PRODUCTIVITY COMMISSION

ENQUIRY INTO

THE IMPACTS OF NATIVE VEGETATION AND BIODIVERSITY REGULATIONS

Submission by:	**John Dival** **Farmer**
Address:	**Western Australia**
Contact:	**Tel.** **Fax.**
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1 SUMMARY

1. In 1992 the Western Australian State Government signed a number of intergovernmental agreements to protect the environment. Notwithstanding that these agreements contained provisions that dealt with equity issues, environmental controls were imposed on rural Western Australia without any thought or consideration of issues of equity for the private landowner. In an effort to placate those who complained of the loss of the use of their land, a Native Vegetation Working Group was established to look at the economic burden carried by individual landowners. Their Final Report was a subjective, patronizing document that increased the anger of farmers.

2. There has been a deliberate move by the Western Australian State Government to avoid payment of compensation to those who have lost the legitimate use of their land as a result of the protection of native vegetation and biodiversity for public good. The rights of the landowner, which have been established since the *Magna Carta*, were recognised in the drafting of the Soil and Land Conservation Act (WA)1945. These rights have been removed, not by statute, but through the use of policy and administration. The term " presumed right to clear" was coined and became commonplace in creating the impression that the right to clear never existed.

3. Many Western Australian farmers are now confronted with an uncertain future as environmental controls are imposed on agricultural land that was intended to contribute to their livelihood. The controls have been imposed with a total disregard of the rights and legitimate expectations of the many private landholders in the agricultural region of Western Australia who have native vegetation growing on otherwise productive farmland. In many cases significant areas of land have not only been totally removed from productive use, thereby denying the property owner the opportunity to reduce the unit cost of the farming operation, but have become a cost to the landowner in terms of fire management and pest control. In other cases there is a gradual decline in productivity as the risk of prosecution for the removal of regrowth increases and the regrowth continues to grow.

4. Neither the Soil and Land Conservation Act (WA)1945, nor the Environmental Protection Act (WA)1986 have compensation provisions, therefore no budgetary restraint exists to limit the taking of private land for public conservation by the State of Western Australia. This is reflected in the methodology used to process clearing notifications whereby the refusal is often based on broad considerations such as regional soil mapping rather than detailed assessment. As a result significant areas of land has lost its potential for agricultural production without proper assessment and without compensation to the owner.

5. The misrepresentation by some government agencies in Western Australia of the intergovernmental agreements and state statutes relating to the protection of native vegetation and biodiversity, the creation of policies and procedures that do not have statutory support, and collusion between agencies to prevent the removal of native vegetation, has been brazen and demoralising. The pattern of misrepresentation by government agencies could be the result of a misunderstanding of their statutory duties, or the result of collusion in the over-zealous pursuit of environmental goals outside of statutory limitations.

6. In either case, it can be argued that these misrepresentations have occurred against a background of breaches of the Western Australian Public Sector Management Act (WA)1994 Code of Ethics by some agencies. This has resulted in the deception of both landowners and the general public as to the legitimate expectation for the future use of private agricultural land in Western Australia. The actions of these agencies led to the establishment of an inquiry by the Western Australian Legislative Council Standing Committee on Public Administration, which has yet to report to Parliament.

7. A State Cabinet decision in April 1995 directed that *"existing controls on clearing under the Soil and Land Conservation Act and the Country Areas Water Supply Act be augmented by a system to ensure that other natural resource conservation issues are considered before any further clearing occurs on private land"*. The Cabinet decision included a requirement that statutory support for the "*system*" of augmentation be approved by parliament. This was not done and it is arguable that the Commissioner for Soil and Land Conservation acted ultra vires to the Act thereafter.

8. The obstacles placed in the way of those wishing to remove native vegetation for agricultural purposes have the objective of preventing any further clearing in the agricultural region. The use of the *Precautionary Principle* has all but removed science from the debate, and the politics of the issue sees governments from either side of the political spectrum unwilling to upset the green vote.

9. However, if a financial cost to the Government for the regulatory taking of private land for public good were imposed, more prudence would be exercised in the choice of the conservation target. This would be in accordance with the Inter Governmental Agreement On The Environment which states that:

"…… the Parties to this Agreement acknowledge that the efficiency and effectiveness of administrative and political processes and systems for the development and implementation of environmental policy in a Federal system will be a direct function of the extent to which the total benefits and costs of decisions to the community are explicit and transparent;" and, *"ensuring that measures adopted should be cost-effective and not be disproportionate to the significance of the environmental problems being addressed."*

10. It is apparent that equity issues urgently need addressing in order to achieve true sustainable development as embraced by the inter governmental agreements. The unrestrained ability of the Government to remove land from

productive use comes at great economic cost to both individuals and the State. Claims of the economic benefit of biodiversity to agriculture are vague and unsubstantiated. Salinization and the loss of biodiversity in the Western Australian wheatbelt are used as examples of the serious economic loss that can occur when native vegetation is removed. However the Environmental Protection Authority, in their Position Paper No. 2, December 2000, state that a deep-rooted vegetation cover as high as 70% would be needed to maintain hydrological function in the agricultural area. It is hard to determine what point this statement intends, however it is unlikely that it is one related to economic function.

An indication of the loss of productivity as a result of the regulation of clearing native vegetation may be gained from the 1995 Cabinet minute. A figure of not less than $100million was estimated as the likely cost should compensation be provided to those who lost use of their land. As most of this land would be farmed as an adjunct to the cleared balance of the property an average return on capital may be as high as 7%, indicating a minimum annual loss for the affected landowners of $7 million.

