

RESOURCE SECURITY

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Part I - Overview

In this Part, Professor Douglas Fisher discusses the resource security issue from a legal perspective and reviews some of the key elements of the *Forest Conservation and Development Bill* (ie the Resource Security legislation) recently debated and rejected by the Federal Parliament.

The development of natural resources has been, at least for the last 200 years or so, a function of rights of property inhering either in the Crown or some other person or institution. More recently, rights of access to natural resources have been increasingly derived from a statutory source or controlled by a statutory mechanism - in either case designed to promote and protect aspects of the public interest.

To the extent that rights of access to natural resources derive from rights of property, the exercise of these rights of access is protected by the security afforded to the rights of property that underpin these rights of access. The developer and the community at large act upon and acknowledge the security afforded by this system and it enables commercial value to be placed with a reasonable degree of confidence upon these rights of access. Rights of property can, of course, be taken away or the manner and extent of their exercise controlled by legislation. Thus rights of property are not and cannot be in any sense absolute. However the law also provides rules for the acquisition of rights of property and the manner and extent of their control in ways that are reasonably certain and predictable.

Nothing in the legal system, of course, is immutable. Rights of property can be acquired; new controls imposed; new financial burdens imposed; existing relationships modified; rights and obligations rearranged. Subject to change by Parliament, security in relation to natural resources ultimately depends upon two factors -

- . the degree of protection afforded to rights of property and ancillary rights of access afforded by the legal system; and
- . the degree of stability or variability built in to the statutory processes that modify or replace existing rights of property.

The management of natural resources at large is responsive to a number of competing objectives. These include the development of the resource, the conservation of the resource and the protection of the environment out of which the resource is taken and into which the waste materials arising as a result of the development are discharged. Resource security is an attempt to resolve some of these conflicts.

Although there is nothing new about resource security, there have been some recent innovative proposals. Specific legal mechanisms for resource security, at least in relation to major new wood processing projects, were foreshadowed in the paper entitled *Building a Competitive Australia* presented to Parliament on 12 March 1991. The purpose of these mechanisms was the integration of resource security and environmental integrity. For an analysis of the proposed Scheme see D.E. Fisher "Proposed Forest Resource Security Scheme: Sovereign Risk or Resource Security?" (1991) 65 ALJ 453. This is referred to hereinafter as "the Scheme".

The Scheme came before the Parliament of the Commonwealth in the form of the *Forest Conservation and Development Bill 1991*. The Bill was presented to the House of Representatives and read a first time on 29 November 1991. The second and third readings of the Bill in the House of Representatives took place on 2 March 1992 and the Bill was passed at the second reading by 67 votes to 63. The first reading in the Senate took place on 3 March 1992. On the second reading in the Senate on 26 March 1992 the Bill was passed by 51 votes to 7 and it was referred to the Standing Committee on Rural and Regional Affairs for consideration and report on or before 2 April 1992.

The Bill was considered by the Senate in Committee on 4 May 1992. An amendment was proposed. Debate commenced at 10.14pm on 4 May 1992 and ended after several divisions at 3.40am on 5 May 1992. When the question that the Bill as amended be agreed to and that the Bill be reported with an amendment was put, there were 28 Ayes and 38 Noes. The Chairman of Committees reported that the Committee had considered the Bill, had amended the Bill, and had negatived the question put. The Chairman also reported that the Committee had agreed to a resolution limiting debate on the Bill under Standing Order 142.

The essence of the Scheme was contained in the statement of objects in Clause 3 of the Bill. It states-

"The objects of this Act are, in cooperation with the States, to:

- (a) identify, and facilitate the protection and conservation of, forest areas of significant environmental, cultural or heritage value; and
- (b) facilitate investment by enterprises in major wood processing projects for the production of value-added products for export, important placement or both."

This provision makes it quite clear that the Scheme is designed simultaneously to protect and conserve the environmental and related values of certain forest areas and to provide security for projects using these forest areas as their source of supply.

