Australia
NSW

23 June 2003

Mr Gary Banks
Chairman
Productivity Commission
P.O. Box 80
Belconnen 2616

Dear Gary

this is in response to your suggestion that I should make a submission to the Commission's current inquiry into ***Native Vegetation and Biodiversity Regulations.***

While I do not have the time to write a full, purpose-specific submission for this inquiry, I take the liberty of attaching a recent paper that relates to property rights and environmental regulations. Some of the points should be relevant to your work. Let me add that I expect the *Centre for Independent Studies* to publish the attached paper.

The major points I would like to make are:

- The proliferation of diverse regulations to conserve nature in Australia amounts to the confiscation of many private property rights, frequently without offers of 'just compensation' (to use the words of the Commonwealth Constitution).

- Property rights are an open-ended bundle of rights (not concessions b a ruler), some of which have not yet been discovered or utilised. Public-choice theory and the political experience in parliamentary democracies have alerted us to the fact that much regulation is counter-productive and violates the citizens' freedom. This is why scholars, such as the American jurist Richard Epstein, whose writings on the topic 1 commend to the Commission's attention, welcome compensation as a means of containing regulatory proliferation. I share this view.

- No single factor is more important to the long-term growth of productivity than the security of private property rights and their unhindered use, protected by the rule of law[I]. Since productivity growth is the Commission's main concern, I would expect it to play the role of the major official advocate for, and educator about, secure property rights in this country.

- From scrappy indications, such as the surveys by Associate Professor Jack Sinden (University of New England) and Ashley McKay cited in the paper, I conclude that the

[I] The central point about the complex, evolutionary connections between property rights and productivity growth can be gleaned from comparative economic history and the theory of institutional economics/public choice. Closed econometric models of a more or less comparative-static nature are poor tools to understanding these issues, even if adds one or more dummy variables are included to capture this interaction. The relevant phenomenon is the dynamic evolution between, on the one hand, economic Tenine (more international competition) and, on the other, behavioral and political responses to it compare chapter 12 of Kasper-Streit, *Institutional Economics*, E. Elgar: Cheltenham, UK, 1998).

regulatory takings now being made by State and Commonwealth parliaments and administrations, will cost a compensation that is a multiple of what is now widely imagined. Stark political choices are therefore looming between practicing the virtues of fully protected property rights and opting for the political expediency of regulating without compensation. The future of international competitiveness and Productivity growth in this country will depend on the outcomes of that choice, as well as on judiciary decisions.

It is my hope that the Productivity Commission will advise the decision makers to stick with the full protection of individual rights and to resist the clamour of the economically illiterate.

For your convenience, I attach a hard copy of my paper, as well as a diskette (Word, prepared on Apple McIntosh). As I will be travelling during the next three months and will be hard to get, I suggest that you contact Greg Lindsay at CIS, should you not be able to open the file on the diskette.

With best wishes for a success of this important and no doubt controversial work

Wolfgang

In Defence of Secure Private Property Rights

Wolfgang Kasper*

Executive Summary

- Secure property rights to an asset give owners an open-ended bundle of rights. Owners may exclude others from access, may use the property as they see fit, benefit from their property and dispose of it, as long as they cause others no harm.

- Property rights are widely respected in communities where owners have to compete, in other words have to risk some of what they own to explore new, useful knowledge. This competitive discipline is uncomfortable for property owners. However, political interference to ease the competitive pressures also allows the authorities to diminish private property rights and gives rise to public scepticism about the merits of the property-rights system.

- Property rights are human rights. Their cultivation underpins individual freedom, promotes economic growth and job creation, and reduces poverty. Citizens of property tend to see advantage in cooperating peacefully and hence in social harmony.

- In a just society, interference with private property rights should be contemplated only if harm to others is proven and three key questions can be answered in the affirmative: [a] Will interventions improve outcomes for people? [b] Will the policy produce social benefits that are greater than the costs it inflicts on individual property owners? [c] Will the losing owners be fully compensated?

- Nowadays, private property is rarely endangered by outright expropriation (classical socialism). Instead, we observe a creeping erosion of individual property rights through costly regulations, which take private property rights away without compensation (neo-socialism). Individual rights of land owners, for example to harvest water or timber, are being taken away without compensation. And independent owners are turned into mere managers of centrally decreed plans. Frequently, governments interfere even without proof that particular property uses are causing harm. Such 'regulatory expropriation' is supported by those who still believe that 'property is theft' – the irrefutable failures of socialism notwithstanding.

- It is likely that the cost of compensation for regulatory takings for the sake of environmental conservation will be massive. If central planning and bureaucratic control are envisaged, these schemes should be fully costed (including the compliance costs to the subjects of control) and then put to State-level referenda. The alternative to intrusive regulation and central planning is voluntary market rationing. It will often require institutional innovation to define property titles which permit trading.

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* *emeritus* Professor of Economics, University of New South Wales, and Senior Fellow, Centre for Independent Studies, Sydney ❐ e-mail: wkasper@cis.org.au. — This is based on two invited speeches, one to a *Property Rights Forum* organised by the Queensland Farmers' and Canegrowers' associations in Cairns (8 April 2003), the other to *Property Rights Australia*

in Roma (5 July 2003). I am indebted to the organisers, fellow speakers and commentators from the floor of both fora for numerous excellent comments and insights.

INTRODUCTION: AUSTRALIA'S ECONOMIC MIRACLE

How were so few people able to open the vast, rough Australian continent during the 19th century? Nature presented enormous difficulties to economic development, and the European settlers came ill prepared. Yet, by the time of Federation, Australia had been developed into one of the most decently governed societies on earth. The feat was achieved by surprisingly few people. By 1860, there were only one million inhabitants and on Federation, there were still only 3.2 million. By then, they earned and enjoyed the highest living standard in the world!

The answer to the puzzle contains a key lesson of history: the immigrants brought with them the British rule of law, a culture of individual rights and responsibilities, and secure private property rights. These institutions gave the settlers great confidence to invest and work with what they owned. Secure property rights and the rule of law made it easy to attract and retain foreign investment, as well as enterprising people with skills, energy and ideas to the Colonies. They were free to discover new uses for their property and talents and they could keep the rewards for risking innovations. A welcome by-product of secure property rights was an optimistic can-do spirit, which most visitors remarked upon at the time. It still lingers in some parts.

Matters have changed greatly since then. Property rights are now being taken away by the visible, regulatory hand of the government. What government grasps is unpredictable, since it responds to political vagaries and diverse, single-issue pressure groups. The principles that made this country great, rich and optimistic are now gradually subverted by more and more encumbrances and controls, and a culture of complaint, dependency and social pessimism is spreading. History suggests that there are real dangers to economic growth, individual freedom and social harmony, if the regulatory proliferation is not stopped.

In part A of this paper, I propose to outline what ought to be done about property rights in the interest of prosperity, social peace and freedom. Private property rights will be defined and methods of proper protection will be discussed. Then, important insights from the relatively new discipline of public-choice economics will be discussed to suggest caution when

replacing the private choices of competing property owners by centralised political choices. Next, I will ask what is expected from property owners and show that secure property invariably produces prosperity, as was the case in 19th century Australia. — In part B, I will deal with present-day realities, which differ greatly from desirable norms. There will be a discussion of the latest assaults on private property rights, which are motivated by environmental concerns, as well as an analysis of the time-tested principles which are now, ever so often, being dismissed out of hand.

If the lessons of history are any guide, neo-socialist takings of specific property rights without compensation will disappoint and prove non-sustainable. In any case, it is a prospect worth fighting.

A. The Protection of Private Property

Private Property Rights Defined

Before one can discuss the benefits of secure private property rights, one has to define them. Without a clear and explicit definition, it is impossible to win the public debates that are now raging in Australia — debates which affect everyone, not only primary producers, but all Australians.

Property ownership is not simply the possession of a valuable asset. It has been defined in legal and economic textbooks as 'that sole…. dominion which one man claims over the external things of the world…. [It] consists in the free use, enjoyment and disposal… without any control… save only the laws of the land" (William Blackstone in his 18th century *Commentaries of the Laws of England*, cited after W. Samuels, 1994, 180). Ownership of an asset – land, machinery, valuable knowledge, or one's body, time and talents – gives the owner an open-ended bundle of rights. In decent societies, these tend to be respected by others, at least most of the time. The bundle not only contains the right to exclude others from using the asset, but also gives owners autonomous rights to using it as they see fit. One can draw diverse benefits from it. Unabridged land ownership, for example, entitles owners to till the

land, to mine the minerals, to exercise the rights of way, to hunt, to collect timber, berries, and rain water, and so on (Kasper-Streit, 1998, 173-211).

