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Publication Details

This article was originally published as Arcioni, E, What's in a Name? The Changing Definition of Weeds in Australia, Environmental and Planning Law Journal, 2004, 450-465. Copyright Lawbook Company. Original journal available here.

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Abstract
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Keywords
weeds

Disciplines
Law

Publication Details
This article was originally published as Arcioni, E, What's in a Name? The Changing Definition of Weeds in Australia, Environmental and Planning Law Journal, 2004, 450-465. Copyright Lawbook Company. Original journal available here.

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What's in a Name? The Changing Definition of Weeds in Australia

Elisa Arcioni*

Changes in cultural values since 1788 have influenced our perceptions of, and approaches to, foreign plant species and the way in which we have defined what is a "weed". This article is an historical overview of the concept of "weeds" in Australia from 1788 to the present. This article follows changes in the definition and concludes with an analysis of the way in which elements of historical definitions can be seen in today's legislative and policy regimes.

INTRODUCTION

This article argues that the official definition of what is a weed in Australia has changed over time, corresponding to changes in the culture and values of Australian society. The focus of the article is the attitudes towards plants in Australia. Attempting to identify and explore the attitudes of individuals and groups in the past is an inherently difficult task, just as it is difficult to establish current attitudes in a diverse population. Nevertheless, it is possible to give an outline of attitudes, as seen through the activities of associations, legislation and policy, as well as other historical documents that portray the attitudes of individuals towards particular plants.[1] This article traces the changes in the definition of what constitutes a weed from 1788 to the present. The article then considers how different historical definitions are reflected in the current official position as established by legislative and policy regimes. The article ends with an overview of the legal issues surrounding weeds in Australia.

A CENTRAL DEFINITION

Weeds, as a category of plants, are often split into sub-categories such as "agricultural" – those damaging to agriculture; "environmental" or "bushland" – those detrimental to native flora and fauna; "urban" – those common in urban areas; and "noxious" – those that are toxic or otherwise of serious concern. Underlying each of these categories is the central idea that weeds are plants growing where they are not wanted. That definition is sufficiently broad to encompass the meaning of the word "weed" in all relevant legislation and policy across all Australian jurisdictions, as well as the use of the word over time.[2] This article examines the changes in the content of this particular

* Faculty of Law, University of Wollongong, NSW 2522. Thanks to David Farrier and Freya Dawson for their comments on earlier drafts of this article and to Rachel Young for her assistance. The first half of this article concerning attitudes to plants in Australia developed from a conference paper presented at *The Outback Summit*, convened by the Environment Institute of Australia and New Zealand, in conjunction with the National Environmental Law Association and the Regional Cultural Alliance, 22-26 October 2003. I thank the participants at that conference for their comments. Since the writing of this article, the NSW government has introduced into Parliament an amendment Bill to the *Noxious Weeds Act* 1993 (NSW). Due to current negotiations regarding potential changes to that Bill, and uncertainty as to the final version of it, the effect of the proposed amendments have not been dealt with in detail in this article. The discussion of the law in NSW in this article is as it stands at the end of October 2004, although some reference has been made to the possible amendments in relevant footnotes.

[1] Heathcote RL, "Early European perception of the Australian landscape: the first hundred years", in Seddon G and Davis M (eds), *Man and Landscape in Australia. Towards an Ecological Vision* (Australian Government Publishing Service, Canberra, 1976), p 29; Frawley K, "An Ancient Assemblage: the Australian rainforests in European conceptions of nature" (1990) 3(1) *Continuum: The Australian Journal of Media and Culture*. p ?

[2] Including the use of the word in the Bible, where a parable explains that weeds are not considered "good seed": Matthew 13:24-30 (Matthew seems to have been fond of the metaphor of weeds – see also Matthew 13:33). For some interesting

definition of weeds. In doing so, it starts from the premise that the definition is inherently anthropocentric, as the weeds are unwanted by humans and any differences in content can be traced to the divergent answers to the following two questions: *by whom* are the plants unwanted and *why* are the plants unwanted. This is consistent with the primary definition of the word "weed" in major dictionaries, which focuses on whether or not the plant is valued, implicitly referring to value to humans.[3] This article outlines the changes in the attitudes of people in Australia in relation to which plants have been considered to be of value and which deemed undesirable.

What is "native"?

Within the discussion of the definition of weeds in Australia, one dichotomy that is often presented is between plants that are "native" to Australia (extant prior to 1788) and within their natural range, and those that are "foreign" or introduced. This assumes that a baseline of "native" species can be found and that the situation prior to 1788 was "natural". Such propositions are now contested. Although there is often an assumption that the natural environment in Australia prior to 1788 was a wilderness, the accepted view today is that Aborigines did affect the landscape in which they lived and that in fact the species and their range in 1788 constituted a "cultural" landscape.[4]

Indigenous Australians were probably involved in the introduction of species into Australia, through trade with the Macassans to the north.[5] Beyond a limited number of introductions, Indigenous Australians also changed the ecology of the country through fire management regimes, the hunting of native fauna and gathering of native flora, as well as cultivating native flora.[6] The extent of the effect of these activities is disputed.[7] However, what seems to be the current dominant view is that Indigenous Australians came to live in a balanced way with the Australian environment and regardless of any changes they wrought on the ecology of the country, they were "relatively minor in speed, extent and intensity compared to the changes that have occurred in the last two hundred years."[8]

Therefore, while this article accepts a baseline of "native" flora as being those species in existence in 1788, that baseline is acknowledged to be one that evolved following interactions between humans and the rest of the natural environment in this country.

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discussion of the origin of the word 'weed' in the English language and its foreign counterparts, see King LJ, "Some Early Forms of the Weed Concept"(1957) 179 *Nature* 1366.

[3] For example, see the *Shorter Oxford English Dictionary*, where the first definition is "A herbaceous plant not valued for use or beauty, growing wild and rank, and regarded as cumbering the ground or hindering the growth of superior vegetation"; Agriculture and Resource Management Council of Australia and New Zealand; Australian and New Zealand Environment and Conservation Council; Forestry Ministers, *The National Weeds Strategy; a strategic approach to weed problems of national significance* (2nd edition, March,1999), p 7; Holzner W, "Concepts, Categories and Characteristics of Weeds", in Holzner W and Numata M (eds), *Biology and Ecology of Weeds* (Dr W Junk Publishers, The Hague, 1982), p 3 at p 3.

[4] Clark RL, "Ecological history for environmental management" in Saunders DA, Hopkins AJM and How RA (eds), *Australian Ecosystems: 200 years of Utilization, Degradation and Reconstruction – Proceedings of a Symposium held in Geraldton, Western Australia 28 August – 2 September, 1988* (Surrey Beatty and Sons for the Ecological Society of Australia, Chipping Norton, 1990), p 1 at p 4; see also Taylor SG, "Naturalness: the concept and its application to Australian ecosystems" in Saunders, Hopkins and How (eds) n 4, p 411; Rose AJ, "Australia as a Cultural Landscape", in Rapoport A (ed) *Australia as Human Setting* (Angus and Robertson, Sydney, 1972), p 58.

[5] Groves suggests that *Tamarind indicus* may have been introduced by the Macassans – see Groves RH, *Recent Incursions of Weeds in Australia 1971-1995*, (CRC for Weed Management Systems Technical Series No 3, 1998), p 8.

