

**SUBMISSION**

**TO**

**COMMONWEALTH PRODUCTIVITY COMMISSION**

**INQUIRY INTO THE IMPACTS OF NATIVE VEGETATION AND BIODIVERSITY  
REGULATIONS**

**BY**

**FERGUSON, KENNEISON AND ASSOCIATES  
113 BRAZIER ROAD  
YANCHEP WA 6035**

**DATE: 18 JULY 2003**

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### **ENCLOSURES**

- Enclosure 1 Copy of signed document, 03/12/1999: Ferguson, Kenneison and Associates to Western Australian Legislative Council Standing Committee on Public Administration requesting that his objections to his assessment be investigated.
- Enclosure 2 Copies of the two signed documents from Appendix 3

# **INQUIRY**

## **INTO**

### **THE IMPACTS OF NATIVE VEGETATION AND BIODIVERSITY REGULATIONS**

#### **1.0 INTRODUCTION**

This submission by Ferguson, Kenneison and Associates is also on behalf nine landowners with properties from west of Coorow in the north, to Gairdner, south of Jerramungup. A brief outline of their individual property particulars is submitted in Section 2.0.

#### **1.1 FURTHER SUBMISSIONS**

Further material will be submitted prior to 30/09/2003, mainly on biodiversity issues, including what we believe are matters affecting our clients and others, but are of little or no relevance to productivity gains, in the long or short term to the landowner. Also with the release of the Final Report of the Legislative Council Standing Committee mentioned below, it would be useful for the Productivity Commission Committee to examine the Report and we also feel it would be useful to provide a further submission, as we represented fifteen landowners before that Committee.

#### **1.2 LEGISLATIVE COUNCIL STANDING COMMITTEE ENQUIRIES**

Ferguson, Kenneison and Associates were instrumental in having the Western Australian Legislative Council Standing Committee on Public Administration conduct an Inquiry into Land Clearing Applications through the lodging of an objection dated 3 December 1999, on behalf of Mr Dennis Martin of "Too-ee Downs", Badgingarra WA 6521 against Government Agencies, including Agriculture Western Australia (AgWA), which includes the Commissioner of Soil and Land Conservation, the Environmental Protection Authority of Western Australia (EPA), Department of Environmental Protection (DEP) and the Department of Conservation and Land Management (CALM), arising from the unsatisfactory conduct of administrative practices by officials, which have impacted severely on him as a result of his application to clear land on Victoria Location 10461, located in the Shire of Coorow (Included in Section 3).

The Standing Committee accepted our submission and advertised the Terms of Reference for the Inquiry on 29 July 2000 (Appendix 1). Hearings were conducted and were then discontinued, due to the election of a new Government on 10 February 2001.

A request was made by Ferguson, Kenneison and Associates to the Labor Government to continue with the hearings. The Government combined the two previous individual Standing Committees, one on Public Administration and that on Finance, now the Legislative Council Standing Committee on Public Administration and Finance, agreed to proceed, advertising for submissions on 6 October 2001 with considerably expanded Terms of Reference (Appendix 1).

The Legal Representative for the Standing Committee, Mr Paul Grant has indicated that the Final Report by the above Committee should be Government, prior to 30 September 2003.

#### **1.3 NATIVE VEGETATION AND BIODIVERSITY REGULATIONS**

This submission is in response to the Terms of Reference into the Impacts of Native Vegetation and Biodiversity Regulations affecting most aspects of farming, as outlined in Attachment A.

In particular, according to the Background to the Terms of Reference, the focus is to be on regulatory regimes such as the effect of the Commonwealth's Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act 1999) and the various State Acts.

Other Acts, Agreements and Strategies that will be cited are the Intergovernmental Agreement on the Environment, the National Strategy for Ecological Sustainable Development, the National Strategy for the Conservation of Australia's Biological Diversity, the Western Australian Soil and Land Conservation Act 1945, the Environmental Protection Act 1986 and the Environmental Protection Amendment Bill 2002.

One fact that we feel the Productivity Commission may have assumed is that for all States and Territories, their Acts and Regulations, related to and impacting on the clearing of native vegetation, would all have been implemented according to law. There is also an expectation by the State that the actions of those in Government, the Agencies, their public servants and the Environmental Protection Authority (EPA) in implementing the law, besides conforming with that law, will abide by the various codes of conduct, ethics and the Public Sector Management Act 1994. This must also include Administrative Law, which involves, among many other things, the Doctrines of Natural Justice, which in itself includes bias as one of the basic and initial rules, Ultra Vires, Procedural Fairness and Legitimate Expectation.

It will be argued and demonstrated, that the Office of the Commissioner of Soil and Land Conservation, the EPA, and other Government Agencies associated with the assessment of notices of intent to clear have failed to adhere to both the Soil and Land Conservation Act 1945 (the Act) and also Administrative Law.

Because our argument of neglect by public servants and the EPA to commit to the assessment of notices of intent to clear with regard to the law, Section 3.0 will examine in more detail where failures to adhere to both Statutory and Administrative Law are evident and include the correspondence, enclosed as part of the document, that resulted in the formation of the first Legislative Council Standing Committee Inquiry advertised 8 July 2000.

#### **1.4 BACKGROUND TO THE INQUIRY**

The failure of the Committee to specifically refer to property rights of the individual in either the Background or Scope of the Inquiry is regrettable. Perhaps the Committee may draw conclusions and comment on that matter resulting from the submissions. Otherwise the relevant issues are addressed in the Background. The reason why we are paying what you may consider an inordinate amount of attention to the problems we outlined and will enlarge on is to make sure that the Committee is informed of the current situation in Western Australia, which has been accepted for seven years. This present situation, we consistently argue, has eventuated from the actions in failing to conform with the law, of the EPA and public servants from relevant Agencies concerned with assessing notices of intent to clear (NOIC) native vegetation for agricultural purposes lodged with the Commissioner of Soil and Land Conservation.

As an example, we include Appendix 2, as the notifying landowner has been required since the signing of the Memorandum of Understanding (MoU) between the Commissioner of Soil and Land Conservation, EPA and other Agencies on the protection of remnant vegetation in the agricultural region of Western Australia, to advertise an intention to clear in the local newspaper and West Australian Newspaper. Our clients have included and added to the accepted format of the Commissioner warnings that they expect their notification, among other things, be proceeded

according to law. This should assist in obtaining redress where actions through the Courts will eventually be required, as the owner refers to his expectations including the Administrative Law issue of according him natural justice, which in all nine cited cases has only been complied with in two of the nine cases, named in this document to date.

## **1.5 SCOPE OF THE ENQUIRY**

All issues outlined in the Terms of Reference will not be addressed. Our intention is to comment in general on issues that we consider are mainly relevant to the nine clients named in Section 2.0.

These will be the impacts on farming practices, productivity, sustainability, property values and returns, landholder's investment patterns arising from the regulation of native vegetation clearance and biodiversity conservation including both negative and positive impacts. The likely duration of such impacts, factors influencing their duration and the extent to which existing Government measures are mitigating any negative impacts are briefly discussed.

The efficiency and effectiveness of the above regimes in reducing the costs of resource degradation and a comment on overlap or inconsistency between State/Territory regimes including their administration are also included.

Examination of the adequacy of assessments of economic and social impacts of decisions made and not made, related to Western Australia and the degree of transparency and extent of community consultation involved being relevant are also included in the Terms of Reference.

Finally discussed are any recommendations of a regulatory or non-regulatory nature that Governments could consider to minimise the adverse impacts of the above regimes, while achieving the desired environmental outcomes, including measures to clarify the responsibility of resource users where comments on private property rights are included.

The Productivity Commission's comments (4) with regard to assessing the matters in (3), that it is to have regard to the legislative and regulatory regimes, and associated implementation measures in all States, Territories and the Commonwealth, whose primary purpose includes the regulation of native vegetation clearance and the conservation of biodiversity, are particularly important for Western Australia. It will be difficult for the Committee in WA, as its Report should recognise the many shortcomings, as we continually argue that policy has replaced law.