2 INTRODUCTION

I welcome the opportunity to submit matters for consideration in this inquiry. As a citizen I have a deep concern with the equity issues which have emerged as a result of both the administration of the Soil and Land Conservation Act 1945, and the accountability of some agencies in dealing with land clearing notifications that have been referred to them. As a farmer I have a particular concern for the future of our own beef cattle enterprise as we have significant and increasing areas of regrowth timber that we may or may not be allowed to control, resulting in significant loss of production. As member of the Property Rights Committee of the Pastoralists and Graziers Association of WA I am aware of the widespread distress that land clearing regulations are causing.

These concerns are heightened by the fact that the Environmental Protection Bill (WA) 2002 is now before the Western Australian Parliament. This bill will remove any vestige of natural justice that might have remained had our existing legislation been administered as intended by parliament and will finally shut the door on any further clearing of agricultural land.

The "Issues Paper" for this inquiry asks the question – *Would currently uncleared land be as productive as land presently in use?* The answer is that we may never find out. What we do know is the concept of an agricultural system in Western Australia based almost entirely on shallow rooted annual species no longer exists. Deep-rooted perennials such as fodder trees and bushes, and oil and timber producing trees, are now an accepted part of agricultural production. They do well on soils that were previously thought unproductive in the traditional sense, and help return a productive capacity to salinized soils. The answer to the question is perhaps that it should not be asked. Given the initiative of those involved in primary production nobody can foresee the future of agriculture accurately enough to answer it. The real question is what price is the community prepared to pay to take away the productive capacity of private land that remains uncleared if the biodiversity conservation benefits have not been costed?

In this submission, I intend to deal mainly with the wider nature of the issues relating to land clearing regulation. I believe that an examination of the various intergovernmental agreements, statutes, policies, and political statements relating to land clearing, and the interpretation of them by government agencies, is important. For several years I have been associated with the work of Ferguson, Kenneison and Associates on the injustices being perpetrated on farmers in this matter and I am therefore aware of the detailed nature of the matters relating to individual cases they will be placing before your Committee. For this reason I will not be dealing with individual cases.

3 THE HISTORY OF THE PROBLEM

It is important to review the history of this matter so that current issues can be placed in context. The events that have given cause to this inquiry probably have their genesis in the global environmental awakening of the mid 1980's that followed the publication of the *World Conservation Strategy: Living Resource Conservation for Sustainable Development (1980).* The move towards protecting our environment gained momentum with the arrival of the "enhanced greenhouse effect" theories in the mid 1980's. The environmental movement swept up governments worldwide and the Australian Government embraced it with vigor. Offshore treaties on conservation and environmental issues were signed with very little thought as to how they would be implemented or the scientific validity of the declarations they contained.

3.1 A State Conservation Strategy for Western Australia

Attempts to put the 1980's agreements into the real world at a State level failed to meet the approval of hard line conservationists. The document *"A State Conservation Strategy for Western Australia" (Jan 1987)* emerged after eighteen months of regular consultative committee meetings. A clear divide existed within the committee between the dedicated conservation interests, and the agency and industry representatives. The views of the latter group were reflected in the final report.

Once published the report became the subject of bitter public comment by the Committee Chairman (who was also CEO of the then Department of Conservation and the Environment) who felt that the report did not go far enough in the protection of the environment. It was the start of the battle to impose biodiversity preservation controls over private land without compensation.

The 1990's saw the emergence of a more professional environmental movement with considerable media skills, and environmental politics began to take hold. The theories of the enhanced greenhouse effect and global warming were accepted by world politics because to raise an argument against them was political death. This gave strength to a more radical environmental conservation push and ecopolitics gathered momentum.

3.2 Intergovernmental Agreements

By 1992 a number of intergovernmental agreements between the Commonwealth and the States and Territories had been signed. The effect of this is outlined in "*Green-letter laws"* below. No statutes had yet been passed by parliaments but the environmental movement had the backing they were looking for. The "precautionary principle" was included in the *Intergovernmental Agreement on the Environment* (IAE) at clause 3.5.1 and it states:

> *Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures*

to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and

(ii) an assessment of the risk-weighted consequences of various options.

This principle guides the conservation movement and environmental agencies, and by invoking it they are able to gain control of the conservation agenda. The principle is now incorporated, or being incorporated, into environmental legislation and has perhaps ended the need for scientific fact to be an element of agency decision making.

3.3 State Cabinet

In April 1995 State Cabinet endorsed a series of recommendations including proposals to:

- *remove the presumed right to clear native vegetation in landscapes containing less than 20% of the original vegetation;*
- *modify the process for assessing clearing proposals to include the consideration of nature conservation;*
- *provide better Government support to remnant vegetation protection and management.*

Amongst other recommendations of the Cabinet Minute were – That Cabinet;

At 2. – *Agree that existing controls on clearing under the Soil and Land Conservation Act and the Country Areas Water Supply Act be augmented by a system to ensure that other natural resource conservation issues are considered before any further clearing occurs on private land.*

At 3.(e) – *Examining the case for compensation as part of the comprehensive review of the Soil and Land Conservation Act. ……;*

At 3.(f) – *Drafting a modified Soil and Land Conservation Regulation under the Soil and Land Conservation Act to implement a), b) and c);*

Neither (e) nor (f) were acted upon by the Government. However cl.2 resulted in a Memorandum of Understanding (MoU) between the Agriculture Western Australia (AGWA), the lead agency, and the Department of Environmental Protection (DEP), Environmental Protection Agency (EPA) and others.