Most of the time, people make use of these rights by voluntary contracts with others. These contracts put a specific right at the disposal of others for a payment. Thus, the right to farm a plot of land can be 'rented out', the right to transit may be granted to a neighbour, or the right to fish the stream for a day may be 'hired out' to tourists (*idem*, 221-255). Owners can also dispose of the entire property or individual rights, for example by sale, gift or inheritance. New rights are being uncovered when owners have to compete — for example, the right to let paying visitors use the land for recreation. Secure property title thus encourages resourceful owners to realise new ideas in the hope that others will find the innovations useful enough to make them profitable. Material progress throughout history has thus relied on the confidence that secure property rights bestow on owners.

One important benefit of property rights is that they can serve as a surety for a loan. The value of these individual property rights – whether already discovered and exploited or still unused — gives savers with spare capital and the banks the confidence that the mortgage is secure. Secure property title therefore enables owners to leverage their assets by raising capital for new purposes.

The only exception to full property rights is taxation. It derives from the need to pay government agencies who protect life, limb and property (agency costs) and, if necessary, enforce such protection. In our tradition, the government's right to tax private property has long been based on parliamentary assent and on rules, which ensure that taxes are raised evenly on all citizens who meet certain parliament-approved criteria.

The Legacy of Magna Carta

Full and secure property title, as just defined, has not always been the norm. Indeed, it is still not the norm in many places. In third-world countries, property titles are poorly protected, so that people often cannot use their own property (land, shanty-town shacks, or street stalls) as collateral for loans that would empower them to climb up the income ladder (de Soto, 2001).

So many in the third world are locked into poverty traps by insecure property and widespread government failure to secure titles.

The Western tradition of property rights began with the Greeks and Romans, who created secure and transparent property titles. They enforced property law, at least until some Roman Emperors began arbitrary expropriations (Bethell, 1998, 61-74). Then, Roman civilisation declined. During the Feudal era, successful military thugs, who styled themselves as lords and princes, granted land titles to loyal followers, but often on limiting conditions and with insecure tenure. Those who fell out of favour with the overlord lost their property again. Little wonder that land was not developed and the economy stagnated during what came to be called the 'Dark Ages'. In China, high, favoured officials were given provinces with the mandate to treat them as 'fish and fowl', in other words take what they could. The peasants and workers therefore had little incentive to improve their property and much incentive to conceal what they owned. Similar conditions prevailed in the Middle East and India. Insecure property title was the twin of economic stagnation.

A revolutionary change occurred in Medieval Europe (Jones, 1981/1987; Kasper-Streit, 1998, 383-381). Opportunistic rulers of small, warring kingdoms discovered that they could collect more revenue, and hence enhance their capacity to wage war, by offering secure property rights, free markets and religious freedom to attract merchants and manufacturers. In England, the story began with *Magna Carta* in 1215, when a weak King was forced to acknowledge that the individual is 'protected in the free enjoyment of his life, his liberty, and his property' (as the eminent jurist William Blackstone put it). Rulers could no longer resume property at random, as they had during the Dark Ages. The rule that owners 'shall not be dispossessed from freehold ground' therefore has long standing (Bethel, 1998, 75-91). Centuries of legal development strengthened and refined the protection of property, leading eventually to a free citizenry, limited government, the rule of law and democracy (Jacobs, 1992). 'England's unique lead in industrialization was [based on] English law' (Hartwell, 1971, 245-250). Australians inherited the essential protections developed because *Magna Carta* and flow-on laws form an integral part of the Australian constitution, the overarching ground rules on which our institutional system, our prosperity, indeed our entire civilisation, rest.

Procedural Justice: Proof of Harm, Rules of Evidence, and Standards of Scientific Inquiry

Economic liberty – the term is often used as a synonym for a fully-fledged property rights regime – is of course not license: All uses of property are limited by the harm they inflict on others. Where this is the case, owners are obliged to desist from exercising their property rights, or have to pay afflicted parties compensation. This problem is much analysed by economists and lawyers. Civilised societies have found numerous, non-violent solutions to handle such conflicts. Most of the time, compensation offers the best solution, but sometimes it is not possible because we do not have enough knowledge to tie cause and effect together, or because the costs of transacting bilateral compensation are excessive[1]. Where external costs cannot be compensated, but are major, we may have to resort to direct government intervention.

In a civilised society with secure private property rights, such interference with individual economic freedom is circumscribed by strict judicial rules (Graph 1). They incorporate the wisdom of centuries of conflict resolution and judicial endeavour. The first rule is that property owners do not have to prove *anything* until proven guilty of having harmed others. This means that the burden of proof rests on harmed parties, and in practice often on the regulator who wants to limit private property. They have to convince a court, beyond reasonable doubt, that a specific property owner is responsible for an observed harmful consequence. Mere suspicion or unproven allegations of harm do not suffice. In practice, this often means that some harm has to be tolerated, before regulators can intervene. It is the price of economic freedom that has to be paid in a free society with secure private property rights.

Western law has developed numerous other, time-tested conventions, which are part of the rule of law (Walker, 1988). For example, the accused are held to be innocent till proven guilty, prosecutors have to disclose facts that are in favour of the accused, and witnesses must be open to cross examination. Courts are often faced with complex issues of evidence and may have to rely on expert witnesses, but these witnesses are expected to adhere to standards of honesty and scientific proof that earn them recognition in their own peer group.

Procedural justice, and the rule of law in general, are valuable cultural possessions of a society; they protect all individual human rights, not only the right to own and enjoy property. As we shall see, these time-tested principles need be upheld for the sake of social peace, justice and prosperity.

Insights from Public-Choice Economics: Three Tests for Policy

There is of course more to the standard legal protection of property rights than just outlined. In addition, policy makers should take important lessons aboard from the relatively new discipline of public-choice economics. Inspired by the, at best mixed, experiences of democracies over the last fifty years, public-choice economists have developed a number of criteria for deciding when collective action (or public choice) can, and should, replace competing, decentralised private choices[2] (Buchanan-Tullock, 1962; Buchanan, 2003, *forthcoming*; Kasper-Streit, 1998, ch. 10). The public-choice approach suggests caution, even scepticism, about government interference with private property and free markets. The empirical evidence shows how often government action detracts from prosperity, security and social harmony because it has unintended, harmful side effects.

