SUBMISSION TO THE

PRODUCTIVITY COMMISSION INQUIRY

INTO THE

IMPACTS OF NATIVE VEGETATION

AND

BIODIVERSITY REGULATIONS

Pastoral House
277-279 Great Eastern Highway
Belmont WA 6104
Phone: (08) 9479 4599
Facsimile: (08) 9277 7311
e-mail: pga@pgaofwa.org.au
Internet Site: www.pgaofwa.org

18th July 2003

IMPACTS OF NATIVE VEGETATION AND BIODIVERSITY REGULATIONS

OVERVIEW

The Pastoralists and Graziers' Association of WA represents a broad spectrum of landowners ranging from pastoral leaseholders to broadacre grain farmers, to major irrigators in the high rainfall zones of the State.

PGA has been integrally involved in Private Property Rights issues at both State and Federal level since the early 1990's and will argue that failure to recognise ***ex ante*** rights is the cause of both unnecessary diseconomy and injustice.

PGA was one of the first farmer bodies to recognise that the protection offered by Section 51 (xxxi) of the Federal Constitution does not extend to State laws.

As a consequence, the State of WA has been able to employ land-use planning, environmental and water and rivers laws that 'take' landholders' private rights to achieve perceived community benefits, without compensating them for their loss. Further, many of the resource management, and competition policy initiatives flowing from State/Federal agreements are interpreted by the States in a manner that seriously diminishes or removes private property rights.

PGA holds the West Australian seat on the National Farmers' Federation and as a member of the NFF Environmental Working Group on Private Property Rights, is an endorsee of the submission made to the Productivity Commission by NFF.

Because NFF has focussed on the impacts to rural landowners of the federal EBPC Act, and because there has been limited application to date of this Act in W.A., this PGA response will be specific to WA legislation.

Rights insecurity is reducing investment, and the private landowner willingness to support reasonable measures to protect the environment.

We will argue that this tendency has undermined the economy, the environment and justice.

BACKGROUND

In our opinion the Background to the terms of reference for this inquiry provides a reasonable summation of the current situation, - with the significant exception that no mention is made of the obvious injustices experienced by some unfortunate individuals.

The property rights focus of the PGA in Western Australia over the past decade, has been on the diminished property value that results from planning initiatives now being imposed by the WA Planning Commission in the regional areas of the State, bans on land clearing, and more recently on what we believe to be the mishandling of water reform and regulation.

The loss of water rights in WA is not confined to regulating water use, but also to the control of farming activities on private land above aquifers nominated for the future supply of urban communities.

The "blighting" or downgrading of private land and by the loss of traditional water rights through increasing government regulation under the guise of "community interest", "environmental responsibility", or "sustainability", is a disincentive to some private ownership and enterprise in rural WA.

Legislation empowering government agencies to **take without compensation** now forms the basis of most acts relating to planning, land, water and environmental management in the State, with massive penalties now in place to deal with offenders.

The personal accounts of PGA members Craig Underwood and Rob Klasson already appear in detail in the appendices of the NFF submission. Other members, with adverse experiences and situations caused by the WA ban on land clearing, by planning constraints on environmental grounds, or by the loss of water rights, or imposition of planning controls to restrict farming activity over water resource areas, have been encouraged to make separate submissions.

Farming Practices

The impact of various land and water use regulations upon the discretionary use that landholders may make of their assets is considerable as no doubt the Government intended that it should be. However, many of the consequences of these regulations were surely never intended or foreseen. In our opinion these unintended/unforeseen consequences arise from:

- The diversity and complexity of the activities the Government sought to regulate prevented those who designed the regulations from appreciating the circumstances of the people they sought to regulate. As is often the case with political matters, advice from organised and articulate lobbies tended to carry disproportionate weight.

- Laws that are open to interpretations that are too wide to satisfy ideal rule-of-law standards.

- The fact that those who make and administer the regulations are sometimes, but by no means always, Zealots with world views that the Parliament would not endorse.

- The tendency for costs of individual regulations to be cumulative over time.

- The ability of regulators when defeated in the application of one regulation to then produce another to achieve the same end. (If it is demonstrated that there is no risk of salination then a risk to biodiversity is argued.)

- The tendency for restriction of one activity to affect others. (clearing, cultivation, grazing and borrowing for instance.)

- The excessive time that bureaucrats are allowed and take to reach decisions.

Despite claims by State administration to the contrary, agreements to preserve native vegetation and biodiversity, have been translated as licences to ban all new land development for farming purposes, even where in our view there is very strong justification for further development to proceed – that is, there is little potential risk to the environment or future higher value land use.

