international nature conservation laws on Australian domestic policy, in particular the extent to which this has occurred in practice and the adequacy of the consequent management arrangements.]*

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I INTRODUCTION

This article forms part of a broader project which seeks to describe and analyse the impact which international laws relating to the conservation of nature have had on Australian domestic law. International nature conservation law is not a closed, self-sufficient system; it is ultimately dependent for its efficacy on the

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extent to which it is implemented in domestic contexts.[1] But, in practice, any attempt to pursue a causal investigation by assessing the extent to which Australian policy has been driven by international developments, as distinct from being generated by purely domestic forces, is an immensely complex undertaking, raising intractable problems of cause and effect.[2] A party may ratify a convention on the basis that its law, policies and programs already meet obligations incurred under it.[3] Such a response is facilitated by the fact that the wording of obligations is frequently flexible, leaving a great deal of discretion with individual parties as to how they will be met. Implementation of a convention may not require legal initiatives and, in these circumstances, the problems of inferring causal relationships are immense as a range of policy instruments could potentially be linked to a convention. The convention may be a contributing factor of variable significance, but the extent of this significance is largely undiscoverable.

When it comes to conventions which rely on an international listing process, however, the causal links between international obligation and domestic implementation are easy to draw, at least at a superficial level. In this article, we focus on the implementation in Australia of provisions in international conventions to which Australia is a party, requiring the international listing of significant areas, in particular, the listing of areas on the World Heritage List under the *Convention for the Protection of the World Cultural and Natural Heritage*,[4] and the List of Wetlands of International Importance under the *Ramsar Convention on Wetlands*.[5] As a first step, however, it is important to place these listing initiatives in the broader context of the historical evolution of international nature conservation law.

[1] As Philippe Sands notes, there is increasing recognition at an international level that the effectiveness of international environmental regimes relies on the extent of domestic compliance: Philippe Sands, 'Compliance with International Environmental Obligations: Existing International Legal Arrangements' in James Cameron, Jacob Werksman and Peter Roderick (eds), *Improving Compliance with International Environmental Law* (1996) 48. See also Steinar Andresen, Jon Skjærseth and Jørgen Wettestad, 'Regime, the State and Society: Analyzing the Implementation of International Environmental Commitments' (Working Paper No WP-95-43, International Institute for Applied Systems Analysis, 1995); David Victor, Kal Raustiala and Eugene Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998).

[2] Instances where Commonwealth legislative initiatives have directly rested on its external affairs power to implement specific obligations under an international nature conservation convention are the exception rather than the rule. The *World Heritage Properties Conservation Act 1983* (Cth) is the outstanding example.

[3] See, eg, Commonwealth, Department of Foreign Affairs and Trade, *Australia and International Treaty Making, Information Kit* (1996) 14–15, which states:

> Many treaties do not require new or prior legislation .. Other treaties ... have been ratified on the basis of an assessment by the Commonwealth that existing Commonwealth or State/Territory legislation is sufficient to implement the provisions of the convention (in other words, we are already meeting domestically the terms of the convention and no further action is necessary), or that the particular treaty obligations can be implemented progressively and without radical change to existing laws.

[4] *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, [1975] ATS No 47 (entered into force 17 December 1975) ('*World Heritage Convention*').

[5] Originally the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, [1975] ATS No 48 (entered into force 21 December 1975) ('*Ramsar Convention*').

II CONSERVING SPECIAL AREAS AND SPECIAL SPECIES

With one significant exception,[6] international agreements which precede the *Convention on Biological Diversity*[7] seek to deliver nature conservation through the identification and protection of special areas (World Heritage Areas, Wetlands of International Importance) and special species (endangered, migratory, waterfowl). They strive to conserve nature through isolating distinctive areas and species rather than managing across the whole landscape.

The *World Heritage Convention* obliges Australia to identify and delineate properties in its territory which fall within the convention's definition of 'natural heritage'.[8] The key qualifying criterion is that the area has to be of 'outstanding universal value' from one of a number of perspectives. The definition emphasises that areas must be 'precisely delineated', emphasising the attempt to isolate heritage icons from the broader landscape.[9] Once parties to the convention have complied with their duty to identify and delineate areas of natural heritage within their territories, they must, 'so far as possible', submit an inventory of those areas which they think are suitable for inclusion on the World Heritage List to an elected intergovernmental committee known as the World Heritage Committee.[10]

Each party to the *Ramsar Convention* is required to 'designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance',[11] and to designate at least one wetland to be included in the List on signing, ratifying or acceding to the Convention.[12] As with World Heritage sites, there is a requirement for boundaries of listed wetlands to be 'precisely described'.[13] Unlike World Heritage sites, however, there is no provision for nominated areas to be vetted by an international body prior to being listed.

The original driving force behind the *Ramsar Convention* was a concern with wetlands as habitat for waterfowl. Indeed, the initial drafts of the Convention were directed to establishing a network of reserves for waterfowl.[14] Even though

6 The exception in the obligation in the *Ramsar Convention* to promote, as far as possible, the 'wise use' of all wetlands (art 3(1)). In practice, the 'wise use' obligation under the *Ramsar Convention* has lain dormant, and has only recently attracted attention at an international level. It has had virtually no impact on Australian domestic policy. The concept and its application are analysed in depth in David Farrier and Linda Tucker, 'Using Wetlands Wisely', forthcoming. The 'wise use' obligation is only a partial exception because, by isolating wetlands from the broader landscape, it perpetuates an approach which seeks to identify the distinctive, here particular ecosystems rather than specific areas, instead of managing across the whole landscape. Pressey and Adam have pointed out that 'many habitats often grouped together as wetlands are not a natural, homogenous group. Many have more in common with non-wetland habitats than with each other': Robert Pressey and Paul Adam, 'A Review of Wetland Inventory and Classification in Australia' (1995) 118 *Vegetatio* 81, 85.

7 *Convention on Biological Diversity*, opened for signature 5 June 1992, [1993] ATS No 32 (entered into force 29 December 1993) ('*Biodiversity Convention*').

8 *World Heritage Convention*, above n 4, art 3.

9 Ibid art 2.

10 Ibid art 11(1).

11 *Ramsar Convention*, above n 5, art 2(1).

12 Ibid art 2(4).

13 Ibid art 2(1).

14 See especially the discussion of the history of the *Ramsar Convention* in Cyril de Klemm and Isabelle Creteaux, *The Legal Development of the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (2 February 1971)* (1995) 81.

the final text has moved some considerable distance from this, there is still a concern about catering for the needs of waterfowl. In selecting wetlands for listing, parties are required to focus on wetlands of international importance to waterfowl in the first instance,[15] and to consider their international responsibilities for the conservation, management and wise use of migratory stocks of waterfowl in all listing decisions.[16] There is a heavy emphasis on the management of wetlands for waterfowl, including a commitment to endeavour to increase waterfowl populations on appropriate wetlands.[17] The Convention, therefore, not only focuses on setting aside special areas, but, within this, focuses on the conservation needs of special species.

The *Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and Their Environment* ('*JAMBA*')[18] and the *Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and Their Environment* ('*CAMBA*')[19] are bilateral agreements which complement the *Ramsar Convention* and which are even more specific in their focus on species. They contain provisions designed to ensure the protection of species of migratory birds specifically listed in annexes. *JAMBA* also commits the two governments to take appropriate protective measures for the preservation of species and subspecies specifically identified by each of the parties as being in danger of extinction, including controlling export and import, establishing sanctuaries and protecting habitat.[20]

The *Convention on the Conservation of Migratory Species of Wild Animals*[21] contains similar cooperative protection measures in relation to migratory species and is also closely associated with the *Ramsar Convention*. Parties must provide immediate protection for the endangered migratory species listed in Appendix I of the Convention,[22] conclude multilateral agreements for the conservation and management of migratory species listed in Appendix II[23] and undertake cooperative research activities.[24] Article 3 addresses the endangered migratory species listed in Appendix I. Parties which are Range States of these species 'shall endeavour' to conserve and/or restore habitats important to their survival; 'prevent, remove, compensate for or minimise' serious impediments to their

15 *Ramsar Convention*, above n 5, art 2(2).
16 Ibid art 2(6).
17 Ibid art 4(4). See also arts 4(1), 4(2).
18 *JAMBA*, opened for signature 6 February 1974, [1981] ATS No 6 (entered into force 30 April 1981).
19 *CAMBA*, opened for signature 20 October 1986, [1988] ATS No 22 (entered into force 1 September 1988).
20 *JAMBA*, above n 18, arts 3, 5, 6.
21 *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, [1991] ATS No 32 (entered into force 1 November 1983).
22 Ibid art 2(3)(b).
23 Ibid art 2(3)(c). Guidelines for the agreements are set out in art 5. Agreements should provide for, inter alia, conservation and management plans; conservation and restoration of habitat; provision of new habitats; control of factors impeding migration; and cooperative research and monitoring.
24 Ibid art 2(3)(a).

migration; and 'prevent, reduce or control factors that are endangering or likely to further endanger the species'.[25]

III QUESTIONING THE DOMINANT PARADIGM

The *Biodiversity Convention* challenges this prevailing international law paradigm which sees nature conservation imperatives being met by setting aside special areas and conserving special species. One of the Convention's objectives is to conserve biological diversity.[26] This is not limited to threatened species, but includes genetic diversity within species. It is concerned with the conservation of all ecosystems, not simply those which human beings find aesthetically pleasing.[27]

While a special areas focus is still present in the *Biodiversity Convention*'s requirement for parties 'as far as possible and appropriate' to establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity,[28] there is a specific commitment to off-reserve conservation in the form of an obligation to 'regulate or manage biological resources important for the conservation of biological diversity *whether within or outside protected areas* with a view to ensuring their conservation and sustainable use'.[29] While parties are required to regulate for the protection of threatened species, they must also cover threatened populations of species (ie genetic diversity within species),[30] and 'promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings'.[31] They must identify and regulate or manage processes and activities which have significant adverse impacts on the conservation and sustainable use of biological diversity.[32]

While the *Biodiversity Convention* challenges the traditional paradigm of how we should go about conserving nature, it also dilutes the influence of international law in this area. It does this by classifying nature as a sovereign resource, and its destruction and degradation as the concern of the respective States. Under a well-established principle of customary international law, reiterated in the Convention, while States are required to take adequate steps to control sources of transboundary environmental harm within their territory or subject to their jurisdiction,[33] they have the 'sovereign right to exploit their own resources pursuant to their own environmental policies'.[34]

25 Ibid arts 3(4)(a), (b), (c).

26 *Biodiversity Convention*, above n 7, art 1.