## **2.0 LANDHOLDERS INCLUDED IN THIS SUBMISSION**

Outlined below are relevant particulars of the nine landholders on whose behalf this submission is forwarded to the Productivity Commission Inquiry.

### **SUMMARY SHEET: LANDOWNER NO.1 MESSRS R & P POWELL**

<b>LAND DESCRIPTION</b>	Melbourne Location 3544, CT, Vol. 1502, Folio 272. Located Rowes Road. 12.5 kilometres WSW of Moora, Shire: Dandaragan
<b>AREA OF PROPERTY</b>	1309.45 ha <b>AREA NOTIFIED TO CLEAR</b> 580.0 ha, 02/04/2001
<b>PURPOSE-CLEARING</b>	Timber Production: Plantation: 500.0ha Pines and 80.0ha other perennial deep rooted vegetation for timber production

4.

**PRESENT STATUS** Soil Conservation Notice imposed 25/06/2001 because of salinity, on and off-site from the planting. Under appeal, 17/01/2002, (EPA Bulletin 1037) to the Minister for the Environment, whom we allege is irrelevant to the process in the form of EPA involvement. As a result of our constant complaints on these and other matters, the Parliamentary Secretary to the Premier (10/07/2003) stated the Minister has been requested to bring the matter to a conclusion as soon as possible.

**FAILURE OF PROCESS AND LAW**

1. Failure to recognise the superior uptake of water by pines as compared with that of the native vegetation it will replace;
2. no recognition of previous plantings of pines or that there would only be 200.0 ha of the property not in pines or deep rooted perennials;
3. no recognition of Rural Zoning & failure to adhere to the Soil and Land Conservation Act 1945 (the Act), especially s13, 14, 32, other legal matters and that the EPA policy of no planting of pines or bluegums on newly cleared land has no basis in law, being ultra vires the Act; and
4. no recognition of the need for timber to service the proposed timber mill to be constructed in the Shire of Moora.

### **SUMMARY SHEET: LANDOWNER No.2 B AND C SORGIOVANNI**

**LAND DESCRIPTION** Victoria Location 10877, Deposited Plan 210801, CT Vol. 2218 Fol. 584 Located in the Shire of Coorow, 47 km west of Coorow, 30 km north east of Warradarge, corner of Garibaldi and Willmott Road.

**AREA OF PROPERTY** 1971.0316 ha **AREA NOTIFIED TO CLEAR :** 965.0 ha, 26/02/2003

**PURPOSE OF CLEARING** Cropping, pasture for stock and the planting of Tagasaste as fodder for stock on areas susceptible to wind erosion.

**PRESENT STATUS** No objection to clearing on grounds of dry land salinity. Plan required for areas likely to erosion by wind. Plan submitted and acknowledged by Deputy Commissioner and to be approved. Decision referred to EPA 26/05/2003. No level of assessment notification as yet from the EPA.

**FAILURE OF PROCESS AND LAW** This area of land has a history of problems dating back to 1993 where the owners had difficulty in obtaining title, as there was not 50% of the land cleared, this figure being a minimum requirement of a Conditional Purchase Agreement to support the Granting of Freehold Title.

Again we argue that the involvement of EPA in the manner applied in the matter of B and C Sorgiovanni has no legal foundation, with the EPA and Commissioner of Soil and Land Conservation being constantly informed of that fact. EPA are irrelevant to the assessment process.

### **SUMMARY SHEET: LANDOWNER NO.3 DS & WG JOHNSTON**

**LAND DESCRIPTION** Victoria Location 10322, Watheroo West Road and Coalara Roads, Badgingarra, Shire of Dandaragan.

**AREA OF PROPERTY** 1549.2125 ha **AREA NOTIFIED TO CLEAR** 602.0 ha reduced to 590.0 ha by definition of the Moora Office, Department of Agriculture.

**PURPOSE OF CLEARING** Cropping and Pasture.

**PRESENT STATUS** Notified an intent to clear approximately 600.0 ha on 27/08/1998 to the Commissioner of Soil and Land Conservation. Commissioner had no objection, informing the EPA (16/11/1998) and DS and WG Johnston of that decision and that he was referring the proposal to EPA for examination on conservation issues. DS & WG Johnston offered the whole of the land, 600.0 ha cleared and 949.0 ha uncleared, to Government for \$498,000.00, this offer standing for approximately two and a half years. Government failed to accept the offer. DS & WG Johnston failed to receive responses to correspondence addressed to the Commissioner in July and December 2002, notifying on 06/02/2003, as a matter of courtesy, the Minister for the Environment that they were proceeding to clear when soil conditions were suitable. Minister responded, 24/04/2003, that it would be advisable for them to refrain from clearing. On 28/04/2003, among other things, the Minister was requested to inform DS and WG Johnston under what Act or Acts and Section or Sections of that Act or Acts would they be contravening when clearing. Although reminded several times, she has failed to respond to that letter of 28/04/2003.

**FAILURE OF PROCESS AND LAW** There are many examples of breaches of the law and the denial of natural justice to DS and WG Johnston in this matter, which could be outlined later if required. A good example is included in the above Present Status.

### **SUMMARY SHEET: LANDOWNER NO.4 MISTPAL PTY LTD**

**LAND DESCRIPTION** Portion Swan Loc. 7809, Lot 56 on Plan 22740, CT Vol. 2137, Folio 481

**AREA OF PROPERTY** 352.9297 ha    **AREA NOTIFIED TO CLEAR** 260.0 ha

**PURPOSE OF CLEARING** Planting of 130.0 ha of Pines for timber and 130.0 ha Tagasaste for stock

**PRESENT STATUS** Because of the actual bias against clearing demonstrated by the EPA over a number of years, a preliminary application to subdivide for conservation was made to the Western Australian Planning Commission (WAPC) and the Shire of Gingin, 20/06/2001, which was rejected by both the Shire and WAPC, both requesting the land retain its use for agriculture as it was zoned Rural under their Scheme. Water and Rivers Commission, Dep.of CALM and EPA are supportive of the subdivision. Notification of intent to clear was lodged with the Commissioner of Soil and Land Conservation, 30/11/2001, not objected to, provided a Management Plan to address perceived wind erosion problems was lodged with them. This was forwarded to them, EPA being also notified and that an application for subdivision into four lots was now to be made. This application to subdivide of 11/11/2002 was rejected on 13/07/2003 for the same reasons as the preliminary application. This exemplifies the insurmountable problems facing owners of land and requires discussion.

### **SUMMARY SHEET: LANDOWNER NO.5 DW AND SM MEADE**

**LAND DESCRIPTION** Kent Location 1910, Roberts Road, Gairdner, Shire of Jerramungup.

**AREA OF PROPERTY** 1151.41 ha    **AREA NOTIFIED TO CLEAR** 100.0 ha 17/09/1998

<b>PURPOSE OF CLEARING</b>	Crop and Pasture
<b>PRESENT STATUS</b>	Under appeal to the Minister for the Environment since 11/02/2002.
<b>FAILURE OF PROCESS AND LAW</b>	<p>The following issues have been noted and are relevant to their notification of intent to clear and subsequent treatment by both the Commissioner of Soil and Land Conservation and the EPA. They are:</p> <ol style="list-style-type: none"> <li>1. that consideration is required as to whether the Doctrines of Natural Justice, Procedural Fairness, Legitimate Expectation and Ultra Vires have been breached in the assessment process by both the EPA and the Commissioner of Soil and Land Conservation;</li> <li>2. that there is a requirement to consider the bias evident in the Memorandum of Understanding between the EPA and Agencies on the assessment of land clearing notifications;</li> <li>3. that the Hon. the Minister for the Environment be requested to answer as to why she has taken the period of one and a half years to decide their Appeal to her against the Recommendations of the EPA contained in EPA Bulletin 1041; and</li> <li>4. that finally an examination of our document to the now Premier of Western Australia, Hon. Dr GI Gallop, MLA, 09/02/2001, facsimiled to his Office the day prior to the WA State elections would be enlightening and worthwhile for the Committee, as it outlines many of the problems that were, and are being encountered by those notifying an intent to clear. The now Minister for the Environment, Hon, Dr Judy Edwards had a copy of that document delivered to her office within the week following the State election.</li> </ol>