It has hardly surprising that the Government has denied to itself the cooperation of many farmers. Some have cleared land, risking prosecution, and others, more subtly, have allowed natural events, such as fires to escape into scrub, or they may have encouraged their livestock into undeveloped areas knowing that these will gradually cause grasses and other introduced species to replace the remnant native vegetation.

Obviously clearing bans most affect those who have in the past preserved most of the remnant vegetation on private land, and who, in many cases, have also planted tens of thousands of trees.

Of new concern to the PGA is the transfer of control of remnant vegetation cases to the State's Environmental Protection Agency for assessment and prosecution.

Breaches of "Environmental Harm" are now to be interpreted by environmental officers on a wide criteria base. Fines ranging to $250,000 for individual land owners and up to $500,000 for corporates could be applicable - even in the event of an offence representing little more than "twig-snapping" by an owner.

Measures to protect species and natural environments including bans on clearing remnant vegetation restrict production of crops and livestock. Only in rare cases will opportunities for alternative activities, such as eco-tourism, produce comparable incomes. If they do, then regulation is not required to bring them about. What is more, bitter experience has taught that the new activity is also likely to run into regulatory restraint.

PGA PROPOSAL FOR BINNU

PGA has been negotiating with the State Department of Agriculture to take a more positive approach in addressing the needs of landowners in WA with land affected by development bans.

In some cases, even Departmental hydrologists and other salinity specialists concede that there is little or no risk of salinity or of serious damage to the environment by the sensible development of remnant vegetation.

From the landowner perspective, the ability to develop land held under his title is greatly more preferable than the payment of compensation in lieu – even if adequate compensation arrangements were to be put into place.

This applies especially to family farmland where pre-clearing-ban sub-divisions left some family members with undeveloped land as their share, but with the expectation that development approval would be automatic.

Landowners have resisted even applying for permission to develop, realising that their would be little or no chance of approval, and furthermore that the formal application process automatically invokes a Soil Conservation Notice, along with adverse impacts on commercial borrowing, or attempts to sell the real estate.

These are amongst the circumstances that exist in a "new land" development area known as Binnu in the Northampton Shire, just to east of Geraldton in WA's Mid West.

There are four categories of rural landowner in this precinct, which has a self-contained ecosystem:

- Those with developed, productive farmland which has little or no salinity risk
- Those with developed farmland with an existing or developing salinity problem
- Those with undeveloped land, where further development would pose a medium to high risk of salinity.
- Those with undeveloped land where the sensible clearing of remnant vegetation would pose little risk of environmental harm or of salinity.

Between 30 and 40 landowners in the Binnu precinct are adversely affected at present by bans on further development, or by bans on drainage and other initiatives to cope with problems on existing farmland.

PGA has proposed to the Department of Agriculture that instead of playing the role of "policeman" and prosecuting those who have been forced to address their individual problems (either by clearing sections of their properties without formal approval, or by draining salt affected sections), the Agency should instead take a proactive attitude by assisting Binnu landowners collectively to address their problems.

We believe that a strong case would exist for State and Federal funding to use the best resources of the relevant agencies to prepare a far-reaching development blueprint for the Binnu area aimed at:

- Identifying safe areas for further development and promoting a case for sensible development to proceed
- Identifying high risk salinity areas of undeveloped land and assisting the owners with adequate forms of readjustment.
- Assisting owners of developed farmland where salinity problems have arisen, to address those problems in the most progressive and positive way.

PGA contends that because of its earlier role as promoter of new land development, the role of the Department of Agriculture should now be to assist landowners affected by the change in policy direction, instead of playing a lead role in prosecuting them.

The guidelines proposed include:

- Using taxpayer funded services and date to assist affected landowners in determining the potential of their land for sustainable development, rather than forcing them through a futile application process.

- A priority to give real meaning to the term "{sustainable development" where the sensible development of land and water resources for agriculture is possible

- Assume as new leading role in resolving issues of equity, and to promote fair adjustment measures where private owners are denied use of their land.

- Recognising that environmental outcomes will advance rapidly, once equity issues are addressed fairly, promptly and adequately.

Whereas the proposal is in its early stages, there has been a recent encouraging response from the Department and we understand that both the State Ministers for Agriculture and the Environment

REGIONAL PLANNING

The W.A. Planning Commission has been able to vastly "diminish" the value of private property on a regional basis, by declaring it under reservation for "future conservation" or similar values.

The Peel region, just south of Perth, and taking in a number of key rivers feeding into the Peel Inlet between Pinjarra and Mandurah, was the first region of the State to be subjected to the Regional planning process, that started here in 1994.