27 See the definition of 'biological diversity': ibid art 2.

28 Ibid art 8(a). A protected area is defined broadly as 'a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives' (art 2), clearly emphasising that protected areas might include private land.

29 Ibid art 8(c) (emphasis added).

30 Ibid art 8(k).

31 Ibid art 8(d).

32 Ibid arts 7(c), 8(l).

33 International law has long embraced a version of common law nuisance. The principle *sic utere tuo ut alienum non laedus* [so use your property as not to injure your neighbour's] underlies the

With the conceptualisation of nature as a sovereign resource, the transboundary environmental harm principle, and the legitimacy which it offers to more intrusive international intervention, has traditionally been neutralised. As a result, international nature conservation law must necessarily tread more cautiously, cajoling rather than demanding, and leaving considerable room for flexibility. Without the transboundary blowtorch to apply to Australia's political belly, international nature conservation law, with its recent message that we need to go beyond the boundaries of protected areas and conserve biological diversity across the landscape, faces an uphill battle to establish itself as a significant influence upon domestic policy.

There are, however, signs at an international level of a growing appreciation that the destruction of nature does indeed have transboundary effects. In allowing parties to take into account revegetation and land clearing since 1990 in calculating net changes in greenhouse gas emissions, the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*[35] offers a thin ray of hope that the assumption that nature is but a resource, and its exploitation solely a domestic concern, will be subject to more critical scrutiny in the future. Article 3 of the *Kyoto Protocol* requires parties to reduce overall emissions of greenhouse gases. Article 3(3) provides:

> The net changes in greenhouse gas emissions by sources and removals by sinks resulting from direct human-induced land-use change and forestry activities, limited to afforestation, reforestation and deforestation since 1990 ... shall be used to meet the commitments under this Article.[36]

In other words, when determining a party's greenhouse gas emissions, clearance of vegetation will count as a source of emissions, while revegetation may

ruling in *Trail Smelter Arbitration (US v Canada)* (1938 and 1941) 3 RIAA 1905 while *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4, 22 enunciates the 'well-recognized principles, namely ... every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.' See also Adrian Bradbrook, 'Energy Use and Atmospheric Protection' (1996) 3 *Australasian Journal of Natural Resources Law and Policy* 25, 31.

34 *Biodiversity Convention*, above n 7, art 3. See also Principle 2 of the Rio Declaration on Environment and Development, United Nations Conference on Environment and Development ('UNCED'), 31 ILM 874, UNCED Doc A/Conf.151/5/Rev.1 (1992) ('Rio Declaration') which recognises the twin principles that states have the 'sovereign right to exploit their own resources pursuant to their own environmental *and developmental* policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction' (emphasis added). Principle 21 of the Declaration of the United Nations Conference on the Human Environment, 11 ILM 1416, UN Doc A/Conf.48/14 and Corr.1 (1972), ('Stockholm Declaration') contained a similar statement, although the addition of the italicised words in the Rio Declaration gives added weight to a focus on resource exploitation. See also Agenda 21: Programme of Action for Sustainable Development, UNCED Doc A/Conf.151/26 (1992) ch 15.3.

35 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (not yet in force) ('*Kyoto Protocol*').

36 This Article should be interpreted in the light of art 2 of the *Kyoto Protocol* which states, in art 2(1)(a)(ii), that in achieving the reduction commitments under art 3, each party shall implement policies and measures

> in accordance with its national circumstances, such as:
>
> (ii) Protection and enhancement of sinks and reservoirs of greenhouse gases not controlled by the Montreal Protocol, taking into account its commitments under relevant international environmental agreements.

constitute a 'greenhouse sink'. Over 17 per cent of Australia's greenhouse gas emissions are attributed to land clearing.[37]

While the *Kyoto Protocol* may be a significant wedge when it comes to driving home the message that destruction of nature has transboundary effects, it only takes us a small step along the way towards greater international leverage in relation to the conservation of terrestrial biological diversity. Greenhouse imperatives do not necessarily require the retention of ecological communities or revegetation with native species in ways which are sensitive to biodiversity conservation objectives. They do not account for the transboundary effects which arise when we destroy the very basis on which the evolution of species depends, or the sources of many medicines, effective in the treatment of global disease, or the roots of new varieties of plants and animals adapted to a variety of environmental conditions, including disease-resistant and stress-tolerant varieties.[38] If greenhouse imperatives are seen to be satisfied by investment from industry in 'sinks' comprising monocultural plantations, then they will have little to offer in terms of the conservation of biological diversity.

IV INCORPORATING PRIVATE LAND INTO SPECIAL AREAS

It has been suggested that an international program needs to have been in place for at least 10 years before an assessment of domestic implementation is meaningful.[39] On this basis, it would be premature to assess the impact of the new paradigms found in the *Biodiversity Convention* and the *Kyoto Protocol* in instigating conservation management outside of special areas in Australia. However, the *World Heritage Convention* (1972) and the *Ramsar Convention* (1971) fall well within this time frame.

In particular, we are interested in the role played by international nature conservation law in challenging Australia's resilient *domestic* nature conservation paradigm which has traditionally confined protected areas, such as national parks and nature reserves, to icon areas on land in public ownership (Crown land), excluding private land.[40] For while these conventions focus nature conservation effort on setting aside special areas, there is nothing in them which prevents the incorporation of private land into these areas. The *World Heritage Convention*

[37] Figure from 1995, quoted in Environment Australia, 'Land Clearing and Climate Change' (1998) <http://www.environment.gov.au/portfolio/esd/climate/factsheets/fs_landcl.html>. See also Department of the Environment, Community Information Unit, 'Australia's Second National Report under the Framework Convention on Climate Change' (1997) <http://www.erin.gov.au/portfolio/esd/climate/international/natcom2/contents.html>. While, however, the Commonwealth government sees considerable potential in the use of greenhouse sinks to keep Australia within its emissions target, and has acknowledged the role of land clearing in climate change, it regards land clearing as being primarily the responsibility of the States and Territories. Its approach is to focus on revegetation and plantations rather than on protecting existing native vegetation.

[38] 'Genetic diversity within species is the foundation of evolution and hence the foundation of the diversity of species': United Nations Environment Programme, *Global Biodiversity Assessment* (1995) 225.

[39] Andresen, Skjærseth and Wettestad, above n 1, 32.

[40] Departures from this paradigm are now beginning to appear. See, eg, *Nature Conservation Act 1992* (Qld) pt 4, divs 4, 5 and 6.

specifically contemplates that World Heritage values may be found on private land. Article 6, which proclaims that natural heritage identified under the Convention is 'world heritage' which the international community has a duty to protect, at the same time adds the caveat that this is 'without prejudice to property rights provided by national legislation'.[41] In other words, private land can be listed, but this does not automatically involve interference with property rights under national law. The *Ramsar Convention* does appear to show some preference for conservation on areas of public land by requiring parties to 'promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening',[42] but it does not exclude the incorporation of private land in listed areas.

To what extent have domestic implementation initiatives in Australia under these two Conventions taken up these opportunities to incorporate land in private ownership, including land held under Crown lease,[43] in international listings? And, to the extent that they have, what arrangements have been put in place to ensure listing is more than simply a symbolic gesture and that private land within special areas is managed to protect *Ramsar* and *World Heritage* values?

The picture which we will paint has been complicated by Australia's federal system of government. In the past, the Commonwealth executive has been, at times, prepared to act pursuant to international conventions with little or no consultation with the States.[44] However, while listing is an executive privilege, putting in place adequate management arrangements has proved more challenging. The power of the Commonwealth Parliament to legislate to implement obligations under international environmental conventions was only clarified as recently as 1983,[45] and there is still doubt when it comes to particular conventions on the extent to which it can legislate in relation to management issues.[46] Regardless of the question of constitutional power, the Commonwealth would face significant logistical problems in carrying out day-to-day management. On the other hand, the States have jealously guarded their traditional role as land

[41] *World Heritage Convention*, above n 4, art 6.