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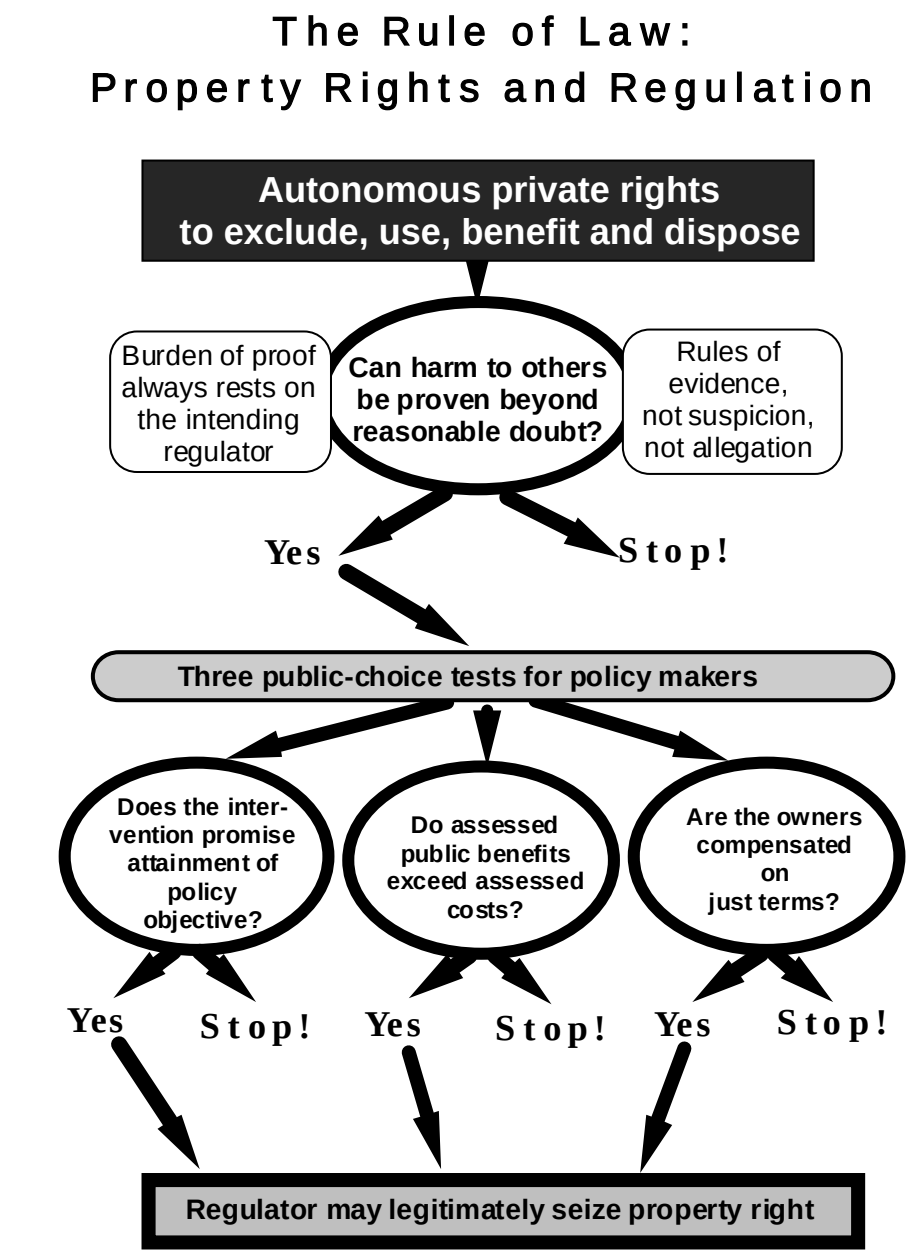
1 Compensation for community benefits need not always involve government. I have boyhood memories of an ornithological society paying Bavarian farmers compensation for the inconvenience of late hay-making, ie. until the sky larks, who are ground breeders, had hatched their eggs.

2 Public-choice economists assume that political agents, like all others, act out of partial ignorance and base self-interest, rather than with perfect knowledge and out of noble selflessness. If you appoint some selfish knave to high office, he is not simply converted into a knight in shining armour. It therefore always helps our understanding of politics to follow the money trail and the affected interests.

Public-choice economics, which has been crucial in inspiring the successful microeconomic reforms of recent decades in many parts of the world, suggests at least three policy tests before a government can be advised to take private property rights away by interfering in markets (Graph 1):

Graph 1



▼ **Will 'administrative failure' merely replace 'market failure'?**

Unfortunately, fallible humans with limited resources can not solve all problems that humans face. One must not fall for the 'control illusion', namely that every problem is solvable. Markets – the voluntary interaction of competing property owners – do sometimes fail. However, experience has shown that governments often fail, too. Those who demand intervention must demonstrate with reasonable plausibility that intervention will not produce overwhelming negative side effects, but improve on the outcomes of the interplay of markets.

It has to be added that the career prospects of eager administrators, electoral gain for politicians and revenge on supposedly undeserving property owners are decidedly no justification for government intervention, however often these are the true motives for regulations.

▼ Will the carefully assessed benefits to the community exceed the costs to individual property owners and to the administration?

When policy is conducted rationally and democratically, it seems uncontroversial to demand that everyone's costs and benefits are taken into account, valued and compared in transparent, just ways. In a humane society, no policy should be adopted that causes more harm than good to the people in present and future generations. In this context, one must never lose sight of the fact that the citizens are the principals and the elected politicians and the bureaucrats only the agents. We, the citizens, and our diverse aspirations, must remain the measure of what is counted as a cost and a benefit.

Policy activists, who pursue single issues, resent that everybody's interests are taken into account. When a former Danish Greenpeace activist and social scientist, Bjørn Lomborg pointed to the costs of the Kyoto Protocol (Lomborg, 2001), he was crucified by the politically correct and many committed natural scientists. However, should one, without prior rational debate, deprive the poor in third-world countries of life opportunities and inflict costs on affluent nations that are the equivalent of tens of thousands of heart-lung machines? If society is to remain just and harmonious, the costs to, and rights of, regulation-aggrieved individuals cannot be disregarded.

When a systematic cost-benefit analysis is undertaken before intervention, one must also count the transaction costs of administering the policy. Proponents of interventions need to explain by what means and methods the property rights of individual citizens are to be modified or taken away. To frame, to supervise and enforce the regulations causes considerable costs to the taxpayer. Admittedly, these are incomes to regulators, but they must be counted as costs to taxpayers and citizens.

▼ Will private owners be fully compensated for their losses?

Justice demands that property owners who lose rights while others benefit, are compensated at full market value. This is why the Commonwealth Constitution stipulates 'compensation on just terms'. Compensation is of course not required when the exercise of property rights harms the long-standing rights of others. However, where new community demands are to be satisfied and existing, protected rights are diminished, compensation has to be paid. The eminent American jurist Richard Epstein has made this point poignantly (Epstein, 1985, 1990, 2000). He has also made the point that the principle of 'no expropriation without compensation' is the only effective antidote against excessive regulation and an essential guarantee of security for citizens. If parliaments and administrations have to compensate individuals for all the regulatory takings which they inflict, the current, excessive regulatory activity will be contained. Officials will then have to be more careful in yielding to noisy, egotistic single-issue groups by relying on regulation that deprive some minority of their rights.

The Obligations of Ownership

Despite its obvious advantages, the system of sacrosanct private property is not popular. This is so mainly for two reasons: [a] controlling other people's private property gives the controllers excellent incomes, careers and power, and [b] private property imposes uncomfortable responsibilities on the owners. Ownership is a mixed blessing in the face of unceasing change and the competition of others, which forces owners to defend the value of their assets by continually engaging in costly and risky competition.

People with property are expected to use their wealth, talents and resources to position themselves in the market, so as to attract good deals from those on the other side of the

market (Kasper-Streit, 1998, ch. 7). Suppliers compete with other suppliers; buyers with other buyers. Thus, suppliers are forced, time and again, to incur costs for improving their product, advertising and after-sale services. These so-called transaction costs may be high, and the returns still disappointing. People with political connections therefore often seek protection. Politicians, who are always in search of support and funds for their next campaign, are tempted to oblige. Once property owners obtain political patronage for shirking the discomfort of unrestricted competition (economists call this 'rent seeking'), they spend less time and effort on searching for new products and production methods. This means less economic growth.

When rent seeking multiplies, the property-rights system decays. Entrepreneurs are then increasingly beholden to politicians and everyone is subjected to proliferating regulations and taxes. The citizens may still hold formal property titles, but they are losing more and more of their freedom to use their own assets as they see fit. They increasingly just implement government management plans and fill in the paperwork (Kates, 2001-02). In the process, they become dependent, whingeing zombies.

Once asset-owning citizens are reduced to lobbying and cease to compete genuinely, the community at large becomes sceptical of the institution of private property, because there is a moral trade-off: Owners enjoy secure, respected and complete property titles, but in exchange, have to expose their wealth and knowledge – time and again – to the risks of competition. This benefits the wealth of the nation. If this 'capitalist compact' is broken, the young and poor will listen to the siren calls of socialists and demand controls and expropriation, irrespective of the cautioning lessons of history.

Lessons of History: Private Property Promotes Prosperity, Harmony and Security

History teaches us to be uncompromising and combative in defence of secure private property rights. The lessons are notoriously uniform: If property is secure and enhanced by reforms, most of the population prospers, and overall freedom is improved (Friedman and Friedman, 1986; Rosenberg-Birdzell, 1986; Gwartney, 1991; Kasper, 1998, 2001-02; Bethel, 1998; Gwartney-Lawson, 2002):

- Agriculture and animal husbandry began some 10,000 years ago, however only where people respected exclusive ownership of herds, plots of land and the crops that grew on them. In various parts of the world, there were bursts of wealth creation and civilisation, which historians call 'Neolithic revolutions'. Before that, roaming bands of Palaeolithic hunter-gatherers only exploited nature. As long as our forebears were unfamiliar with the notion of secure property in land and other assets, they were only able to feed small numbers and to achieve only extremely slow cultural and economic progress. Their lives were brutish and short — whatever the neo-romantics in universities and the media would have us believe.