The MoU became the controlling document for the actions of agencies in controlling land clearing. Over several years the validity of the MoU was persistently challenged by the environmental consultants Ferguson, Kenneison and

Associates and it became a discredited document and was revoked by the present Minister for Agriculture.

Several matters questioning the legality of the 1995 Cabinet Minute have been placed before the Western Australian Legislative Council Standing Committee on Public Administration *Inquiry Into Land Clearing Applications* by the Ferguson, Kenneison and Associates. It is argued that the endorsement by Cabinet of the AGWA proposals was an executive decision that was not backed by statute, and in doing so could have recommended actions that could be ultra vires to the Soil and Land Conservation Act 1945.

It was also wrong that those affected by the Cabinet Minute were prevented from examining it because of "Cabinet confidentiality" notwithstanding that it was also in the hands of the Agencies. This is seen by many as an abuse of executive power, as the document, despite having an enormous impact on the farming community, was being treated as if it were black letter law – but it was not a public document. It was not a law that could be examined to see if landholders were being treated fairly and according to the law by the agencies. However, a copy of the Minute was obtained and once seen, questions regarding the legality of the document were quickly raised.

3.4 Green-letter laws

In July 1993, Dr Brian O'Brien, who was foundation Director and Chairman of the EPA in Western Australia in 1971, presented a paper on Federalism and Ecopolitics to the Twelfth Annual Conference of the National Environmental Law Association in Canberra. It was amazingly prophetic in its content. In the opening abstract to his paper Dr. O'Brien said:

> *In 1992 the nine Australian Governments endorsed an Intergovernmental Agreement on the Environment, a National Greenhouse Response Strategy, and a National Strategy for Ecologically Sustainable Development. These, and related Agreements of '92, have added ill-defined and wide-ranging "green-letter laws" to the black-letter laws of governments and the Constitution, and the grey-letter laws of government administrations. These "green-letter laws" have no proven value to environmental protection but are a source of great uncertainty in future decision making.*
>
> *The interactions of ecopolitics and federalism, driven by global forces associated with the United Nations Conference on Environment and Development, made many of the flaws of these Agreements inevitable once the decisions were made to formalise New Federalism in the environmental field.*

Elsewhere in the paper he said:

> *The principles, policies, and hundreds of commitments of these and companion documents are now "green-letter laws", put in place without parliamentary scrutiny, but as binding on all bureaucracies of each of*

the nine Australian Governments as the signature of a Prime Minister or Premier can make them.

He continued:

It is unclear how they should be added on to the black-letter laws created largely by Parliament and the grey-letter administrative controls, and how, or if, they modify the more conventional laws.

There can be no doubt that they will increase government interventions, influence decisions, and introduce unnecessary additional environmental bias into interpretations and conditional approvals. They give an anti-development ethos to notions of sustainable development, with opportunistic social engineering in many areas.

There seems no direct legal accountability or redress against green-letter laws in the way that there is for black-letter and grey-letter laws. The latter and their applications can be challenged by bringing procedures before a judge and the legal system can progress towards a solution. Evidence and proofs of reality can be used to challenge government's decisions, conditions, and approvals, and determine an outcome.

But can there be legal challenges against green-letter laws of the Agreements of '92, which give policies and directives? Dr. O'Brien asks and he later adds that: *The demonstrable fact that some of these green-letter laws are remote from reality adds to the difficulty of dealing with them. The only redress seems via the political process and ecopolitics, perhaps case by case.*

The accuracy of the predictions of Dr. O'Brien is stunning and it is hoped that a way to avoid the need for redress "*case by case"* can be found.

4 AGENCY ETHICS AND INTERGOVERNMENTAL AGREEMENTS

4.1 Public Sector Code of Ethics

The Public Sector Code of Ethics is a provision of the Public Sector Management Act (WA) 1994 which place obligations of ethical behaviour on the public sector. This Act followed the Western Australian 1992 Royal Commission that highlighted examples of inappropriate behaviour of both elected and non-elected officials.

Farmers in Western Australia have a legitimate expectation that the Code will be observed by the agencies responsible for policies and procedures that implement the various intergovernmental agreements that impact on their livelihood. They also have a legitimate expectation for procedural fairness when notifications of

intent to clear native vegetation are processed. Important provisions of the Code in respect to this are:

JUSTICE

Intent *–*

Be fair, use and share power for the common good, take non-discriminatory action

Applying this principle means*:*

- *Using and sharing power for the common good of both individuals and society.*
- *Practicing universal fairness and equity.*
- *Not treating people as a means to an end.*
- *Not discriminating against, abusing or exploiting people.*

In order to meet the requirements of the ethical principal of Justice, we have a responsibility to comply with the following values and behaviours:

Fairness and Equity

We have a responsibility to:

- *Act impartially to serve the common good, while recognising that equity can involve treating people differently according to their circumstances.*
- *Practice universal fairness, and protect people's rights to due process, equal opportunities and equitable outcomes.*
- *Develop and maintain an environment that is free of fear or favour and is open, accountable and impartial.*
- *Provide for advocacy and the fair resolution of grievances and complaints brought by employees and the public.*

Lawful obedience

We have a responsibility to:

- *Uphold the laws of the Commonwealth of Australia and the State of Western Australia*
- *Faithfully and impartially carry out lawful decisions and policies.*

RESPECT FOR PERSONS

In order to meet the requirements of the ethical principal of Respect for Persons, we have a responsibility to comply with the following values and behaviours: ***…***

Openness

We have a responsibility to:

- *Be open about decisions and actions we take and the reasons for those decisions and actions.*
- *Recognise that others have a right to know about decisions and actions that affect them*
- *Provide information that enables people to make informed decisions themselves*

The code has not been properly observed by some agencies in implementing the provisions of the intergovernmental agreements on environmental conservation and processing notices of intent to clear native vegetation from agricultural land. Public documents and information obtained under the Freedom of Information Act 1992 provide evidence of abuse of the provisions of the Public Sector Code of ethics.

