

A wild law look at carbon rights in trees and soils

Distillation of wild law

- The universe is a communion of subjects, not a collection of objects (Berry)
- The dichotomy in our laws between nature and ‘civilisation’ is false (Cullinan)
- that the dominant meaning of property, that it is about abstract rights rather than real things, “can be linked directly to maladapted land use practices and their ecological consequences” (Graham)

- “That no one has a property right to destroy the benefits of a natural system... may seem obvious, yet its opposite has been the (unarticulated) watchword of the developmental economy’s property system.” (Graham)

Themes

1. Humans as subjects owning (other aspects of) nature as objects is something that seems difficult for legislatures to create good law on.

Good law = clear and consistent law

2. Should wild law be focusing on rights for nature, or on human responsibilities as part of nature?

Case study

- Climate change
- ‘biotic sequestration’
- Australian States’ ‘carbon rights’ legislation
- Market mechanisms and ‘propertising’ of nature vs ‘command and control’ legislation

“A century ago, it would have been difficult to imagine that the carbon sequestration process, an ineluctable constituent of natural progression, would constitute a verifiable property resource distinctive from the underlying land ownership” (Hepburn)

What are carbon rights over?

- Static stores of greenhouse gases in vegetation and soils?
- processes of sequestration and release of greenhouse gases by vegetation and soils?
- right to manage those processes?
- the benefits from the rights to manage those processes?
- The potential ability of vegetation and soils to sequester?

New South Wales

- “Carbon sequestration right” means a right conferred on a person by agreement or otherwise to the legal, commercial, or other benefit (whether present or future) of carbon sequestration by any existing or future tree or forest on the land after 1990
- “Carbon sequestration” means the process by which the tree or forest absorbs carbon dioxide from the atmosphere
- Deemed to be a *profit a prendre*.
- Forestry covenant is an interest in land.
- Can be granted separately from a forestry right applying to a crop of trees on the land.

Victoria

- “Carbon sequestration right” means an exclusive right to the economic benefits associated with carbon sequestered by vegetation other than vegetation that has been harvested, lopped or felled.
- “Soil carbon right” means an exclusive right to the economic benefits of carbon sequestered underground, excluding carbon stored within plants
- Both deemed to be interests in land, but not an easement or a right of way.
- May be created by the registered proprietor of a freehold or leasehold estate.
- Separate carbon sequestration rights, soil carbon rights and forestry rights may be registered in respect of particular land (but no more than one of each in respect of any particular land)

Queensland

- “Natural resource product” includes all parts of a tree or vegetation, whether alive or dead, including parts below ground, carbon stored in a tree or vegetation, and carbon sequestration by a tree or vegetation.
- “Carbon sequestration” includes the process by which the tree or vegetation absorbs carbon dioxide from the atmosphere.
- Rights are a *profit a prendre*.
- Ownership of the trees or vegetation can be separated from the ownership of the carbon sequestration right.

Comparison of the legislative definitions of carbon rights

- the New South Wales and Tasmanian legislation is concerned with rights to benefits of **biotic processes** of sequestration of carbon dioxide in certain vegetation;
- the new Victorian legislation will be concerned with rights to economic benefits associated with **biotic stores** of carbon in vegetation and soils;
- the Queensland legislation is concerned with both **biotic stores** and **biotic processes** of sequestration of carbon in vegetation;
- the Western Australian legislation is concerned with benefits and risks arising from changes to the atmosphere caused by **biotic processes** of sequestration and release of carbon by vegetation and soils;
- the South Australian legislation is concerned with the capacity of forest vegetation to absorb carbon.

Carbon rights legislation – no comprehensive treatment of an identifiable ‘separate’ aspect of nature

- Only carbon and not any other greenhouse gases are covered.
- Stores and processes involving soils are not covered in all jurisdictions.
- Although the process of storage is encompassed within sequestration, actual physical biotic stores of carbon are only overtly covered in Victoria and Queensland.
- Not all jurisdictions cover processes of sequestration.
- Only the Western Australia legislation refers to processes of release of carbon.

- varying rights to manage or deal with the carbon rights as defined within each piece of legislation
- only the Queensland carbon rights legislation deals with a direct right in the biotic stores and biotic processes of sequestration in vegetation
- legal character of these property rights is not consistent

Argue for a return to simple command and control, as informed by our best available scientific knowledge and the precautionary principle – our human laws should be concerned with humans, and giving humans responsibilities, not just to other humans, but to other members of the earth community.

- Humans as members of the earth community
– less rights over and more responsibilities
towards other members of the earth
community
- Wild law theory – in the narrow context of
human law, focus on human responsibilities
rather than non-human rights?