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## The Noxious Weeds Act 1993 (NSW) – balancing people, planet and profit?

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## The Noxious Weeds Act 1993 (NSW) – balancing people, planet and profit?

### Abstract

Does the legislative system of weeds management in NSW balance the interests of people, planet and profit? Weeds pose a threat to agriculture, human health and the natural environment and therefore require management to address those threats. Such management is challenged by the need to balance the negative effects of weeds on a variety of interests with the financial costs and detrimental side-effects of the weed management itself. The central legal element of the weed management system in New South Wales is the Noxious Weeds Act 1993 (NSW). The Act cannot be considered in isolation. It must be considered in the context of the policies surrounding the Act, established by the Noxious Weeds Advisory Committee. Although the NSW weed regime acknowledges a number of interests, there is no guidance for how they are to be balanced against each other.

### Keywords

Noxious Weeds Act 1993 (NSW), balancing interests, Noxious Weeds Advisory Committee, policy

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# The *Noxious Weeds Act 1993* (NSW) – balancing people, planet and profit?

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**Summary** Does the legislative system of weeds management in NSW balance the interests of people, planet and profit? Weeds pose a threat to agriculture, human health and the natural environment and therefore require management to address those threats. Such management is challenged by the need to balance the negative effects of weeds on a variety of interests with the financial costs and detrimental side-effects of the weed management itself. The central legal element of the weed management system in New South Wales is the *Noxious Weeds Act 1993* (NSW). The Act cannot be considered in isolation. It must be considered in the context of the policies surrounding the Act, established by the Noxious Weeds Advisory Committee. Although the NSW weed regime acknowledges a number of interests, there is no guidance for how they are to be balanced against each other.

**Keywords** *Noxious Weeds Act 1993* (NSW), balancing interests, Noxious Weeds Advisory Committee, policy.

## INTRODUCTION

Weed control is a major issue in Australia and has been so for at least 150 years. It is well accepted that control is necessary to avoid the detrimental side effects of weeds. How that control takes place, by whom and under what formal arrangements is the subject of debate. Within that debate is a question of how to balance various interests – human health, the environment and the economy. In New South Wales, the formal weed control regime falls under the NSW Department of Primary Industries and the *Noxious Weeds Act 1993* (NSW). How does that regime balance the many interests at stake in weed control?

## BALANCING PEOPLE, PLANET, PROFIT

The balancing act to be undertaken is between people, planet and profit ('PP&P'). Those three elements need some explanation. In essence, the three elements are all interests of humans. The first, 'people', can be defined as a concern for the maintenance of human health. The second, 'planet', reflects the value of the natural environment. The environment has intrinsic value but it also has value for humans because of the need to sustain biodiversity as an essential characteristic of the planet in order to ensure human survival. The last, 'profit', reflects the importance of the economy in society and suggests that financial burdens should be avoided.

**Issue 1: Weeds affect PP&P** Each of those elements must be considered in three ways. First, it should be acknowledged that the existence of weeds can have a detrimental impact on all three interests due to their ability to cause allergies or be poisonous to humans, compete with native flora and fauna and place a financial burden on agriculture. Therefore, the notion of what is a weed should include species that have a detrimental impact on any of the three interests. This has been recognised by the Australian Weeds Committee, in adopting the National Weed Strategy Executive Committee's principles for weed legislation. One of those principles was "Integrated action against the economic, environmental and social impact of weeds. Weed management is an integral part of managing agricultural systems, natural resources, biodiversity and components of human welfare (directly e.g. health and aesthetic values, or indirectly e.g. viability of local communities)." (National Weeds Strategy Executive Committee undated).

**Issue 2: Control methods affect PP&P** Once it is accepted that weed control is necessary, the interests of human health, the natural environment and the economy must be taken into account when determining whether, and if so what, control obligations will be imposed and then in deciding the method of control to be adopted. This is necessary because the three interests identified above can be affected due to the possible detrimental impacts of some control methods such as the impact of herbicides on human and environmental health. In relation to the economy, the mere imposition of control obligations necessarily brings with it a financial cost of implementation on the land occupier and the law enforcement agents.

**Issue 3: Conflicts between PP&P** Thirdly, there is the question of how to make a decision regarding listing or control method where there may thereby be positive effects on one of the three interests (people, planet and profit) but detrimental effects on one or more of the others. Such conflict can occur in a number of ways. Some examples are where a weed is detrimental to the environment or agriculture but is prohibitively expensive to control, or where a species is detrimental to agriculture but provides habitat for endangered fauna. Arguably, the question of prioritising one interest over the others is the most difficult of the issues and, as will

be outlined below, is the one that has received the least attention in the formal NSW weed management system.