[42] *Ramsar Convention*, above n 5, art 4(1).

[43] While at a theoretical level, land held under freehold tenure is quite distinct from Crown leasehold, in practice the ideology of private property has been extended to Crown leasehold, particularly where leases are perpetual. State governments, through their traditional reluctance to exercise their substantial powers of intervention in relation to the management of land held under Crown leasehold, have conspired to this end.

[44] This has been particularly the case with the listing of World Heritage Areas, as discussed in Phillip Toyne, *The Reluctant Nation* (1994). The antagonism caused by the Commonwealth's proactive stance in relation to World Heritage was hosed down by the development of 'cooperative federalism' in the 1980s. The Commonwealth's approach to implementation of international treaties now allows the States a clear role. For example, cl 7.1 of 'Principles and Procedures for Commonwealth-State Consultation on Treaties' requires consultation between the Commonwealth and the States and Territories 'in an effort to secure agreement on the manner in which the obligations incurred should be implemented': Commonwealth, Department of Foreign Affairs and Trade, above n 3, 82.

[45] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams Case*').

[46] Commonwealth, House of Representatives Standing Committee on Environment, Recreation and the Arts, *Managing Australia's World Heritage*, Parl Paper No 193 (1996) [3.22]–[3.49].

managers and have responded quickly to the threats to this posed by, from their historical perspective, enlarged Commonwealth legislative powers.[47]

V *RAMSAR* WETLANDS AND PRIVATE LAND

A *Neglecting Private Land*

Australia has not shown itself particularly eager to take up the opportunity offered by the *Ramsar Convention* to incorporate wetlands in private ownership into the List of Wetlands of International Importance. Of the 49 listed *Ramsar* sites, only 10 incorporate private land. In practice, the focus of the listing process in Australia has been on wetlands located on Crown land. The level of protection, however, varies considerably from jurisdiction to jurisdiction and from area to area within a particular jurisdiction, reflecting a diversity of approaches by States and Territories to the implementation of the Convention.[48]

Location on Crown land does not guarantee a *Ramsar* wetland protected status. *Ramsar* wetlands are not necessarily seen to be worthy of a domestic designation which highlights their special status. This ignores the Convention's commitment to 'promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands ... and provide adequately for their wardening'.[49] All eight of Victoria's listed wetlands are located on Crown land, but the more detailed reservations are quite messy, spanning a number of categories, including State forest (Barmah Forest and Gunbower Forest), wildlife reserve, marine reserve, salinity disposal reserve, water supply reserve, regional park and national park. The Kerang Wetlands comprise 22 wetlands variously reserved for water supply, wildlife and salinity disposal, and some without any specific reservation.

On the other hand, all three Northern Territory sites are in national parks, and in New South Wales four of the listed wetlands are in nature reserves, with the other two in national parks.[50] Yet this ostensibly high conservation status may prove to be quite illusory. The fundamental problem with a strategy which seeks

47 The Coalition of Australian Governments' *Intergovernmental Agreement on the Environment* ('*IGAE*'), entered into by the States, Territories and the former Labor government on 25 February 1992, made it clear that whatever the formal position under the *Australian Constitution*, in practice each State is responsible for the policy, legislative and administrative framework for the management of its living resources, with the Commonwealth restricted to ensuring that these meet Australia's international obligations: the parties specifically recognise 'that the States have primary responsibility in the general area of nature conservation', subject to Australia's international obligations (sch 9(2)). Not only did States in the *IGAE* succeed in having their role confirmed as land managers, they also managed to whittle away some of the executive's power to list areas under international conventions by insisting on some degree of prior consultation: see above n 44.

48 For a summary of the Australian *Ramsar* sites, see generally Michelle Handley, *Australia's Wetlands Record: 2nd Triennial Report* (1998) and Environment Australia, Biodiversity Group, Wetlands, Waterways and Waterbirds Unit, 'Site descriptions for Australia's Ramsar Sites' (1998) <http://www. anca.gov.au/environm/wetlands/siteindx.htm>.

49 *Ramsar Convention*, above n 5, art 4(1).

50 Negotiations have been underway with private landholders for future *Ramsar* listings for a number of years but the process is obviously much longer than that required for sites already under National Parks and Wildlife control: Interview with Samantha Hampton, Ramsar Coordinator, NSW National Parks and Wildlife Service (by telephone, 2 April 1998).

to deliver nature conservation through setting aside areas of land in public ownership is that boundaries are likely to have been determined by historical and political factors, bearing no relationship to the natural boundaries which should determine an area's management needs.

The Macquarie Marshes in the north-west of New South Wales cover more than 150,000 hectares and comprise a complex of swamps, channels and floodplain. The area designated as a *Ramsar* site in 1986 is, however, restricted to the existing nature reserve which is only 18,143 hectares, or 14 per cent of the Marshes.[51] Many of the bird breeding colonies are located on privately owned areas of the wetland.[52] The main land use here is cattle grazing, but there is some cotton farming which relies on irrigation water.

Yet the management difficulties caused by these arbitrary boundaries, which exclude a massive part of the Marshes from the *Ramsar* listing, are dwarfed alongside the problems stemming from activities quite external to the wetlands themselves. Upstream from the Marshes, there is extensive cultivation of irrigated cotton. This has led to a sometimes bitter struggle for water between upstream cotton irrigators, on the one hand, and an uneasy alliance of cattle graziers in the Marshes and conservation interests, on the other. The scientific evidence shows that the Marshes are shrinking because of these hydrological impacts. Under the 1986 Macquarie Marshes Management Plan, the Marshes received a guaranteed allocation of 50,000 megalitres of water per year. A new version of the Management Plan which was released in 1996 provides for an additional 75,000 megalitres.[53] The status of the Marshes as a *Ramsar* site is perceived by some to have been a vital consideration in securing additional water for the area.[54] Objective Two of the 1996 Management Plan is

> [t]o meet the objectives of the Ramsar Convention and other international nature conservation agreements to which Australia is a signatory. These objectives include maintaining the ecological character of Ramsar listed wetlands.[55]

While the increase in water available for instream purposes is regarded as a positive step in maintaining the Marshes' ecological character, management is not

[51] Gill Witter, *Wasting Wetlands: A Report on Threats to Ramsar Sites* (1996) 11. Apart from *Ramsar* listing, the reserve is also subject to *JAMBA* and *CAMBA*, above nn 18–19. The Marshes are also on the Register of the National Estate. In fact, there are two listings; one for the Marshes as a whole and one for the nature reserve. They are also listed on the Register of the National Trust as a Landscape Conservation Area as well as being included in Environment Australia's *Directory of Important Wetlands in Australia* (1996). See New South Wales, Department of Land and Water Conservation and Department of National Parks and Wildlife Service, *Macquarie Marshes Water Management Plan 1996* (1996).

[52] Richard Kingsford and Rachael Thomas, 'The Macquarie Marshes in Arid Australia and Their Waterbirds: A 50-Year History of Decline' (1995) 19 *Environmental Management* 867, 875. Kingsford notes that: 'The Macquarie Marshes that stopped the westward progress of the explorer Oxley in 1818 ... were probably at least twice the size they are today': at 874.

[53] New South Wales, Department of Land and Water Conservation and Department of National Parks and Wildlife Service, above n 51, 8.

[54] Interview with Rochelle Callaghan, Ramsar Coordinator, NSW National Parks and Wildlife Service (by telephone, 10 September 1996).

[55] New South Wales, Department of Land and Water Conservation and Department of National Parks and Wildlife Service, above n 51, 3.

simply about making quantities of water available. Waterlogging as well as reduced flooding has killed river red gums in parts of the Marshes; the changes to the water flow have affected growth and distribution of native plant species.

> Because the main channel in the North Marsh Reserve now receives a consistent but small flow in times when ordinarily it may have been dry, areas of common reed and cumbungi have increased, whilst in contrast, water couch has decreased. This is a concern because of [its] importance for water bird feeding and for graziers.[56]

The objective, therefore, is to return flow patterns to the high variability which once characterised the ecosystem.[57] This reflects the commitment in *The NSW Wetlands Management Policy* that '[w]ater regimes needed to maintain or restore the physical, chemical and biological processes of wetlands will have formal recognition in water allocation and management plans.'[58]

In addition to issues relating to river flows, there are also external threats to water *quality*. Saline discharges resulting from irrigation, run-off from cropped areas upstream and raised water tables are a major concern,[59] as are contaminants in irrigation drainage, especially pesticides, which may be a threat to breeding waterbirds.

The Macquarie Marshes are typical of many other *Ramsar* sites where the primary threat is posed by external, rather than on-site, effects. Environmental flows are an issue for the inland *Ramsar* sites which are within or near agricultural regions. The World Wide Fund for Nature has identified Barmah Forest, Gunbower Forest and Hattah Lakes in Victoria as specifically threatened by the lack of environmental flows.[60] Diversion of water from listed sites is also a threat for Victoria's Western District Lakes wetlands and Lake Albacutya. Aside from water shortages, too much water or water delivered at the wrong time of year to satisfy the demands of irrigators can be equally damaging to wetland ecosystems.[61] In addition, a number of wetlands are suffering from water quality problems. While some of these are the result of on-site point-source discharges, others stem from activities carried out elsewhere in the catchment, including run-off from agricultural and urban areas, and rising salinity levels caused by land clearing.