[6] Clark, n 4, p 4; Walsh FJ, "An Ecological Study of Traditional Aboriginal Use of 'Country': Martu in the Great and Little Sandy Deserts, Western Australia" in Saunders et al, n 4, p 23 at pp 34-35.

[7] For example, see the discussion in Dovers S, "Still settling Australia: Environment, history and policy" in Dovers S (ed), *Environmental History and Policy: Still Settling Australia* (Oxford University Press, Melbourne, 2000), p 2 at pp 7-9.

[8] Kirkpatrick J, *A Continent Transformed; Human Impact on the Natural Vegetation of Australia* (Oxford University Press, Melbourne, 1994), pp 30-36; see also Dovers S, "Australian Environmental History: introduction, review and principles" in Dovers S (ed), *Australia Environmental History; Essays and Cases* (Oxford University Press, Melbourne, 1994), p 2 at pp 2-3.

INDIGENOUS AUSTRALIANS' ATTITUDES TO NATIVE PLANTS

This history of attitudes to plants focuses on the period from British colonisation of Australia to today. Therefore, it does not allow for a comprehensive discussion of the attitudes of Indigenous Australians to plant species, as they existed prior to colonisation. However, it should be noted that many species were (and continue to be) valued by Indigenous Australians for their utility as food sources, sources of fibre and building materials, in addition to having spiritual significance.[9] It is clear that Indigenous law and custom is predicated on important relationships between Indigenous peoples and country, including not only the land but native flora and fauna. This has been at the heart of many debates regarding bioprospecting and exploitation of natural resources by non-Indigenous people.[10]

ATTITUDES I – BRITISH COLONISTS

The first attitudes considered in detail are those of the British arrivals from 1788. The commonly held view is that the attitude of settlers was unquestioningly a negative one: the native flora was considered useless, tasteless and unworthy of protection, and only British species or those familiar to Britons were considered to be of any value.

To obtain an understanding of this attitude, it is beneficial to consider the activities of the Acclimatisation Societies. These Societies were established with very clear objectives. Their brief was to acclimatise or naturalise English plants (and animals) into the Australian environment.

As described by one writer:

> members of the societies looked on Australia as a country bereft of such (British) attractions as melodious songbirds and animals of the chase – omissions that they sought to remedy. This objective, actuated by nostalgia and a professed sense of social responsibility for their fellow settlers, led to efforts to acclimatise … British animals and plants in their new homeland.[11]

The Acclimatisation Societies sought to "compensate for the existence of what [was] referred to as the native 'songless bright birds', and help assuage the homesickness of the nostalgic antipodean settler."[12] These individuals and Societies urged the introduction "of other objects common in Britain."[13] There are documented instances of families choosing "English trees and plants", to distinguish their property and British connections from the otherwise "grey-green of gum trees, dry undergrowth, the untidy Australian scattering of leaves and bark."[14]

This sense of nostalgia as a motivating factor in activities relating to plants in Australia was recognised as early as 1892. Hamilton, in reading a paper before the Royal Society, stated:

> Scotch thistles are said to have been introduced for the sake of the associations clustered round the plants in the mother country. The … plant is reported to have been introduced into Tasmania by a patriotic Scotchman desirous of having his natural plant growing near his new home. He appears, by all accounts to have succeeded only too well.[15]

Nostalgia has been explained as the basis for a duty to "recreate a European landscape in this foreign land and to beat the natural vegetation into submission and make something useful out of it

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[9] See for example the *Julayinbul Statement of Indigenous Intellectual Property Rights* (1993) that states "Indigenous Peoples and Nations share a unique spiritual and cultural relationship with Mother Earth which recognises the inter-dependence of the total environment".

[10] For a range of perspectives on Indigenous attitudes to the environment in this context, see the International Indigenous Knowledge and Bioprospecting Conference, April 21-24, 2004, Macquarie University, Sydney, Australia. Information on the proceedings is available at http://laurel.ocs.mq.edu.au/~cjone005/index_conference.htm

[11] Lever C, *They Dined on Eland; The Story of the Acclimatisation Societies* (Quiller Press, London, 1992), p 100.

[12] Lever, n 11, p 107.

[13] Francis GW, *The Acclimatisation of Harmless, Useful, Interesting and Ornamental Animals and Plants* (a paper read before the Philosophical Society, Adelaide, South Australia, May 13 1862), p 10.

[14] Niall B, *The Boyds; a family biography* (Miegunyah Press, Melbourne, 2002), pp 53-54.

[15] Hamilton AG, "On the Effect which Settlement in Australia has Produced Upon Indigenous Vegetation" (read before the Royal Society of New South Wales, September 71892), reproduced in (1892) 26 *Journal and Proceedings of the Royal Society of NSW* 178 at 224.

in order to survive."[16] Some suggest that even into the late 19th century, "thousands of pioneers still hoped to plant England, its hedges and its fruit trees and green and pleasant fields, to the exclusion of almost everything Australian."[17]

The reason for such an attitude is arguably related to the sense of identity of the colonists. There was no "Australian" identity. One of the first official recorded uses of the name "Australia" seems to have occurred in 1817, when New South Wales Governor Lachlan Macquarie used the name, expressing "hope in an official despatch that this should become the official name of the colony."[18] However, it is not clear that people identified themselves as Australian. One prominent New South Wales figure, William Wentworth, in writing a poem on Australia while studying at Cambridge, named the poem 'A new Brittania in another world'[19], yet returned to Australia in 1824 to establish the newspaper The Australian. In general, colonists identified themselves as Britons, albeit exiled in another land. Indigenous Australians and their views did not feature when it came to identifying the official position about plants and which were desirable or undesirable. The official position of that era as manifested by the Acclimatisation Societies' statements and activities exhibited a hunger for the "familiar" British flora and fauna, reflecting their clear identification with the "mother country", England. In relation to the characterisation of plants, therefore, in simplistic terms, British species were considered desirable, Australian native species undesirable or, at best, merely tolerated.

This view of a strict dichotomy between Australian and British species is not the whole story. The Acclimatisation Societies did not represent the attitudes of all colonists. As has been argued by Bonyhady in The Colonial Earth,[20] this analysis is a stereotypical interpretation (and perhaps a simplistic one) of history. One exception that has been proposed is the views of the 'intellectual'[21] component of the colonial society. Another to be developed below is the view associated with the economic needs or activities of the society. In addition to such general exceptions, there is clear evidence that even within groups in colonial society there was a diversity of opinions in relation to the Australian environment.[22]

The so-called "intellectual" contingent of the colonial community was made up of artists and writers, many of whom appreciated the aesthetics of the native flora and in fact campaigned for the protection of beautiful areas and species.[23] Examples of this attitude include Eugene von Guerard's commiseration that:

> unfortunately the progress of settlement is necessitating the destruction of these magnificent forests, which in many instances clothe a rich chocolate soil of especial value to the farmer … the stately giants were rapidly falling before the pitiless axe of the hardy pioneers of civilisation.[24]

Local newspapers sometimes called for the protection of the native trees for similar aesthetic reasons. A report in the Illawarra Mercury in 1890 included the following, with respect to the red