4.2 Intergovernmental Agreements On The Environment

These agreements have formed the basis for environmental protection in Western Australia. The most significant of these are the:

- *Intergovernmental Agreement on the Environment* (IGAE) 1990.
- *National Strategy for Ecologically Sustainable Development* (NSESD) 1992.
- *National Strategy for the Conservation of Australian Biological Diversity* (NSCBD) 1996.

More recently, in August 2001, Commonwealth, State and Territory Governments committed themselves, through the Natural Heritage Trust, to the *National Framework for the Management and Monitoring of Australia's Native Vegetation* 2001.

The provisions in the intergovernmental documents support the concept of sustainable economic development and the need to have productive land use. With the exception of the *National Framework For The Management And Monitoring Of Australia's Native Vegetation,* they also recognise the need for economic and equity considerations and the IGAE states in Schedule 2 that *"…the use of natural resources and the land remains a matter for the owners of the land or resources…"*.

Most importantly, the NSCBD provides for "*fair adjustment measures for those whose property rights are affected*". It should be noted that the use of the term "property rights" is used here in the normal context – not in the context of "tradable property rights" for vegetation management as referred to in the *National Framework for the Management and Monitoring of Australia's Native Vegetation.*

Notwithstanding the equity provisions of the primary agreements, agencies are presenting only the conservation provisions of the agreements to the public. The selective omission of the equity provisions of the intergovernmental agreements in various guidelines, policies, and the drafting of statutes, is a breach of those agreements and therefore a breach of the Public Sector Code of Ethics. It has assisted in building a public perception that there is nothing immoral in the state

depriving landowners of the right to productive use of their land without just compensation.

4.3 Biodiversity value?

The *National Framework For The Management And Monitoring Of Australia's Native Vegetation* goes further in the effort to justify the regulatory taking of private land and claims in its *Vision* statement that;

> *This vision also recognises the inextricable link between the conservation of biodiversity and sustainable agriculture. Conservation of vegetation is neither an alternative land use nor an opportunity cost - it is an investment in natural capital, which underwrites material wealth. Conservation of biodiversity means much more than just protecting wildlife and its habitat in nature reserves. Conservation of native species and ecosystems, and the processes they support -- the flows and quality of rivers, wetlands and groundwater, and soil structure and landscapes -- are all crucial to the sustainability of primary industries.*

Statements such as this are found in many conservation publications, and yet when the authors are pressed for detail none is given. Most agricultural production throughout the world is undertaken as a monoculture and in addition, Australian agriculture depends almost entirely on the use of exotic species. Farmers attract criticism when they argue the validity of the biodiversity concept as espoused above. That is not to say, however, that Australian farmers do not recognise the considerable benefit of deep-rooted vegetation, native or otherwise, as well as symbiotic biodiversity, for sustainable agriculture.

4.4 Agreement content

Abbreviated selections of some of the provisions of the three earlier agreements are listed below with bolding added to clauses that I believe are significant:

From The Inter Governmental Agreement on the Environment

> *AND WHEREAS the Parties to this Agreement: ……*
> *ACKNOWLEDGE that the efficiency and effectiveness of administrative and political processes and systems for the development and implementation of environmental policy in a Federal system will be a direct function of:– ….*
>
> *(iii)* ***the extent to which the total benefits and costs of decisions to the community are explicit and transparent;***
>
> *3.2 The parties consider that the adoption of sound environmental practices and procedures, as a basis for ecologically sustainable development, will benefit both the Australian people and environment, and the international community and environment.* ***This requires the effective integration of economic and environmental considerations in decision-making processes, in***

order to improve community well-being and to benefit future generations.

3.4 Accordingly, the parties agree that environmental considerations will be integrated into Government decision-making processes at all levels by, among other things: ….

(iii) ensuring that measures adopted should be cost-effective and not be disproportionate to the significance of the environmental problems being addressed.

SCHEDULE 2

5. ***Within the policy, legislative and administrative framework applying in each State, the use of natural resources and land, remain a matter for the owners of the land or resources, whether they are Government bodies or private persons.***

From The National Strategy for Economically Sustainable Development

The Guiding Principles are:

- ***decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations***
- *where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation*
- *the global dimension of environmental impacts of actions and policies should be recognised and considered*
- *the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised*
- *the need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised*
- *cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms*
- *decisions and actions should provide for broad community involvement on issues which affect them*

These guiding principles and core objectives need to be considered as a package. No objective or principle should predominate over the others. *A balanced approach is required that takes into account all these objectives and principles to pursue the goal of ESD.*

From The National Strategy for the Conservation of Australian Biological Diversity

1.5.1 Incentives for conservation

Ensure that adequate, efficient and cost effective incentives exist to conserve biological diversity. These would include appropriate market instruments and appropriate economic adjustments for owners and managers, such as fair adjustment measures for those

whose property rights are affected when areas of significance to biological diversity are protected. Priority should be given to: …

4.5 Agreement compliance

The agreements are used by the Western Australian DEP, EPA, AGWA, and WAPC to support rigid conservation policies and guidelines that prevent the clearing of native vegetation on agricultural land. But the agreements also carry references to economic and equity considerations, with the NSCBD making direct reference to property rights. The documents carry the signatures of the representatives of the Western Australian Government.