[56] M D Young et al, *Reimbursing the Future* (1996) Pt 1, 65.

[57] C M Finlayson, 'Australian Wetlands: The Monitoring Challenge' (1996) (draft paper, copy on file with author) 11. See also Kingsford and Thomas, above n 52, 874–5; New South Wales, Department of Land and Water Conservation, *The NSW Wetlands Management Policy* (1996) 17.

[58] New South Wales, Department of Land and Water Conservation, *The NSW Wetlands Management Policy*, above n 57, 17.

[59] Young et al, above n 56, 65–6.

[60] Jamie Pittock, David Mitchell and Michelle Handley, *Australia's Wetland Record* (1996) 13.

[61] Along the River Murray, over 35 per cent of seasonally inundated wetlands are now permanently full, altering water patterns and causing degradation of wetlands: Australian Nature Conservation Agency, *Draft Wetlands Policy of the Commonwealth Government of Australia* (1996) 11. (This information was not included in the final version of the *Wetlands Policy of the Commonwealth Government of Australia* (1997)).

It is by now apparent that the issue of private land management goes beyond incorporating privately owned wetlands in areas listed under the *Ramsar Convention*. Wetlands management, and the law which underpins it, must be framed in a broad catchment context. In terms of environmental policy, it is not simply a question of buying off, through outright purchase or compensation, the few landholders whose land comprises part of the wetland concerned, but dealing with the established expectations of those whose activities elsewhere in the catchment impact on it. The Macquarie Marshes case study raises questions about the whole existence of protected areas managed in isolation from their surroundings. The lifeline of a wetland is an appropriate supply of water of suitable quality. Wetlands are therefore particularly susceptible to external threats stemming from a range of activities taking place elsewhere in the water catchment which affect the quality and quantity of water flows. Indeed, it is the external threats to the Marshes which are seen to be the most significant at this stage. Any threat posed by inappropriate grazing regimes on unlisted areas within the Marshes is not even covered by the Management Plan.

B *Confronting the Issue of Private Land*

The Macquarie Marshes reflect the general approach to listing under the *Ramsar Convention*, which has been to draw boundaries, arbitrarily if necessary, so as to exclude land in private ownership. Responding to this, the Commonwealth's 1996–97 *National Wetlands Program* gave priority to funding preparatory work leading to the nomination of sites on private land.[62] There are, however, already several listed sites which do encompass areas of private land. These include the Peel-Yalgorup system in Western Australia, Moreton Bay in Queensland and Jocks Lagoon, Lake Crescent and Ringarooma River Marshes in Tasmania. The Apsley Marshes in Tasmania is exclusively located on private land.

When it comes to management, the obligation placed on parties under the Convention is to 'formulate and implement their planning to promote the conservation' of listed wetlands. This is contrasted with the obligation to promote 'as far as possible the wise use' of all wetlands, whether they are listed or not.[63] In other words, wetlands on the *Ramsar* list are to be conserved, whereas unlisted wetlands are to be used, albeit wisely.

There are those who would adopt the traditional approach in Australia to management and use of protected areas, such as national parks, and seek to equate 'conservation' with 'preservation', distinguishing this from 'wise use', which would tolerate some level of productive human use. By drawing the distinction between conservation and wise use, the Convention itself seems to contemplate that cautious management of listed wetlands is intended. But there will clearly be problems in extending such an approach to private land, where it

[62] Environment Australia, *National Wetlands Program Guidelines 1996/97* (1997) Priorities & Funding Guidelines, 2.

[63] *Ramsar Convention*, above n 5, arts 3(1), 4(1).

comprises part of a listed site, because the strong likelihood is that there will already be well-established productive uses.[64]

Until recently, limited attention has been paid to management of the Tasmanian *Ramsar* sites identified above, which incorporate areas of private land owned by a total of nine landholders. This is a common pattern with most *Ramsar* sites in Australia.[65] There are no management plans for the privately held *Ramsar* wetlands and there were no management plans in place for any of the Tasmanian sites until early 1998. Although 'guidelines' for private landholders have been negotiated for the past two years, the situation has dictated an extremely cautious approach.[66] While the Convention is acknowledged as providing the impetus for recent management initiatives,[67] there is limited room for manoeuvre when it comes to developing policy instruments to advance management objectives. This is particularly true of regulatory initiatives. In the first place, on-site threats to wetland values on areas of private land incorporated in sites stem primarily from existing uses, in particular grazing pressures, rather than developmental aspirations. There are strong equity arguments which favour exempting current uses from new regulatory requirements, and these are generally reflected either in legislative protection of the use to which land is currently being put, or the provision of compensation for any restrictions placed on it. So, for example, the *Threatened Species Protection Act 1995* (Tas) allows the Minister to make an interim protection order 'to conserve the critical habitat of a listed taxon of flora

64 The traditional approach appears now to have been largely rejected by the parties to the *Ramsar Convention* themselves. In 1987, the parties established a working group to examine the application of the wise use provisions. The group's findings were accepted at the fourth meeting of the parties in 1990: *Fourth Meeting of the Conference of the Contracting Parties* (Montreux, 27 June – 4 July 1990) Annex to Recommendation C.4.10: 'Guidelines for Implementation of the Wise Use Concept of the Convention':

> The wise use provisions apply to all wetlands and their support systems within the territory of a Contracting Party, both those wetlands designated for the List, and all other wetlands.

Note also that in the 'Guidelines for Implementation of the Wise Use Concept' the concept of 'conservation' is used liberally in explicating wise use. This approach has been taken up in the *Wetlands Policy of the Commonwealth Government of Australia* (1997). The Policy draws no distinction between management objectives for listed and unlisted wetlands. The goal is 'to conserve, repair and manage wetlands wisely': at 8. 'Conservation' ('management of a wetland in a way that protects its ecological processes and values') is explicitly distinguished from 'preservation' ('management in a way that excludes consumptive or exploitative uses'): at 26. See also Farrier and Tucker, 'Using Wetlands Wisely', above n 6.

65 Out of the 49 *Ramsar* sites in Australia, only 14 have management plans and of these, three have been described as inadequate: Handley, above n 48. (Handley refers to only 10 sites having management plans as of early 1998, but four of the Tasmanian *Ramsar* sites have since had plans finalised: interview with Robbie Gaffney, Ramsar Wetlands Management Plan Project Officer, Department of Lands, Parks and Wildlife, Tasmania (by telephone, 20 August 1997 and 26 March 1998)). Four of the six NSW *Ramsar* sites have management plans pursuant to their status as nature reserves under the *National Parks and Wildlife Act 1974* (NSW). The other two sites have had plans drafted. One of the priorities under the Commonwealth's National Wetlands Program has been the development of management plans for existing *Ramsar* sites, but the indicative funding is only $150,000, and this is also available for documenting new sites: Environment Australia, *National Wetlands Program Guidelines 1996/97*, above n 62, Priorities & Funding Guidelines, 2. Handley notes that '[o]f all of the 29 management plans funded by the National Wetlands Program since 1996, none have been completed to date': Handley, above n 48, 14.

66 Gaffney, above n 65.

67 Interview with Stewart Blackhall, Wetlands Manager, Department of Lands, Parks and Wildlife, Tasmania (by telephone, 5 August 1997).

or fauna or a nominated taxon of flora or fauna', and this can prohibit or regulate 'any activity which takes place on the land or the use and management of the land within the habitat which is the subject of the order'.[68] But compensation must be paid where landholders directly suffer financial loss.[69]

Secondly, regulation unaccompanied by fiscal incentives is increasingly perceived as having serious limitations as a policy instrument designed to induce private land management for nature conservation. It is calculated to breed hostility among the very people whose cooperation is required, because they will continue to be responsible for wetland management on a day-to-day basis.

In practice, the primary strategy on the Tasmanian sites has been to attempt to build up relationships with landholders, appealing to their goodwill and using gentle persuasion, combined with limited financial inducement. Negotiations have focused on two issues: fencing off riverbanks to keep out stock during winter months, and encouraging selective grazing of the wetland to help control introduced grasses during summer months, when the land is dry enough to withstand cattle. Materials are supplied to landholders in return for their labour. There is, however, an element of landholder self-interest to which appeal can be made as research indicates that there are productivity gains in pumping clean water to stock and avoiding stock losses through bogging.[70]

All of these Tasmanian sites were listed in 1982 without prior consultation with landholders,[71] reflecting the prevailing focus on adding names to a list, with little attention paid to putting in place arrangements for ongoing management. The tentative approach eventually taken to the management of these sites is a reflection of the difficulties confronted by governments when land in private ownership is incorporated into special area designations, and perhaps explains the cautious approach taken in recent years to the listing of sites incorporating private land.[72] Clearly a policy response which relies on regulation alone cannot begin to grapple with the challenge posed by the incorporation of private land, particularly where management requires modification to productive uses to which the land is currently put. On the other hand, the approach which has been taken on the Tasmanian sites relies far too much on the goodwill of landholders, with the likelihood that, in practice, there will be significant gaps in management depending on the attitudes of individual landholders.

68 *Threatened Species Protection Act 1995* (Tas) ss 32(1), 33.