- From the late Middle Ages, warring European princes began to protect the economic (and religious) freedom of merchants and others. They did not act out of noble sentiments, but to attract investors and industries which would generate revenues to finance their rivalries. As a consequence, modern growth began. The European – and later North American and Australian – economies were carried forward by confident and competing entrepreneurs in agriculture and industry (Jones, 1981/1987; Rosenberg-Birdzell, 1986; Kasper-Streit, 1998). By contrast, technically more advanced Asian states – China, India, Persia, Egypt and Ottoman Turkey – were ruled by self-serving power elites who confiscated property arbitrarily. Their economies and civilisations stagnated. Only in the second half of the 20th century did most states begin – more or less – to secure and protect private property rights from thieves and thugs. The rest is history. The growth process has now swept up most countries on earth — except Africa, where life and property are notoriously insecure, and much of the former Soviet Union, where private property was long considered to be theft and property is still poorly protected from private and political mafias.

- In post-war West Germany, per-capita incomes rose fast once people enjoyed secure property rights and most markets were set free. The war-ravaged country was rebuilt within a decade and people regained confidence, freedom and hope. Ignorant journalists called this a 'miracle'. — By the time the Berlin wall came down, 50 years later, East Germans, who had started from the same low base in 1948, generated average per-capita incomes of a miserable 40% of what their western compatriots produced, because most forms of private property had been outlawed in the East.

- In China's Sichuan province (of some 100 million inhabitants), food riots in the late 1970s forced the Communist Party to break up the Commune system of collective ownership. The centralised management of agriculture, which had been much admired by Western intellectuals, was abandoned. Within two years of farm privatisation, agricultural productivity rose by 50% (Kasper, 1981). The quality and variety of food supplies improved 'miraculously'. The privatisation experiment was later extended to all of China, giving some 600 million peasants at least a semblance of private property rights and the incentive to develop their own resources. Since then, China's agricultural output has risen more than four-fold.

- After the communist victory in Vietnam in 1975, bad weather was regularly blamed for crop failures. Yet, re-privatisation in the late 1990s improved the weather in mysterious ways, and Vietnam again became a major rice exporter.

- Rains in the mid-1990s triggered North Korea's famine. It has not yet been overcome despite copious foreign food aid. Yet, the same rains caused only a minor setback in food production in South Korea, because private farmers quickly repaired the flood damage to their fields.

One could continue the list. The conclusion is always the same: Where property titles are effectively protected from public and private kleptocrats and people are free to use property through market contracts with others, this produces prosperity, optimism and freedom prevail.

This point is also documented by systematic long-term historic and cross-country comparisons. 85% of the huge differences between the richest and the poorest countries on earth can be attributed directly to differences in political and economic freedom (Roll-Talbott, 2001)[3]. No economically and politically free country is poor; none of the unfree countries is affluent.

[3] The relationship between the security of property rights and the freedom of their use is not always tight in the short term. Like a slowly corroding railway bridge, eroding property rights may not be immediately notice. Then, a cataclysmic accident occurs. This is why econometricians, who are used to correlating quarterly or annual data, tend to relegate open-ended institutional evolution to 'dummy variables'. The dynamic interaction of economic changes and periodic political adjustment to economic pressures (as described in Kasper-Streit, 1998, 387-404) cannot be easily modelled, because it is fraught with discontinuities and deals with discoveries of yet-unknown solutions.

Although the focus here is on the material consequences of well-protected property rights, it should be added that secure private property is inextricably linked to justice, social peace and freedom in general. Property owners, who interact voluntarily to make the best of what they own, acquire habits of cooperation and compromise. It is widely recognised that this breeds a 'commercial ethic' and social harmony (Jacobs, 1992). People who work together in markets to combine their assets quickly discover that discrimination on grounds of race, religion or social origin is costly. Wherever the rules are clear, they discover what has been distilled in the saying that 'good fences make good neighbours'. By contrast, coercion, sly redistribution, discrimination and division are all too often the hallmarks of the political game. This makes for social conflict. Much private and little public choice therefore fosters social harmony.

Secure property rights and the freedom to use them are also an essential precondition for freedom in general. Paupers cannot defend themselves against aggressive neighbours or a rapacious state. The defence of private property in the courts costs much money. This is why classical philosophers of freedom have always stressed that 'citizens of property' are essential for a free society (Friedman-Friedman, 1986). And freedom, in turn, is of fundamental value to any society, because – as the philosopher Immanuel Kant observed – 'freedom is the quality that brings out the best in all of us.'

By most international and historic comparisons, Australian property rights are still reasonably well protected. However, over recent years, Australia's freedom standards have been slipping, as regulators and judges busily multiply the encumbrances imposed on property titles (Kasper, *passim*). Many keep claiming 'market failure' and clamour for putting government interests above the interests of private citizens in complete ignorance of the hurt this will cause to our prosperity and freedom. We live no longer in one of the few Western countries that have sole access to modern technology, but compete globally. Emerging economies are improving the quality of governance and property protection. Reactions to differences in economic freedom now occur faster and more massively, so that self-inflicted competitive handicaps – for example rampant environmental controls without compensation – are punished quickly and resoundingly by world markets. A recent study by the Department of Foreign Affairs and Trade showed the great benefits of globalisation, but also stressed the

need for strong and secure institutions, which allow people to succeed in global markets (DFAT, 2003). Other parts of government are not heeding that message.

One has to fear that this lucky country will not escape the fundamental wisdom that is expressed in the following Arab proverb:

> *'Give a man a rock in secure possession, and he will create a garden.*
> *Give him a garden on an insecure lease, and he will leave behind a desert.'*

B. The Neo-Socialist Onslaught

Socialism has Failed — Let's Reinvent it!

The doctrine of the primacy of individual autonomy and private property, as just outlined, is nowadays contentious with many. They claim that collective purposes and public choices must have priority (e.g. Samuels, 1994, 180-184) and even that private property rights are always conditional on the ruler's toleration. Accordingly, the authorities should intervene whenever the property-rights system produces outcomes that can be labelled 'market failures'. High courts in many countries, including Australia, have recognised more and more encumbrances on private property, putting the interest of government above that of individual citizens and oblivious of the harm their rulings inflict on freedom and prosperity. The 'conditionality school' nowadays demands increasing limits to private autonomy, so that private property and free markets become un certain, and there is less trust.

Most societies in East and West have learnt that outright seizures of private property are extremely costly. Old-style socialism — as practised by Lenin, Mao and Castro, and advocated for essential industries in living memory by the Australian Labor Party — is dead. Hardly anyone over the age of consent nowadays shouts: "Property is theft!"… at least not outside sociology departments and journalism schools.

Yet, everywhere activist groups are busy re-inventing socialism. Throughout Western capitalist societies, private property is habitually confiscated piecemeal. Parliaments and bureaucrats busy themselves decreeing regulations which extinguish long-existing private

property rights. They do so ostensibly for good causes — to improve safety, public health, environmental conservation, social equity (however defined), the national culture, and much more. Economists and lawyers call this 'regulatory expropriation', for there is normally no compensation for the losses that the regulations inflict. Throughout the Western world, the fatal old mistakes of socialism are now being repeated in a new guise. In the interest of clarity, I prefer to call this new political movement 'neo-socialism' – expropriation by a thousand regulatory cuts and without proper compensation.

At this point, it has to be recalled that private property is not the mere possession of a physical asset, but an open-ended bundle of diverse rights. Most regulations diminish and destroy some of these rights, so that property is worth less (Epstein, 2000). For example, fruit growers may discover that new health regulations make newly bought packing machinery unusable. Owners of fishing rights may be surprised by new regulations, which destroy the value of their gear and their families' livelihood. Land management plans pop out of government inquiries that propose to take long-standing economic liberties away. When NSW farmers all of a sudden have to pay metered rates for the rain water, which they collect on their own land in their own dams, their properties are devalued[4]. Yet, governments are reluctant to even speak of compensation for regulatory losses. When the draft rezoning of the Barrier Reef was announced in late May 2003, withdrawing a third of the Reef area from access to fishing (as against less than 5% before), federal environment minister, Dr. David Kemp, observed that thinking about compensation for fishermen was 'premature'.