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[16] Hobbs RJ and Hopkins AJM, "From Frontier to Fragments: European impact on Australia's vegetation" in Saunders, n 4, p 93 at pp 106-107.
[17] Hobbs and Hopkins, n 16, at p 107.
[18] McMinn WG, *Nationalism and Federalism in Australia* (Oxford University Press, Melbourne, 1994), p 6. Arguably *the* first use of the word in relation to the continent now known as Australia was in Matthew Flinders' 1804 chart of this country. See Meachan S, "The Chart that Put Australia on the Map", *Sydney Morning Herald*, 9 June 2004, p 17.
[19] McMinn, n 18, p 16.
[20] (Melbourne University Press, Melbourne, 2000).
[21] This characterisation is taken from Hobbs and Hopkins, n 16, at p 107, where the authors there state that landscape artists formed the basis of this group but that it was a "movement that scarcely affected the population as a whole". In contrast, Frawley describes the views of the literary and artistic members of colonial society as "elite": Frawley, n 1.
[22] For example, for a discussion of the diversity of attitudes among farmers, see W Frost, "Did they Really Hate Trees? Attitudes of farmers, tourists and naturalists towards nature in the rainforests of Eastern Australia" (2002) 8 *Environment and History* 3. For a discussion in relation to fauna see Stubbs BJ, "From 'Useless Brutes' to National Treasures: a century of evolving attitudes towards native fauna in New South Wales, 1860s to 1960s"(2001) 7 *Environment and History* 23.
[23] Wallace-Crabbe C, "The Escaping Landscape" in Carroll J (ed), *Intruders in the Bush: the Australian quest for identity* (2nd ed, Oxford University Press, Melbourne, 1992), pp 157-180.
[24] As quoted in Mills K and Jakeman J, *Rainforests of the Illawarra District* (Coachwood Publishing, Jamberoo, 1995), p 28.

cedar trees of the region: "It is to be hoped the present possessors (of the Berkeley Estate) will preserve these ancient landmarks for their natural beauty, if not as valuable shelter for stock."[25]

However, this appreciation came after the very early colonial period, when even this "elite"[26] group within the Australian colonial society catered to their British patrons. Some have argued that artists were clouded both in their written works and artistic portrayals of the environment by British landscape ideals and colours rather than giving accurate depictions of Australian species.[27] It seems that artists were part of the "homesick people", reflecting the "fashion to despise native surroundings" and that they, along with the other colonists, "wanted to be English".[28] Therefore, the views of the "intellectual" component of colonial society represent more a development of attitudes rather than a strict exception to the general distaste for Australian species.

The appreciation of the aesthetic beauty of some native species, specifically the large specimens, came alongside the scientific appreciation of the species as curiosities. Natural scientists such as Joseph Banks were obviously interested in the native flora of Australia. Banks stated that it was "the products of nature which we so much wishd [sic] to enjoy a nearer acquaintance with"[29] and indeed he did have such an acquaintance through his many collecting expeditions along the east coast as official botanist on Cook's expedition.[30] In addition, there are examples of colonists specifically requesting and purchasing natives such as eucalypts and melaleucas, although the documented instances of such requests acknowledge that these species were "not usually planted by the colonists, especially in the country".[31]

The attitudes were not merely aesthetic or scientific.[32] After only a short time, the British colonists came to appreciate the value of some of the Australian native species for their utility with respect to human survival and economic advancement. Banks was concerned not only with expanding scientific knowledge of plants but also with the utility of the plants new to British eyes.[33] This reflects what some have characterised as the "utilitarian dream" of converting the Australian landscape into "useful purposes".[34] A number of native species were considered valuable in an economic sense. By the 1830s there was a well-established industry centred on huon pine in Tasmania, the timber being considered "choice and invaluable"[35]. Red cedar was a species that has been given the status of the most important product of the colony,[36] known colloquially as "red gold".[37] Some have argued that it was the pivotal element in the establishment of settlements along the coast to the north and south of Sydney.[38] There was certainly a recognition of the economic value in such timber trees, so much so that most of it had been cut down "and carried away to Sydney" by 1822.[39] Ironically the value of some of the species led to their almost permanent demise, either because of over-zealous timber cutting aimed at great financial rewards, or due to clearing for agriculture that "was to become a national obsession for 100 years after

[25] As quoted in Mills and Jakeman, n 24, at p 29.
[26] Frawley, n 1.
[27] See Powell JM, *Images of Australia, 1788-1914* (Department of Geography, Monash University, Melbourne, 1972); Birrell R, "The social origin of Australia's conservation movement" (1987) 8 *Journal of Intercultural Studies* 22.
[28] Quotations of artist Frederick McCubbin and novelist Rosa Praed reproduced in Birrell, n 27, at p 23.
[29] Beaglehole JC (ed), *The Endeavour Journal of Joseph Banks 1768-1771, Vol II* (The Trustees of the Public Library of New South Wales in association with Angus and Robertson, Sydney, 1963), p 52 [27].
[30] Beaglehole, n 29, at pp 58-60, 83, 95.
[31] State Heritage Register – Brown low Hill Estate, www.heritage.nsw.gov.au/08_subnav_2p.cfm?itemid= 5051301
[32] In using these words I am joining the literature of a number of writers who have categorised attitudes to the Australian environment. See, for example, Heathcote RL, "The Visions of Australia 1770-1970" in Rapoport, n 4, at pp 77-98; Heathcote, n 1.
[33] Beaglehole, n 29, at pp 113-115.
[34] Powell, n 27, p 1.
[35] Millington RJ, Jones R, Brown D and Vernon B, *Huon Pine – Endangered?* (University of Tasmania Environmental Studies Occasional Paper No 9, 1979), pp 10, 12, quoting Burn D, *Narrative of the Overland Journey of Sir John and Lady Franklin and Party from Hobart Town to Macquarie Harbour* (1842).
[36] Vader J, *Red Cedar; The Tree of Australia's History* (Reed Books Pty Ltd, Frenchs Forest, 1987), p 7.
[37] Gaddes AS, *Red Cedar, Our Heritage* (Wyndham Observer, Nanango, 1990), p 9.
[38] Mills and Jakeman, n 24, at p 1.
[39] Mills and Jakeman, n 24, at p 27, quoting Governor Macquarie.

settlement".[40] This last activity was often mandated by conditions in leases that forced tenant farmers to clear a certain area of land within a specified time or risk losing the benefits of the lease.[41]

ATTITUDES II - AGRICULTURE

The production of non-native species through agriculture is another lens with which to examine historical attitudes to plants in this country in order to determine the historical meaning of the word "weed". Agriculture was described by the New South Wales Minister for Agriculture in 1921 as "a continual fight against weeds", which, even at that stage, was estimated to cost millions of pounds in the State of New South Wales alone.[42]

Towards the end of the 19th century the British patriotism of the Acclimatisation Societies had extended to the introduction into Australia of British species, including species known to be agricultural weeds in Britain. Some called for the removal of species to avoid being "swallow[ed] … up in ruin".[43] In 1850, Superintendent La Trobe issued a Government Notice regarding the "urgent necessity of timely measures being taken to check the growth and spread of the large 'Milk Thistle' in the Port Phillip District".[44] As early as 1864, a commentator on the Acclimatisation Societies noted, "many injurious plants have been imported, which afterwards could not be eradicated, which we have experienced in the Scotch Thistle, Bathurst Burr … Variegated or Milk Thistle … and the Scotch Burr … all injurious weeds introduced into the colony."[45] Some contemporaries declared the Societies had thereby done "more harm than good".[46]