69 *Threatened Species Protection Act 1995* (Tas) s 45(1).

70 Gaffney, above n 65.

71 Blackhall, above n 67.

72 Since 1990, of the 19 sites listed under *Ramsar*, only two — Moreton Bay and Peel-Yalgorup — have incorporated private land. Of those, Peel-Yalgorup's private land comprises a small section owned by a local preservation society.

VI WORLD HERITAGE AREAS AND PRIVATE LAND

A *Excluding Private Land*

As with the *Ramsar Convention*, the issue of private land management has been largely bypassed in Australia in the implementation of the *World Heritage Convention*. Although freehold and/or Crown leasehold land has been included in nine of Australia's 13 listed World Heritage Areas, generally the amounts are small, or, in the case of Aboriginal land, it has been granted subject to special arrangements relating to land use.[73]

In some cases, the exclusion of private land from World Heritage Area boundaries has proved controversial. For example, the original boundary proposal for the Wet Tropics World Heritage Area, released for public review in April 1988, prompted such a hostile response from affected landholders that the boundaries were redrawn so as to confine them primarily to Crown land. In its submission to the House of Representatives Report on Managing World Heritage, the Cairns Environment Centre commented that the boundaries of the Wet Tropics World Heritage Area 'have tended to be the area of outstanding universal value on Crown land' and that this resulted from 'a reluctance to develop management approaches to private lands'.[74] The freehold land that was not excluded from the World Heritage Area had particularly high conservation values and/or landholders did not object to being included in the listing.[75] The World Tropics Management Authority ('WTMA') has recognised that the boundaries are unsatisfactory in terms of the protection of World Heritage values, and that they must be revised to incorporate areas of high conservation value,[76] but this will depend on substantial increases in funding. As a result of extensive land clearing, only 20 per cent of the vegetation which existed at the time of European settlement remains on the coastal lowlands, most in fragmented remnants,[77] but much of this was excluded from the World Heritage Area because it comprised freehold land.[78]

The development of the Jabiluka uranium mine, adjacent to Kakadu National Park, one of Australia's first listed World Heritage Areas, also raises questions

[73] The private landholdings within the World Heritage Areas comprise: freehold — the Great Barrier Reef, Tasmanian Wilderness (only .03 per cent), Wet Tropics (2 per cent), Shark Bay (approx .04 per cent) and Fraser Island; inalienable freehold — Kakadu and Uluru-Kata Tjuta National Parks (vested in Aboriginal Land Trusts and leased back to the Director of National Parks and Wildlife); leasehold — Wet Tropics, Willandra Lakes; Lord Howe, Shark Bay: Environment Australia, 'Australian World Heritage Areas: World Conservation Monitoring Centre Natural site data sheets' (1998) <http://kaos.erin.gov.au/land/conservation/wha/auswha.html>.

[74] Cairns and Far North Environment Centre, submission (No 53) 5 as quoted in Commonwealth, House of Representatives Standing Committee on Environment, Recreation and the Arts, above n 46, [4.132].

[75] Commonwealth, House of Representatives Standing Committee on Environment, Recreation and the Arts, above n 46. See also discussion in Wet Tropics Management Authority, *Protection through Partnerships, Policies for Implementation of the Wet Tropics Plan* (1997) 115.

[76] Interview with Margaret Woodland, Land Management Officer, Wet Tropics Management Authority, Cairns (by telephone, 18 March 1998 and 9 July 1998).

[77] Young et al, above n 56, 81.

[78] Woodland, above n 76.

about the appropriateness of World Heritage Area boundaries which sidestep potential conflicts in land use.[79] Although the issues here involve cultural heritage conservation perhaps more than nature conservation, they are nevertheless illustrative of more general considerations relating to the private land issue. The mining lease, issued in August 1982, is on land which had been granted to the Jabiluka Aboriginal Land Trust in June 1982 under the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The national park was declared in three stages, in 1979, 1984 and 1987. The Kakadu Aboriginal Land Trust and Jabiluka Aboriginal Land Trust own approximately one third of the land, but lease it back to the Director of National Parks and Wildlife to be managed as a national park, while the remaining area is vested in the Director of National Parks and Wildlife.[80] The World Heritage listing was also progressive: Stage I of the park was inscribed in 1981, Stage II in 1987 and Stage III in 1992. The national park boundaries dictated the boundaries of the World Heritage listing. The listing is on the basis of both natural and cultural values. It meets Natural Criteria 44(a)(ii), (iii) and (iv) of the Convention's Operational Guidelines as an

> outstanding example representing significant ongoing ecological and biological processes; as an example of superlative natural phenomena; and containing important and significant habitats for *in situ* conservation of biological diversity.[81]

It is listed under the Guidelines' Cultural Criteria 24(a)(i) and (vi) as 'representing a unique artistic achievement and being directly associated with living traditions of outstanding universal significance.'[82]

Kakadu National Park has three 'holes' within its boundaries, comprising the Jabiluka, Ranger and Koongarra uranium mining leases.[83] The Ranger and Jabiluka leases are contiguous and are surrounded by Stage II of the national park. The Senate Standing Committee on Environment, Recreation and the Arts has commented:

> Had the areas contained within the mineral leases of Ranger, Koongarra or Jabiluka been of no commercial mining value, they would now be part of Kakadu National Park and judged by the Government worthy of inclusion on the World Heritage List.[84]

[79] Kakadu National Park (Stages I and II) is one of the few World Heritage sites to also have *Ramsar* listing.

[80] Environment Australia, 'Australian World Heritage Areas: World Conservation Monitoring Centre Natural Site Data Sheets' (1998) <http://kaos.erin.gov.au/land/conservation/wha/auswha.html>.

[81] Commonwealth, Department of the Environment, Sport and Territories, *Australia's World Heritage* (1995) 15.

[82] Ibid 16.

[83] As recommended by the Ranger Uranium Environmental Inquiry which stated '[w]e conclude that if Ranger and Jabiluka are to proceed, those mineral lease areas should be excluded from the park': Ranger Uranium Environmental Inquiry, *Ranger Uranium Environmental Inquiry, Second Report* (1977) 290. The Ranger uranium mine commenced operations in 1981.

[84] Commonwealth, Senate Standing Committee on Environment, Recreation and the Arts, *The Potential of the Kakadu National Park Region* (1988) 271.

The Draft Environmental Impact Statement for the Jabiluka Project notes that the cultural heritage value of the Jabiluka lease area has been recognised by the Australian Heritage Commission's ('AHC's') listing of two areas within the lease site on the Register of the National Estate.[85]

The Djawumbu-Madjawarna Sites Complex is found within this AHC area, and contains some of the most significant rock art sites in the region. The Malakunanja II site is generally regarded as one of the most significant occupational sites in Australia, particularly as the general area is one of the earliest areas of Aboriginal habitation.[86]

In other situations where private land has been excluded from the boundaries of internationally listed areas in Australia, the primary consideration appears to have been the appeasement of land owners. In this case, however, the land owners wanted their land to be included in Kakadu National Park. The Ranger Inquiry agreed with the proposal by the Northern Land Council 'that all Aboriginal land in the Region west of Arnhem Land ... should be incorporated in a national park', but then backtracked on this by excluding the mining areas, even though they were located on Aboriginal land.[87]

The approach of the World Heritage Committee to the question of boundaries has, as we might expect, been cautious. At its 1987 meeting, it announced that it had decided to include Stage II in the site inscribed on the World Heritage List. This is the stage which surrounds — and avoids — the Jabiluka and Ranger leases. Commenting on the position within the World Heritage Area, the Committee commended the Australian authorities for having taken appropriate legislative measures to prohibit mineral exploration and mining and for their efforts to restore the natural ecosystems of the site.[88] Yet uranium mines were to be situated on the World Heritage Area's doorstep, in an area which also had claims to inclusion. Although the Committee did go on to suggest that Australia 'modify the boundaries of Stages I and II in order to protect the entire catchment area, and to include the cultural values to the East of the present National Park',[89] its 1992 report, in which Stage III of the listing was announced, again 'commended the Australian authorities', this time for the extension of the park and 'for the exemplary management operation at the Park'.[90] The Committee 'inscribed the full extent of the Park as re-nominated by the Australian authorities'.[91] There was no further suggestion that the boundaries might be inadequate.

[85] ERA Environmental Services, Energy Resources of Australia Ltd and Kinhill Engineers, *The Jabiluka Project: Draft Environmental Impact Statement* (1996) Executive Summary 19.

[86] Ibid

[87] Ranger Uranium Environmental Inquiry, above n 83, 291.

[88] United Nations Educational Scientific and Cultural Organisation ('UNESCO'), *Report of the World Heritage Committee (11th session)* SC-87/CONF.005/9 (Paris, 20 January 1988) Part VII(9)(A). For a discussion of the measures taken by the Commonwealth to prohibit mining *within* Stage II of Kakadu, see Colin Hall, *Wasteland to World Heritage* (1992) 207ff.

[89] UNESCO, *Report of the World Heritage Committee (11th session)*, above n 88, Part VII(9)(A).

[90] UNESCO, *Report of the World Heritage Committee (16th session)* WHC-92/CONF.002/12 (Santa Fe, 14 December 1992) Part X(C).

[91] Ibid.