Considerable effort was made in these agreements to ensure the recognition of the principles of Ecologically Sustainable Development (ESD). These principles require the effective integration of economic and environmental considerations in decision-making processes; not the open-ended conservation of private land as practiced by the EPA/DEP, and AGWA. How is it that such clear provisions are ignored?

Policies developed by the agencies impose strict conservation values on private agricultural land containing native vegetation without compensation while purporting to uphold the intergovernmental agreements. Examples include: *Environmental Action – Government's Response to the State of the Environment Report (*DEP of WA December 1999*)* Ch. "Maintaining Biodiversity" page 12, Bulletin 966 (Clearing of Native Vegetation, Advice to the Minister, EPA of WA 1999) page 15, *Position Statement No 2* (EPA of WA 2000) page iii. Statutory planning mechanisms also allow local authorities to prohibit the clearing of any vegetation however the compensation provisions of the Town Planning and Development Act are of little use in an agricultural context.

5 KEY LEGISLATION AND POLICY

5.1 Soil and Land Conservation Act 1945

This Act relates to the conservation of soil and land resources, and to the mitigation of the effects of erosion, salinity and flooding. It is drafted in terms that recognises the rights of the landowner in the use of the land. It does not, for example, approve, license, or permit the clearing of vegetation. Instead it provides for the Commissioner to have the opportunity to disapprove of an action that is likely to cause land degradation, and then issue a Soil Conservation Notice to prevent the action.

Section 13 of the Act provides that:

13.*The general functions of the Commissioner shall include —*

(a) the prevention and mitigation of land degradation;

(b) the promotion of soil conservation;

(c) the encouragement of landholders and the public generally to utilise land in such a manner as will tend towards the prevention and mitigation of land degradation and the promotion of soil conservation; and

(d) the education of landholders and the public generally in the objects and practice of soil conservation.

In the case of (a) above, Section 32 of the Act requires the Commissioner to form an "opinion" that land degradation will result from clearing. To form that opinion the Commissioner must investigate the matter. Neither the Act nor the Regulations require the applicant to lodge a series of scientific studies before the Commissioner is prepared to form an opinion that land degradation may occur. It is an obligation for the Commissioner to provide the evidence to support the Notice that is intended to prevent the likely degradation. The term degradation in the Act is defined as:

*``**Land degradation**'' includes —*

(a) soil erosion, salinity, eutrophication and flooding; and

(b) the removal or deterioration of natural or introduced vegetation,

that may be detrimental to the present or future use of land.

The Act is directed towards the protection of the productive capacity of the land and there are no provisions that relate to the conservation of biological diversity. The duties of the Commissioner are defined in section 14 of the Act as:

***14.**The duties of the Commissioner shall include —*

(a) the carrying out of surveys and investigations to ascertain the nature and extent of land degradation throughout the State;

(b) the investigation and design of preventive and remedial measures in respect of land degradation;

(c) the carrying out of experiments and demonstrations in soil conservation and reclamation;

(d) the recording and publishing of the results of such surveys, investigations, designs, experiments and demonstrations;

(e) the dissemination of information with regard to land degradation and soil conservation and reclamation;

(f) the instruction and supervision of landholders in matters pertaining to soil conservation and reclamation;

(g) the advising and assistance of landholders whose land has been affected by land degradation;

(h) *the coordination, having regard to the purposes of this Act, of the policies and activities of Government departments and public authorities in relation to any of the foregoing matters, and in regard to the alienation, occupation and utilization of Crown lands or other lands vested in public authorities;*

(ha) *the collection of rates imposed under section 25A;*

(i) *the carrying out of works authorized by this Act.*

All of these duties are intended to assist the continued productive use of the land.

5.2 Environmental Protection Act 1986

This act can only control land clearing if clearing is deemed to be a proposal that is defined in the Act as:

"proposal" means project, plan, programme, policy, operation, undertaking or development or change in land use, or amendment of any of the foregoing, but does not include scheme;

It is arguable that clearing is not a "proposal" but instead an activity that is essential to, and inseparable from, the land use or undertaking on the property, which is agricultural production. A comparison could be made with a quarry proposal in which clearing the vegetation and overburden is an activity essential to the undertaking. Once approval of the quarry is obtained it follows that clearing is inevitable.

At present most assessments under the Act are refused as a *Proposal Unlikely to be Environmentally Acceptable (PUEA)* which also avoids the necessity for a detailed assessment of the property.

5.3 Town Planning and Development Act

The Town Planning and Development Act 1928 has provisions for the protection of any vegetation, native or exotic, in any location. Compensation could be claimed if the Planning Scheme preventing the clearing of vegetation acted in a way that would prevent the continuation of an existing land use, and the claim was made within six months of the gazettal of the Scheme. Where the land is reserved under the Act compensation is automatic, however most equity issues arise in rural areas when productive land is blighted by such mechanisms as "landscape protection".

The provisions of the Act have been significantly strengthened by the recent introduction of the *Statement of Planning Policy No.11 Agricultural and Rural Land Use* (WAPC 2002) Statements of Planning Policy have the power of a regulation under the Act. It allows authorities to take land by regulation by defining an activity such as the removal of native vegetation as a "development" requiring the approval of Council. This avoids the need to reserve land and thus

the need to pay compensation. It complies with a Cabinet directive to protect natural resources by statutory planning regulation.

