



SOUTH EAST FOREST RESCUE

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This is about recognising that the amount of greenhouse gas emissions from cutting down trees is very significant. The world puts a lot of carbon into the atmosphere because people cut trees down [rather] than preserve them. And we know that deforestation is a significant driver of greenhouse gas emissions. [We] are about looking at ways in which we can preserve these forests. It's in our national interest to find ways to do that because these forests put carbon into the atmosphere when they are cut down. (Penny Wong, Cth Minister for Climate Change, 2010)

Dear President Obama,

I am writing to inform you of the civil war on the south coast between Forests NSW and conservationists, and why conservationists are choosing direct action. It is time now to act by either repealing the civil litigation exemptions in the *Forestry and National Park Estate Act 1998* (NSW) and/or ending native forest logging. We have lobbied state government, we have lobbied federal government, we have had no success.

In NSW in relation to native forestry activities, contrary to Orwell, the totalitarian idea that there is no such thing as law, there is only power, has taken root. Are the principles of jurisprudence so remote from the ordinary needs of civilized society, and the ordinary claims it makes upon its members, as to deny a legal remedy where there is so obviously a social wrong?¹

Summary of Facts

The rights of NSW citizens to participate in enforcing appropriate levels of environmental quality in native forests under Forests NSW control abruptly ceased with the enactment of the *Forestry and National Park Estate Act 1998* (NSW) and the consequent signing of the Regional Forest Agreements.² The exemption clause under s 40 of the Act ensures there is no environmental democracy and no consultation in areas covered by the RFAs. Individuals or communities call a meeting, the community objects, Forests NSW set up prohibited area zones and log regardless.³

No matter how great the environmental damage FNSW or their contractors cannot be taken to court for a breach of any Act or any law. The rights of public participation is limited to making submissions to the state and federal governments if the various pieces of legislation come up for review.⁴

It is understood that privileged groups seldom give up their privileges voluntarily. Reinhold Niebuhr states 'groups tend to be more immoral than individuals'.⁵ Therefore it should come as no surprise that the FNPE Act

¹ *Donoghue v Stevenson* [1932] AC 562, Lord Atkin.

² For an historic overview of the RFAs see Jan McDonald, 'Regional Forest (DIS) Agreements: The RFA Process and Sustainable Forest Management,' (1999) *Bond Law Review* 295.

³ A meeting was called by the police 10/9/08 to announce they would have 'zero tolerance' to protest in Bermagui where the community were trying to protect remnant koala population on the South Coast.

⁴ See Aidan Ricketts and Nicole Rogers 'Third Party Rights in NSW Environmental Legislation: the Backlash' (1999) 16 *EPLJ* 2.

and its subordinate regulations were enacted to further the interests of the financially interested, for example Forests NSW, South East Fibre Exports, Boral:⁶

Sometimes legislation arises to further the interests of one group or another, against other interest groups and sometimes the entire society.⁷

When the legislation was introduced by the government the community was given assurances that:

The agencies which currently have enforcement and compliance powers will continue to have those powers and continue to use them to ensure that the licences are adhered to.⁸

Despite numerous legitimate and often severe breaches referred to the Department of Environment, Climate Change and Water (now Office of Environment and Heritage) by various communities and organisations, there has only been one prosecution for breaches of any regulation on the south coast since the FNPE Act was introduced.⁹ This is contrary to Section 2 of the *Interpretation Act 1987* (NSW) which provides:

In any Act or Instrument, the word 'shall', if used to impose a duty, indicates that the duty must be performed.

The legislation exemptions were put in place because the environmental impact statement processes were costly, time consuming and became increasingly more difficult for Forests NSW to comply with as their anachronistic practices were held up to the microscope. Protests were also very costly and time consuming for the police and the State.¹⁰ The labour government attempted to deal with the conflict by imposing the exemptions and restrictions on civil litigation but:

Since the contradictions remain the same, and the legislation is merely an overlay, it is likely to give rise to further conflicts at a later date.¹¹

It is of note that no environmental impact assessments are conducted. FNSW and their contractors are exempt from every piece of environment protection legislation.

Is This Just?