The language is often a revealing give-away. Thus, farmers who collect rainwater on their properties and at their own expense are publicly reviled as 'water barons'. This alludes to the old-socialist campaign against 'robber barons', industrialists who work, invest and innovate to produce goods and services which others want to buy. Spokesmen for the Conservation Foundation assert that the growing regulation of land uses is unavoidable, for such is the 'march of history'. Environmentalists invoke 'iron laws of history'. Last time these terms were

[4] There are of course difficult issues at stake, for example in sharing water between upstream and downstream users. These can be solved by a better definition of water rights, which allows rational allocation through market exchanges. Those users who can make the most valuable use of that scarce commodity, water, must be allowed to bid for it. And those who find water too dear, must be able to

widely used was by Lenin and Hitler to bolster their respective socialist causes. Of course, the failure of Lenin's and Hitler's grand designs should have taught us that, in history, nothing is predetermined which individuals who fight back cannot overturn!

Present-day neo-socialists, like their intellectual forefathers, just don't get it: They still think that wealth creation is based on the mere exploitation of the land or the workers. The public have little understanding of the toil, investment, innovation, learning and risk-taking by enterprising people. Hence, activists and media writers get away with ignorant nonsense about 'unearned income' and exploitative 'barons', and neo-socialist, piecemeal expropriation is widely tolerated — at least till it comes to a backyard near you.

On the other hand, it is understandable that governments resort increasingly to regulatory takings of private property rights. They have run into barriers of taxpayer resistance and therefore lack the funds to underwrite all those promises to particular lobby groups (Epstein, 2000). Parliamentarians of all political hues therefore rely more and more on regulation to achieve ambitious ends, never mind that these may be unjust to some citizens. Regulations are invariably at the expense of some citizens' private property rights and someone's freedom. Moreover, regulations have negative side effects, which politicians blithely brush aside because they impact only further down the track. The consequences are a problem for a later administration. Activist politicians, who typically look no further than the next election, prefer interventionism because it is cheap.

When old-fashioned judges or economists raise questions, whether interventions will work or whether compensation is paid, they are greeted with incomprehension, if not popular wrath. Moreover, when one debates the issues with politicians, bureaucrats, scientists or media gurus, one does not have to dig deep before one encounters lingering beliefs that 'property is theft', indeed that 'rich' property owners deserve to be disadvantaged. By contrast, one encounters little appreciation of how secure wealth empowers creative people and how competitive risk-taking by confident property owners creates wealth. Widespread economic illiteracy thus gives rise to intellectual and popular tolerance of neo-socialism.

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economise on it or mobilise additional supplies. Adding a tax wedge by charging water rates is not a sensible way of resolving these complex issues.

Proof of Harm, not Mere Suspicion or Precaution

As was said above, it is legitimate for politicians to intervene in order to protect the community's shared interests from harm which private uses of property may cause. Governments may, for example, consider preserving biodiversity by taking away the long-standing property right of farmers to clear vegetation on their property. The problem is that most politicians now want to do this on the cheap, discarding the time-tested rules of the property-rights system, which is one of the most valuable elements of the social capital that underpins our affluence.

The rule of law demands that harm done to others by a particular use of property is proven beyond reasonable doubt. This is often not easy. Green activists, committed enemies of the institution of private property, and politicians therefore advocate a 'precautionary principle', asserting that expected harm constitutes sufficient grounds for interference with private autonomy. Subjective fears and alleged future damage can of course never be proven. The 'precautionary principle' becomes an *omnibus* excuse to take property rights away, and the entire capitalist civilisation would be undermined at its very core.

This is not to reject precaution as a sensible guide to human action. However, the 'precautionary principle' is being claimed only for conserving nature, while at the same time inviting the most incautious and short-sighted attacks on prosperity, justice, social peace and freedom.

Precautionary confiscation is normally justified with the argument that damage to the environment is irreversible. But this is hardly ever true, and often the damage occurs only to a tiny portion of a natural asset. It is, for example, grossly misleading to equate damage to some small parts of the Barrier Reef with its entire, irreversible destruction. Nature has great powers of self-repair. In Hiroshima, they have to use weedkillers to conserve the nuclear impact site; and on Fraser Island none of the conservation experts could identify the sites mined for beachsands in the 1970s. Bedsides, affluent societies can do much to restore and conserve nature.

One has, therefore, to remain critical of widely accepted official attitudes. Although the Productivity Commission rejected the 'precautionary principle', one of its recent studies advocated certain controls and government actions "notwithstanding remaining scientific uncertainty about the condition of reefs and the time scale for effective remedial action" (Productivity Commission, 2003). Admittedly, the Commission is a body expert in economic analysis and ill equipped to understand and analyse contradictory and complex problems of natural science. Nevertheless, the above statement comes very close to subscribing to the precautionary principle of the Greens. Moreover, one cannot help but note that the study pays insufficient regard to secure private property. Is it asking too much of a Commission, which is entrusted primarily with the pursuit of productivity, that it accords a higher and more explicit status to private property rights which are essential to productivity growth? Instead of justifying what governments decree, one should expect the Commission to be a public advocate of the merits of private property rights and their effects on economic growth.

Confusing and ill-informed public utterances by political leaders and revolutionary court rulings (for example, on native title) are now causing widespread uncertainty and fears of further illegitimate abridgements of private property rights. Political leaders could do much good if only they indicated occasionally that they understand private property and its contribution to a decent society.

The Burden of Proof Rests with the Regulator

Recently, a high-ranking official, with whom I had raised the question of property rights restrictions on Queensland farmers, miners and industrialists, lectured me that "failure to determine positive proof of guilt [that environmental damage is caused by producers] is not identical to positive proof of innocence". As if free citizens had to prove their innocence, when they enjoy lawfully what is theirs! — I took the opportunity of lecturing *him* that producers, who exercise their rights within the law, do not have to prove anything, until proven guilty beyond reasonable doubt of having caused damage to others.

It is the essence of secure human rights, including property titles, that individuals do not have to justify their free enjoyment. The burden of proof that the enjoyment of a property

right should be curbed rests always on those who allege harm. This includes regulators who wish to interfere. They always carry the burden of proof if they want to regulate. This is not a trifling technicality; our free, individualistic Western civilisation depends on such legal institutions. How sad when high government officials know so little about the rule of law!

The media should, incidentally, also be expected to presume property owners innocent until proven guilty. The 'politically correct' and the advocacy journalists these days frequently violate this principle, instigating modern versions of McCarthyism and public show trials! People, who caution against hasty expropriation and point to human rights, are all too readily reviled as scheming to wreck the environment. Any landowner in his right mind values the natural assets he possesses, for this is part of their future livelihood. Those who despoil their land, suffer in the long term; they have to make amends or leave the land. There is no doubt scope for improvement in land management practices in Australia, but no useful purpose is served by Greens and media accusing farmers of ignoring the benefits of a healthy environment.

Standards of Scientific Proof Must Not be Discarded

When harm is to be proven in court or public inquiries, complex scientific issues are at stake. Judges and commissioners have to depend on expert witnesses. While I am not a natural scientist, I am concerned how often insiders that tell of expert witnesses being partisan and scientific proof of environmental damage being based on dubious, contentious methodology. For example, the NSW Farmers' Association recently showed how superficial the documentation under the *NSW Threatened Species Act* has been in recent years (NSW Farmers' Association, 2003, 1-2). In most cases (ca. 70%), only purely taxonomic references were given in property-rights restricting listings under the Act. In about 10 more percent of cases, just one or two references were cited. Gross violations of accepted scientific methods were noted, for example that mere hearsay and anecdotal evidence formed the basis for conclusions, that correlations confused cause and effect and that matters were openly biased towards vested interests. The same has been found to apply in the US, as a study by the (US) Council of State Governments revealed (1999).

How often are we shown horror images of salt pans, turbid water or expanses of dead coral. This is meant to shock. However, one has to ask sceptically whether these salt pans have not existed all along, whether turbidity is not essential nourishment to mangroves and how extensive and irreparable the areas of dead coral are.