### **SUMMARY SHEET: LANDOWNER NO.6 G AND E BAKER**

<b>LAND DESCRIPTION</b>	Avon Location 27695, Berry Brow Road, 10 Km south of Bakers Hill, Shire of Northam.
<b>AREA OF PROPERTY</b>	337.0 ha <b>AREA NOTIFIED TO CLEAR</b> 40.0 ha 05/09/2997
<b>PURPOSE OF CLEARING</b>	Planting of Tagasaste, either as a pure stand, or alley farmed with clover and various perennial grasses.
<b>PRESENT STATUS</b>	Notice of intent to clear objected to "as I am of the opinion that land degradation in the form of salinity is likely to result if your notified clearing is carried out and I continue to object to your clearing proposal." G and E Baker have not proceeded to further their proposal as they were and are completely disgusted with their treatment, considering the amount of time spent in devising a workable and sustainable system.
<b>FAILURE OF PROCESS AND LAW</b>	G Baker requested, as an alternative, that the notified area be planted to Pines or Bluegums, being informed by the representative of the Office of the Commissioner that they could not consider that alternative as it was against policy. Also in correspondence, 08/01/1998 to G and E Baker, the Deputy Commissioner made a statement, which we allege was ultra vires the Act with an intention to deceive them.

## SUMMARY SHEET: LANDOWNER NO.7 J F MORGAN

<b>LAND DESCRIPTION</b>	Portion of Wellington Location 1398, Lot 2 CT Vol. 1532 Folio 037, Plan 12547. Located 8.0 kms south west of Quindanning, north of Stockyard Road, in the Shire of Williams.
<b>AREA OF PROPERTY</b>	1906.9859 ha <b>AREA NOTIFIED TO CLEAR</b> 760.0 ha 10/09/2001
<b>PURPOSE OF CLEARING</b>	Establishing a further 760.0 ha of Bluegums in addition to 386.0 ha of Bluegums planted on already cleared land. Over 90% of Lot 2 would then be under plantation for timber production.
<b>PRESENT STATUS</b>	Referred to the EPA on 05/12/2001 for evaluation on conservation issues. EPA set a level of assessment within the week, by 10/12/2001 of Public Environmental Review. Information under FOI has recently been requested. EPA had incorrect information prior to setting this level.
<b>FAILURE OF PROCESS AND LAW</b>	<p>There are many failures, both in the assessment process and law, in regard to this matter. Outlined below are some of them. They are:</p> <ol style="list-style-type: none"> <li>1. that the Commissioner Soil and Land Conservation refuses to decide the appeal against the SCN imposed on the area notified;</li> <li>2. that the Commissioner accepted and concurred with advice that the replacement of the native vegetation with a twenty to twenty four year regime, including coppice regrowth of Tasmanian Bluegums (<i>Eucalyptus globulus</i>) would result in both on and off-site salinity;</li> <li>3. that in the assessment process, conservation values were part of that process, a fact that the Commissioner, Mr David Hartley has recently denied, but occurs in that process by his Office; and</li> <li>4. that there are many inconsistencies evident in this matter, some which will be useful later in your process (Native Veg &amp; Regs).</li> </ol>

## SUMMARY SHEET: LANDOWNER NO.8 KJ IR AND MJ O'DEA

<b>LAND DESCRIPTION</b>	Plantagenet Locations 6478 and 6988, Hassell Highway, 13 Kms north east of Many Peaks, Shire of Albany.
<b>AREA OF PROPERTY</b>	1337.5 ha <b>AREA NOTIFIED TO CLEAR</b> Up to 370.0 ha 26/03/1997
<b>PURPOSE OF CLEARING</b>	Pasture and cropping.
<b>PRESENT STATUS</b>	O'Deas appealed against a Soil Conservation Notice imposed on the notified land. The Appeals Committee found in favour of them after a site visit, discussion and examination of information. However the Minister only allowed clearing of 150.0 ha on condition that 220.0 ha be reserved in perpetuity under Part IVA, Section 30B, Soil and Land Conservation Act 1945. They agreed, having little option, cleared and planted the 150.0 ha, and then sold the property. They have notified the Department of Agriculture of an intention to claim damages from them, resulting from their failure to comply with the law in the assessment.
<b>FAILURE OF PROCESS AND LAW</b>	The Department of Agriculture in this matter, we allege, have disregarded both fact and law, failed to adhere to the Doctrines of Natural Justice, Legitimate Expectation, Procedural Fairness and Ultra Vires. This failure also applies to their disregard for part, sections 13, 14,

Functions and Duties, Soil and Land Conservation Act 1945. They also demonstrated bias against KJ, IR & MJ O'Dea under s32(1)b of the Act.

## **SUMMARY SHEET: LANDOWNER No.9 J AND M FERNIE**

<b>LAND DESCRIPTION</b>	Lot 7778, Wannamal South Road, Shire of Gingin, 12 kilometres north east of the Gingin Townsite.
<b>AREA OF PROPERTY</b>	1750.0 ha <b>AREA NOTIFIED TO CLEAR</b> 600.0 ha 18/06/2002
<b>PURPOSE OF CLEARING</b>	Timber production. Plantation 500.0 ha Pines, remainder Sandalwood, both in conjunction with the Forest Products Commission.
<b>PRESENT STATUS</b>	Deputy Commissioner Soil and Land Conservation, Andrew Watson had no objection to clearing for the proposal as outlined, but would seek a method of assurance that Pines would be planted. A Watson referred the proposal to EPA, 06/09/2002. EPA set Level of Assessment, Proposal Unlikely to be Environmentally Acceptable (PUEA) on 10/10/2002, which was not appealed by Mr Fernie. EPA Bulletin, 1084 was issued as a Report and Recommendations that the project not proceed. On 02/04/2003, on behalf of J Fernie, we advised the Minister for the Environment that he was proceeding to clear when conditions were suitable. There has been no response to date from the Minister.
<b>FAILURE OF PROCESS AND LAW</b>	Failure to recognise the Act, and that the EPA policy on not planting of bluegums or pines on newly cleared land, among other things, has no legal foundation and is ultra vires the Act. Further matters will be outlined on 07/08/2003.

### **3.0 REPLACEMENT OF LAW WITH PROCEDURES IN WESTERN AUSTRALIA**

Section three examines the replacement of law with procedures and the demonstrated disregard for Administrative Law in the assessment process of notices of intent to clear. Also included are our initial two pages of correspondence to the Legislative Council Standing Committee on Public Administration, on behalf of Mr Dennis Martin, which outlined the evidence on which the Inquiry was advertised on 29 July 2000.

As the Terms of Reference include the level of the understanding of the relative legislative and regulatory regimes among stakeholders, Section 3.2 will examine that matter in a summary form and demonstrate the basis for our argument as to how law became replaced by policy.

#### **3.1 MARTIN CORRESPONDENCE TO THE STANDING COMMITTEE**

Below is a typed copy of our correspondence on behalf of Mr Dennis Martin to the Legislative Council Standing Committee on Public Administration and Finance. A copy of the signed original is enclosed for the Committee.

Prior to our submission to the Legislative Council Standing Committee on Public Administration on 03/12/1999 for the Committee to examine his case, an appeal, 09/08/1999, against recommendations of the of the EPA to the Minister for the Environment contained in EPA Bulletin 917 dated December 1998, which recommended that Mr Martin not be allowed to proceed with his clearing, was lodged with the Appeals Convenor to the Minister, on his behalf.

PO Box 4  
**MOUNT HELENA WA 6082**

Telephone: (08) 9572 1504  
 Facsimile: (08) 9572 1804

The Chairman  
 Public Administration Committee  
 Attention Committee clerk, Ms Lisa Hanna  
 Legislative Council  
**PARLIAMENT HOUSE**  
**PERTH WA 6000**

Dear Sir

This is an objection lodged by Ferguson, Kenneison and Associates of PO Box 4 Mount Helena WA 6082 on behalf of Mr Dennis Martin of "Too-ee Downs" Badgingarra WA 6521 against Government Agencies including Agriculture Western Australia (Ag WA) which includes the Commissioner of Soil and Land Conservation, the Environmental Protection Authority of Western Australia (EPA), Department of Environmental Protection (DEP) and the Department of Conservation and Land Management arising from the unsatisfactory conduct of administrative practices by officials which have impacted severely on him as a result of his application to clear land on Victoria Location 10641, located in the Shire of Coorow.