Clause 3 then goes on to indicate the means for achieving these objects. It provides-

"The objects are to be achieved by:

- (a) establishing the procedures and conditions for granting resource security to a wood processing project, including completion, by the Commonwealth and the one or more States concerned, of a comprehensive integrated assessment process that involved consideration of the environmental, cultural, heritage, social and economic impact of the project; and
- (b) preventing the exercise of Commonwealth decision making powers in relation to the project, except in the exceptional circumstances provided for in this Act."

It is these mechanisms that are the particular interest of the legal system. The legislative structure envisaged by the Bill is a complicated set of interrelated provisions that are original both in their overall conception and in respect of particular elements of the total Scheme.

It needs to be emphasised that the Scheme is designed to provide security in relation to the development of resources that are located within a State, in this case forest resources, and that it is the State which has direct constitutional responsibility for such resources located within its boundaries. However, it is contemplated that the goods produced by the project for which security may be granted will either be exported from Australia or consumed or used in Australia in place of goods that would otherwise be imported into Australia.

There is no doubt about the capacity of the Commonwealth to legislate with respect to the export or import of goods. To this extent at least the Scheme falls within the legislative competence of the Parliament of the Commonwealth under s.51(i) of the Constitution. If the project entrepreneur were a foreign corporation or a trading corporation within the meaning of s.51(xx) of the Constitution, then the Scheme would to this extent also fall within the legislative competence of the Commonwealth.

The novel feature of the Scheme, however, is the capacity of the Parliament of the Commonwealth to legislate with respect not to export or import but with respect to import replacement. Does the consumption or use in Australia of goods produced in Australia but in place of goods that otherwise would be imported into Australia fall within the purview of s.51(i) of the Constitution? It would appear to be a matter of speculation at this stage.

Whatever the constitutional position of the Commonwealth, there would seem to be little doubt that a State may legislate to provide access to its resources to whomever it chooses and in whatever way it thinks fit. This would certainly seem to be true of the forest resources to which this Scheme is particularly directed. It is interesting nevertheless that the Scheme involves two distinctive sets of arrangements to achieve the final objective. These are on the one hand an agreement between the entrepreneur seeking authority for the project and the State with responsibility for the resource in question and on the other hand an agreement between the State and the Commonwealth ensuring that all the undertakings given by the State and the Commonwealth are able to be implemented in relation to the project. This may well require legislation on the part of the State. It is, of course, the specific purpose of the *Forest Conservation and Development Bill* to provide a legal regime enabling the Commonwealth to discharge its responsibilities in relation to this set of arrangements.

These two agreements are fundamental to the Scheme. The division of constitutional responsibility between the Commonwealth and the States ensures that it is for the State to provide security of access to the resource. Since the Commonwealth has no direct responsibility in relation to resources located within the States, the role of the Commonwealth in this situation is to undertake not to exercise any powers available to it that would have the effect of restricting or prohibiting security of access to the resource granted by the State. The positive role of the State and the negative role of the Commonwealth together comprise the totality of the security granted to a project under this Scheme.

It is the agreement between the Commonwealth and the State and the substance of this agreement that constitute the second part of the constitutional framework of this Scheme. The Commonwealth clearly has no direct power in relation to the resources located in the States. Notwithstanding this, there is no question that the Commonwealth can use its powers indirectly to influence the way in which resources within the State are developed, for example by requiring an environmental impact statement under the *Environment Protection (Impact of Proposals) Act 1974* (Cth) in relation to a proposal to export resources from a State. The Scheme in question seems to be based upon this approach to the extent that it ascribes these distinctive functions to the State and to the Commonwealth. Nevertheless the agreement between the State and the Commonwealth is significant not so much as an arrangement giving constitutional power to the Commonwealth which it would otherwise lack but rather as a "political" arrangement between the State and the Commonwealth as one of the foundations upon which the whole Scheme is based.

The second feature of the role of the Commonwealth is the negative aspect of its undertaking not to exercise statutory powers otherwise available to it. Generally it is not open to a Minister or any other person or institution exercising statutory powers to undertake either to exercise the power in a particular way or not to exercise it at all in advance of the circumstances arising for the exercise of the power in accordance with the legislation itself. However, in this case the legislation specifically authorises the Commonwealth to do just that.