Citizens must insist for the sake of a sustainable future of prosperity that the courts and regulators adhere to accepted standards and not play loose with scientific proof.

Issues of Philosophy

Environmentalism is often underpinned by deeper philosophical questions which must be addressed in critical public debate.

One school of thought about nature conservation considers conservation one of the fundamental goals of sound policy, because it secures a good future for coming generations. From this point of view, nature conservation is part of the human goal of long-term security (Kasper-Streit, 1998, 86-89). Other schools of thought assert or imply that nature has rights independent of human aspirations. 'Apes have human rights, too', asserted a recent journal headline. This poses unsolvable logical and philosophical problems.

One can analyse the costs and benefits of actions from the human standpoint and rationally argue about them, but one cannot know the valuations of certain outcomes by animals, since humans cannot communicate with them about these matters[5]. Any cost-benefit calculus becomes impossible when assessments are made from different and incompatible bases. What is the right policy if it is in the polar bears' interest to consume seals? How can we logically trade off the interests of bears, seals and humans, other than using our own human reference standards?

[5] In practice, the protagonists of rights for Nature claim those rights for themselves. Independent rights for Nature are then only a ploy to escape critical, democratic debate and to quarantine conservation policies from the usual contest among multiple policy objectives.

That we are now in danger of losing the human focus was again made clear by the Commonwealth-funded *Terrestrial Biodiversity Assessment*, which was selectively leaked in April 2003. The report paints a 'bleak picture of the country since European settlement' and 'warns of continued levels of extinctions'. The ecosystem of the Murrumbateman area of NSW and the Cumberland Plain of NSW are singled out as having suffered the worst biodiversity losses. Are theses areas – namely Canberra and Western Sydney where citizens work and pay taxes to fund such investigations – to be seen as no more than 'losses' to biodiversity? Is the norm a sparsely populated continent? Do improvements for humans no longer count as benefits, but merely as damage to Mother Earth? 'Deep Green' segments of the bureaucracy appear to have moved so far from shared community values that they would deny the citizens' right to arrange nature to human benefit and dismiss human aspirations to further augment such benefits, if pristine nature is affected. One then comes readily to the conclusion that all agriculture harms biodiversity, and that humans are no more than despoilers of Nature.

In the interest of a free, humane society, one has to begin with an analysis of both the costs and the benefits of development to human beings. Nature conservation enters the calculus only under the rubric of security of future generations. The alternatives are inhumane. Moreover, they are likely to lead to a backlash against nature conservation, because societies, whose wealth has been destroyed by gross violations of property rights, are in the end not able and willing to conserve nature.

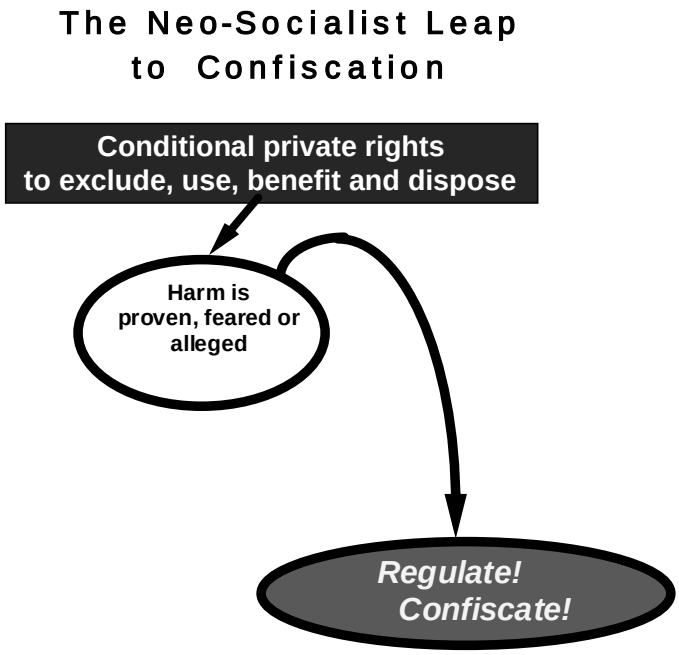
Truth and the Vision of the Anointed

Often, those who agitate against secure property rights act out of deeply held, quasi-religious convictions, claiming the moral high ground. One cannot help but feel reminded of a *bon mot* of the German philosopher, Friedrich Nietzsche who said: "The enemy of the Truth is not the lie, but those committed to a higher cause." Even when committed people defend high ideals, such as Mother Nature, they must accept compromise with all other interests in our pluralist society. They must also accept that all of us have limited knowledge and can be wrong at times. Single issues may excite lobbyists and help their fund-raising, but a healthy, stable society requires responsible policy makers who keep numerous, conflicting values in mind.

Because of this, we are well advised to look for social arrangements which help to uncover the truth and new opportunities, as well as to correct past errors. This criterion is fulfilled by the system of competitive markets and clearly defined property rights. It is rarely met by government action where past errors can be frequently disguised with more public spending, and where central decision often means that errors are concentrated.

All this may sound unduly sceptical about the capacity and motivation of governments. However, my scepticism derives from a life-long involvement with public policy and a grounding in public-choice economics. Everyone acts out of self-interest. Political parties, single-issue lobbies, charities and scientific institutes are motivated by the pursuit of income and influence. Government agencies eager to expand give their 'client lobbies' funding, official recognition and other support in exchange for their calls for growing government action. This enables politicians and bureaucrats to claim that they are only responding to public pressure (Rabkin, 1999). What one can observe in environmental policy fits the description and analysis of new-age politics by Stanford University economist Thomas Sowell in his book *The Vision of the Anointed* (Sowell, 1995, also see Henderson, 2000). Self-appointed elites turn marginal issues into existential 'Causes', for which they have 'The Solution'. Inspired by what happens on the other side of the world, the '*Internationale* of the Anointed' may even push solutions in search of a problem. When it becomes apparent that 'The Solution' causes more harm than good, they celebrate the fact that they have influenced policy, but studiously ignore the damage done by violations of private property rights. Instead, they fabricate their next, career-promoting 'Cause'. Being an Anointed minister, activist or organisation is nowadays quite profitable, since budget allocations are moved by 'Causes'. In this way, government grows and individual freedom and self-responsibility get eroded.

Graph 2



If private property is to remain protected, proper legal procedure and the three public-choice inspired tests discussed in Part A cannot be disregarded. It will simply not do to just say: "Damage proven or only expected: Regulate! Confiscate!" (Graph 2). The leap to regulation and confiscation may look simple and expedient, but it jettisons the wisdom of generations of legal endeavour and worldwide historic experience. All that such a streamlined administrative approach will do is to expedite a return to the Dark Ages!

Nature Protection on the Cheap and the Sly

Most policies to protect the environment in Australia are based on a naïve trust in the capacity of government to know and influence matters. The technocratic approach is to rely on planning and directives, trusting against all past experience that unwilling 'subjects' comply and ignoring unintended consequences. Thus, the *Wentworth Group* of scientists has produced a plan to improve land and river management in the Murray-Darling Basin. It relies on all farmers drawing up detailed management plans for their property, which are based on government directives. The plans of all farmers require prior approval and are policed by regional bodies. This is social engineering on a grand and prescriptive scale. No one has yet

come up with an estimate of the compliance costs to farmers, let alone the impact on the value of affected rural properties. It is unclear how much governments intend to pay to farmers to compensate them for the extra paperwork and loss of economic freedom, and how much will be swallowed by administration and coordination costs. Compensation to farmers for implementing the Wentworth proposals would certainly cost a multiple of what has been offered so far[6]. Some estimate the cost to affected farmers to be in the order of $ 20 000 million.

If farmers remain unconvinced and resentful, the Wentworth plan will no doubt be as effective as Soviet central plans were. Observers who are impressed by top-down planning schemes typically assume that writing targets down on paper, designing plans and creating bureaucratic structures makes things happen. The reality is different: As soon as responsibility is taken over by planners and farmers are subjected to directives and supervision, self-responsibility, alertness to emerging problems and readiness to remedy matters with one's own resources tends to suffer (Kasper-Streit, 1998, 142-155; 416-422). The consequences for farm productivity in China and North Korea were mentioned. Those technocrats and politicians who now wish to rely on planning mechanisms, supplemented by a little subsidy here or there, should be invited to look at socialist nature management around the Aral Sea or the outcomes of Czechoslovak or Polish environmental planning, before it is too late. What natural scientists rarely appreciate is that planning and coercion have the side effect of inducing people to cease doing things (Rosenberg-Bridzell, 1986). Why should North Korean peasants have repaired the embankments in the floods when this was the responsibility of the Commissars? Why should farmers do conservation work in the district once this becomes the responsibility of the Wentworth Commissars?