We seek Leave of the Standing Committee on Public Administration to have an examination of our allegations related to these administrative practices by officials, which have resulted in a near total failure of both delivery and quality of service, because of demonstrated ineptitude and incompetence by public servants. This incompetence and ineptitude was, and still is demonstrated, apparent and embodied in a "Memorandum of Understanding" signed by those Agencies mentioned above and one other, the Water and Rivers Commission. All Signatories must bear responsibility for Mr Martin's unfortunate predicament resulting in substantial ongoing losses and damage to his business. The Memorandum of Understanding does not possess legal authority.

Among practices that we allege have been inflicted upon and impacted severely on Mr Martin are:

- 1) the occurrence of bias by public servants;
- 2) failure to act fairly in the discharge of their Statutory Duties;
- 3) failure to notify Mr Martin of his legal rights;
- 4) breaches of natural justice including:
  - a) failure to comply with the law regarding procedural fairness; and
  - b) failure to comply with the Doctrine of Legitimate Expectation;
- 5) a blatant disregard for the Doctrine of the Sovereignty of Parliament;
- 6) estoppel by conduct and representation;
- 7) the Doctrine of Ultra Vires;
- 8) bureaucratic deceit and misrepresentation to Mr Martin;
- 9) the failure of the Memorandum of Understanding (MoU), signed by Government Agencies, to resolve issues appertaining to land clearing, this failure being exacerbated by the document's inherent inability to resolve procedural and process breakdowns, the very matters that the MoU was ostensibly structured to prevent;

- 10) allied to number nine, the failure of the appeals process to the Minister for the Environment to provide for any process or procedural breakdown to deliver natural justice and procedural fairness to Mr Martin where failures of process and procedures have occurred in Stages 1-3 of the assessment process with the Commissioner of Soil and Land Conservation and whoever he may have chosen to advise him.

Throughout these procedures there is a failure to recognize the status of Article 17 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948 which stated:

*No one shall be arbitrarily deprived of his property.*

Whilst not incorporated into Australian Law it nevertheless creates a legitimate expectation that actions would not be conducted in a manner which was inconsistent with Article 17 of the universal Declaration of human Rights and that decision-makers would act on the basis that ones property rights should not be deprived by arbitrary means.

The detailed grounds and explanation will be with the Committee Clerk, Ms Lisa Hanna by Monday December 13<sup>th</sup> 1999.

Enclosed is the request by Mr Dennis Martin to place this matter before the Legislative Council Standing Committee on Public Administration and the Authority to act on his behalf for Ferguson, Kenneison and Associates of PO Box 4, Mount Helena WA 6082.

Yours sincerely,

Signed

J R Ferguson  
for  
Ferguson, Kenneison and Associates

acting on behalf of

Mr Dennis Martin  
of  
"Tooee-Downs"  
Badgingarra WA 6521

Date: December 3 1999.

As outlined in Section 1.2 the Legislative Council Standing Committee, after lodging of further information, accepted Mr Martin's proposal and advertised for submissions on 29/07/2000 (Appendix 1)

### **3.2 LEVEL OF UNDERSTANDING OF RELATIVE LEGISLATIVE AND REGULATORY REGIMES AMONG STAKEHOLDERS**

To gain a better insight into this matter and support our argument outlined below, that the replacement of law with policy by those assessing NOIC, was fact, we will forward further relevant documentation, once the Report of the Legislative Council Standing Committee is provided to Government. This could be by 30/09/2003 and can be discussed at our appearance before the Committee on 07/08/2003.

However we provide a short summary of events from the time of release of the Cabinet Decision on 10/04/1995 to the release of the EPA Bulletin 966, which provides an overview supporting our argument that public servants would have been, and are aware, of the legality of actions they implemented in the assessment of NOIC. The Committee should be able to determine, utilising this short summary of that period, to determine whether actions of those concerned were ultra vires the Soil and Land Conservation Act 1945. Also it serves to emphasise the near impossibility of any landholder forwarding a NOIC to the Commissioner, to have a full understanding of the regulatory regime being imposed on them. An enclosed internal note, 02/04/2001, Jim Dixon to David Hartley, Commissioner of Soil and Land Conservation, who also is Executive Director Agricultural Resource Management and a Note to File, Re Powell/Ferguson NOI, 27/04/2001 (Appendix 3), should be of interest. It provides some indication to the Committee of support for our argument that law has been replaced by policy, with the interests of the landholder being disregarded and discarded.

There is other supporting material in correspondence to and from the Commissioner of Soil and Land Conservation, Mr David Hartley and the Deputy Commissioner, Mr Andrew Watson, that demonstrates that the incident presented above, is by no means isolated.

Our argument is clear in that the public servants from the time of the release of the Cabinet Decision to them, from whence they produced the MoU, well knew what they were doing, but those landholders submitting NOIC had little understanding, and could not be blamed for that lack of understanding of how law was being replaced by procedure. To this day, our argument remains that most landholders do not understand how this became the norm and prevailed.

Outlined below is a summary of events concerning the actions of the public servants from Agencies responsible for assessing of the NOIC. The EPA were also involved in this process, although we constantly argue their irrelevance in the matter, except to advise the Commissioner of Soil and Land Conservation, if he requests information. EPA are not the sole final determinant in the process as they, the public servants from the Agencies concerned with assessing NIOC and Government, would have the landholder believe. This fact has been admitted, with the Deputy Commissioner Soil and Land Conservation, appearing on behalf of the Commissioner, in evidence given before the Standing Committee of the Legislative Council on 15/11/2000 and the Chairman of the EPA, Mr Bernard Bowen, appearing and presenting evidence to the same Committee a week later on the 22/11/2000.

The examination of evidence in support of our argument that policy in many instances replaced law follows and includes:

1. Cabinet Decision, Protection and Management of Remnant Vegetation on Private Land in the Agricultural Region (Cabinet Decision), 10/04/1995;
2. Proceedings of a Workshop on Environmental Aspects of Land Clearing in Western Australia, N Halse (Workshop Proceedings), 02/03/1999; and

3. EPA Bulletin 966, December 1999, Clearing of Native Vegetation, Advice to the Minister for the Environment from the EPA under Section 16(j) of the Environmental Protection Act 1986, (EPA Bulletin 966).

**NOTE:** The Cabinet Decision, 4.3(f), page 8, Workshop Proceedings, Policy Context (f), page 5 and EPA Bulletin 966, Section 3.1.1, Government Position (e) all noted and allowed for drafting of a modified Soil and Land Conservation Regulation under the Soil and Land Conservation Act 1945 to implement (a-c), EPA 1999, Workshop Proceedings of 02/03/1999.