#### THE NSW LEGISLATION

If it is accepted that each of the interests deserves protection but that such a balance is also required between them, due to the effect of weeds and weed control, how is that accommodated by the NSW weed management system? In referring to the 'system' the focus here is on the legal regime regarding weed control. In NSW there is a range of legislative measures that have the potential to address the problem of weeds (Arcioni 2003). However, the central piece of legislation is the *Noxious Weeds Act* 1993 (NSW), which developed out of the many iterations of the *Local Government Acts* of NSW, which in turn developed from earlier legislation. The objective of the *Noxious Weeds Act* is to provide a general State-wide framework for weed control (Long Title). The operation of the Act is through the NSW Minister for Primary Industries (formerly the Minister for Agriculture. NSW Agriculture was amalgamated with three other agencies to form the Department of Primary Industries on 1 July 2004.) declaring a species to be a weed for all or part of the State and nominating a control category, which establishes the specific control obligations relating to that weed. The Act then sets out the options available to the relevant government bodies ('local control authorities' – local councils, or the Minister) to enforce the obligations of land occupiers. It is open to debate whether the Department of Primary Industries (and in the past NSW Agriculture) is the most appropriate government agency to be responsible for weed control, but that is beyond the scope of this paper.

Nowhere in the Act is there mention of any balancing between people, planet and profit. In relation to Issue 1, that of considering the detrimental effect of weeds on PP&P, that is ignored in the Act. The Act does not even establish how the decision regarding listing is to be made. It merely gives the Minister the power to list weeds. In relation to Issue 2, that of the impact of the control method and imposition of control obligations, no mention is made regarding what method is to be adopted, only the mandated end-result of control (e.g. "the weed must be prevented from spreading", "the weed must be fully and continuously suppressed and destroyed"). The only exception is the situation covered by section 18 of the Act, which allows for the relevant local control authority to require private occupiers of land who have not complied with their control obligations to carry out weed control in a "manner specified". That is, the authority can determine what method is to be adopted, but the Act does not outline *how* that method is to be chosen.

With respect to the imposition of control obligations, there is a differentiated level of control required, depending on whether the occupier is a private individual or a public authority. However, there is no hint of a consideration of the financial burden of such imposition of obligations on either type of occupier. In relation to the cost of implementing the Act, the first barrier is the need for inspection of properties to determine compliance and the consequent cost of doing so when the enforcement agents are responsible for a large area of land. There is an option for cost recovery of some enforcement procedures, but there are a number of difficulties that have led to calls for amendment (Arcioni 2003). With no mention of Issue 1 and limited provision made for Issue 2, it is not surprising that the Act is also silent in relation to Issue 3 - how to manage any conflict between the interests of people, planet or profit in weed control. There is no guidance on how to prioritise those interests in relation to each other.

#### NOXIOUS WEEDS ADVISORY COMMITTEE POLICIES

The Act does not explicitly address the interests of people, planet or profit, but the policies of the Noxious Weeds Advisory Committee ('NWAC') certainly go some of the way to considering the three issues outlined above. Under the Act, provision is made for the establishment of advisory committees to assist the Minister in exercising his/her functions under the Act. Such a committee has been established – the NWAC, with a brief to advise the Minister "on all matters related to noxious weed control" and to "Recommend to the Minister plant species to be declared as noxious weeds" (NWAC 2003). That Committee has also established a Policy ('Policy Paper 1') on declaration of weeds, which sets out "the criteria for deciding on the declaration of noxious weeds and their control categories" (NWAC 2002).

That Policy acknowledges the effect of weed incursions on all three interests by making those effects bases for declaring a species a weed under the Act. Namely, the "serious adverse effect" of the weed on "agriculture, the environment or human health" or the expected benefit of declaration for "agriculture, the environment, or the community" are relevant factors. This is a welcome change from the past when the focus was exclusively on the effects of weeds on agriculture and therefore the economy (Strang 1969). However, a detrimental effect on one of PP&P is not sufficient to have a weed declared under the Act. Other considerations include the extent of the weed's distribution and the intention of local authorities to control the weed if listed. This mix of considerations – the effects on the three interests along with issues of

possibility of control or extent of distribution – is also evident in the Policy’s explanation of why a weed will be put into a particular control category.

What of the second aspect – that of considering the effect of the method of control adopted and the consequent financial burden of requiring control? In relation to control methods, Policy Paper 1 does not add anything to the legislation. There is some guidance in relation to the use of biological control agents in the limited circumstances envisaged by section 18, explained above (NWAC 1995), although not explicitly referring to the *effect* of such a method of control on any of the interests discussed here. There is no general guidance in the NWAC Policies on which control methods should or could be adopted. However, there are other legislative regimes being developed to address these problems, such as regulating the use of herbicides. There was a concern that the wording of the legislation would lead to an emphasis on the “poison, burn and chainsaw brigade” (New South Wales Parliament 1993), but through the information services of NSW Agriculture (which will hopefully be continued with that agency’s amalgamation into the NSW Department of Primary Industries from 1 July 2004) and the bush regeneration movement, there are control methods being adopted that go beyond those negative stereotypes.

In relation to the cost of imposing control obligations, the Policy *acknowledges* the economic burden that obligations of weed control place on land occupiers and acknowledges that declaration may lead to a restriction on “personal freedom by forcing landholders to carry out activities which they would not otherwise carry out”. However, the Policy does not address how landholders are to manage those costs. There are funds available at a national (National Heritage Trust) and State (NWAC) level for control programs but such funds are obviously not available to every landholder with control obligations and the Policy states that declaration of a weed does not guarantee any additional governmental funding for weed control.