Without engaging the voluntary, entrepreneurial energies of self-reliant people on the land, environmental protection and farm productivity will be damaged, rather than promoted by the Wentworth mechanism. Anyone even vaguely familiar with past technocratic planning schemes, which overtax the cooperation of affected parties, cannot but agree with the conclusion of one observer: "The report is full of good things from the environmental point of

[6] The NSW government has committed $120 m in taxpayers' funds over the next four years, and there is the

view", he wrote, "but its lack of interest in the economic and property rights of farmers is breathtaking" (Duffy, 2003).

Natural scientists, who are trained to analyse controlled laboratory experiments with dead matter, rarely understand that communities cannot be so easily controlled and directed. In social evolution, human interaction is quite complex and developments are quite discontinuous, so that the naïve social-engineering approach (models, plans, targets, directives, and so on) fails.

Meanwhile, the Queensland government has progressively tightened controls on clearing remnant native vegetation[7]:

- In the mid-1990s, the *Land Act* was amended by the Goss government to ban tree clearing on leasehold land, with exceptions for some categories of vegetation being made subject to a permit system.

- In late 1999, the Beattie administration passed the *Vegetation Management Act* to ban clearing of 'endangered' remnant vegetation on freehold properties.

- Now, a State-Federal deal allows Queensland to ban all clearing of remnant native vegetation on leasehold and freehold land as from 2006, with some exemptions (e.g. for regrowth) still possible under a government permit system.

While the earlier restrictions were imposed without any offer of compensation, the latest regulations are coupled to some compensation. The Queensland government has set aside $75 million for that purpose. The latest scheme can now go ahead because the federal government has offered another $75 million to Queensland for one-off compensation payments to farmers affected by those additional restrictions. This 'carrot' of $150 million is accompanied by the 'stick' of an immediate prohibition of many types of vegetation clearing to

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prospect of more millions of Commonwealth taxes for the venture (Duffy, 2003).

[7] Queensland retains large areas of woody vegetation: In 1995, 76.1 million hectares (or 30% of the State's land area) were woodland. Since then, some 5 million hectares of woods have been added. This means that present stands are double the the State government's official target, which is to retain woodland on at least 35% of Queensland's land area.

attain unspecified objectives of the Kyoto Protocol (an ill-informed attempt at world government, to which the Australian government has not subscribed, and that with good reason, Dutton-Kasper, 2002-03). Disputes are to be resolved, not by Land and Environment Courts, but by the minister. This shifts much power to the government and amounts to a gross diminution of Australia's traditional rule of law.

We now observe administrative confusion and discrimination. There was no provision to compensate for the bans on clearing of freehold land under the 2000 Act, whereas some compensation is now on offer for the additonal bans of 2003. This has created a woefully confusion about property law: If the restriction of vegetation-clearing rights is recognised as a taking by government which attracts compensation, this – one would think – creates a precedent for State and/or Commonwealth compensation for all such takings. A further logical muddle arises from the Commonwealth now sharing in the new compensation with the reference to 'Kyoto responsibilities'. Will the clause in the Australian Constitution to pay 'compensation on just terms' not apply to such takings under the recent land-clearing bans, in which the federal government is now implicated?

The sums offered to date as compensation for the 2003 bans (some $150 million) look ludicrously inadequate, if one takes property rights and just compensation seriously. The regulations will take valuable rights away forever and restrict the future capacity of farmers to innovate. The ban on tree clearing will cost several orders of magnitude more than the figures now mentioned by politicians. It seems that the new controls are being passed surreptitiously and without discussion of the true costs. The political debate has to be about whether the Queensland public wants all existing native vegetation badly enough to consider substantial tax increases, sufficient to compensate all individual landholders for the alleged gain to the community.

An indication of the orders of magnitude that will be required in new taxation can be gleaned from fieldwork by Jack Sinden (University of New England). He recently interviewed 51 farmers in the Moree Shire of NSW to estimate the decline in land value and farm productivity as a consequence of the NSW *Native Vegetation Conservation Act*. In this small sample, the potential loss in land values is $198 million (or 21 per cent). Some $20 million are

expected to be lost additionally in regular annual incomes (Sinden, 2002). The cost of tree conservation in New South Wales will be borne very unevenly. Sinden estimates that farm families are compelled by the Vegetation Act to forego 15.6 per cent of their potential earnings, whereas urban families will lose only 0.5 per cent of their earnings through additional taxes[8].

To date, the public debate and the legislation in Queensland, New South Wales and elsewhere have proceeded in ignorance of the economic facts and the costs. Relevant legislation should be discussed only after the costs and the benefits of such proposals are estimated (which is now to be done by the Productivity Commission within a year). Environmental protection on the cheap and the sly will only produce a backlash and conflict. These are momentous matters for the population at large. In a decent democracy, the issues should be put to State referenda, testing popular willingness to shoulder the additional tax burdens for protecting the vegetation or to divert some of the funds of the GST- and land-tax rich States to protecting remnant native vegetation.

Protecting the Environment: Plan or Market?

The alternative to central planning – backed by moral suasion, coercion and taxation – is the introduction of clearly defined property rights for scarce assets. Then, a market price can emerge that rations demand and at the same time mobilises additional supply (Anderson–McChesney, 2003). In the past, when resources – such as stands of native vegetation or clean water – became scarce, institutional creativity and markets have helped to overcome emerging scarcities. For example, when parking space in the CBD became scarce, pay parking was made possible. This not only rationed non-essential street parking but also promoted the provision of additional parking spaces.

[8] Some estimate the losses in farm incomes (and hence property values) on the basis of the per-hectare level of grass production for cattle: Probably, some ten times more grass grows on cleared land than under trees. It is tehrefore estimated that a cattle-carrying hectare will produce some $31/hectare p.a. less after the bans, and that some 81 million hectares may be affected by the various bans (A. McKay, 'Information/Fact Sheet', Property Rights Australia, e-mailed, private communication).

Australians have a long tradition of institutional creativity. For example, the Australian inventions of Torrens title and strata title have solved land-tenure problems most successfully. Likewise, it is possible to define water entitlements that then allow trading, rationing of demand and mobilisation of more supply[9]. Effective markets depend on reliable and well-enforced property rights. They depend on simple laws and courts which cultivate simple, abstract and general rules and abstain from engineering specific outcomes (Leoni, 1961). The great advantage of rationing by market price over planning is that it is depoliticised. It works with voluntary compliance, rather than coercion, hence much more cheaply (Kasper-Streit, 1998, 142-155, 287-293).

Alas, neo-socialists and planners rarely accept this fundamental insight.

Courts as a Line of Defence for Private Property

The presumption is widespread that Australia's legal system can no longer be relied upon to give owners the traditional security and confidence of property ownership. In some respects, this seems justified since the High Court dismissed the confidence-inspiring legal construct of *terra nullius* when recognising aboriginal land title, and since judges increasingly engage in engineering specific outcomes which they consider 'socially just'. This is why some farm groups now lobby for new legislation, instead of testing centuries-old property law in the courts.

Nevertheless, judges regularly affirm the common law and private property title when citizens appeal to the courts. This is of course costly. For example, Justice Horton Williams of the South Australian Supreme Court ruled on 14 February 2003 that the South Australian State government had no right to take away, at short notice and without proper compensation, the rights of 28 Murray River fishermen to use gill nets. The Rann government's ban on gill nets to catch native fish would have deprived 28 citizens of an important property right, the court found. The remaining rights would hardly have allowed these families to earn a livelihood. In other words, the government's attempt was expropriation with minimal compensation, just 1.5 times a fisherman's annual income. The

[9] One problem with water is that it is not a static stock of an asset like land, but a flow that can be stored only at considerable cost. Markets handle such allocational problems all the time, for example in the efficient allocation and exploration of oil and gas.

court found that the SA minority Labor government had intervened out of political opportunism, on the basis of a political compact to obtain an independent's support in parliament. No scientific reasons to justify the restrictions were given. 'Apart from this compact (and the groundswell of opinion…), there is no other evidence which might provide a basis … for [this] exercise of regulatory power'. The judge ruled that the fishermen were entitled to the 'quiet enjoyment' of their property until it was seized with reasonable notice and the right to demand just compensation.