Following are the actions of the public servants from the Agencies concerned with assessment of NOIC, that we argue allowed law, including the disregarding of the Administrative Law Doctrines of Natural Justice, Legitimate Expectation and Procedural Fairness and Ultra Vires to be replaced by Policies and Procedures. They are:

1. that in the MoU, signed by all Agencies with concerns related to NOIC, the Purposes outlined in that document were altered from that stated in the Cabinet Decision, with the intent of reducing the opportunity to clear and to narrow available options which would restrict and damage those landholders submitting notices of intent to clear;
2. that the public servants then compiled the MoU, following the Policy Context - Dr Bryan Jenkin's Proceedings Document, Workshop Proceedings, 02/03/1999, the Cabinet Directive and Cabinet Decision ;
3. that the public servants in the one year and eleven months compiling the MoU, failed to have any legislation prepared to implement the changes required by Cabinet, prior to the introduction of the MoU;
4. that the MoU was then signed by the senior public servants of the five Agencies and the Chairman of the EPA on 06 & 07/03/1997, they knowing, that if they took the care to read or ask advice, that that there had been no enactment of, or changes to any legislation, either to the Soil and Land Conservation Act 1945 or to the Soil and Land Conservation Regulations 1992, to make the changes lawful that were to be implemented in the MoU;
5. that the MoU, a document with a disregard for fact and law, continued to be used by the Agencies and the EPA until recently, even though they were informed by Ferguson, Kenneison and Associates from 1999 that actions resulting from its use would be, among others, actions ultra vires the Act;
6. that further, the public servants and also the EPA, through our lodged appeal documents, have been advised that they are not only acting ultra vires the Act, but also failing to uphold the various Doctrines of Administrative Law applicable in these matters;
7. that in failing to acknowledge and change procedure and policy to conform with the law, we argue that they have little concern for the law, or alternatively, that they are prepared to take the risk for their actions, even if found to be ultra vires the Act and outside the law, as they could be interpreted as being for a noble cause, the prevention of the clearing of land;
8. that in EPA Bulletin 966, the Chairman of the EPA, Mr Bernard Bowen noted, Section 3.1.1, page 5, when outlining the Government Position of 1995, that some of the components have been implemented , others have not, including the modification in the form of a Regulation as outlined as being required to the Soil and Land Conservation Regulations 1992. This was to allow vegetation retention for the purpose of conservation of native vegetation in its own right and also biodiversity;
9. that in the EPA Bulletin 966, Section 3.3, Assessment experience using the MoU, pages 8 and 9, the Chairman of the EPA, Mr Bernard Bowen stated that *the purpose of the MoU was to give effect to aspects of the agreed Government Position of 1995.*

*The EPA is aware that full implementation of the Government Position has not yet occurred and problems are being experienced as a result;*

10. that from the above two statements it is clear that the Chairman of the EPA, Mr Bernard Bowen has advised the Minister for the Environment, Government, all Members of Parliament and the general public that legislation as required to implement positions (a-c), Section 3.1.1, EPA Bulletin 966 drawn from the Cabinet Decision and Directive has not been implemented; and
11. that our argument is further justified in replacement of law with policy, in that the Chairman, Mr Bernard Bowen, in fact has advised all who care to read EPA Bulletin 966 that the assessment process up to the date of its release in December 1999, has been interpreted and operating, among other things, ultra vires the Act, as the Legislation stated as required in the Decision Sheet had not been implemented .

We have constantly maintained that our argument of law being replaced by policy is well supported and validated, with the above eleven points demonstrating how easy it has been to replace law with policy and procedures in the assessment process. We also argue that there has been a concerted thrust to prevent clearing of native vegetation without regard to the applicable law, leaving many unanswered questions. Examination of the foregoing material demonstrates just how difficult it has been for any landholders and those advising them, to gain a sufficient level of understanding of the relevant legislative and regulatory regimes. This was also complicated by the birth and death of the MoU and the requirement to take into account the actions of those within the Agencies and the EPA.

As mentioned earlier in this Section we could have our documentation at present with the Legislative Council Standing Committee Inquiry, available by the end of September 2003. This will outline in more detail the public servants involved, involvement of the EPA and Agencies, this also being assisted with correspondence coming to hand from questions that we have asked and are continuing ask of the public servants involved in the matter.

### **3.3 SOIL AND LAND CONSERVATION ACT 1945 (the Act)**

The above Act, implemented in 1945, with subsequent changes made to improve its effectiveness over the following fifty eight years, has been the main method of addressing land degradation matters. It does not attempt to address the conservation of vegetation for its biological diversity.

In examining the scope of Ecologically Sustainable Development for the Soil and Land Conservation Act 1945 (the Act), the EDO in an undated document, commissioned by the Western Australian Soil and Land Conservation Council, raised as a fundamental issue of whether the Act should not only be directed towards the conservation of land for its productive capacity, but also for the preservation of land for ecological reasons, such as biodiversity protection.

They argued, with this being well known and supported, that the Act in its current form is directed towards the conservation of land for its productive capacity rather than for reasons of biodiversity protection. Their conclusion was drawn in particular from the Act's definition of "land degradation", which refers to (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 the land* (EDO, undated)

The Environmental Defenders Office also stated that it might be argued that limitations in the Act, related to being unable to deal with biodiversity and vegetation conservation issues, can be compensated for by other WA legislation, particularly where the use of legislation is integrated by inter-agency arrangements. They added that this approach can be seen in the *Memorandum of Understanding for the Protection of Remnant Vegetation Land in the Agricultural Region of Western Australia*. This Memorandum (MoU) seeks to compensate for the Commissioner's inability to object to clearing on biodiversity grounds by establishing a process of referring clearing proposals to the Environmental Protection Authority (EDO, undated).

Of interest is that the undated EDO document failed to comment on problems with the MoU or the actions of the Commissioner of Soil and Land Conservation's assessment procedures.

Following on from the MoU signed by Government Agencies and the EPA, 06-07/03/1997, the Chairman of the EPA, Mr Bernard Bowen, wrote to the Minister for the Environment in November 1998 raising a number of issues of concern in relation to the assessment of clearing applications in the agricultural area through the MoU process and advising of the EPA's intention to run a workshop. The aim was to examine ways in which the matter of clearing applications could be progressed in a more effective and efficient manner (EPA, December 1999).

The thrust of the document was the EPA's inability, using the mechanisms available through the present legislation, to deal with the issues of conservation and biodiversity when landowners notify an intention to clear. In Section 3.1.1, Government Position, page 5, the Chairman refers to the failure to include the modifications of the relevant Regulations under the Soil and Land Conservation Act. He then refers, Section 3.3, Assessment experience using the Memorandum of Understanding, *the purpose of the MoU was to give effect to aspects of the agreed government position of 1995. The EPA is aware that full implementation of the government position has not yet occurred and problems are being experienced as a result*. This was also outlined in Section 3.2.

It has been our continuing argument to Government and Agencies that without the required implementation of legislation to provide support, as required by Cabinet, the ensuing MoU became nothing more than a document of collusion and possibly much worse, between the signatory Agencies and the EPA. This enabled them, to among things, constantly operate ultra vires the Act and ignore the Doctrines of Natural Justice, Legitimate Expectation and Procedural Fairness in so doing.

The Cabinet Summary Sheet including the Minute, dated 27/02/1995 and noted as received on 03/03/1995 by Cabinet, is concise in its proposal and requirements. The Cabinet Decision Sheet, 10/04/1995, signed by the Deputy Premier, was equally explicit, the decision being "Cabinet approves the recommendations in the submission. The financial requirements are subject to consideration by the Cabinet Estimates Committee".

It is also arguable that the Chairman of the EPA, Mr Bernard Bowen's statements above, bring home why most of the problems he outlined to the Minister of the Environment in the EPA Bulletin 966 had eventuated. It can be further argued, that the implementation of the Cabinet Decision in the form of an MoU, by the public servants, signed by the then Commissioner of Soil and Land Conservation, CEO's of the four Government Agencies and the Chairman of the EPA, with the knowledge that legislation had not been enacted, but was required in the form of amendments, was not only a recipe for disaster, but could have legal ramifications at a later date.

#### **4.0 REGULATION OF CLEARING OF NATIVE VEGETATION FOR BIODIVERSITY CONSERVATION.**

The Terms of Reference, 3 (f) include the degree of transparency and extent of community consultation when developing the above regimes and 3(e) the adequacy of assessments of economic and social impacts of decisions made under the above regulatory regimes.

Because the Terms of Reference of this Inquiry are based on the examination of the regulatory regimes in the States and Territories along with the Commonwealth's Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act 1999), it is very important that once again it is made clear to the Committee the current situation in Western Australia. This was briefly referred to in Section 1.3 and will be further outlined in this section.

#### **4.1 LEGISLATION FOR CONSERVATION OF NATIVE VEGETATION IN WESTERN AUSTRALIA**

In Section 1.3, the EPBC Act 1999 was referred to in the Terms of Reference for the Inquiry. This Section also noted other Agreements and Strategies, including the Western Australian Soil and Land Conservation Act 1945, the Environmental Protection Act 1986 and the Environmental Protection Amendment Bill 2002. Also included was the assumption that in all States and Territories, the various Statutes would have been implemented according to law.