The importance of agriculture to the colony became the basis for identifying particular plants as "unwanted" in Australia – species detrimental to agriculture. The example of the Scotch Thistle is a useful one to demonstrate the change. It was deliberately introduced by a Scotsman in order to re-create a part of Britain in Australia. However, it came to be considered a weed because of its effect on agricultural production, therefore requiring eradication. Similarly, concern was raised in the late 1800s regarding the detrimental effects of other British plants like sweetbriar.[47] It was not only British species that were causing problems in agricultural areas. Other, non-Australian and non-British species had been introduced for ornamental[48] and/or agricultural purposes and were also of concern to farmers. Legislation was introduced to control certain species of plants detrimental to "the cultivated and waste lands".[49] One example is the first *Prickly Pear Destruction Act* in 1886 (NSW). In the parliamentary debates, it becomes clear that it was the effect on agriculture that was relevant to the decision to mandate destruction of the species, with members of the Assembly making statements like: "all the *very best lands* have been covered by this terrible

[40] Benson DH and Howell J, "Sydney's Vegetation 1788-1988: utilization, degradation and rehabilitation" in Saunders, n 4, p 115, at p 120.
[41] See Bonyhady T, *The Colonial Earth* (Melbourne University Press, Melbourne, 2000), p 80; Frost W, "European Farming, Australian Pests: Agricultural Settlement and Environmental Disruption in Australia, 1800-1920" (1998) 4 *Environment and History* 129 at 132.
[42] Capt Dunn, New South Wales, Legislative Assembly, *Debates*, 19 October 1921, p944.
[43] *Sydney Magazine of Science and Art*, October 1857, pp109-110, referred to in Parsons WT and Cuthbertson EG, *Noxious Weeds of Australia*, (2nd ed, CSIRO publishing, Canberra, 2001), p 231.
[44] *Port Phillip Government Gazette* No 47, November 6, 1850, as quoted in Parsons and Cuthbertson, n 43, p 231.
[45] Bennett G, *On the physiology, and also on the Utility, and Importance of the Acclimatisation or Naturalisation of Animals and Plants to Australia* - An address delivered to the members of the Acclimatisation Society of New South Wales at the Annual Meeting April 4 1864, as printed in the Annual Report of the New South Wales Acclimatisation Society, 1864, p 35.
[46] Lever, n 11, pp 100-101.
[47] Mr Vaughn, New South Wales, Legislative Assembly, *Debates*, 27 May 1886, p 2288. Concern was also raised in relation to Bathurst burr and thorn-bush: New South Wales, Legislative Council *Debates*, 16 June 1886, p 2666 (Mr White).
[48] For example, lantana. See New South Wales, Legislative Assembly, *Debates*, 27 May 1886, p 2288 (Mr Vaughn).
[49] *An Act for preventing the further spread of the Scotch Thistle*, No 15, assented to 2 January 1852, as quoted in Parsons and Cuthbertson, n 43, p 3, where the authors also mention similar legislation in Victoria in 1856 and South Australia in 1862 proclaiming Bathurst burr a weed.

plant"[50], "some of the *richest lands* in the Upper Hunter have become of no use, owing to the existence of the plant".[51]

From the turn of the 20th century, legislation was used quite often to address the problems faced by agriculture. In addition to the species-specific measures, there were general measures such as the *Agricultural Seeds Act 1921* (NSW)[52] and the *Local Government Acts 1906* and *1919* (NSW),[53] which established listing systems for undesirable plants. The *Agricultural Seeds Act* placed restrictions on the sale and distribution of seeds deemed to be detrimental to agriculture. The *Local Government Act* placed onerous eradication obligations on landholders upon whose land "noxious weeds" were growing. Once a plant was declared a noxious weed, landholders were required to "extirpate and destroy the plants"[54] and, in the 1919 incarnation of the *Local Government Act* to "destroy such plants … and … thereafter keep the land free therefrom".[55] There was no explicit reference in that *Local Government Act* to the protection of agriculture. However, the operation of the *Local Government Act* was limited in its scope by official policy which defined "noxious weeds" to be only those plants which posed a "serious risk" to agriculture.[56] As Carter explains, at first the legislation focused on "weeds of grazing land, reflecting the dominant land use at the time. As land use shifted to cropping, weeds that affect crops were included (on lists of species requiring control)".[57] The notion that the category of weeds was restricted to plants detrimental to agriculture is supported by the introduction to a book on the biology and ecology of weeds, where one of the editors states that "the 'original weeds'" were those of "arable land".[58]

ATTITUDES III – ENVIRONMENTAL CONCERNS

As early as 1892, individuals were considering the impact of human intervention, such as clearing, agriculture and the introduction of foreign species, on the Australian environment. A paper was read before the Royal Society of New South Wales, entitled "On the Effect that Settlement in Australia has produced upon Indigenous Vegetation"[59], which considered that "the introduction of a new flora" has or will result in the "modification of the indigenous flora through competition".[60] The law became involved in protecting native species at risk of extinction, in order to protect timber for human use and maintain sufficient numbers of fauna for hunting.[61]

By the end of the 20th century there emerged a relatively widespread recognition of the intrinsic value of the environment, reflecting international social movements and a recognition of the value of native biodiversity, encompassing a more biocentric view of the natural environment.[62] However, this is only the latest variant of concern for the natural environment. The deep origins of the modern environmental movement have been traced to historical

[50] Mr Fletcher, New South Wales, Legislative Assembly, *Debates*, 27 May 1886, p 2287. Emphasis added.
[51] Mr Abbott, New South Wales, Legislative Assembly *Debates*, 27 May 1886, p 2287. Emphasis added.
[52] This Act was the precursor to the current *Seeds Act 1982* (NSW). If the *Noxious Weeds Amendment Bill* 2004 (NSW) is passed, the *Seeds Act* will be repealed.
[53] This was later to be re-enacted in a 1993 version, by which time the provisions relating to weeds had been transferred from the *Local Government Act* to the *Noxious Weeds Act 1993* (NSW).
[54] *Local Government Act* 1906 (NSW), s 112(c).
[55] *Local Government Act* 1919 (NSW), s 470(1)(c).
[56] See the *Local Government Act 1906* and 1919 (NSW) and see Strang J, Chairman of Noxious Weeds Advisory Committee, Department of Local Government, Sydney, in his "Letter to the editor re noxious weeds",(1969) 5(2-3) *Farm Management Journal of Farm Management Sector of Australian Institute of Agricultural Sciences* 28.
[57] Carter R, "Strategies and Planning for Weed Control" in *9th Biennial Noxious Weeds Conference Proceedings* (Dubbo, 1997), p 9.
[58] Holzner, n 3, at p 4.
[59] Hamilton, n 15, p 178.
[60] Hamilton, n 15, p 178.
[61] Walker RB, "Fauna and Flora Protection in New South Wales, 1866-1948" (1991) 28 *Journal of Australian Studies* 17-28.
[62] Mosley JG, "Towards a History of Conservation in Australia" in Rapoport, n 4, at p 136; Frawley K, "The History of Conservation and the National Park Concept in Australia: A State of Knowledge Review" in Frawley K and Semple N (eds), *Australia's Ever-Changing Forests; proceedings of the first national conference on Australian forest history* (Dept of Geography and Oceanography, University College, Australian Defence Force Academy, Canberra, 1988), p 395.

philosophical developments[63] and the "destructive social and ecological conditions of colonial rule" from 1660.[64] In the Australian context it is argued that there have been a number of stages in the development of a conservation ethic, incorporating utilitarian, aesthetic and, most recently, ecological perspectives.[65] The legislation in place today arguably reflects a combination of conservation ideas – some based on the intrinsic value of the environment,[66] others more obviously reflecting the understanding of the environment as a limited resource to be used for human consumption while also being preserved for future generations. This idea has been described as 'wise use' managerialism[67] or, more commonly, as ecologically sustainable development.