This is something of a novelty. For on the one hand Parliament has invested the relevant Minister with power to make a particular decision within the framework of the enabling legislation whereas the legislation setting up this Scheme would give to the Minister the power to decide not to exercise the other more general power with reference to the project for which security is granted under this Scheme. An example would be the power to require an environmental impact statement under the legislation already mentioned.

The Scheme in a practical sense falls into two distinct parts. The first is the conditions under which a grant of resource security may be made and the second is the actual mechanism for ensuring that the security will be effective. It should be emphasised that there is nothing absolute about the security able to be granted or actually granted under this Scheme.

There are technically five conditions to be satisfied before there is even the possibility of resource security. The first is that the wood processing project must exhibit certain characteristics - including, if it is a new project, an investment of at least \$100 million. Secondly, there must have been completed an appropriate assessment process and this includes an examination of the environmental, cultural, heritage, social and economic issues that might reasonably be expected to arise from conducting the project. The third condition is the capacity of the State to carry out its obligations under the agreement between it and the Commonwealth. The fourth condition is an agreement between the State and the enterprise providing what has been so far described as the positive elements of resource security. The fifth condition is an agreement between the Commonwealth and the State ensuring that the State undertakes its responsibilities vis-a-vis the enterprise and that the Commonwealth will not use its powers to restrict or nullify the project that is the basis of these agreements.

It is interesting, by way of reference, to note that the agreement between the Commonwealth and the State is specifically stated to be legally binding although it is provided that neither party is liable to pay damages for any breach. An injunction would not be contemplated in such a situation. So the Scheme contemplates an agreement that is legally binding but not on the face of it enforceable.

The second part of the Scheme is the provision of security from the Commonwealth point of view - namely the negative aspect of the whole Scheme. The fundamental provision is the prevention of the exercise by the Commonwealth of certain powers that would have the effect of preventing or obstructing the implementation and completion of the project. However, there are five exceptions to this element of security. These are in short form -

- . major and unforeseen environmental or cultural impact
- . parts of the assessment process conducted during the construction phase, the commissioning stage or the operational stage
- . matters not relevant to the assessment process
- . material breach of the agreements
- . breach of any condition or requirement imposed during or after the assessment process.

These exceptions identify circumstances arising after the grant of resource security in the first instance. It is, in other words, a recognition in statutory form of the doctrine to the effect that arrangements remain valid to the extent that circumstances remain unchanged.

Although this Scheme affected only wood processing projects displaying certain characteristics, the whole notion of resource security is relevant to natural resources at large. Although this Bill has not been enacted, it contains a potentially significant model that confronts in subtle terms the distinctive constitutional functions of the States and of the Commonwealth in relation to natural resources, recognition of the interest of the entrepreneur in the context of an agreement between the entrepreneur and the State, a form of political arrangement between the State and the Commonwealth and the novelty of a power not to exercise a power otherwise available in the particular circumstances of the project in question.

Part II - Perspectives

In this Part, two key players in the resource security debate, Dr Robert Bain of the National Association of Forest Industries and Mr Mike Krockenberger of the Australian Conservation Foundation provide their perspectives on some of the key questions in the Resource Security debate. (*Questions by John Emmerig; answers unedited*)

QUESTION: Do we need resource security legislation? (Yes/No). Briefly, what is NAFI's/ACF's (as the case may be) position on implementing resource security legislation?

Dr Robert Bain

Yes. there is a need for legislation to balance competing demands on the forests. To date legislation has only been provided for preserved forests such as National Parks and World Heritage. This has created insecurity for businesses operating in the managed forests because they can be reallocated without any legal consequence.

The implementation of resource security therefore requires Commonwealth and State Governments should assess their forest resources for the full range of conservation and economic values in a single integrated process. When this process is completed, the allocation of forests to various end uses, ranging from wilderness to multiple use forest should be clearly spelled out. This decision should then be backed by federal and state legislation in a manner which makes it clear that the requirements of both levels of government have been fully met and that the forest allocation will not be revisited unless some major, unanticipated and exceptional situation occurs.