In relation to costs imposed by control obligations, it is important to remember that it is not only landholders who thereby bear a financial burden. Enforcement agents, predominantly local control authorities (councils etc.) are also burdened with the cost of inspection regimes, administration and enforcement action due to their role under the Act.

What then of the last and most problematic issue, that of prioritising interests over others in making decisions regarding weed management and control? The negative effects of cost and loss of liberty consequent on control obligations have led to the inclusion of a requirement of “a demonstrated public benefit” before a

weed will be declared under the Act. Presumably, this includes a combination of the interests at the heart of this conference, namely people, planet and profit. Requiring such a demonstrated public benefit before declaration of a weed arguably involves the *balancing* of some interests against others. That is, balancing the “benefit” of weed control (environmental? agricultural? health?) with the burdens of control obligations identified above. However, the Policy does not identify what interests are to be considered within that broad banner or the way in which they are to be treated or prioritised one against the others.

#### IMPLICATIONS OF THE SYSTEM

It is clear that the NSW weed legislation is generally silent on matters of balancing or even considering different interests in weed control but that there are policies in place to go some of the way to addressing those concerns. The implications of this structure, namely minimalist legislation with policy determining the real effect of the legal requirements, are both positive and negative. On the positive side, it allows for changes in priorities to occur in a speedier manner than if they were to have to pass through Parliament, as the relevant Minister can change the relevant policies at any time. However, that allows for one member of the executive government to have control over weed management (albeit on advice of the broad-based NWAC and the relevant government agency) to the detriment of full debate in Parliament by all elected representatives whose role is to legislate for the State. Perhaps a balance is required here as well? Namely, if balancing interests is of such great importance, it could be inserted in the Act in a general way, with the precise manifestation of that balance being given detail through the NWAC Policies. That would entrench a consideration of the three main interests – people, planet and profit, along with some guidelines on how to balance them, while still allowing for flexibility in the operation of the system. In taking that step, New South Wales would be charting new territory. Although the legal regimes in most other Australian State jurisdictions acknowledge the variety of interests relevant to weed control, they do not establish guidelines for how to balance them.

#### CONCLUSION

Balancing the interests of people, planet and profit is essential to a weed management regime, in order for the system to address all the effects of weed infestations and the methods available to control those weeds. In NSW, there is a clear legislative structure that, unfortunately, ignores these interests. However, there are policies endorsed by the relevant Minister which go some way

towards addressing the interests of health, the environment and the economy. Although the interests are acknowledged, especially the effect of weed infestations on those interests, the effects of control methods and burden of legal obligations are given a passing mention but no substantive consideration. Importantly, there is no clear outline of how the interests are to be balanced against each other, in circumstances where they conflict.

Changes could be made to improve the system, by entrenching the three main interests within the legislation (while keeping the detail in the policy to allow for flexibility), and more guidance in relation to what control methods should be adopted to avoid detriment to those interests that are at the heart of weed control. Some such guidance is already available through NSW Agriculture and the NSW and National Weed Strategies. Therefore, looking beyond the legal regime, constituted by a combination of the Act and the NWAC Policies, there are practical avenues which can be used to address the issues raised here.

In relation to the consequential issue of how to deal with conflicts between the three main interests identified, the only instance in the formal regime of an attempt to balance them is in the notion of an overriding "public benefit". Without giving it any explicit meaning, there is a risk that the system may result in unintended bias towards some interests. As was stated in the National Weeds Strategy, "[h]istorically, agricultural weed problems have received the greatest attention and funding for research, education, training and advisory activities. Government has led the way in this regard, but private industry has followed closely. Today, the Commonwealth and State governments provide considerable funding for such activities directed towards agriculture, far less for forestry and even less for bushland and conservation areas. Agricultural consultants are readily available to advise on weed management for crops and pastures, but few consultants are available to assist weed management programs in other situations. ... There is a need to broaden the weed focus." (Agriculture and Resource Management Council of Australia and New Zealand *et al.* 1999)

Therefore, the first step in ensuring a balance would be to outline what kinds of interests are encompassed by such a phrase even though it may never be possible to provide detailed guidelines on the application of the balancing act, as that inevitably rests on a consideration of all the circumstances.

However, any discussion of options for improvement must be placed within the context of two ongoing reviews of the NSW weed management system. A Review of the Act was conducted in 1998, in accordance with legislative requirements (*Noxious*

*Weeds Act* 1993 (NSW), NSW Government 1998), but has not yet been released by Cabinet. In addition, Robert Gledhill is conducting a review of the coordination and management of weed control in NSW, the results of which will hopefully be made known some time this year. The terms of reference of both reviews are arguably broad enough to encompass at least some of the issues associated with balancing the interests discussed above. It is hoped that in the process of both reviews, some of the points made above will be considered.

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