The legislated exemptions of the *Forestry and National Park Estate Act 1998* (NSW) are not 'rightly framed' and are classic examples of 'flawed legislation.'¹² They are in breach of international obligations on the environment and human rights, they are inequitable, unjust and unfair. Their only purpose is to serve the 'grasping' at the expense of community:

The grasping man who is concerned with goods, and the unfair man who commits unjust acts are unjust, unfair and unequal.¹³ The equitable man is the man who chooses and does such acts and is no stickler

⁵ Reinhold Niebuhr was pre-eminent US philosopher and 20th century theologian.

⁶ Now Nippon Paper Group trading as South East Fibre Exports; Australian Forest Products Association (ex NAFI) is the very well funded lobbying body of the woodchip industry, based in Canberra, Australia.

⁷ See W Chambliss and R Seidman, *Law, Order and Power*, (Addison-Wesley Pub Co, 1982) 77-78.

⁸ Minister Yeadon, *NSW Legislative Assembly Hansard*, 12 November 1998.

⁹ Information provided by Ian Cranwell, head of DECC EPRG, (2009).

¹⁰ For an extensive history of native forest logging and the RFA process see Ajani J, *The Forest Wars*, (Melbourne University Press, 2007).

¹¹ Bottomely S, and Parker S, *Law in Context*, (Federation Press, 1997) 81.

¹² Sax JL, *Defending the Environment*, (Vintage Books, 1971) Ch 6, 155-156.

¹³ Aristotle, "The Nicomachean Ethics" *Book V* in *Society, Law and Morality*, Frederick A Olafson (ed) (Prentice-Hall Inc, NJ, 1961) 26.

for his rights but tends to take less than his share, and this state of character is equity, which is a sort of justice,¹⁴

And:

The law bids us to do both the acts of a brave man (not to desert our post), a good tempered man (not to strike another), and those of a temperate man (not to commit adultery) and the rightly framed law does this rightly.¹⁵

If the equity maxims that ‘equity will not suffer a wrong to be without a remedy’ and that ‘equity looks on that as done which ought to be done’ then the exemptions, in the *Forestry and National Park Estate Act 1998* (NSW) and all subordinate legislation, are inequitable.¹⁶

St Thomas Aquinas stated ‘an unjust law is a human law that is not rooted in eternal law and natural law’. Using the law merely for the sake of law is insufficient to maintain a cohesive society. When law and order fail to establish justice they become ‘dangerously structured dams that block the flow of social progress’.¹⁷

Solzenhitsyn stated:

Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyses man’s noblest impulses.

A just law is any law that uplifts humanity, any law that keeps humanity oppressed is unjust. It is unjust because it is a distortion of our common idea of right. The exemptions are unjust because the RFA regime traps both conservationists and loggers in a system of deception that distorts their common perceptions of each others shared humanity. It is unjust because the lawbreakers are protected by the police, who we perceive to be the upholders of the law. We believe that society must protect the robbed and punish the robber. Conservationists see loggers as the robbers of the future of the planet, and loggers may see conservationists as the robbers of their livelihoods, but:

It is somehow wrong to despoil the environment, to act in ways that waste natural resources and wildlife, and to gratify pleasures of the moment at the expense of living creatures who are no threat to us.¹⁸

What better example of humanity’s tragic separation, from each other and the earth, their awful estrangement, than the killing of the very thing which provides them with life.

Rule of Law

Section 40 seems to suggest any citizen is disallowed remedy or relief. This is possibly the most important issue.¹⁹ Section 40 provides proceedings cannot be brought under any Act. Section 40 also states at 1(b) ‘any person... regardless of whether or not any right of the person has been or may be infringed by or as a consequence of that breach’. The protection of fundamental human rights concern the courts as they scrutinise

¹⁴ Ibid 34.

¹⁵ Ibid 27.

¹⁶ Cook, Creyke, Geddes and Hamer, *Laying Down the Law* 7th ed. (LexisNexis Butterworths Aust, 2009) [2.10] 19.

¹⁷ Martin Luther King Jnr., Letter from a Birmingham Jail, in *Why We Can’t Wait*, (1964), (Signet Classic, 2000) 64, (online) <<http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf> as of 1/03/2010>.