Mr Mike Krockenberger

The Foundation believes that resource security legislation covering native forests would not help the timber industry become sustainable and is a threat to the conservation of our native forests. Resource security for the timber industry is best provided by plantations on already cleared land.

The Foundation believes that the Australian native forest sawn timber industry is becoming economically unviable. Half of Australia's sawn timber consumption already comes from our softwood plantations, and a further 10% is imported (mainly from New Zealand). Old growth eucalypt forests supply just 11% of our sawlogs. In Victoria the production of hardwood timber has been declining by 4% per year and consumption of plantation grown softwoods have been increasing by 6% per year. The volume of sawn timber from Victorian softwood plantations will triple in the 1990's. This trend is evident to a greater or lesser extent in all Australian states. It will become exceedingly difficult for timber production from native forests to compete without increased subsidies.

The hardwood woodchip and pulp industry is also heading for trouble. There are seven million hectares of eucalypt plantations in countries like Brazil. Plantation grown resources have considerable market advantages, mainly: uniform size for ease of handling; much shorter growing times; better and uniform quality; and reduced chemical use in processing.

The proposed resource security legislation aimed to guarantee resources to world scale pulpmills. The production volume required to make a pulpmill viable in the world market is constantly increasing. The Resource Assessment Commission concluded that there is not enough timber on the mainland to supply such a mill, and only enough timber in Tasmania if conservation objectives and the sawn timber sector were compromised.

Resource security legislation as proposed for native forests was an attempt by industry to grab remaining unprotected forests - specifically environmentally significant old growth forests - while this timber could be sold on the international and domestic markets. These old growth forests would be converted to defacto eucalypt plantations which would produce woodchips that could be sold internationally in the future. An

irreplaceable resource, old growth forests, would have been lost to prolong the viability of an inefficient and declining industry. Thus the legislation can be seen as an attempt to lock governments and continuing subsidies for native forest logging.

- ▶ Unacceptable environmental impact would have been the price of propping up an industry that needs restructuring.

QUESTION: What do you see as the consequences (environmental or otherwise) if we do not have resource security legislation?

Dr Robert Bain

The Resource Assessment Commission has pointed out that cessation of logging of native forests will close off a wide range of economic and social options for the current and future generations.

- ▶ Without resource security legislation there will be very little investment in Australia's second largest manufacturing industry. Industry will become increasingly uncompetitive, leading to progressive closure of plants and redundancy of workers and this will flow through to the economies of many rural towns.

Australian imports of wood and timber products will increase substantially. We already have an annual trade deficit in forest products of about \$1.4b to \$1.7b, equal to about 10% of the nation's total trade deficit.

Mr Mike Krockenberger

The environmental implications of resource security legislation for native forests were severe.

Victoria already has resource security since 1987 in the form of 15 year licences with industry where the state agrees to supply set timber volumes or pay compensation. This has resulted in 98% of the estimated timber volume outside existing reserves being allocated to industry. As new conservation values have been identified, such as endangered species, wilderness areas and undisturbed catchments, protection has been refused on the basis of licence commitments and cost of compensation.

It is inevitable that new values requiring protection in native forests will continue to be found. Resource security is naive since no amount of "up front" environmental assessment will identify all values requiring protection. Resource security would have locked Australia into heightened conflict between conservation and industry over native forest logging.

Even though the proposed legislation has been defeated these threats remain. A number of state governments are implementing similar forms of resource security. Few reforms appear likely from the Commonwealth's draft National Forests Policy. World scale pulpmills may now not proceed but they were never likely because they are an economically marginal proposition.

The economic consequences of resource security legislation failing can be good if properly utilised. Government and industry now have an opportunity to focus on plantations as a guaranteed resource, and develop a more efficient and competitive industry in the process. Industry may also focus more on productive projects rather than grandiose pulpmill plans.