5.4 Policies and guidelines.

Policy and guidelines have been developed to give effect to the more senior policies, including State Cabinet's April 1995 directives (para 3.3), that are intended to halt clearing. These make no pretence of looking at the merits of the proposal and are therefore discriminating against individual farmers who have undeveloped farms, in favour of those with farms that are fully developed.

The principle agencies using flawed guidelines and policies are AGWA, the EPA, the Department of Environmental Protection, and the WAPC. The common thread in this endemic abuse of the Code of Ethics (para 4.1) can be found in the shared membership of various agencies working groups and committees. These committees were put in place by the agencies to prepare the policies and guidelines to implement on the protection of natural resources. Committee balance was not only ignored, significant membership overlap occurred.

5.4.1 Memorandum of Understanding (MoU)

The MoU (AGWA 1997) was a key document guiding the actions of agencies in their assessment of land clearing applications. It contains the AGWA Supporting Manual 4.3 *Procedures for the Administration and Assessment of Clearing and the Protection of Native Vegetation in Western Australia.* The Preface to the manual, written by the then Commissioner for Soil and Land Conservation, Kevin Goss, makes it clear that clearing will be objected to on the basis of the 20% rule (see 3.3 – State Cabinet) without examining the individual merits of the application prior to the decision. If landholders challenge the Commissioner they must prove nil land degradation will occur and also prove that conservation values are not threatened. These conditions and the 20% rule are ultra vires to the Soil and land Conservation Act 1945.

In the Preface to the MoU the Commissioner also makes the point that AGWA is, *… operating, on the behalf of landholders and the whole of government, the "front end" of a single evaluation process which covers a range of issues. It is important to ensure that cross agency cooperation is maintained at all stages of the assessment process.* Thus the opportunity is provided for agencies to collude to deny applicants the right to a fair hearing of their legitimate expectation to clear their land in accordance with the provisions of the Soil and Land Conservation Act 1945

5.4.2 Draft regrowth policy

A draft policy (AGWA Dixon, May 1998) relating to regrowth of previously cleared vegetation was sent to several Land Care District Committees in July 1998. This draft policy was an attempt to legitimise actions by AGWA that are ultra vires to the provisions of the above Soil and land Conservation Act 1945. The draft policy set out guidelines that in fact were already being applied by the Commissioner for Soil and Land Conservation. By these actions, landowners with regrowth on previously cleared land are forced to allow the regrowth to re-

establish and not allow further agricultural production on the land. Despite the fact that the draft policy was not ultimately finalised, perhaps because it was ultra vires to the Act, the actions proposed in it are still applied by AGWA. It is not the duty of the Commissioner for Soil and Land Conservation to force the removal of land from agricultural production, unless he can prove degradation as defined by the Act. In fact it is the reverse, as his duties are intended to assist in maintaining the productive use of the land (see paragraph 5.1). Whilst the EPA Bulletin 966, page 16, recommends that clearing native vegetation for replacement with non-native deep-rooted vegetation such as tagasate or blue gums is unacceptable, and the reason for this is not given, the Commissioner has an obligation to suggest that these productive alternatives if it was thought that the removal of the regrowth would cause hydrological problems.

5.5 Dubious practices

In his paper on the *Green Letter Laws* (para 3.4) Dr O'Brien has pointed directly to the problems that we now face in matters relating to land clearing and the approval process. By introducing *"unnecessary additional environmental bias into interpretations and conditional approvals"* as foreseen by Dr O'Brien agencies have acted in a manner contrary to the laws of justice and prejudicial to the legitimate expectations of applicants in dealing with notification of intent to clear land for agricultural purposes. This bias has grown to the extent that environmental considerations have become the only considerations. AGWA have clear directions from the Soil and Land Conservation Act 1945 in regards to processing notification of intent to clear and this is being ignored in favour of unproven biodiversity conservation considerations.

The Code of Ethics' instruction to "*Practice universal fairness, and protect people's rights to due process, equal opportunities and equitable outcomes"* has not been adhered to. Abuse of the Code can be found in the membership of various agency working groups and committees involved in the process of public consultation and policy formulation following the State Cabinet 1995 decision. Agency overlap on committees could have made effective review of particular agency responibilities difficult. Events such as a committee that reviewed an important, but very controversial, statutory planning report produced by the chairman of the committee, as a consultant, did little to engender confidence in the process.

AGWA, the EPA, the DEP, and the WAPC have produced flawed and misleading guidelines and policies. For example the EPA Bulletin 966 (Clearing of Native Vegetation, Advice to the Minister, EPA of WA 1999) makes extravagant claims regarding the biodiversity value of native vegetation to agriculture, leading to the vegetation's elevation to a status far beyond reasonable conservation values. Many of the claims have not and cannot be supported by fact, nor can the claims be shown to apply to all remnant vegetation in the agricultural region of Western Australia. Such things are difficult to argue against in public as it is an emotive issue and most of society – including farmers – see the natural Australian landscape as a thing of great beauty. However, the Bulletin 966 biodiversity

claims are for the most part the result of subjective judgements and yet the Bulletin is relied upon to prevent further land clearing in the Agricultural Region.