Further in Section 3.0, it was outlined quite clearly, the problems evident in Western Australia (WA) by the use of procedure to replace law. It is worthwhile to consider several more aspects of this replacement of law with procedure and how it became "acceptable" in WA.

The Statutory Requirements and responsibilities related to the clearing of land for agriculture, outlined in the Memorandum of Understanding (MoU) between the Agencies and the EPA were, Commissioner for Soil and Land Conservation, *the Soil and Land Conservation Act 1945*, Environmental Protection Authority, *the Environmental Protection Act 1986*, the Department of Conservation and Land Management (CALM), *the Conservation and Land Management Act 1984* and *the Wildlife and Conservation Act 1950* and the Water and Rivers Commission, *the Country Areas Water Supply Act 1947; (Clearing Licence) Regulations 1981*.

The Australian Government was signatory to a number of national environmental agreements. These were *Inter-Governmental Agreement on the Environment*, the *National Strategy for Ecologically Sustainable Development* and a *National Greenhouse Response Strategy*, being referred to by B.J O'Brien as Green Letter Laws, the Agreements of '92. Also in 1996 *the National Strategy for the Conservation of Australia's Biological Diversity* was signed by all State Premiers.

##### **4.1.1 GREEN LETTER LAWS: THE AGREEMENTS OF 1992**

Of interest, and related to three of the above documents, was the paper presented at the 12<sup>th</sup> National Environmental Law Conference, Canberra, 4-6 July 1993 by Brian J. O'Brien, Green Letter Laws: The Agreements of 1992.

In the Abstract he stated:

"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 Government 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."

Further, "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."

Examples of the above statement related to flaws in these agreements being inevitable, are provided by examination of the National Strategy for the Conservation of Australia's Biodiversity (Commonwealth of Australia, 1996).

#### **4.1.2 STATE OF THE ENVIRONMENT REPORT 1988, ENVIRONMENT WESTERN AUSTRALIA: GOVERNMENT RESPONSE OF 1999.**

An example of problems encountered in this area, related to Biodiversity, are evident in the State of the Environment Report 1998, pp20-29 and the Government Response of 1999, pp12-17.

Other examples where the truth is handled carelessly are contained elsewhere in both documents, but discussion would be wasted, as there are enough mistakes and bias evident in matters related to biodiversity, related to treatment of the issue of equity between the rural and city landowner.

Please compare the Government Response No.14 and Actions 14.1-3 related to the protection of biodiversity in vegetation in the agricultural area, with the implementation of Perth's Bushplan, to the treatment offered to landowners of agricultural land to determine whether bias exists and if so, who are the benefactors and who are meant to be and are the losers.

The suggested response No.15, Action 15.1 and Implementation are worthy of examination. With the date of the State of the Environment Report, 1998 and the Action and Implementation being 1999, which without doubt indicates the thinking pervading Government and Agencies, when in Implementation, "the revised and extended memorandum of understanding (MoU) will be developed in 2000." This is to extend the interagency MoU on clearing controls to apply statewide based on common principles applied with geographically appropriate biodiversity criteria.

Once again it is argued that this is an excellent example of the intended and gradual erosion of law by process and procedure. Those signatories to the MoU in March 1997, signed without a legal basis for the replacement of law by procedures, have been successful to date in their endeavours, indicating their intention of progressing their intentions through a document that both disregards fact and law. Among other things, it is argued that the public servants concerned with the MoU, altered the definition of "to clear" contained in the Act of 1945, appertaining to the Soil and Land Conservation Regulations 1992, to suit their own ends, when citing it in the MoU. That is one example of what ensues when any Government is willing to condone this type of disregard for fact and law, overlooking this example and the many others being brought to their attention.

#### **4.1.3 SUMMARY SHEET OF 1995: PROTECTION AND MANAGEMENT OF REMNANT VEGETATION ON PRIVATE LAND IN THE AGRICULTURAL REGION**

The Summary Sheet of 27/02/1995, which preceded the Cabinet Directive of 10/04/1995 and the MoU, outlined clearly what it intended to achieve, why it was required and the need for a change of law to accommodate the proposed changes.

It included Purpose, (Objectives of proposal) which were discussed earlier, outlined the Relation to Government Policy. This was Implementation of a review of existing policy in line with recommendations made to Government by the Select Committee into Land Conservation, the Working Group of peak Natural Resource Advisory Councils and the Working Group of CEO's of Agencies responsible for natural resource management.

Outlined under Urgency and Supporting Reasons was Urgent: Current situation is untenable given inequities and threat to natural resource management.

Those consulted and the extent of agreement reached: were the Western Australian Farmers Federation, Pastoralists and Graziers Association, Conservation Council (assumed to be of Western Australia), Soil and Land Conservation Council, Rural Committee, Department of Environmental Protection, Department of Conservation and Land Management, West Australian Water Authority and the Department of Agriculture. It was stated that there was a good level of agreement reached.

The Recommendation from the Minister for Primary Industry was attached, addressed to the Premier, where three options were discussed, One, maintain the status quo, Two, a total ban on further clearing and Three being Restrictions on clearing. Noted in the Directive, Option Three, Restrictions on clearing, was selected by Cabinet and directed to be implemented, with the Agencies and apparently the Environmental Protection Authority, then proceeding to produce the MoU, related to their future methods of operation in addressing notifications of intent to clear submitted from landowners requesting to expand their agricultural or silvicultural operations.

The Summary Sheet, signed 27/02/1995, dated as received 03/03/1995, when forwarded to Cabinet, stated that Executive Council Approval with Legislation in the form of Amendments were required for implementation. It can also be argued that subsequent statements, including the Briefing Note, 17/05/1995, Commissioner of Soil and Land Conservation to then Minister for Agriculture, makes it quite clear of the intention to have legislation, in the form of additional or changed Regulation/s to the Soil and Land Conservation Regulations 1992, to implement Option 3 of the Directive.

No Regulation or other changes to legislation, outlined as being required for the changes, were made prior to, or after the implementation of the MoU and at any time to the present.

It can be argued that this omission, clearly indicated an intent by the signatories and their present representatives, among other things, of being prepared to operate ultra vires the Soil and Land Conservation Act 1945 and also, what is far worse, failing to recognise Administrative Law, including the Doctrine of Natural Justice in their assessment of notices of intent to clear.

The Chairman of the EPA in Bulletin 966, December 1999, as also outlined in this document, Section 3.2. No.8, reminded the then Minister, that the proposed Regulation had not been implemented, referring in two sections of the document, 3.1.1, p5 and 3.3, p8, to that fact.

Once again, it is not unreasonable to argue that many of those within the Agencies and the EPA, the now known EPA Service Unit, Department of CALM, Water and Rivers Commission and Department of Environment, the latter two named being the now Department of the Environment, in their involvement with notices of intent to clear, are aware of our argument that they act ultra vires the Soil and Land Conservation Act 1945 and also fail to adhere to many of the Doctrines of Administrative Law.

The MoU was signed by the CEO's of four Agencies, the Commissioner of Soil and Land Conservation and the Chairman of the EPA on 06 & 07/03/1997. Again we argue and will continue to argue that they, among other things, by both omission and commission demonstrated an intent to act ultra vires the Soil and Land Conservation Act 1945.

#### **4.2 DEGREE OF TRANSPARENCY & EXTENT OF COMMUNITY CONSULTATION**

Since 1995, on matters affecting the clearing of land in the agricultural area of WA, except for the Cabinet Decision, there has only been an Environmental Protection Amendment Bill 2000, now 2002, with minimal community consultation on the proposed changes over the last three years. The Bill, as presently structured, would eliminate any clearing of large areas of vegetation for agricultural purposes, being aimed at conserving native vegetation. It would certainly prevent all clearing at present under consideration for the nine named landowners in this submission. Also proposed, but without general consultation with the farming community, is an Agricultural Amendment Bill.