The *World Heritage Convention* does not, in fact, rule out multiple use of World Heritage Areas, including mining, if such use does not conflict with the values for which the area was listed. Despite this, there was clearly a perception on the part of the Commonwealth government that the more restricted domestic paradigm of appropriate use of protected areas, with its hostility to mining, would be reinforced rather than modified by an international listing.

B *Confronting the Issue of Private Land: Willandra Lakes*

When it comes to the management of private land which has been included in the boundaries of World Heritage Areas, the high profile of the Convention, both nationally and internationally, has ensured a much greater commitment to securing the protection of relevant values than is evident in the voluntary approach taken to the management of the Tasmanian *Ramsar* sites.

At the same time, the management initiatives have been slow in coming to those World Heritage Areas with a relatively low profile.[92] Willandra Lakes Region World Heritage Area in southern New South Wales comprises Mungo National Park and 10 pastoral properties under perpetual Crown leasehold tenure.[93] A consultative committee was not convened until 1984. There was only one landholder representative. A study on the effects of listing on the local people was not finalised until 1995, but the listing had an early impact on existing land use. Cultivation permits which had been issued for periods of nine years under s 18DA of the *Western Lands Act 1901* (NSW), and which were already in use, were suspended in the mid-1980s without, at that stage, any offer of compensation.[94] They were ultimately reinstated in the early 1990s.

After such inauspicious beginnings, and the alienation of the affected community, it has proved to be a slow and expensive road back to effective management.[95] Management objectives have been made more complex by the fact that the listing was on the basis of both the Area's outstanding universal cultural and natural values. Its cultural values stem from Aboriginal archaeological features, including human burial sites. It meets the criteria for para (a)(iii) of the Convention's *Operational Guidelines* for cultural world heritage, according to which a property should 'bear a unique or at least exceptional testimony to a cultural

[92] See discussion in Marcus Lane, Geoff McDonald and Tony Corbett, 'Not All World Heritage Areas Are Created Equal: World Heritage Area Management in Australia' (1996) 13 *Environmental and Planning Law Journal* 461.

[93] The original boundary of the World Heritage Area encompassed 600,000 ha. In 1995 it was modified and reduced to 240,000 ha: World Conservation Monitoring Centre, 'Descriptions of Natural World Heritage Properties: Willandra Lakes Region' (1998) <http://www.wcmc.org.uk:80/protected_areas/data/wh/willandr.html>.

[94] Les Wakefield, 'Living within a World Heritage Region — A Landholder's Perspective' in Commonwealth, Department of the Environment, Sport and Territories, *World Heritage Managers Workshop, Ravenshoe, April 11–15 1996: Papers and Proceedings* (1996) 91.

[95] On the history of management planning in the area, see generally Corbett and Lane who argue that an important cause of the problems in the past was 'top-down, prescriptive planning combined with a rational-comprehensive approach to planning which denies the importance of human values and which does not engender local stakeholder involvement': Tony Corbett and Marcus Lane, 'The Willandra Lakes Region World Heritage Property: A Planning Phoenix?' (1997) 14 *Environmental and Planning Law Journal* 416, 416.

tradition or to a civilisation which is living or which has disappeared'.[96] Under natural values, it is cited as meeting the criteria for para (a)(i) of the *Operational Guidelines*, namely

> outstanding examples representing major stages of the earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features.[97]

It shows how Aboriginal society adapted to environmental change, involving climate, fluctuations in lake levels and the eventual drying up of the system. In other words, the role of human beings in shaping the landscape in the past is squarely acknowledged. The issue then becomes whether current and proposed human land uses, such as grazing and cropping, threaten these values rather than whether they are having a destructive impact on biological diversity.

The Plan of Management, released in December 1995, was developed following a five-day workshop in June 1995 which involved all major stakeholders.[98] Individual property plans for the on-ground management of each affected property have recently been put in place. The wheels, however, have had to be oiled by a 'socio-economic structural adjustment' package, funded jointly by the State and Commonwealth governments.[99] The Plan of Management talks squarely in terms of 'compensation',[100] and the bases on which payments to leaseholders are to be made make it clear that the aim is the retrospective one of putting them in the financial position they would have been in if the World Heritage Area had not been listed. There are three heads of payment:

- diversion of effort, including time spent travelling to, and attending negotiations and meetings relating to, the development of the management plan;
- income forgone as a result of the suspension of existing cultivation consents in the mid-1980s; and
- the 'blot on title' resulting from World Heritage listing.[101]

[96] *Operational Guidelines for the Implementation of the World Heritage Convention*, as cited in Commonwealth, Department of the Environment, Sport and Territories, *Australia's World Heritage*, above n 81, 46.

[97] Ibid 43.

[98] World Heritage Australia, *Sustaining the Willandra: The Willandra Lakes Region World Heritage Property Plan of Management* (1996) Summary, 3. There is also a draft Regional Environmental Plan applying to the World Heritage Area: New South Wales, Department of Urban Affairs and Planning, *Willandra Lakes Draft Regional Environmental Plan No 1: World Heritage Property* (exhibited 16 December 1996 – 31 July 1997). Decision-making authorities 'must take into account' the aims and objectives of the Regional Environmental Plan when considering any planning or development proposed for the area (cl 9). The Regional Environmental Plan's objectives include to protect, 'conserve and manage the World Heritage Property in accordance with any strategic plan of management ... and to set up a consultation method for making decisions on conservation and development within the World Heritage Property' (cl 3). The Regional Environmental Plan is expected to be gazetted by late 1998.

[99] No written material is available setting out the detailed terms of this package. Basic information about its terms is derived from an interview with Ross O'Shea, Premier's Department, Wagga Wagga (by telephone, 27 April 1998). The authors alone are responsible for the commentary and conclusions.

[100] World Heritage Australia, *Sustaining the Willandra*, above n 98, Strategy 22, C30.

[101] Ibid.

While the second head can be justified on the basis that equity considerations require compensation where restrictions are imposed on the use to which land is currently being put, it squarely conflicts with the legislation, which allows the Western Lands Commissioner to suspend cultivation consents, not only for breach of condition, but for 'any other reason', with no mention of compensation.[102]

The head of payment relating to 'blot on title' needs closer scrutiny. The formal position is that it contains no element of compensation for restrictions on land *clearing* because the approach here is to apply existing government legislation and policy as it relates to the Western Division, and this is already very restrictive.[103] The concern here is almost certainly to avoid setting any precedent for paying compensation in the remainder of the Western Division, where clearing is regulated. On the other hand, the Plan of Management does contain a commitment to negotiate claims for compensation where *cropping* is restricted to protect World Heritage values when it would have been allowed apart from this,[104] and 'blot on title' would be the only head of the package under which this could be taken into account. This apart, however, it is clear that the primary factor underlying this head of compensation is the climate of uncertainty which World Heritage listing produced in the market place, and the drop in market values of properties which resulted.[105] The absence of any clear management directions until 1995, combined with the initial suspension of cultivation permits in the mid-1980s, made potential buyers of leasehold properties situated in the World Heritage Area extremely wary when it came to committing themselves. Genuine hardship resulted, particularly to those leaseholders close to retirement. Those most affected sold their leaseholds to the New South Wales government.[106] Of the 17 pastoral properties which made up the bulk of the original World Heritage listing, seven have now been bought back, with most to be incorporated in the national park.

The park now includes the most vulnerable of the cultural sites which comprise about 75 per cent of the World Heritage Area's sensitive areas. The other sensitive areas are located on the remaining 10 pastoral properties and management of those sites will be governed by individual property plans.[107]

What we see in the Willandra Lakes is an ad hoc response dominated by political considerations to a situation already aggravated by delay and lack of consultation. There is a worrying lack of transparency in the financial arrangements which have been put in place, although this is understandable given the concern

[102] *Western Lands Act 1901* (NSW) s 18DA(8A).

[103] World Heritage Australia, *Sustaining the Willandra*, above n 98, Strategy 4.1, C10. See, eg, *Western Lands Act 1901* (NSW) s 18DB. The clearing controls in this legislation have, from the beginning of 1997, been effectively subsumed into the *Native Vegetation Conservation Act 1997* (NSW).

[104] World Heritage Australia, *Sustaining the Willandra*, above n 98, Strategy 36.2, C50.

[105] Ibid Strategy 22, C30.

[106] Interview with Ted Richardson, pastoral leaseholder and former spokesperson for the Willandra Landholders Protection Committee, and one of the five to sell (by telephone, 22 June 1998).

[107] Interview with Ross O'Shea, Premier's Department, Wagga Wagga (by telephone, 7 July 1998).

that this should be treated as a special case which did not set any precedent requiring the payment of compensation whenever land values decline because of land use restrictions imposed in the public interest. The structural adjustment package has no basis in legislation, while the provisions of the Plan of Management are vague, and their relationship with the package not always obvious. In spite of a commitment in the Plan of Management to '[d]evelop a framework of incentives to recognise contribution of Landholders to the management of the Willandra',[108] the financial package is exclusively retrospective, focusing on losses flowing from World Heritage designation rather than payments to landholders for the positive contribution which they can make to ongoing management. There are good grounds for compensating landholders who are effectively prohibited from continuing their current land use. Compensation for disappointed development aspirations is quite a different proposition, however, and if the package does contain elements of this under the broad head of 'blot on title', they need to be carefully justified. Clearly there were special circumstances in this particular situation caused by uncertainty emanating from delay in clarifying management intentions. When it comes to grappling with the issue of private land management within special areas, a crucial lesson to be learnt is the need to have management arrangements in place from the outset to avoid loss of market value resulting not simply from the imposition of restrictions on land use, but from uncertainty in the market place about the degree to which land use might be restricted.