5.6 The role of Agriculture Western Australia.

On an ABC Radio National program titled Land Clearing In WA Drawing To A Close, broadcast on Saturday 5/09/98, Keith Bradby, Policy Officer with the Sustainable Rural Development Program, Agriculture Western Australia, was interviewed by Alexandra de Blas. An extract from the interview follows:

> *Keith Bradby:*
> *In the bulk of the wheat belt we've really said enough is enough. If your shire is below 20% of vegetation instead of us assessing your proposal you need to argue your proposal. You need to prepare your case. We feel land degradation will occur with any further clearing out there and very few land owners can prove this wrong.*
>
> *We've also developed biodiversity criteria. Up till very recently all assessments were largely done on land degradation grounds and that has introduced a whole new set of extra hoops that landholders need to negotiate. And the third key step was to integrate the actions in the legislation of four agencies and two authorities. All of whom have power over the clearing of native vegetation. What it's meant is instead of the land holder taking years and years of going from department to department we can generally deal with in three or four months and if they do end up with the EPA in high level formal assessment at least they get there quicker.*
>
> *Alexandra de Blas:*
> *How have the farmers responded to this reduction of land clearing in WA?*
>
> *Keith Bradby:*
> *By and large it's very well supported. We are in crisis times with land degradation, salinity and other terrible things happening in our landscape and that's well recognised by the 130 odd land conservation district committees we have. There is a bit of pain being felt by the individual land holders who have had their economic future severely affected with these controls but it is a minority. It is a small minority, it was long overdue and it's generally well supported.*
>
> *Alexandra de Blas:*
> *Is the idea to stop land clearing completely?*
>
> *Keith Bradby:*
> *"Well the policy position is that if you can justify land clearing against very stringent land degradation biodiversity criteria then government has no objection. The reality is that very few proposals even look like getting through those hoops."*

In March 1999 the Primary Industries Minister Monty House announced new administrative procedures for those notifying the intention to clear land. Under the new process, landholders had to clearly demonstrate that there will be no adverse environmental impact. The reversal of the onus of proof by this administrative action may well have been the last of the hoops referred to by Bradby.

The action by the Minister to reverse the onus of proof was reported in the "Farm Weekly" on the 18th March 1999 under the headline "Clearing ban imposed". Despite the fact that the administrative procedure was in conflict with the Soil and Land Conservation Act, and appeared to lack any stautory backing, no secret has been made of the intention to make it almost impossible to clear native vegetation. Despite doubts regarding the legality of the administrative procedure its use continued.

5.7 The role of the EPA, DEP

I believe it is possible to examine the practices of these two bodies together as the activities of the two are so inter-meshed that at times it is hard to make the distinction between the two. However one distinction that does exist is the EPA's role in providing advice to the Minister for the Environment. This advice has significance for the public perception of the matter being considered. The Authority is seen as being independent even though it depends heavily on advice from the DEP in its deliberations.

The possibility therefore exists for the DEP's position on any matter to be conveyed via the EPA as independent advice to the Minister. The effect of this is to make a contrary position taken by any third party untenable in the eyes of the public. I suspect that this has happened to an extent in the *EPA Bulletin 966 – Clearing of Native Vegetation – Advice to the Minister*. Advice to the Minister should be scrupulously accurate and should not contain subjective judgements, deceptive or misleading statements, or mislead by omission. It should fairly present to the Minister all available relevant information. I believe this has not been the case with Bulletin 966 and in presenting it to the Minister and the public the Chairman of the EPA, Dr Bernard Bowen, is in breach of the Public Sector Code of Ethics.

The EPA *Position Statement No.2* (EPA of WA 2000) is similarly misleading, as is the *Governments Response to the State of the Environment* (EPA of WA 1999). All of these documents support the creation of a public perception that supports a unilateral approach to land clearing in Western Australia that denies the owners of land containing remnant vegetation natural justice and a fair hearing of their legitimate expectation. The DEP has not administered its responsibilities in this matter with fairness and equity.

6 EQUITY IN DEALING WITH LAND CLEARING

6.1 Equity at a local level

When dealing with the public, agencies are obliged to act impartially to serve the common good; recognise that equity can involve treating people differently according to their circumstances; practice universal fairness; and protect people's rights to due process, equal opportunities and equitable outcomes. Despite this the lack of fairness and equity is evident in every aspect of land clearing in the agricultural region of Western Australia.

The difference in attitude when dealing with reservation or "regulatory taking" in the metropolitan area compared to the agricultural region is stark.

A comparison of the statements contained in the document *Government's Response to the State of the Environment Report* Cl.14 and 14.3 gives an example of the city/country divide. Clause 14 and 14.1 deal with agricultural lands and the words controls, governing, rigorous environmental assessment processes, planning policies and procedures are the ones used. In contrast 14.3 is about Perth's Bushplan and it is about consultation, landowner, private land, negotiated outcomes and solutions. In addition, $100 million dollars was set aside for those whose land was affected by the reservation of native vegetation in the metropolitan area.

The contrasts are an example of the total disregard by the officers of the DEP for the Public Sector Code of Ethics and natural justice. No attempt is ever made in any of their documents to recognise the rights of the private rural landowner. To his credit the Chairman, Dr. Bernard Bowen, has constantly raised the equity issue in relation to land clearing in the agricultural region and the DEP has ignored him. It is not a sufficient argument to say it is not their role to look at equity issues in relation to the environment as intergovernmental agreements on the environment say that it is.

It is one thing to have the media and conservation groups claiming private property for public good, but when it is realised that both the political and the bureaucratic sides of government have lined up to take land by regulation at no cost, it is a cause for despair. AGWA will no longer argue your case based on science and productivity because Cabinet has directed that natural resource conservation shall be a primary consideration. It is beyond the capacity of an individual to mount a legal challenge against the Government.