QUESTION: Are you satisfied with the way the resource security issue has been handled at the political level (and if not, why not)?

Dr Robert Bain

NAFI is not satisfied that the issue has been handled satisfactorily at the political level. The legislation was drafted to try to meet both political and forest management objectives. In the end, it achieved neither goal satisfactorily. Politically, it was intended to encourage eye catching new projects worth \$100m or more while at the same time minimise the objections of the environment lobby by being very limited in its range of application and involve long, time consuming and costly approval processes.

From a forest management point of view the Bill was partly misdirected as it focussed on wood processing projects rather than on the forest resource. The approach to forest assessment that has been adopted by most governments and endorsed by the Resource Assessment Commission is to assess forests on a regional basis and

then allocate them to reserves, multiple use or some other classification. The RAC pointed out that a project by project approach is reactive, not conducive to sound investment and may not tie in with regional assessments and sound long term forest management.

Mr Mike Krockenberger

The resource security issue has been handled in a most disappointing manner at the political level. The proposed legislation was hastily developed with little thought for its consequences. The legislation pre-empted a number of important Commonwealth inquiries, for instance those of the Ecologically Sustainable Development Working Group, and the Resource Assessment Commission Forests & Timber Inquiry. It also pre-empted the development of the National Forests Policy.

QUESTION: Ideally, how does NAFI/ACF (as the case may be) think the resource security question should be progressed from here?

Dr Robert Bain

NAFI believes that the issue of resource security aspects needs to be reconsidered on the basis of the recommendations of Resource Assessment Commission and the recommendations of the Forestry Working Group on Ecologically Sustainable Development. Both these groups concluded that there is no basis for cessation of native forest logging. They recommended that Government should ensure that Australian forests are being managed properly and that the reserve system is adequate, but then provide the industry with security to invest and develop internationally competitive businesses. The Government must develop a National Forest Strategy, including revised Resource Security Legislation, in order to implement these findings and avoid the progressive closure of a very large industry.

Mr Mike Krockenberger

The Foundation believes industry and government should now focus on providing resource security through plantations, other fibres and recycling. Enough plantations are in the ground and nearly ready to harvest to begin shifting the native forest sector onto this efficient and relatively conflict-free base. A number of sectors of the timber industry are already transferring to plantations, such as the APCEL Snuggery pulpmill.

A plantation based industry can be achieved more quickly by governments moving to cost recovery for their forestry services, by adopting the measures proposed by the National Plantations Strategy and by government buying policies. Forestry resources should focus on increasing plantation productivity and identifying products and markets for softwood residues.

Additional plantations that may be required should support other objectives, such as diversifying rural economies, disposal of waste water and salinity control. Plantations should only be established on previously cleared land and should not be established either by clearing native forests or by conversion of native forests by intensive silvicultural treatment, ie clearing by stealth.

The Foundation advocates the cessation of native forest woodchip exports in the near future and a target of the year 2000 for the phase out of native forest logging. National native vegetation clearing controls should be implemented as soon as possible.

QUESTION: What do you perceive to be the public's attitude on the resource security question - do you read them as being in support or opposition to the scheme proposed in the Bill?

Dr Robert Bain

We do not think that the public has much understanding of the proposed scheme. To the extent that the environment lobby has been successful in misleading people into believing that resource security involves open slather destruction of the native forests, then the public are naturally opposed to it. However, anybody who has followed the debate closely, will understand that very rigorous environmental assessment processes are involved, that only a small fraction of the forests will be available for logging and that the management will be monitored very carefully.

Mr Mike Krockenberger

Polling strongly shows that the majority of Australians want forests protected. Tens of thousands of letters were written to politicians around Australia opposing the concept and legislation. Australians want their timber needs met and their native forests protected and hence would support the maximisation of plantation resource use by the timber industry.

QUESTION: What elements of the resource security scheme proposed in the Bill were you:

- (a) satisfied with and why?
- (b) dissatisfied with and why?