This notion of environmental protection, whether for the sustainability of resources for use by future generations or as a reflection of the intrinsic value of the environment, certainly reflects a different attitude to that of the nostalgia evident in the British-focused colonial era. Native species are now considered to have some value, regardless of whether or not they can be harvested as a physical resource. However, what impact has this had on the definition of what constitutes a weed in Australia? Most significantly, it has led to the introduction of a new category of weed – environmental weeds, those plants that pose a threat to the survival of native species. This has been reflected in legislation, which identifies environmental weeds and mandates the abatement of the threats they pose to native species. For example, in New South Wales, *chrysanthmodies monilifera* (commonly known as bitou bush) and exotic perennial grasses have been listed as "key threatening processes" under the *Threatened Species Conservation Act 1995* (NSW).[68]

THE DEFINITION TODAY

This brief history of attitudes to plants shows that there have been a number of interests affecting what plants are valued and which deemed undesirable. These include the nostalgia linked to Britain following colonisation, economic interests (especially agriculture) and environmentalism. What of the position today?

The connection to Britain has been maintained to a limited extent, through heritage legislation. Species planted in or around the colonial era and in a particular precinct can be granted heritage protection and therefore be retained for their historical value, to remind us of the British influence in Australia since 1788. In New South Wales, the *Heritage Act 1977* (NSW) provides such protection. Under its provisions, there are lists of areas and items that are to be preserved. These include Brownlow Hill Estate, where non-native species are protected due to the Estate being "one of Australia's best surviving examples of a colonial garden" including "clipped hedges of box" etc. The area is protected on the basis that, inter alia, it represents "gardens and landscapes reminiscent of the 'old country' … representative of Colonial landscape design".[69] Heritage regimes seem to be the only official manifestation of the colonial bias towards the 'mother land' and the notion of a British identity affecting which plants are valued through government policy or legislation. At a deeper level, however, some have argued that even today we are "still largely aliens in an alien land",[70] although our cultural connections are now more diverse than simply British.

In contrast to nostalgia and history, the strong agricultural identity of the country has continued to permeate as a central element in weed control in the modern era. There remain

[63] Pepper D, *The Roots of Modern Environmentalism* (Routledge, London, 1984).
[64] Grove RH, *Green Imperialism: colonial expansion, tropical island Edens and the origins of environmentalism, 1600-1860* (Cambridge University Press, New York, 1996), p 486.
[65] Birrell, n 27, p 24.
[66] Bates G, *Environmental Law in Australia* (5th ed, Butterworths, Sydney, 2002), pp7-8 [1.8]-[1.9].
[67] Frawley, n 62; K Frawley, *Exploring Some Australian Images of Environment*, (Department of Geography and Oceanography, Australian Defence Force Academy, Working Paper 1987/1), p 33.
[68] *Threatened Species Conservation Act 1995* (NSW), Sch 3. Following listing of a threat, a threat abatement plan is prepared. A draft plan for bitou bush has been prepared and is likely to be placed on public exhibition some time in 2004.
[69] State Heritage Register – Brownlow Hill Estate, n 25. Another example is State Heritage Register - Bentinck Street Elm Trees . See www.heritage.nsw.gov.au.
[70] Seddon G, "Introduction" in Seddon and Davis, n 1, p 1, as discussed in Hobbs and Hopkins, n 16, p 107.

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specific legislative measures to address agricultural weeds,[71] reflecting the fact that weeds continue to be "one of the most commonly reported land degradation problems on broadacre and dairy farms"[72] and also through recognition of the contribution agriculture plays in the broader Australian economy. It is clearly acknowledged today that weeds cause losses to farmers, and therefore the entire economy of the country, with recent estimates suggesting a price tag of $5 billion.[73] Weeds are recognised as having the effect of invading "valuable grazing and agricultural land rendering it both unproductive and often unviable due to the costs of control".[74]

In relation to the degradation of the environment, economic assessment of the cost of weeds is "almost totally absent".[75] However, the practical effect of weed infestations on the natural environment is the alteration of habitat and increased competition for survival, leading to possible extinction of both native flora and fauna.[76] Concern relating to these threats has led to specific legislative measures to protect native species against foreign plant species. In New South Wales these measures include the *Threatened Species Conservation Act 1995* (NSW). In addition, there is a range of other legislative avenues that can address weed issues in an environmental context, although it is questionable whether those options are being used to their full potential for that purpose.[77]

In addition to legislative measures to protect individual interests placed at risk by weeds, a National Weeds Strategy has been developed to coordinate efforts to deal with weeds of all kinds, throughout the country.[78] The Strategy and State and Territory weed legislation are discussed in more detail below. However, one important element of the Strategy to note here is the broad definition it establishes in relation to what is a weed. According to the Strategy, "a weed is a plant which has, or has potential to have, a detrimental effect on economic, social or conservation values".[79] Therefore, it is a definition reflecting a diversity of interests.

The definition within legislative regimes of what counts as a weed now reflects the same range of interests as at the national policy level. The New South Wales position is instructive. In that State, the main piece of legislation regarding weeds is the *Noxious Weeds Act 1993* (NSW), which grew from the many incarnations of the *Local Government Act* (NSW). There is no definition of what is a weed within the *Noxious Weeds Act*. Policy dictates the definition. The Minister for Primary Industries establishes the relevant policy,[80] on the recommendation of the Noxious Weeds Advisory Committee. The latest version of the definition considers the impact of a plant species on agriculture, the environment and human health,[81] in contrast to the policy that existed until at least 1969, where species could only be listed if they posed a serious risk to agriculture.[82] Most jurisdictions within Australia have adopted a similarly broad definition. Some

[71] For example, in New South Wales the *Seeds Act 1982* (NSW) (although this Act may be repealed if the *Noxious Weeds Amendment Bill* 2004 (NSW) is passed) and *Stock Foods Act 1940* (NSW).
[72] Australian Weeds Committee, *Principles of Weeds Legislation Discussion Paper* (2002), p 3.
[73] Groves, n 5, p 27, where it is acknowledged that these costs are based on an assessment in 1996.
[74] *Western Catchment Blueprint* (2003), p 32.
[75] Groves, n 5, p 27.
[76] Groves R and Willis A, "Environmental Weeds and Loss of Native Plant Biodiversity: some Australian examples" (1999) 6(3) *Australian Journal of Environmental Management* 164.
[77] For a discussion of these in New South Wales see Arcioni E, "Out Damned Weeds! Weed management in Australia – Keeping Them at Bay" (2003) 8(1) *Australasian Journal of Natural Resources Law and Policy* 75 at 89-95.
[78] Agriculture and Resource Management Council of Australia and New Zealand, n 3.
[79] Agriculture and Resource Management Council of Australia and New Zealand, n 3, p 7.
[80] Formerly the Minister for Agriculture, until 1 July 2004. At that date, Mineral Resources, New South Wales Agriculture, New South Wales Fisheries and State Forests of New South Wales were amalgamated into the one Department of Primary Industries.
[81] Noxious Weeds Advisory Committee, *Policy on declaration of weeds* NWAC Policy Paper 1 (reviewed Feb 2002) available at http://www.agric.nsw.gov.au/reader/1973 [3.5]-[3.6]. However, if the *Noxious Weeds Amendment Bill* 2004 (NSW) is passed, the definition of what is a weed will be incorporated within the Act itself.
[82] Strang, n 56.

jurisdictions have enshrined such a definition within legislation,[83] others, like New South Wales, rely on policy.[84]

LEGAL ISSUES SURROUNDING WEEDS

Due to the detrimental impact weeds have on a variety of interests, the law in Australia intervenes to require control of weed species. The law also recognises that compensation may be awarded where the dispersal of weeds causes damage to individual interests. What follows is an outline of the main legislative regimes concerned with weed control, in the context of the National Weeds Strategy, and a brief discussion of the relevance of the common law.