6.2 Equity at a National level

The inclusion of short-term atmospheric carbon exchange in land-use, land-use change and forestry in the national greenhouse gas inventory following the Kyoto conference surprised the agricultural industry because the mathematical science of it did not add up. The Federal Government directly targeted land clearing and Senator Hill spelt out the reason for it. It "gave Australia the chance to restructure other aspects of energy production" he said.

That seemed fair to all but those who were in the effected industries, including farming. Agricultural industries were a soft target when compared to the fossil fuel industries, and we were going to be discriminated against so that Australia could meet its Kyoto targets if the protocol was ever ratified. It transpired that it wasn't because Australia and the United States of America both insisted that the Inventory should reflect "what the atmosphere sees".

The use of poor science in promoting the greenhouse industry has been the hallmark of the past decade. The government misrepresentation of the facts and science of carbon exchange in industries related to land-use, land-use change and forestry has already resulted in market distortion and loss of assets. A punitive approach to any domestic regulation of industry including such proposals as a carbon tax and an incentive-based approach would further distort the market, and yet it has been discussed.

The carbon exchanges of these industries are in balance at least annually in the case of agricultural production, and more probably measured only in decades in the forest industry. It does not need a science or history education beyond the secondary level to seriously question the veracity of including these emissions in the inventory or their effect on global climate.

Agricultural and forest industries were penalised to buy time for the fossil fuel industry, and for some farmers the penalty has been particularly severe. When a small land clearing proposal was approved by the Western Australian Minister for Environmental Protection, Senator Hill, as the Federal Minister at the time, threatened our State with the loss of National Heritage funds in a blatant display of discriminatory bias. Farmers were again made to feel like global vandals who were going to cause a climate catastrophe.

6.3 Final Report of the Native Vegetation Working Group

The State Government undertook the implementation of intergovernmental agreements to protect the environment in the agricultural areas of Western Australia without any thought or consideration for issues of equity for the private landowner. In an effort to placate those who complained a Native Vegetation Working Group was established to look at the economic burden carried by individual landowners.

Their Final Report is a subjective, patronizing document that increased the anger of farmers; and is an example of how a committee can be structured to obtain a particular outcome. The inclusion of the Coordinator of the Conservation Council in the Group was a case of putting the fox in charge of the hen house.

The *Guiding principles* (page 1) of the report makes it clear that compensation will not be forthcoming. It is totally subjective in assessing the *Individual and Community Benefits of Vegetation Retention* in 4 (page 19). In 5.1.2 the report is used to promote bringing pre-1991 clearing notifications that were not disallowed

into provisions Sub-regulation 4(5) of the Soil and Land Conservation Act 1945. These early assessments did not have any time limitation of them whereas the post 1991 regulation had a two-year limitation. The recommendation would require retrospective legislation. The document was intended to assist landholders placed in an iniquitous situation in this matter – not find ways to drag more into the mess.

The opening paragraph of Section 6.5.1 does most to condemn the Working Group. The terms of reference for the Group asks them to *'develop mechanisms that minimise the economic burden carried by the landholders…"* and yet the Group only looked at mechanisms that provide *'a level of fairness and for which there is a high level of community support'*. This was clearly was not going to help those seeking equity. Those landholders that insist that their rights be upheld are termed *'unresolved cases'*. They are required to work with a *Case Management Team* for twelve months and if still *'unresolved'* another twelve months of "case management" may be required by the Review Board.

7 CONCLUSION

The issues raised in this submission lead me to respond to some of the topics raised in the scope of the inquiry in the following way:

(a) The impacts on farming practices, productivity, sustainability, property values and returns, landholders' investment patterns and the attitude of finance providers, arising from the regulation of native vegetation clearance and/or biodiversity conservation, is almost entirely negative and likely to remain so permanently. The level of understanding of the relevant legislative and regulatory regimes among stakeholders is, at least, confused. The boundary between the law, which is reasonable, and its implementation, is obscure and contradictory. The extent to which existing government measures are mitigating any negative impacts is arguably minimal. Farmer initiative has been dealing effectively with most problems, and in some cases, despite government intervention.

(b) The efficiency and effectiveness of the regulatory conservation regimes in reducing the costs of resource degradation begs the question- costs to whom? In relation to native vegetation and biodiversity the costs in the Western Australian agricultural areas are almost entirely borne by the landowner

(c) Overlap or inconsistency between Commonwealth and State regimes, including their administration, in relation to the matter of this inquiry is minimal in my experience. This could well be because of a political reluctance to invite funding and compensation issues that would come with Commonwealth involvement.

(d) The possibility for perverse environmental outcomes, including those that may result from perceptions of a financial impact, arising from the implementation of regulatory conservation regimes is high. The financial risk of alerting authorities to the presence of a significant conservation value is considerable.

(e) The assessment of economic and social impacts of decisions made under the regulatory conservation regimes is almost non-existent.

(f) The degree of transparency and extent of community consultation when developing regulatory conservation regimes has been low, and, when implementing the regimes at an individual level, almost secretive.

(g) To achieve the desired environmental outcomes, including measures to clarify the responsibilities and rights of resource users governments must first be prepared to bear the cost of using private land for public good. An indication of the loss of productivity as a result of regulation of clearing native vegetation may be gained from the 1995 Cabinet minutes. A figure of not less than $100million was estimated as the likely cost should compensation be provided to those who lost productive use of their land. As most of this land would be farmed as an adjunct to the cleared balance of the property an average return on capital may be as high as 7%, returning $7 million year to the affected landowners.

8 REFERENCES

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