Dr Robert Bain

- (a) We are satisfied that when all the preliminary steps have been carried out and the legal instrument granted in relation to a project, it would have ensured that most Commonwealth requirements were met and issues could not be raised again under Commonwealth law except in the event of unforeseen, exceptional circumstances.
- (b) Our main concern is with the "project" approach and the \$100m cut off. However, there were also serious questions about the amount of time and duplicated effort that would be required in the assessment process and the clause whereby the Commonwealth explicitly excluded any compensation for breach of the provisions of the Act.

Mr Mike Krockenberger

The Foundation was entirely dissatisfied with the proposed resource security legislation. The aim of the Bill was to lock up unprotected native forests for timber production. This would amount to economic protection for a failing industry. The supposed provisions to ameliorate the environmental impact of the Bill, such as "up front" assessment, were naive and worthless as long-term environmental protection measures.

QUESTION: What features would you introduce to correct what you see as being the deficiencies with the scheme proposed in the Bill - that is, what are the key structural elements that NAFI/ACI thinks should be present in any future proposed resource security legislative scheme?

Dr Robert Bain

We believe that forest assessments should be largely carried out by the State Governments, but that they should meet standards required by the Commonwealth and, as necessary, involve the Commonwealth in integrated assessments. Once regional forest assessments are completed and agreed at Commonwealth and State level, they should be endorsed by legislation. The legislation should ensure secure access to the resources outside the forest reserve system, subject to strict management plans. If for some reason, resources need to be subsequently placed in a reserve, there should be clear provision for compensation either in terms of alternative resources or monetary assistance.

Mr Mike Krockenberger

The foundation would not support any resource security for native forest logging under any circumstances.

QUESTION: Should the resource security legislation be limited to forest projects or should it have a broader application, and if so to what projects, and why?

Dr Robert Bain

Resource security legislation should not be directed at projects. It should be used to ratify regional forest use plans that have been developed to meet State and Commonwealth requirements. Provided the resource is harvested in a manner which is environmentally sound, the uses that it is subsequently put by industry should be primarily a commercial decision. This is also the view of the RAC.

Mr Mike Krockenberger

Resource security should not be applied to other industries based on natural resources if it is likely to compromise environmental protection. Considerable fluctuations in resource availability and long term over-exploitation can be seen in most resource based industries: over fishing our marine resources; water use in the Murray-Darling Basin; agricultural land degradation and so on. Arbitrary "guarantees" of resources will not achieve sustainability.

QUESTION: In relation to forest resources, to what forest resources do you think that resources security should:

- (a) apply and why?
- (b) not apply and why?

Dr Robert Bain

(a & b) Resource security should eventually apply to all of Australia's native forests. That does not mean they should all be available for logging. The majority should be in some form of reserve, such as World Heritage or National Park. The balance should be available for multiple use, including sustained wood production.

In other words, all our forests should be carefully assessed, their future management planned and then this should be endorsed in legislation.

Changes to boundaries and land use would then have to take place on a well planned, scientific basis and require compensation to parties, that stood to lose financially by the decision. The discipline of legislation is required to avoid the consequence of purely political forest use decisions.

Mr Mike Krockenberger

Resource security legislation, that is security for industry over a publicly owned resource, should only be considered for state owned plantations upon which a timber industry should be based. Plantations are an appropriate resource to commit to industry provided the public receives an appropriate return. It should not apply to native forests.

QUESTION: What do you see as being the biggest stumbling block to getting resource security legislation into place?

Dr Robert Bain

The biggest stumbling block to getting legislation into place is the politics of the issue. All major political parties agree that resource security legislation is required. However, they also know that preferences from Green or Democrat candidates in the next election may have a significant influence on some urban seats and the forest industry could be very influential in many rural seats. They both want the support of the industry but, at the same time wish to minimise the degree to which they antagonise the environment lobby.

Mr Mike Krockenberger

Resource security legislation contains an inherent contradiction as a concept, namely that the commitment of large areas of native forest to industry and conservation of environmental values are compatible. The legislation thus enhances conflict between industry and conservation in the community which is and will remain a stumbling block to the introduction of such legislation.