In 1997 the National Weeds Strategy was published,[85] following mentions of the issue of weeds in a number of earlier national policy documents.[86] As the sub-heading of the Strategy suggests, it sets out "a strategic approach to weed problems of national significance". These weed problems include:[87]

- weed problems which threaten the profitability or sustainability of Australia's principal primary industries;
- weed problems which threaten conservation areas or environmental resources of national significance;
- weed problems where remedial action may be required across several States and Territories; and
- weed problems that constitute major threats to Australia's biodiversity.

Although the Strategy is restricted to "nationally significant" weed issues, also sets a policy framework that affects weed control at the State and local levels. It is also complemented by State policies.[88] The Strategy seeks to address weed problems through the goals of:

- preventing the development of new weed problems;
- reducing the impact of existing weed problems; and
- providing the framework and capacity for the ongoing management of weed problems.

The Strategy does so through allocating responsibility to different parts of the community and determining funding priorities for weed control activities in relation to weeds of national significance. However, it operates within the context of State-based legislation and does not

[83] *Land Protection (Pest and Stock Route Management) Act* 2002 (Qld), ss 37(1), 38; *Catchment and Land Protection Act* 1994 (Vic), s 58(4); *Weed Management Act* 1999 (Tas), s 9(1).

[84] For example, in the ACT, the ACT Weeds Strategy, established in 1996, at p 9 states that a species may be considered for "priority control" on the basis of prevalence, "ecological or economic impact … or simply because it offends aesthetically". The relevant legislation is the *Land (Planning and Environment) Act 1991* (ACT), but there is no mention of the basis of any listing there. In the Northern Territory, declarations are on the basis of, inter alia, the species constituting "a significant threat to the productivity of land and water, flora and fauna resources or, in some cases to human health": Department of Infrastructure, Planning and Environment, "Weed Management, www.ipe.nt.gov.au, follow links home>weeds. In South Australia, in order to assess weeds for proclamation, the "economic, environmental and social effects of weeds" are considered: Virtue J, "Weed Risk Assessment", http//sustainableresources.pir.sa.gov.au/pages/pests/weeds/plant3.pdf. See also Animal and Plant Control Commission – South Australia, "Weed Assessment Guide August 2002", pp 6-8.

[85] It should be noted that the Strategy is currently under review by the Australian Weeds Committee.

[86] See *The National Strategy for the Conservation of Australia's Biological Diversity* (Department of Environment, Sport and Territories, Canberra, 1996) pp 25-26; Australian and New Zealand Environment and Conservation Council, *Review of the National Strategy for the Conservation of Australia's Biological Diversity* (Environment Australia, Canberra, June 2001) pp 52-54; *The Decade of Landcare Plan* (Commonwealth Government, Canberra, 1991) and the *National Strategy for Ecologically Sustainable Development* (Commonwealth Government, Canberra, 1992).

[87] Agriculture and Resource Management Council of Australia and New Zealand, n 3, p 3.

[88] See for example the *New South Wales Weeds Strategy* (April 1998) available at www.agric.nsw.gov.au/reader/1981 The National Weeds Strategy was not the first weeds strategy in Australia. The Tasmanian policy was finalised before the National Weeds Strategy was completed: Ministerial Working Group for the Development of Tasmanian Weed Management Strategy, *WeedPlan: putting the pieces together: A Tasmanian Weed Management Strategy* (Department of Primary Industries and Fisheries, Hobart, 1996).

attempt to override existing structures in place at the local and State level but to make them consistent with the national policy framework. The full allocation of roles appears in the table overleaf:[89]

Individual landowners and land users have a role to: • Understand that weeds are an important factor in land degradation. • Detect and report new weed occurrences. • Understand land use systems and the cause/effect relationships which apply to weed problems. • Apply their knowledge and skills to improve weed management. • Integrate economic and environmental values in the management of weed problems on their land. • Cooperate with and, where relevant, plan weed management activities jointly with neighbours. • Support and promote sustainable production practices to minimise the development of weed problems.
Communities have a role to: • Coordinate local group development and action on weed problems. • Encourage local involvement in the management of public land. • Participate in local and regional weed management programs. • Raise awareness and improve education on weed issues.
Community and industry organisations have a role to: • Represent members' interests on weed issues. • Provide their members with information on weed management issues. • Participate in the development of codes and policies that will reduce the impact of weeds.
Local governments have a role to: • Assist with data collection and information exchange. • Assist with the coordination of community weed management programs. • Act as a community advocate on weed issues. • Support the activities of local self-help groups to undertake weed management activities. • Develop and apply local weed management strategies. • Exercise statutory responsibilities to encourage responsible weed management. • Manage weed problems on their own land responsibly, in cooperation with other landowners.

[89] Agriculture and Resource Management Council of Australia and New Zealand, n 3, pp 26-27.

State and territory governments have a role to: • Encourage responsible weed management by: o providing a suitable institutional and legislative framework; o developing and implementing effective policies and programs; o providing positive support through financial incentives and assistance schemes as well as appropriate standards and regulations; o provide leadership, coordination and resources for research, assessment, advisory services, education and public awareness programs on weeds; o encourage the development of effective weed management strategies at local, regional, State and national levels; o enhance cooperation and coordination of weed management at local, regional and State levels; o manage weed problems on their own land responsibly, in cooperation with other landowners.
The Commonwealth Government has a role to: • Manage weed problems on its own land responsibly, in cooperation with other landowners and in cooperation with the States to: o facilitate the development of an economic, social and cultural framework that encourages weed management as an integral part of sustainable land management; o provide the appropriate legislative framework, including quarantine and environmental legislation, necessary to reduce the impact of weeds; o provide the mechanism by which weed problems of national significance can be identified and addressed; o develop and encourage national weed management policies and programs; o provide leadership, coordination and resources for research, assessment, education and public awareness on weed issues of national significance; o encourage the development and integration of effective wed management strategies at local, regional and State levels; o develop with all stakeholders and balanced program of incentives, standards and penalties to ensure effective action to address weed problems.

In general terms, the Strategy allocates primary responsibility for weed management to landholders or land managers, with governments given the "fundamental role" of providing the economic and social framework within which weed management should operate.[90] It is questionable whether this has been done effectively, due to the costs of control and the lack of financial incentives for public and private landholders to control weeds. Nevertheless, both the State and Commonwealth levels of government have enacted legislation to control weeds.