¹⁸ D’Amato A., ‘What Obligation Does Our Generation Owe the Next? An Approach to Global Environmental Responsibility’ (1990) 84 *American Journal of International Law* 190.

¹⁹ See *O’Toole v Charles David Pty Ltd [No 1]* (1991) 171 CLR 232, Deane, Gaudron, McHugh JJ, [290–292].

decisions very closely, applying standards differently when such freedoms are at stake.²⁰ The fundamental principle is the principle of legality, or the rule of law.

On this Heydon J provided definition of purpose of the rule of law, which goes some way to the separation of powers doctrine:

The rule of law prevents citizens being exposed to the uncontrolled decisions of others in conflict with them. Powerful citizens are not permitted to use self-help against other citizens so far as their arbitrary might permits. Officers of the State are not permitted to imprison or otherwise deal forcibly with citizens or their property merely because they think it is their duty to do so. Mobs are not able to loot or lynch their enemies at will. Indeed Saint Augustine thought that without a rule of law States themselves were nothing but organised robber bands. The rule of law operates as a bar to untrammelled discretionary power.²¹

The purpose of the rule of law is to remove both the reality of injustice and the sense of injustice. It exists not merely because of the actual remedies it provides for damages, injunctions and other specific remedies, and criminal sanctions. It exists also to prevent a damaging release of uncontrollable forces of disorder and primal urges towards private revenge against wrongdoers by assuaging the affront to human dignity experienced by the victims of wrongdoers.²²

Lord Bingham stated:

The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.²³

On the rule of law Kirby J stated:

As a principle, the rule of law is essential. However, it is only so as it safeguards and promotes the higher principle of justice. Justice for all. Harmony in society and its laws through justice. Not simply justice for the majority, as expressed in democratic elections. Justice also for minorities. Justice, especially, for vulnerable and unpopular minorities. It is when minorities demand the protection of the law that our discipline, the law, is tested.²⁴

Lord Bingham defined what was to become the rules within the Rule:

- (1) The law must be accessible and, so far as possible, intelligible, clear and predictable;
- (2) Questions of legal rights and liability should ordinarily be resolved by application of the law and not by the exercise of discretion;
- (3) The law must apply equally to all, except to the extent that objective differences justify a relevant differentiation;
- (4) The law must afford adequate protection for fundamental human rights;
- (5) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;

²⁰ Fuller D, 'LAWS2115 Notes', Administrative Law, University of Queensland, 2008.

²¹ J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110.

²² *Ibid* [112].

²³ Lord Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67.

²⁴ Kirby M 'The Rule of Law Beyond the Law of Rules' (2010) 33 *Australian Bar Review*

- (6) Ministers and public officials at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers;
- (7) Judicial and other adjudicative procedures must be fair and independent; and
- (8) There must be compliance by the state with its international legal obligations.²⁵

Perhaps at the nub of this complaint is that s 40 provides immunity to wrongdoers. In *Puntoriero v Water Corporation* it was provided that to confer an immunity to prosecution in respect of damage, which would not have been suffered if the action had been performed in accordance with terms, would be to stultify the objects of an Act.²⁶

Kirby J provided:

It can be assumed that, but for the immunity, the respondent would be liable in law to the appellants. It can also be assumed that, but for any exemption provided by the statutory immunity, the appellants could enforce that liability by an action against the respondent with respect to the loss or damage that they have suffered as a consequence of the exercise by the respondent of its functions.²⁷

A pillar of the rule of law was stated by Justice Jackson in the Supreme Court of the United States in 1949:

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.²⁸

How is that FNSW and their contractors have been placed above the law? Presumptions of interpretation state that Parliament does not interfere with fundamental rights, nor does it deprive people of access to the courts. The fundamental rule of law states that no one is above the law.²⁹ All law is governed by the principles established as part of the common law. In my view the enactment and continuing operation of s40 is in breach of the rule of law. The statutory immunity afforded Forests NSW and logging contractors does not afford justice.

²⁵ Lord Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67, 81.

²⁶ *Puntoriero v Water Corporation* [1999] 199 CLR 575.