Areas of prime riverfront farming property, as well as more than 10,000 hectares of adjoining farm property have been "blighted" by various future reservations varying from "floodway protection", "conservation" and "regional park"

These reservations not only restrict development and use of the land, but nominate the State Government as the ultimate buyer, at a time, and a price to suit the buyer. The Government claim is that compensation is available, - but experience in the Perth Metropolitan area, shows any compensation will be at the lowest common denominator.

Mr Phil Curran, hairman of the Peel Action Group which is affiliated with PGA, will provide further details on regional planning implications for private landowners.

STATEMENT OF PLANNING POLICY NO. 11

A statewide statutory planning policy to direct rural resource management through planning schemes at a Local Government level was gazetted in March 2000 as Statement of Planning Policy No 11 (SPP 11).

This policy started out under the previous State coalition government as a "right to farm" concept to protect farmers and rural landowners against other industries such as mining, as well as urban encroachment.

However SPP11 quickly became an instrument of the W.A. Planning Commission to impose land control regulations on landowners, in many cases to remove traditional rights without compensation.

PGA now regards SPP 11 as a major threat to private, rural land ownership in W.A., because it empowers the W.A. Planning Commission to direct local authorities to implement a wide range of planning controls over rural land use, including specific farming operations. Local authorities are obliged by the Town Planning and Development Act to have regard for a Statement of Planning Policy in the making of their planning schemes. If the Commission is not satisfied that a planning scheme conforms with the intent of a particular Statement of Planning Policy, it will not be endorsed for gazettal.

It is in this way that State Government agencies are already beginning to impose a series of controls and prohibitions over private rural land to "reserve" water, remnant vegetation, conservation areas, and other "community uses," without any requirement to compensate the owner.

PRODUCTIVITY

Conventional measures of productivity depend upon the values that freely acting individuals place upon goods and services.

Obviously, if producers are compelled to use resources for ends for which people are not prepared to pay as much as they would for the first-chosen ends, conventional productivity is reduced. In many cases production on the directly affected land is reduced to very close to zero.

However, because people cannot be excluded from enjoyment of many environmental ends, ability to 'free ride' prevents these entering the market economy. Therefore, comparisons of productivity before regulation and after are barely relevant.

There are many large areas in Western Australia where land once regarded as low yielding in terms of rural production, has since been developed to reach optimum productivity using modern technology and products.

Development opportunities delayed for reasons of perceived soil quality were therefore lost once WA introduced bans on the clearing of remnant vegetation.

Denial of this substantial potential to owners of remnant vegetation, without compensating them in any way for their loss, represents a further serious denial of productivity.

WA's Soil and Land Conservation Act is constructed in a way that offers no recognition of the rights of landowners to develop and manage their land.

The Act does not deal in any way with Productivity – being specific only to land degradation.

SUSTAINABILITY

The managers of agricultural and pastoral lands are aware that their operations need to be carried out in a sustainable manner or they have no future in the industry.

The concept of sustainability must take into account the economic, ecological and social aspects of the enterprise. In most regulations imposed by government only the environmental aspect is considered.

There are many cases in WA where environmental regulations curtailing farming activities on the grounds of preserving biodiversity have rendered the enterprise financially unsustainable which leads to a social cost to the community.

The push from government to institute wide spread tree plantings, promoted as being ecologically sustainable has many drawbacks. Some of these are related to environmental issues due to the lack of management of weeds and feral animals and erosion caused by the firebreak requirements. Another issue is the widespread use of chemicals that are applied from both the air and ground that has health implications.

The social cost to rural communities of tree plantations has been documented but the economic benefit to these communities has yet to be seen.

While we are in no position to say what is the balance, it must at least be asked whether the practice of imposing bans without adequate compensation does not prejudice the viability of some species and ecosystems that most people would wish to preserve in approximately their current state.

PROPERTY VALUES AND RETURNS

Bans and regulations reduce overall enterprise returns – sometimes to zero on the land directly affected.

Property values, which are a rational multiple of earnings, are also reduced.

An adverse impact of the COAG water reform process in WA on rural land values, has been the transfer of water ownership to the Crown.

Traditional water assets that have always been of feature of many WA rural properties, and have reflected property values accordingly, are now subject to major readjustment.

FLOW-ON EFFECTS

Economies of scale, including the capacity to cover living expenses, are important to almost any enterprise and certainly to agriculture. When production is prevented on part of a property it often affects adversely the equipment and services that may be justified for the whole enterprise.