Weed management regulation generally falls to the States and territories in Australia. However, the Commonwealth has an important role in relation to the prevention of weed problems through the quarantine regime. The *Quarantine Act 1908* (Cth) operates through "measures"[91] which, in the case of weeds, is the Weed Risk Assessment system. This system assesses species for known or potential weediness, according to available data and some controlled trials.[92] That

[90] Agriculture and Resource Management Council of Australia and New Zealand, n 3, p 25.
[91] A broad definition of "measures" appears in s 4.
[92] For further details see Arcioni, n 77, pp 80-87. See also Steinke E and Walton C, "Weed Risk Assessment of Plant Imports to Australia: Policy and Process"(1999) 6(3) *Australian Journal of Environmental Management* 157; Pheloung PC, Williams PA and Halloy SR, "A Weed Risk Assessment Model for Use as a Biosecurity Tool Evaluating Plant Introductions" (1999) 57(4) *Journal of Environmental Management* 239; Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *The Weed Risk Assessment System*, www.affa.gov.au. Follow links Home > Biosecurity Australia – Plant Biosecurity> Weed assessment of new plant imports>development of a new weed assessment system; Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Weed Assessment of New Plants Import Overview*,

system is currently under review by the relevant authorities and the Cooperative Research Centre for Australian Weed Management. In addition to quarantine the Commonwealth has the constitutional power and existing legislative provisions to be involved in the regulation of weed management through the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC). Under the EPBC, regulations can be used to mandate weed control,[93] or weeds could be listed as key threatening processes[94] which, as with the *Threatened Species Conservation Act 1995* (NSW) outlined above, can lead to the development of threat abatement plans.[95] There are also more indirect measures available under the legislation.[96]

None of these options have been used for weed management. However, there are moves to change the legislation at the Commonwealth level to give it a more explicit role in the control of weeds. On 19 November 2002 the Democrats introduced *the Environment Protection and Biodiversity Conservation Amendment (Invasive Species) Bill 2002* into the Senate. That Bill seems to try and consolidate a number of measures to address weed problems. It would incorporate a risk assessment process generally similar to the current Weed Risk Assessment system; place limits on the importation and possession of species listed as weeds and mandate the creation of threat abatement plans. The Bill was sent to the Environment, Communications, Information Technology and the Arts Legislation Committee on 26 March 2003 but the Committee's report has not yet been released.[97]

The Commonwealth has a key role in the prevention of weed problems but it is generally left to the States and territories to regulate in relation to weed management once a species has entered the country. Since 1997 there has been a goal to create consistency across State and territory weed legislation.[98] This is to occur through the provision of guidelines and adoption of them by the States and territories. "Principles" developed by the National Weeds Strategy Executive Committee[99] and Australian Weeds Committee have been released to this end, set out below:[100]

Legislation for weeds shall include the following:

- a duty of care binding on all persons;
- integrated action against the economic, environmental and social impact of weeds;
- actions to support preventive weed management;
- actions against human activity as a major vector of the spread of weeds and plants with weed potential;
- a precautionary approach to weed management decisions;
- weed management planning;
- community awareness and consultation;
- precedence over other legislation where essential for minimising weed impact and spread;
- maximum uniformity of provisions with other States and Territories.

www.affa.gov.au/content/output.cfm? ObjectID=D2C48F86-BA1A- 11A1-A2200060B04009; Walton C, Ellis N and Pheloung, *A Manual for using the Weed Risk Assessment System (WRA) to Assess New Plants* (Plant Quarantine Policy Branch P, Australian Quarantine and Inspection Service, Canberra, 1998).

[93] *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), ss 301A, 303(1), where weed species affect biodiversity. NB there is different geographic reach for each type of regulation – the former covers the entire Australian jurisdiction, the latter only Commonwealth areas.

[94] *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), s 183(1), note the definition in s 188(3).

[95] *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), ss 270A-271.

[96] For example, the *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth) provides for bioregional planning: s 176, bilateral agreements: s 45(2)(a) and management plans for Commonwealth areas: s 367.

[97] The Committee was due to give its report on the Bill by 25 November 2003. An extension of time was granted to March 2004.

[98] Agriculture and Resource Management Council of Australia and New Zealand, n 3, p 30, Object 1.3, Strategy 1.

[99] The National Weeds Strategy Executive Committee was disbanded on 30 June 2002. The Australian Weeds Committee has the responsibility for overseeing the Strategy and National weed management.

[100] National Weeds Strategy Executive Committee 'Core Principles of State and Territory Weed Legislation' (undated) pp 15-16.

The aim of the Principles is to create consistent, not necessarily uniform, legislation across the Australian jurisdictions. At present there are no obvious actions being taken to do either. Nevertheless, in each State and Territory jurisdiction there exists legislation to mandate control of weeds.[101] One common feature across all the State and territory legislation is the responsibility resting on landholders and managers to control weeds on their land, consistent with the National Weeds Strategy which states that "the primary responsibility for weed management rests with landholders/land managers but collective action is necessary where the problems transcends the capacity of the individual landholder/land manager to address it adequately."[102]

The State and territory legislation generally ascribe the same responsibilities to public and private landholders/land managers, except for New South Wales where the relevant act, the *Noxious Weeds Act 1993* (NSW), places a greater burden on private landholders. Private landholders under that legislation are required to, depending on the species, control weeds to the extent of eradication. In contrast, the most that public landholders are required to do is prevent the spread of weed species from their land.[103] In most of the Acts, species are listed as weeds and placed within a "control category" which may determine the severity of the threat posed by the weed and to what extent the weed must be controlled.[104] Landholders are then required to control the weeds to a specified extent on their land, although in some instances private landholders are also required to control weeds on land adjacent to their property, such as on some kinds of roadsides.[105] In addition to landholders' responsibilities, the legislation also regulates the sale and distribution of declared weed species[106] or weed-contaminated materials.[107] However, difficulties in enforcement frustrate the aims of the legislative regimes. If a landholder does not comply with the weed control obligations, an inspection must be carried out prior to any enforcement activity. There are clearly insufficient resources to ensure all land in Australia is inspected frequently, leading to a lack of detection and therefore of enforcement of weed control obligations.[108]

Outside the legislative realm is the potential of the common law to play a role in relation to the damage caused by weeds. It has been argued that there could be a general duty of care for "sustainable land management",[109] under which weed control could potentially fall. In addition, the established law of negligence provides an avenue of consideration. The law of negligence in Australia has been in disarray for a number of years. It could be described as a morass of facts and

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[101] Only direct legislative measures are discussed in this article. These are *Noxious Weeds Act 1993* (NSW); *Catchment and Land Protection Act 1994* (Vic); *Land Protection (Pest and Stock Route Management) Act 2002* (Qld); *Agricultural and Related Resources Protection Act 1976* (WA); *Animal and Plant Control (Agricultural Protection and Other Purposes) Act 1986* (SA); *Weed Management Act 1999* (Tas); *Weed Management Act 2001* (NT); *Land (Planning and Environment) Act 1991* (ACT). Legislative provisions which could provide an indirect basis of weed control are beyond the scope of this article. However, see for example, in New South Wales, Arcioni, n 77, at 91-94 where examples are given of weed control forming part of management planning under the *Local Government Act 1993* (NSW) and the *Environmental Planning and Assessment Act 1979* (NSW).

[102] Agriculture and Resource Management Council of Australia and New Zealand, n 3 p 3.

[103] *Noxious Weeds Act 1993* (NSW) ss 12, 13.

[104] *Noxious Weeds Act 1993* (NSW) s 9; *Catchment and Land Protection Act* 1994 (Vic) ss 60-63; *Land Protection (Pest and Stock Route Management) Act 2001* (Qld) s 38(2); *Agricultural and Related Resources Protection Act 1976* (WA) s 36; *Weed Management Act* 2001 (NT) s 7; *Land (Planning and Environment) Act 1991* (ACT) s 254.