C *Confronting the Issue of Private Land: The Wet Tropics*

In spite of the fact that significant areas of private land have been excluded from the boundaries of the Wet Tropics World Heritage Area listed in 1988, its 747 separate land parcels and 26 different forms of land tenure[109] include areas of freehold and Crown leasehold land. By contrast with Willandra Lakes, the handling of those limited areas of private land which have been incorporated in the World Heritage Area reflects a transparent, participative and relatively rapid response, albeit one which still relies heavily on the use of compensation as a policy instrument.

The Wet Tropics has had a much higher profile than Willandra Lakes, in part stemming from the intergovernmental conflict in which it was embroiled at its conception. The Queensland government's international lobbying against the

[108] World Heritage Australia, *Sustaining the Willandra*, above n 98, Strategy 41.1.2, C58.

[109] Queensland, Wet Tropics Management Authority, *Annual Report 1996–97* (1997) 11. Out of a total area of 894,420 ha, freehold land in the World Heritage Area makes up 3,250 ha. Public land comprises 205,000 ha of leasehold and vacant Crown land or federal-owned land used by the defence forces; 250,318 ha of national parks; 331,215 ha of State forests and 73,882 ha of State forest timber reserves: World Conservation Monitoring Centre, 'Descriptions of Natural World Heritage Properties: Wet Tropics of Queensland World Heritage Site', (1998) <http://www.wcmc.org.uk:80/protected_areas/data/wh/wettropi.html>. The leaseholdings include perpetual leases (208 ha), expiring leases (97,961 ha), mines and energy leases (30 ha) and Department of Primary Industry and Department of Energy leases (8,673 ha): Queensland, Wet Tropics Management Authority, *Annual Report 1996–97* (1997) 11.

nomination illustrates the depths to which Commonwealth–State relations fell.[110] Toyne relates the comments by Australia's Ambassador to UNESCO, Charles Mott, to then Environment Minister, Senator Graham Richardson, that Australia was 'the only country that sends its internal difficulties to the [World Heritage] Committee on an annual basis, and to this extent appears to be gaining a bit of a reputation for eccentricity'.[111] The product of the intense controversy surrounding the nomination of the site, however, has been a highly structured institutional framework in which the Commonwealth has played and continues to play a significant role.

A Commonwealth–State agreement concluded in 1990 — the Wet Tropics World Heritage Management Scheme — led to the establishment of the jointly funded WTMA in 1992.[112] This has legislative status under Part Two of Queensland's *Wet Tropics World Heritage Protection and Management Act 1993* (Qld), with a board of directors appointed jointly by the Commonwealth and Queensland governments.[113] The WTMA coordinates management, while the Queensland National Parks and Wildlife Service and Queensland Forest Service carry out on-the-ground management: 'WTMA is a unique structure involving substantial Commonwealth influence on decisions and finance within an area of predominantly State land control.'[114]

The *Wet Tropics Management Plan 1998* (Qld),[115] made under the *Protection and Management Act 1993* (Qld),[116] was developed in association with an extensive community consultation program, involving attitude surveys and workshops, the release for public comment in 1992 of a Wet Tropics Strategic Directions document, and the exhibition of the Wet Tropics Draft Plan in 1995.[117] In response to the challenge posed by private land management, the *Protection and Management Act 1993* (Qld) and the *Wet Tropics Management Plan 1998* (Qld) put forward a detailed package to address activities which are

[110] See Toyne, above n 44, 80–1. See also Bruce Davis, 'Federal–State Tensions in Australian Environmental Management: The World Heritage Issue' (1989) 6 *Environmental and Planning Law Journal* 66, 72.

[111] Toyne, above n 44, 81.

[112] *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) s 6 ('*Protection and Management Act 1993* (Qld)'). See also *Wet Tropics of Queensland World Heritage Area Conservation Act 1994* (Cth) s 3. This latter legislation makes it clear (s 9) that these arrangements do not affect the operation of the *World Heritage Properties Conservation Act 1983* (Cth), which leaves the Commonwealth with significant powers of intervention where the area is under threat.

[113] *Protection and Management Act 1993* (Qld) s 14.

[114] Lane, McDonald and Corbett, above n 92, 468.

[115] *Wet Tropics Management Plan 1998* (Qld). The plan was gazetted in August 1997. However, it was declared to be of no force or effect in November 1997 following an administrative challenge in the Queensland Supreme Court. See *Pearson v Littleproud as Minister for the Environment* (8293/97) SC Qld Order. The plan was amended as a result and gazetted in May 1998 and ss 1–2 commenced on the day of notification. The remaining provisions commenced on 1 September 1998.

[116] See *Protection and Management Act 1993* (Qld) pt 3 for procedural provisions relating to management plans. The *Wet Tropics Management Plan 1998* (Qld) is subordinate legislation under this Act.

[117] Wet Tropics Management Authority, *Protection through Partnerships*, above n 75, 5.

inconsistent with World Heritage values.[118] This combines a system of land use regulation in which the discretion of decision-makers is tightly circumscribed, with the payment of compensation, and management incentives. It promises to be much more than the symbolic gesture which regulatory regimes relating to nature conservation on private land have traditionally been, although much will depend on whether the financial mechanisms are adequately resourced.

There is a broad prohibition covering 'destruction of forest products' without a permit, including land clearing and logging.[119] A range of other activities are prohibited without a permit, including mining, interfering with the flow of watercourses, and building and maintaining structures.[120]

In deciding whether or not to grant a permit, the WTMA's discretion is severely constrained. The *Wet Tropics Management Plan 1998* (Qld) provides that the WTMA is not simply to balance economic and environmental considerations: the likely impact of the proposed activity on the area's integrity is 'the most important consideration'.[121] This, in part, stems from a provision in the *Protection and Management Act 1993* (Qld) which requires the WTMA to 'perform its functions in a way that is consistent with the protection of the natural heritage values of the Wet Tropics Area'.[122] What this means is that the decision-maker's traditional prerogative of assigning its own weightings to decision-making considerations[123] has been nullified in an attempt to ensure that short-term socio-economic imperatives do not overwhelm conservation of natural heritage values.[124] This is reinforced by a requirement that 'the Authority must consider whether there is any prudent and feasible alternative' to the proposed activity, including an alternative site, an alternative way of carrying out the activity and the alternative of not carrying it out at all.[125] In addition, the precautionary principle must be applied in the decision-making process:

> [I]f there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[126]

[118] The *Wet Tropics Management Plan 1998* (Qld) prevails over local planning schemes, and local council decisions must be consistent with it: *Protection and Management Act 1993* (Qld) ss 49–50.

[119] *Protection and Management Act 1993* (Qld) ss 56, 4; *Wet Tropics Management Plan 1998* (Qld) s 25 *Protection and Management Act 1993* (Qld) ss 56–7 commences 1 September 1998.

[120] *Wet Tropics Management Plan 1998* (Qld) s 26.

[121] *Wet Tropics Management Plan 1998* (Qld) s 56.

[122] *Protection and Management Act 1993* (Qld) s 10(4).

[123] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

[124] See David Farrier, 'Factoring Biodiversity Conservation into Decision-Making Processes: The Role of the Precautionary Principle' in Ronnie Harding (ed), *The Precautionary Principle* (forthcoming, 1998).

[125] *Wet Tropics Management Plan 1998* (Qld) s 58.

[126] *Wet Tropics Management Plan 1998* (Qld) s 57. See also *Protection and Management Act 1993* (Qld) s 10(6) which requires the Authority to perform its functions in a way that is consistent with the objectives and principles of the *Draft National Strategy for Ecologically Sustainable Development*: Ecologically Sustainable Development Steering Committee, *Draft National Strategy for Ecologically Sustainable Development: A Discussion Paper* (1992). On the role of the precautionary principle in decision-making processes, see Farrier, above n 124.

In other words, once there is evidence of a 'threat' from a proposed activity of 'serious or irreversible environmental damage', this damage must be accounted for in the decision-making process even though it is not proven to the degree ordinarily required by the tenets of scientific proof. Effectively, what this means is that once the 'threat' threshold has been satisfied, the burden of proving that the threat does not in fact exist passes to the proponent.

One category of development is, however, freed from these constraints. Although a permit must still be sought for the building of residences which comply with relevant local government approvals, it *must* be granted.[127] In these limited circumstances, the option of refusing to grant an approval and paying compensation is not available.

In some circumstances, compensation must be paid where a landholder's interest is injuriously affected.[128] We have already argued that where regulation interferes with current, as distinct from proposed, land use, there are strong intra-generational arguments that the community as a whole should pay, rather than letting the burden fall on individual landholders. The *Protection and Management Act 1993* (Qld) accepts this and provides for compensation in these circumstances, defining 'existing use' generously so as to include not only the present use but also uses which 'could lawfully be made as of right' prior to the commencement of restrictions in the *Wet Tropics Management Plan 1998* (Qld).[129]

More difficult to understand are provisions which require compensation to be paid where prohibitions on 'destroying a forest product' injuriously affect the landholder's interest in the land.[130] Prohibitions on the commercial exploitation of forest products (eg forestry) are specifically excluded from this compensation requirement,[131] but compensation is required where land clearing is prohibited. The reasons for this are not clear. The objective was to provide for compensation only where a clear prior intention to carry out the activity has been exhibited, distinguishing this from mere disappointed expectations.[132] But this conservative approach is not reflected in the wording of the legislation.