The Environmental Protection amendment Bill 2002 fails to address the issue of equity, this being of particular interest as the National Strategy for the Conservation of Australia's Biodiversity 1996, signed by the State Premiers, page 4, states *all sectors of the community will share the costs and benefits of conserving biological diversity*. It further states, section 1.5.1 Incentives for conservation, *ensure that adequate, efficient and cost effective incentives exist to conserve biological diversity. These would include the use of appropriate market instruments and appropriate economic adjustments for owners and managers, such as fair adjustment measures to those whose property rights are affected when areas of significance to biological diversity are protected.*

There has been no attempt whatsoever from the State Governments since the signing of that Strategy, to move to implement the statements cited above. There has certainly been no indication that now, or in the future, when land zoned Rural is able to be cleared for agricultural purposes with a management plan submitted that will achieve water balance and not cause land degradation, that the area outlined in the NOIC will not have an objection to that clearing imposed in the form of a Soil Conservation Notice over the notified land. An examination of the two documents, Appendix 3, are one example, among others, of the methods utilised by the Acting Deputy Commissioner Soil and Land Conservation, in conjunction with four employees of the Department of Environmental Protection (DEP), that have and are being used to make sure that a Soil Conservation Notice is imposed on the unfortunate landowner. Of the named employees of the DEP, Mr Kim Taylor is one of the seven Directors, and another Ms Clark is a legal representative.

Position Statement No.2, Environmental Protection of Native Vegetation in Western Australia, clearing of native vegetation, with particular reference to the agricultural area, EPA December 2000, is another document focusing on vegetation conservation and its biodiversity. This document as Preliminary Position Statement No.2 (PPSNo.2), 1999, was released for a public comment period of three months, ending on 31/03/2000. Position Statement No.2 still contains statements recommending actions ultra vires the Soil and Land Conservation Act 1945. It promotes “green letter laws” these being a characteristic of the EPA.

In our submission of 31/03/2000 to the PPSNo.2, EPA were informed that not only were they proposing action ultra vires the Soil and Land Conservation Act in Section 4.2, but were also clearly advocating actions ultra vires the EP Act 1986, referring to the Applicant, *Coastal Waters Alliance v Environmental Protection Authority*, Heard 10/08/1995, Delivered 26/03/1996, File No/s CIV 1963 of 1994. They then removed the reference to clearing in the Agricultural Region for High Value Land Uses to Clearing in the agricultural areas where alternative mechanisms address biodiversity values. However they made no attempt to redress their same mistake, repeated as Section 5.2, being demonstrated by the same statement being made in the EPA Bulletin 966, released within days of the Preliminary Position Statement No.2, even though they knew the consequences of their actions of 1996. Ample evidence is available to prove that the actions of the EPA outlined in this submission, continue to the present day.

#### **4.3 ADEQUACY OF ASSESSMENTS OF ECONOMIC AND SOCIAL IMPACTS**

The Term of Reference related to the adequacy of assessments of economic and social impacts of decisions made under the above regulatory regimes is relatively easily addressed. There has been virtually no assessment in Western Australia, conducted at any level, of the social and economic impacts ensuing from decisions arising from the regulation of native vegetation clearance and biodiversity conservation.

The present curtailing of clearing of native vegetation, utilising methods we argue are generally in breach of the law, are far too late to address the issue of salinity. The wheatbelt in Western Australia is now virtually all cleared. The machinery in the form of the Soil and Land Conservation Act 1945 has been available through Section 32 to prevent much of the clearing that has taken place over the preceding years. The problem arises through the inability of those with the responsibility of implementing the Act over many years and not the Act itself. This is still evident today when *s 32(1), whenever the Commissioner is of the opinion that as a result of –(b) clearing or intended clearing* is used to prevent clearing, the Commissioner imposes a Soil Conservation Notice on the landowner notifying an intent to clear, if for instance his opinion is that salinity will result from that intent. It is consistently argued that he then has willingly and knowingly demonstrated his bias, incompetence, or both, in failing to act on those landowners, who for many years, by their previous clearing, have contributed to the cause of the present waterlogging and salinity problems in many catchments.

The failure to implement the Act without bias, has been a major factor in making a situation far worse than it should be at present. This is because the delay has only served to exacerbate the economic and social impacts on the farming community. Dr Graeme Robertson, the present Director General of Agriculture and a former Commissioner of Soil and Land Conservation, has acknowledged that the failure to implement the Act is more of the problem than any failure within the Act itself.

There is little evidence demonstrated in the past to address the social and economic impacts of the regulation of clearing of native vegetation. An attempt was made through the Native Vegetation Working Group to resolve issues related to some form of recompense to those affected landowners. The attitude of the Working Group on a related issue, when they submitted to the House of Representatives Standing Committee on Environment and Heritage, Public Good Conservation, was criticised by the Committee.

## 5.0 CONCLUSION

This submission has addressed and made brief comments on some of the Terms of Reference on this Productivity Commission Inquiry into the Impacts of Native Vegetation and Biodiversity Regulations.

Prior to 30 September 2003 additional material on Biodiversity Valuation will be submitted to the Committee, addressing the difficulties in valuation of vegetation for conservation and biodiversity, the effect on the landowner and the value to the landowner of retention of the native vegetation related to productivity on the land.

Further material will also be submitted once the Final Report of the Western Australian Legislative Council Standing Committee on Public Administration and Finance, Inquiry into matters of land use has been released to the public.

Matters that affect and impact on landowner's productivity from the introduction of Regulatory Regimes introduced by Government in Western Australia and the Commonwealth are itemised below. They are:

1. that in their deliberations, the Commission must take account of the particular circumstances applicable in Western Australia, where we have constantly argued that Law, including Administrative Law, has been consistently replaced by process and procedure by those assessing notices of intent to clear (NOIC) native vegetation for agricultural purposes;
2. that this fact should be taken into account when the Final Report is delivered, as the assessments of landowners NOIC if conducted according to law, we argue, would have resulted in a much different outcome;
3. that the failure of the system of assessment of clearing of native vegetation in this State resulted from, among other things, the attempt to decide matters of conservation and its biodiversity by using the Soil and Land Conservation Act 1945 after 1995;
4. that the items listed in this submission and in the above points should be recognised by the Commission in their Final Report, but the resolution of those actions by the public servants of the Agencies and the Environmental Protection Authority (EPA), we argue are outside the law, is not the concern of the Commission, but by the eventual use of other methods in the future;
5. that the Commonwealth's Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), although implemented, has had little effect to date in the assessment process in Western Australia;
6. that bias has been exhibited by the EPA against the replacement of native vegetation with *Pinus sp* and/or *Eucalyptus globulus*, as they refuse to recommend its removal, as they maintain that it is their Policy;
7. that if that is the case and as it appears that their Policy is not certified in the EP Act 1986, then we argue EPA are acting ultra vires the Soil and Land Conservation Act

1945, when refusing to consider the replacement of native vegetation with those species as noted in No.6;

8. that the level of understanding of the relevant legislative and regulatory regimes in Western Australia is quite low by landowners, this being due to our earlier arguments that process and procedure have in many instances mainly replaced law, with the landowner understandably not being able to comprehend how the decisions can be justified;
9. that there is very little in the way of positive impacts, for the landholders who we represent, resulting from the imposition of these regulatory Regimes through the Memorandum of Understanding (MoU), all being negatively affected to varying degrees, with we argue, little positive outcome for the environment;
10. that there has been no assessment undertaken of economic and social impacts of decisions made under the regulatory regimes in Western Australia, in fact one senior bureaucrat maintains that it is a normal business risk that applies to any business person when changes are made to the regulatory regime such as have taken place in Western Australia since 1997, when the MoU became operative;
11. that there has been little community consultation when implementing the regimes since 1995 as evidenced by our statements in 4.1.3, these demonstrating that the decision of Cabinet was disregarded by the public servants in that no change to legislation was implemented, with no effort being made to do so;
12. that to further demonstrate their disregard for the Cabinet Directive, it is argued that the public servants concerned with its implementation then altered the objectives to apparently suit an agenda of their own when compiling the MoU; and
13. that the main recommendation that can be made that Government in Western Australia could consider to minimise the adverse outcomes and still achieve acceptable environmental outcomes, we have consistently argued is to ensure that those responsible in Government make sure that the public servants concerned with assessments of NOIC, implement the relevant Statutes according to law and that their actions conform with Administrative Law.