[105] *Catchment and Land Protection Act 1994* (Vic) s 20(2) which states that "A land owner must take all reasonable steps to prevent the spread of regionally controlled weeds … on a roadside that adjoins the land owner's land."

[106] *Noxious Weeds Act 1993* (NSW) ss 28, 30; *Catchment and Land Protection Act 1994* (Vic) s 71; *Land Protection (Pest and Stock Route Management) Act 2001* (Qld) ss 39, 42-44, 46; *Agricultural and Related Resources Protection Act 1976* (WA) ss 72,75; *Animal and Plant Control (Agricultural Protection and Other Purposes) Act 1986* (SA) ss 52,54; *Weed Management Act 2001* (NT) s 9.

[107] *Noxious Weeds Act 1993* (NSW) s 28, 30-32; *Catchment and Land Protection Act 1994* (Vic) s 71; *Land Protection (Pest and Stock Route Management) Act 2001* (Qld) s 45-46; *Agricultural and Related Resources Protection Act 1976* (WA) s 75; *Animal and Plant Control (Agricultural Protection and Other Purposes) Act 1986* (SA) ss 52-54; *Weed Management Act 2001* (NT) s 9.

[108] See Arcioni, n 77 at 109 – 119 for a detailed analysis of enforcement measures under the New South Wales regime.

[109] See Gardner A, "The duty of care for sustainable land management" (1998) 5(1) *The Australasian Journal of Natural Resources Law and Policy* 29.

not much law. Indeed, some have argued that the High Court has "given up the search for a workable test entirely".[110] Therefore, one needs to return to the fundamental elements of: the existence of a duty of care, the standard of that duty and breach of that duty causing loss. If one considers the classic statements in *Donoghue v Stevenson* [1932] AC 562, the law of negligence is that 'A' has a duty to prevent reasonably foreseeable damage to 'B', if 'B' is someone who 'A' should reasonably have in their contemplation as someone who may reasonably be injured as a result of 'A's actions. The standard of care with which 'A' must comply is whatever is reasonable in the circumstances, considering the cost of preventive action, the likelihood and extent of potential risk etc. If that standard is breached, leading to 'B's loss, 'A' is liable to pay 'B' compensation.

How do these broadly stated principles apply in the case of weeds? It is clear that weeds can lead to a range of damage, including health damage to humans, financial losses to agriculture due to damage to crops and livestock, and threats to native biodiversity. In addition, due to the regulation of weed species in Australia, the existence of weeds on property can lead to financial loss to the landholder due to the cost of control as required under the legislation outlined above. It is questionable whether all kinds of loss can lead to damages under the law of negligence. However, it is clear that *some* kinds of damage caused by weeds would be recoverable. To explain that last statement, it is useful to consider a recent case dealing with weeds.

Dovuro Pty Ltd v Wilkins (2003) 201 ALR 139, decided by the High Court in September 2003, concerned the situation of farmers who had bought contaminated seed. Dovuro imported canola seed from New Zealand to its Melbourne and Fremantle sites. The seed was on-sold to local suppliers and then to farmers in Western Australia. The seed was contaminated with three species that, after their purchase by the farmers, were prohibited from import and sale in Western Australia by Agriculture WA. This led to a requirement for the farmers to control the species on their farms, including a suggestion of "destruction of seed derived from affected paddocks for a period of at least 5 years".[111] This obviously led to a financial burden on the farmers and they consequently sued Dovuro.

Initially, Dovuro had conceded they owed a duty of care to the farmers. On appeal they sought to retract that concession but to no avail. Even though the Court did not need to address the issue of duty, Hayne and Callinan JJ, in the majority, with whom Heydon J agreed,[112] seem to have accepted that Dovuro was under a duty to protect the farmers, as consumers of the goods they distributed, from a risk of injury by those goods which was reasonably foreseeable in the circumstances.[113] In the end, because the contaminants were not declared until after the farmers had purchased the seeds, Dovuro could not, at the time of sale, have foreseen the financial damage caused and therefore were not liable to pay damages. However, if the species had been declared between their importation and sale to local suppliers, it is arguable that the damage *would* then have been foreseeable by Dovuro and if they had persisted with the sale, Dovuro would have been liable for the consequent damage to farmers. Therefore, negligence certainly provides one avenue of consideration when determining the legal issues surrounding weeds and recovery of compensation for the damage caused by such species, although any such recovery depends on the circumstances of each case.

CONCLUSION

The way in which plants are characterised, as good or bad, deserving of protection and encouragement in their growth and spread, or requiring management, control or eradication, says much about the society which makes those choices, what that society values and why. The way in which plants are characterised in Australia and how that has changed over time reflects a change in the nature of Australian society, its values and characteristics. Non-Indigenous Australian identity has gone through a series of changes since 1788. Initially, it was focused on Britain. The focus

[110] Luntz H, "Round-up of Cases in the High Court of Australia in 2003" (2004) *Torts Law Journal* 1 at 54.
[111] *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139 at 149 (Gummow J).
[112] *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139 at 182.
[113] *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139 177 -179.

later shifted to agriculture. Concern for the environment also became a relevant factor. The Australian identity now seems to be a combination of a number of interests. The diversity in our identity reflects the multicultural origin of the population, the importance of agriculture to local, regional and national economies and a concern to protect the natural environment. Those changes in focus, or changes in identity, have affected how plants are characterised as beneficial and good and which are characterised as undesirable and unwanted, and therefore 'weeds', requiring eradication or control. These changes resonate today, in the way in which weeds are defined and a number of interests are considered in that definition. It is also reflected in how the law recognises damage caused by weeds, requiring control under legislation and, to a lesser extent, providing for compensation under the common law.

There are now conflicts between the various interests in determining when a weed will be declared under legislation, requiring compulsory control, and what form of control will be used. Conflicts emerge due to the possibility of some plants being detrimental to some interests but valuable to others. For example, some environmental weeds that invade natural bushland and compete with native species, possibly leading to their extinction in that area, may be financially valuable for agriculture as pasture plants. Potential conflict between interests may also arise in relation to the method of control adopted in managing a weed. For example, treating a weed with herbicide may advance agricultural interests if the plant is detrimental to farming, but pose an environmental risk if weed control is conducted near a watercourse, resulting in pollution of the ecosystem. There is no clear mechanism to resolve the conflicts.[114]

Weeds are plants growing where they are not wanted. In order to understand what is contained in that definition, one must question by whom the plant is unwanted and for what reasons. In considering those questions, it is clear that the content of that broad definition has changed over time in Australia. Today it clearly encompasses numerous plants, as there are a number of legitimate interests that are taken into account. However, as the list of officially recognised weed species grows there emerge conflicts between the interests at the heart of weed control. We have surpassed the challenge of recognising human health, the environment and the economy as issues important to weed control. The challenge ahead is to learn how those interests can be balanced.

[114] This has been acknowledged as a problem at the national level: Agriculture and Resource Management Council of Australia and New Zealand, n 3, p 23. However, see Sindel B and Johnson S (eds), *Proceedings of the 14th Australian Weeds Conference 'Weed Management: balancing people, planet, and profit'* (Richardson R.G and Richardson FJ, Melbourne, 2004). In relation to the balancing of interests at the New South Wales level, see Arcioni E, "The *Noxious Weeds Act 1993* (NSW) – balancing people, planet and profit?" in Sindal and Johnson, n 114, p 669.

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