The WTMA can enter into cooperative management agreements, under which the landholder might be induced to agree to land use restrictions beyond those ordinarily applicable under the *Wet Tropics Management Plan 1998* (Qld), and would actively manage the land. The inducement could take the form of pay-

127 *Wet Tropics Management Plan 1998* (Qld) s 63.

128 For a discussion of compensation for injurious affection in the context of planning legislation, see Alan Fogg, *Land Development Law in Queensland* (1987) 718.

129 *Protection and Management Act 1993* (Qld) s 54.

130 *Protection and Management Act 1993* (Qld) ss 56(3)(b), 57; *Wet Tropics Management Plan 1998* (Qld) s 44. Note that these provisions, and the provision requiring compensation for interference with existing use, do not operate in situations where only restrictions, as distinct from prohibitions, are imposed (ie restrictive conditions attached to a permit allowing the activity to go ahead).

131 *Protection and Management Act 1993* (Qld) ss 57(2), 56(3)(a), 4.

132 Interview with Vicki Pattemore, Manager of Planning, Wet Tropics Management Authority, Cairns (by telephone, 25 August 1997).

ments, or permission to carry out another activity regulated under the Plan of Management.[133]

Cooperative management agreements have already been negotiated with several landholders.[134] The agreements so far signed have included a number of trade-offs. For example, some landholders wished to re-establish native rainforest on part of their land that had been cleared. They and the WTMA entered into an agreement whereby the WTMA agreed to fund the revegetation and three years' subsequent maintenance of the land, including fencing of the area. In return, the landholders agreed to:

- conserve the biological diversity and ecological integrity of the land;
- take reasonable steps, including repair of damaged fencing, to exclude non-native animals from the revegetation plot;
- not allow any species listed as undesirable plants to grow on the land;
- ensure that no cats were kept on the land; and
- provide ongoing maintenance of the revegetated area.[135]

The landholders could also nominate other areas to be revegetated back to their natural state and the WTMA agreed to provide advice and, at its discretion, material assistance.

The Wet Tropics package represents a sophisticated attempt to balance demand for more sensitive management of private land in the interests of intergenerational equity, with the equitable division of the costs of doing this among the existing generation. The constraints on the exercise of discretion by the WTMA in making permit decisions represents a very real attempt to make sure that, symbolically, extensive land use restrictions are not whittled away in practice by a tyranny of individual decisions based on compromises allowing modified versions of activities to proceed and, in the process, systematically compromising nature conservation values. There is a commitment to compensation where restrictions are imposed on existing uses, but the commitment extends beyond this to selected instances of defeated development aspirations. The precise basis on which this selection has been made, however, is unclear. Finally, there is the provision for voluntary Cooperative Management Agreements which open the way for landholders not simply to be compensated for forgoing land use activities outlawed by the Plan of Management, but also to be remunerated for active management of the land in ways which are sensitive to nature conservation. The shortcoming here is that there is no provision for agreements to run with the land, so as to bind future purchasers.

133 *Protection and Management Act 1993* (Qld) s 10; *Wet Tropics Management Plan 1998* (Qld) s 41.

134 Interview with Vicki Pattemore, Manager of Planning, Wet Tropics Management Authority, Cairns (by telephone, 23 July 1997).

135 This information comes from private conservation management agreements.

VII CONCLUSION

Although, for the most part, Australia has avoided confronting the challenges posed by land in private ownership when nominating areas for listing under international conventions, on a limited number of occasions private land has been incorporated. Now, with the realisation that international demands for nature conservation entail more than the sweeping gesture involved in the initial listing, the management chickens have come home to roost and, with this, the difficult problem of how to induce private landholders to manage their land in ways sensitive to international objectives. The indigenous landholders within the Jabiluka mining lease who wanted their land incorporated in the Kakadu National Park will be the exception rather than the rule. Most non-indigenous landholders will see their interests as threatened by incorporation into an internationally listed area.

The case studies of private land management in these areas illustrate, for the most part, the intractable nature of the problem rather than the efficacy of the responses. The one possible exception is the strategy adopted in the Wet Tropics, although the task has been made easier by drawing boundaries so as to exclude significant areas of private land. On paper, at least, the package of measures in the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) and the *Wet Tropics Management Plan 1998* (Qld), the issue of compensation for defeated development aspirations aside, looks impressive. The pressure on decision-makers to depart from grand conservation designs during the tyranny of the case-by-case approvals process has been addressed by carefully constraining their discretion.

The question of compensation, however, remains a vexed one. There is limited room to manoeuvre where human uses of private land have already been established and are ongoing. This is the problem of the existing use. Although the State and Commonwealth Constitutions are no bar to land use regulation, including regulation of existing uses,[136] basic equity considerations prevent regulation from being used to shut down existing operations without some form of recompense. However, the fact that current uses have not already completely destroyed conservation values indicates that there may be some room for compromise. Indeed, because wetland ecosystems have been modified over time by human activity, there may be conservation benefits to be derived from existing practices, as where a particular grazing regime can be used to control exotic grasses and biomass levels.

[136] Section 51(xxxi) of the *Australian Constitution* provides that any 'acquisition' of property by Commonwealth instrumentalities must be made on 'just terms'. However, in the *Tasmanian Dams Case* (1983) 158 CLR 1, three of the four members of the High Court who dealt with the issue held that even land use regulations which effectively reduced the status of an area to the equivalent of a national park did not constitute an acquisition. The recent decision in *Newcrest Mining (WA) v Commonwealth of Australia* (1997) 147 ALR 42 is consistent with this position, but for an argument to the contrary see Karla Sperling, 'Going down the Takings Path: Private Property Rights and Public Interest in Land Use Decision-Making' (1997) 14 *Environmental and Planning Law Journal* 427. There is no equivalent provision to section 51(xxxi) in the State Constitutions: Tim Bonyhady, 'Property Rights' in Tim Bonyhady (ed), *Environmental Protection and Legal Change* (1992) 46.

Developmental aspirations do not have the same claims to freedom from regulatory intervention as current uses. However, pressures to compensate are likely to prove compelling where, for example, prior to regulatory intervention, there was a clear intention to carry out development in the short term, or where management outcomes mandated by government now effectively foreclose all currently viable economic activity.[137] Yet there is a substantial case to be made for government delivering financial recompense to landholders, not as compensation for defeated aspirations, but in a form which emphasises their long term role as land managers and provides them with an alternative form of income to that which they have to forgo. In other words, we should be talking not of compensation but of stewardship payments, that is, paying landholders for active stewardship of the land in situations where constraints on land use to meet conservation objectives effectively deprive them of any alternative productive use.[138]

These financial issues will not go away. But they are more likely to be at the forefront of debate where the focus is on conserving nature by setting aside special areas, as it has been under the *World Heritage* and *Ramsar Conventions*. So long as we think in terms of special areas, private landholders will continue to want special deals. In this context the issue of private land is always likely to be marginalised by policy makers as being all too difficult. The easy way out will be to draw area boundaries so as to exclude private land, to use gentle persuasion, or to cave in to landholder demands for compensation for defeated aspirations, or even for outright purchase.

We have seen that the *Biodiversity Convention* offers an alternative paradigm, one which recognises that although special areas are important, it is unrealistic to concentrate our conservation efforts upon them exclusively. Under the *Biodiversity Convention*, conservation on private land across the landscape is an imperative rather than the option it represented under the earlier conventions. It is oversimplistic to assume that problems in designing policy instruments, which will induce private landholders in special areas under international conventions to manage their land in ways which are sensitive to the objectives of that convention, will necessarily flow through to a context where the issue is generalised to private land management across the landscape. Under the latter scenario, it becomes much easier to talk not simply of the *rights* of private landholders but also of their *responsibilities*. We are no longer asking an unhappy few to bear the complete burden of nature conservation for the whole community. In these

[137] In *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992), the United States Supreme Court held that under the *Fifth Amendment to the United States Constitution*, which provides that private property cannot be 'taken for public use without just compensation', a taking occurs when regulation deprives a landowner of all economically beneficial or productive uses of the land in question.

[138] See especially David Farrier, 'Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations' (1995) 19 *Harvard Environmental Law Review* 303; David Farrier, 'Policy Instruments for Conserving Biodiversity on Private Land' in Ross Bradstock et al (eds), *Conserving Biodiversity: Threats and Solutions* (1995) 337; David Farrier, 'Implementing the In-situ Conservation Provisions of the United Nations Convention on Biological Diversity in Australia: Questioning the Role of National Parks' (1996) 3 *The Australasian Journal of Natural Resources Law and Policy* 1.

circumstances, it is easier to gain acceptance of broad ground rules which apply across the board. These at least include the regulation of broadscale clearing, and even absolute prohibitions on clearing in sensitive areas, such as riverine corridors.