Another interesting case was a recent decision of the NSW Land and Environment Court against Hunters Hill Council to pay $ 2.515 million in compensation for a tiny foreshore block, aftert Council zoning had made all development of the property impossible. Council was obliged to compensate at full market value, as the Valuer General had established. The prospect that Council would have to raise local rates was not deemed a relevant argument to reduce the amount of compensation (*Daily Telegraph*, 23 March 2003).

These and similar cases show that the spirit of *Magna Carta* is still being upheld in Australian court rooms. Authorities, who want to achieve policy objectives on the cheap by making neo-socialist leaps, run the risk of costly reprimand. Such cases should also serve to caution eager interventionists that their actions inflict costs on taxpayers. The electorate will, sooner or later, pass judgement on the costs and the benefits of such regulations. It is likely that the voters will look at the compensation costs, think of tax burdens and then reign in the proliferation of frivolous interventions.

FIGHTING BACK: WE OWE IT TO OUR CHILDREN

The protection of private property rights goes far beyond deciding the future of one industry or another. It will define what kind of society ours is to be — a community of self-responsible, free, entrepreneurial citizens, who innovate and solve problems, or regulation-damaged zombies dependent on the government's subsidy drip.

Since so much is at stake, the debate about property rights protection and environmental conservation in Australia has to become more explicit. It has to be better informed and economically literate, which means it has to be informed by estimated costs and benefits. To

date, the public exchanges about these matters appear to be a 'dialogue of the deaf'. On one side, there are the farmers, foresters, fishers and miners, who are becoming increasingly vocal about violations of their private property rights. They are joined by some old-fashioned jurists, economists, and free-market think tanks, who stress the historic importance of property rights and therefore insist on proper compensation for legitimate regulations. On the other side are single-issue activists, political and bureaucratic controllers, natural scientists who are completely ignorant of history and economics, most of the media and many church leaders — in short the outspoken, collectivist part of public opinion. The two sides face each other in complete incomprehension. This is dangerous, as it paves the way to stagnation and conflict.

The argument for the strong legal protection of property and other individual rights is based on the lessons of history, social theory and the hope that our children will be able to prosper. This is not to dismiss environmental protection as a worthwhile objective of policy, but it has to be achieved with respect for property and other human rights. Often, the best solution will be through market processes, which engage the voluntary cooperation of property owners. If , by contrast, the implicit assumption is that property is theft and that all can be planned in government offices, policy risks not only long-term prosperity and social cohesion, but also environmental quality.

Liberty is rarely granted to citizens. It has forever to be claimed and re-claimed by the citizens. In the eternal tug of war between collective interests and ordinary citizens, there is never more than a cease-fire. As of the beginning of the 21st century, it seems, State governments, the High Court and noisy, subsidised single-issue lobby groups have ended the cease-fire. Only the thin and fickle defence of the common law and the lessons of history separate our civilisation from lapsing back into the Dark Ages.

This matter is too important to be left to self-seeking politicians and control-hungry bureaucrats. Keeping private property secure from political opportunism is worth a political and – if necessary – a courtroom fight.

References

T.L. Anderson – F. S. McChesney (eds.) (2003), *Property Rights, Cooperation, Conflict and Law* (Princeton, NJ: Princeton University Press).

T. Bethel (1998), *The Noblest Triumph: Property and Prosperity through the Ages* (New York: St. Martin's Press).

J. Buchanan (1991), *Constitutional Economics* (Cambridge, MA: Basil Blackwell).

J. Buchanan (2003 forthcoming), 'Public Choice Theory', *Policy,* vol. 19:2.

J. Buchanan-G. Tulloch (1962), *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor, MI: University of Michigan Press).

(US) Council of State Governments (1999), *A State Official's Guide to Sound Science* (http://stars.csg.org) [accessed 5 May 2003].

Department of Foreign Affairs and Trade [Australia] (2003), *Globalisation: Keeping the Gains* (Canberra: DFAT).

M. Duffy, 'Carr Goes Green, Farmers See Red', *Daily Telegraph*, 24 May 2003.

D. Dutton-W. Kasper (2002-03), 'Green Protectionism', *Policy*, vol. 18:4 (Summer); 23-25.

R. Epstein (1985), *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press).

R. Epstein (1999), *Principles for a Free Society* (Sydney: Centre for Independent Studies).

R. Epstein (2000), *Towards a Regulatory Constitution* (Wellington: NZ Business Roundtable).

J. D. Gwartney (1991), "Private Property, Freedom and the West", in J. L. Doti and D. R. Lee (eds.), *The Market Economy — A Reader* (Los Angeles: Roxbury Publications), 62-76.

J.D. Gwartney - R. Lawson (2002), *Economic Freedom of the World, 2002 Annual Report* (Vancouver, BC: Fraser Institute).

M.& R. Friedman (1986), *Free to Chose* (Harmondsworth: Pelican).

D. Henderson (2000), *Anti-Liberalism 2000: The Rise of New Millennium Collectivism* (London: Institute of Economic Affairs/.

J. Jacobs (1992), *Systems of Survival* (New York: Random House).

E. L. Jones (1981/1987), The European Miracle, 2nd ed. (Cambridge: Cambridge University Press).

W. Kasper (1998), *Property Rights and Competition – An Essay on the Constitution of Capitalism* (Sydney: Centre for Independent Studies), chapters 4 and 5.

W. Kasper (2001-02), 'Economic Freedom Watch', *Policy*, vol. 17:4 (Summer), 37-43.

W. Kaper (*passim*), *Economic Freedom Watch, Reports* (Sydney: Centre for Independent Studies).

W. Kasper - M.E. Streit (1998), *Institutional Economics – Social Order and Public Policy* (Cheltenham, UK and Northampton, MA, USA: E. Elgar), chapters 7, 8, 10 and 14.1.

S. Kates (2001-02), 'Private Property without Rights', *Policy*, vol. 17:4 (Summer), 32-36.

B. Leoni (1961), *Freedom and the Law* (Princeton, NJ: Van Nostrand).

B. Lomborg (2001) *The Skeptical Environmentalist -- Measuring the Real State of the World* (Cambridge, UK: Cambridge University Press).

National Farmers Federation (2002), *Property Rights Position Paper* (Canberra: NFF, May).

NSW Farmers' Association (2003), "Dubious (Lack of) Data', *The Primary Report*, 01/03 (January).

J. Norberg (2001), *In Defence of Global Capitalism* (Stockholm: Timbro).

R. Roll - J. Talbot (2001), 'Why Many Developing Countries Just Aren't', *Working Paper*, Anderson School, University of California, Los Angeles [www.anderson.ucla.edu]. For a summary, see: 'Differences in Political and Economic Freedom are Key Determinants in Per-Capita Income Differences Across Countries' [www.worlddevelopmentnow.com].

Productivity Commission (2003), *Industries in the Great Barrier Reef and Measures to Address Declining Water Quality* (Canberra: Productivity Commission).

J. Rabkin (1999), *Euro-Globalism? How Environmental Accords Promote EU Priorities into "Global Governance" — and Global Hazards* (Brussels: Centre for the New Europe).

N. Rosenberg – L.E. Birdzell (1986), *Why the West Grew Rich* (New York: Basic Books).

W. J. Samuels (1994), 'Property', in G. Hodgson, W.J. Samuels, M.R. Tool (eds.), *The Elgar Companion of Institutional and Evolutionary Economics*, vol. 2 (Cheltenham, UK: E. Elgar).

J. Simon (1995), *The State of Humanity* (Oxford: Basil Blackwell).

J. A. Sinden (2002), 'Economist Estimates Cost of Vegetation Act to Farmers', *University of New England Press Release* no. 016/02, 12 February 2002 [accessed on UNE website on 12 June 2003].

H. de Soto (2001), *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books).

T. Sowell, *The Vision of the Anointed – Self-Congratulation as a Basis for Social Policy* (New York: Basic Books, 1995).

G. de Q. Walker (1988), *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne: Melbourne University Press).