## REFERENCES

- Agencies (Government) and Environmental Protection Authority. 1997. **Memorandum of Understanding for the protection of remnant vegetation on private land in the agricultural region of Western Australia.** Government of Western Australia.
- Beresford, B., Bekle, H., Mulcock, J and Phillips, H, 2001. **The Salinity Crisis. Landscapes, Communities and Politics.** University of Western Australia.
- Commonwealth of Australia, 1992. **National Strategy for Ecological Sustainable Development,** AGPS: Canberra, ACT.
- Commonwealth of Australia, 1996. **The National Strategy for the Conservation of Australia's Biodiversity,** AGPS: Canberra, ACT.
- Commonwealth of Australia, 2001. **Public good conservation: Our challenge for the 21<sup>st</sup> Century. Interim report of the Inquiry into the Effects upon Landholders and Farmers of Public Good Conservation Measures Imposed by Australian Governments.** House of Representatives Standing Committee on Environment and Heritage, September 2001.
- Environmental Protection Authority, March 1999. **Proceedings of a Workshop convened by the EPA concerning Environmental Aspects of Land Clearing in Western Australia.** Convened by the Environmental Protection Authority.
- Environmental Protection Authority, December 2000. **Environmental Protection of Native Vegetation in Western Australia. Clearing of native vegetation, with particular reference to the agricultural area. EPA Position Statement No.2**
- Environmental Protection Authority, December 1999. **Clearing of Native Vegetation – Environmental advice on the issues arising from the use of Section 38 to assess clearing proposals in the agricultural area, and implications for the other areas of Western Australia.** EPA Bulletin 966.
- Government of Western Australia, 1997. **Soil and Land Conservation Act 1945.** Reprint as at 12 August 1997.
- Government of Western Australia, 1998, **State of the Environment Report 1998,** Department of Environmental Protection, Perth, WA.
- Native Vegetation Working Group, 2000. **Final Report of the Native Vegetation Working Group.** Government of Western Australia.

## APPENDICES

- Appendix 1 Western Australian Legislative Council Standing Committee on Public Administration: Terms of Reference 29/07/2000; and Western Australian Legislative Council Standing Committee on Public Administration and Finance: Terms of Reference 06/10/2001.

- Appendix 2 Example of J F Morgan of Notice of Intention to Clear lodged in the local and Western Australian newspapers outlining the legal expectations of the landowner from the assessing Agencies; and  
Example of Authority to Act on behalf of J Fernie. These are varied to suit the individual client.
- Appendix 3 Internal note, 02/04/2001, Jim Dixon to Mr David Hartley, Commissioner of Soil and Land Conservation; and  
Note to file, 27/04/2001, Re: Powell/Ferguson NOI.

## **ENCLOSURES**

- Enclosure 1 Copy of signed document, 03/12/1999: Ferguson, Kenneison and Associates to West Australian Legislative Council Standing Committee on Public Administration requesting that his objections to his assessment be investigated.
- Enclosure 2 Copies of the two signed documents in Appendix 3.

## **APPENDIX 1**

## **APPENDIX 2**

## **APPENDIX 3**

## COPY OF DOCUMENT

RELEASED UNDER FOI ACT WESTERN AUSTRALIA 1992 - Item 22

### Note to File re Powell/Ferguson NOI

Meeting at DEP, 27 April 2001. Present, Kim Taylor, Ben Carr, Nick Woolfry Alison Clark, Jim Dixon. Note Added by Ferguson, Kenneison and Associates: First four named are employees of the DEP, K Taylor a Director, A Clark, Legal Officer.

1. NOI lodged without advertisement and supporting case. Ag accepted this because it felt that by doing so, we had at least some control. We do recognise that the "policy" requirements of the MoU in terms of the need for advertisements etc are undermined by so doing.
2. It could be argued that the intended land use being pines is not land degrading and therefore the Commissioner cannot object. However the Commissioner has no guarantee that pines would be planted.
3. Ag legal advice (verbal) is that the Commissioner cannot issue SCN until a reasonable time after the pines should have been planted. However this is unsatisfactory since
  - o The clearing would have already occurred.
  - o There would be a significant separation between the action of clearing and the Government's response (SCN) thus losing the connection.
  - o The wrong message would have gone out to other applicants.
  - o The EPA may not be able to exercise its power since there would be no DMA through which to exercise those powers.
4. My inclination would be issue the SCN objecting to clearing on the grounds of
  - o The absence of opportunity for community comment.
  - o No guarantee that pines would be planted and the default land use of crops and pasture being inadequate to control groundwater.
  - o Possible land degradation between the time that pines were planted and when they started pumping significant quantities of water (Kim Taylors suggestion).
5. The arrangement is as follows:
  - o The IAWG will refer the case to the EPA which will most likely issue PUEA (Proposal Unlikely to be Environmentally Acceptable), this level of assessment being advertised for two weeks. If there is an appeal at the level of assessment, the level of assessment will be elevated to PER (Public Environmental Review). If the level of assessment is not appealed, the Minister will issue a bulletin which is itself subject to Appeal. The problem with this is that while the Minister may issue a statement that the proposal may not be implemented there are no penalties, and no constraints except via a DMA. (The details and process above need to be worked through more carefully by Alison Clark, legal officer).
  - o The Commissioner should also issue a SCN objecting to the clearing (see above), This will give support to the EPA process and may be critical in providing a DMA. The SCN should be issued fairly late in the process so as to extend the time available to the EPA to run its process with bulletins etc. ie 90 days plus the time before any appeal against a SCN.

Signed

Jim Dixon

27 April 2001

**COPY OF DOCUMENT**

**RELEASED UNDER FOI ACT WESTERN AUSTRALIA 1992 – Item 24**

**Dixon, Jim**

**To:** Hartley David  
**cc:** holyoake, newell  
**Subject:** FW: JIM FERGUSON'S ATTENDANCE AT OFFICE TODAY  
**Importance:** High

David

Advance warning of a new "attack" from Ferguson. It is rather clever and we will need to be careful in our response.

- The Commissioner has delegated authority from the Minister for the Environment (1992) to allow clearing of native vegetation for the planting of tree crops where the Com. is of the opinion that land degradation will not result. (Interesting but probably not relevant).
- Tree planting will not lead to land degradation, so the Com. will not be able to object particularly if the proponent offers permanency of land use via a lien over the land. (eg. in another case near Williams)
- In a totally unrelated case, Nick and I approved clearing of bush that was guaranteed to succumb to salt and water logging, on the proviso that tree crops would be planted. Ferguson could easily be aware of this.
- This means that the pressure will be on the DEP to object from a nature conservation perspective. No real problem there except that their policy is clear for the "wheatbelt" but less clear in other areas. (Position Statement No.2)
- With his NOI, Ferguson has only submitted the material called for in the Regulation. He has not submitted the additional material called for by the MoU and subsequent ministerial announcements. (eg, newspaper advertisements). We will have to reply in writing that his NOI has not been registered and he will use this as evidence that we are acting outside the law.
- This NOI is probably also strategic positioning in light of anticipated compensation (the anticipation seems to be there), and or a clearing moratorium.

Jim

**From:** Newell Veronica  
**Sent:** Monday 2 April 2001 6.04  
**To:** Ben Carr  
**cc:** Dixon Jim; Holyoake, Kelly  
**Subject:** Jim Ferguson's attendance at office today  
**Importance:** High

Ben

I'll retrieve the old file and discuss here tomorrow before faxing over the details, in case he has some thoughts on how best to handle the NOI submitted by Ferguson today. The basic details are –

2.

580ha on Melbourne Location 3544, corner Kayanaba and Rowes Roads, approx 12.5km south west of Moora, owners Roland and Pamela Powell.

Proposed use – pinus pinaster on suitable areas, remainder to be planted with other deep rooted perennials.

Kelly believes there is a prior objection to clearing – about 5 years ago.

The submission wouldn't meet the MoU and other ministerial requirements, but would probably meet the requirements as laid out in Reg 4.

Regards  
Ronnie

**ENCLOSURE 1**

**ENCLOSURE 2**