²⁷ *Puntoriero v Water Corporation* [1999] 199 CLR 575 Kirby J, [50].

²⁸ *Railway Express Agency Inc v New York* 336 US 106, 112–113 (1949).

²⁹ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 1902, Ch IV, (Adamant Media Corporation, 2005); Loughan G, *Privative Clauses and the Commonwealth Constitution* (Paper Presented at the Australian Government Solicitor's Constitutional Law Forum at Canberra, 23 October 2002), 3; see also LexisNexis (online) < <http://www.lexisnexis.com.au/about-us/rule-of-law/default.aspx>>.

Why Direct Action?

The steps that are taken toward non-violent direct action are not taken lightly. Firstly there is a collection of facts to determine whether injustice exists. Then there is a process of negotiation with the people who are likely to affect change. Following this there is a period of self-examination and questioning and then, if there has been no remedy, direct action.

We have been waiting a very long time for action on climate change and for the realisation that the industrial destruction of our native forests is one of the biggest causes. The European nations are moving with broadband light-speed toward combating the climate crisis, meanwhile we creep snail-mail like toward any sort of consensus that climate change exists. Perhaps it is easy for those whom it is a constant and very pleasant 21°, due to their home, car then office's air conditioning, to say 'wait', but when you see the razing of once beautiful and majestic native forests, the escalating rates of extinction of birds and animals, and the dry creek beds then maybe you will understand why we cannot wait.

We have sought negotiations only to find that the power structures of both the state and federal governments and their subordinate departments are unwilling to act in good faith. It is argued by the governments that NSW must meet its wood supply agreements, but as is common knowledge, the wood supply agreements were flawed from the outset, the hectare figures for area available for logging were incorrect. The wood supply volumes were designed by FNSW to log a hundred years worth of logs within twenty years.³⁰ FNSW has been logging over quota since the RFAs were signed therefore they are running out of product.

The government may declare a *force majeure* or regulate against native forest logging to prevent public harm.³¹ As Forests NSW native forests section incurred a \$232M before tax loss in 2011, \$16 million dollar loss in 2010, and \$14 million 2009 we ending native forest logging as an advantageous economic alternative.

Until such action is taken it seems the only real recourse for conservationists and community organisations, in areas covered under the RFAs, is to stand up, sit down and lock on for justice, by actions of civil dissent. As Lon Fuller so aptly put it:

The rule of law actually justifies disobedience, if governments do not govern in accordance with certain norms which are at the real core of the ideal. Particular violations of the rules of law by a government have the consequence that the government rules are not laws at all and so there is no moral obligation to follow them.³²

A person who breaks a law that their conscience tells them is unjust and accepts the penalty in order to arouse the conscience of the wider community, is expressing the highest respect for the law.

This holds true for all of us. The situations that effect local communities in areas that fall under the RFA regimes throughout the country impact everyone. Greenhouse gas emissions in one state know no boundaries. No one is an outsider when it comes combating climate change just as no one is an outsider when it comes to pursuing justice - injustice anywhere is a threat to justice everywhere, and this injustice will continue unless the

³⁰ *Return of the Ark: The Adequacy of Management Strategies to Address the Impacts of Climate Change on Biodiversity*, Legislative Assembly, Standing Committee on Natural Resource Management (Climate Change), Sydney, NSW, 2009.

³¹ See Butterworths, Halsbury's Laws of Australia, (at 4 March 2010) 110 Contract, V11 Discharge of Contract, (8) (A) and (B).

³² Lon Fuller, *The Morality of Law*, Yale UP, 1964, Ch 2.

civil litigation exemptions in the *Forestry and National Park Estate Act 1998* (NSW) are repealed and native forest logging is ended.

You are in the most effective position to do what is honourable, to be chronicled as a peacemaker of this conflict. I hope you and the people will rise to meet the challenge, but even if you do not I have hope for the future. We will have action because our common goal is one of survival. The fight is unstoppable.

*We must not forget that what we are looking for is not only what is just without qualification, but also political justice.*³³

Kind Regards

L Stone

³³ Aristotle, above n 13, 31.