This argument is readily extendable to rural communities. Regulations that restrict production, in turn restrict the economic justification for roads, wheat bins, employment, schools, shops etc.

ATTITUDES OF FINANCE PROVIDERS

Lenders require security for their investment and, since they prefer not to sell people up, also look for reliable cash flow.

Any regulation that prejudices the earning capacity of an asset causes the rational lender to prefer other investments.

A West Australian example of this effect is that when the owner of undeveloped farming land decides to apply for a Notice of Intent to clear all or portion of his property, it is automatic procedure for a Soil Conservation Notice to be applied to his property. Evidence of the impact of this on the pre-existing operations of the owners due to the result loss of lender confidence, will be presented by individual members of the PGA.

The transfer of water rights (mentioned above), and ongoing uncertainty in WA over access to water for commercial users, is also beginning to impact on lenders.

RECOMMENDATIONS

The PGA's principle recommendation is that landholders be compensated for the taking of pre-existing rights. Justice is not always clear and we all experience trivial injustices which tend to be offset by trivial windfall gains. Nevertheless, when people expect to obtain substantial compensation for the loss of esteem caused by slighting or careless words and for failure to honour the implied contracts associated with the provision of goods and services, surely private citizens are entitled to be recompensed for the deliberate taking of a right occasioning non-trivial material loss.

The PGA, when considering individual cases, has come across examples of bad law, bad administration, the application of bad science and sheer bloody mindedness. It does not contend that these are the rule, indeed it is often given reason to appreciate good law and competent, helpful administration. Nevertheless, as other submissions made by reference to people's own cases will demonstrate, such failures are not rarities. They cannot be entirely eliminated by any administration.

A burden placed upon the taker to compensate the owner would serve three purposes. It would:

- Mitigate a class of serious injustice. (Bear in mind that the uncompensated losses are people's savings that are being expropriated.)

- Allow people to invest their time and material resources and banks to lend without the fear of 'sovereign risk' and consequent economic loss.

    - Cause the taking authority to ration its takings to those where the community benefit is expected to exceed the individual loss and consequent compensation payment.

Hard cases will arise. What is the pre-existing right of a person without clear legal title to a water supply that for three generations has been assumed to attach to his property? (We contend that such private rights should be recognised.)

Administration will sometimes be difficult. What is to prevent farmers claiming 'compensation' for remanent vegetation they never did intend to clear? (We contend that to achieve workable administration farmers will have to accept fairly arbitrary rules related to surrounding practice concerning the proportions of their properties supporting trees/remnant vegetation.)

These sorts of difficulty already arise and in any case are insufficient reasons not to allow the presumption of compensation for takings by the crown, as there is for the cases of private takings. All the Courts need ask is: 'Would compensation be required if a private person has assumed the particular right from another'.

The State of Western Australia has made significant progress in applying its rights to ignore compensation to private landowners in an increasing number of situations.

Many of these opportunities for land taking and control by the State, flow from Commonwealth directives and reform initiatives, often from Council of Australian Government agreements.

The Commonwealth Constitution in most cases provides for the rights of private landowners to be compensated where their land is taken or diminished in value.

PGA would like to see similar pressure applied by the Commonwealth Government to the States, not only to force the payment of much-needed compensation to private individuals, but also to make the State Government taking and "blighting" of private land far more accountable.

Rural productivity in W.A. will be increasingly impaired if landowners are forced to concentrate instead, on defending their property.

CONCLUSION

Grower organisations such as the Pastoralists and Graziers' Association were formed principally to deal with the productivity objectives of their members, and therefore contribute significantly to the prosperity of those members, the State and the Nation.

Since the Decade of Landcare, Native Title, World Heritage Listing, various COAG Reforms and the many planning and resource regulation initiatives of both State and Federal Governments, PGA member resources have had to be increasingly directed at the mounting fight to protect private property rights.

Currently, Native Title is the only area where funding (Federal) is available to ensure that the interests of landowner/leaseholder members are in any way represented.

The increasing array of natural resource management and environmental initiatives appear to have carried abundant funding for non-landowner, political lobby groups such as the Australian Conservation Foundation and its affiliates, World Wildlife Fund, Greening Australia, the Environmental Defenders' Office and many others.

Landowner/producer lobby groups are buckling under the increasing weight of responsibility for private property rights in rural Australia. In most cases, notice of the many anomalies and injustices developing in the area of property investment and management, - those that will have a widening adverse impact on national productivity, - are being brought to the attention of the Federal Government by organisations such as PGA at their own cost.

Any review of this position by the Productivity Commission would be most welcome.

❄❄