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NATIVE VEGETATION INQUIRY
PRODUCTIVITY COMMISSION
LB2, Collins Street East
MELBOURNE VICTORIA 8003

Attention: Ms Michelle Cross

Dear Commissioners

Our submission on the Productivity Commission Draft Report follows, and is mainly a response to your draft recommendations in the report applicable to our original submission, which was on behalf of nine landowners. An approximation of the monetary loss incurred by the landowners will also be outlined and presented at the public hearing in Perth Tuesday, 17 February 2004.

This submission will include a brief update on those landowners' current position and also include another landowner, Beermullah Pty Ltd, Lot 4, located on Beermullah West Road in the Shire of Gingin.

The Draft Report reflects many of the problems encountered by our clients and other landowners in Western Australia.

Also to be presented by email is documentation which is a summary of actions of the Environmental Protection Authority (EPA), four Government Agencies and the Commissioner of Soil and Land Conservation, involved in compiling a Memorandum of Understanding for the protection of remnant vegetation on private land in the agricultural region of Western Australia. This section will be marked confidential, being for the use of the Commission and indicates in summary form how we argue law was replaced by policy by the public servants, which enabled the conservation of native vegetation for biodiversity, through dubious processes, which should be resolved for their legality through the courts.

This document, marked as confidential, is not to be released to the public, but is to indicate to the Productivity Commissioner of how law was replaced by procedure over the period from the time of the Cabinet Directive of 10/04/1995 being issued to the public servants in the Agencies and the EPA which resulted in the Memorandum of Understanding release in April 1997, through to the present. The Commissioner of Soil and Land Conservation is still responsible for the assessments of notices of intentions to clear at the present time.

Also briefly discussed is the failure of the Western Australian Government to finalise the Legislative Council Standing Committee on Public Administration and Finance, Inquiry into the Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land In Western Australia.

Whether the Government Agencies and the EPA have conformed with the law in the determination of notices of intent to clear by landholders is not within your Terms of Reference to determine, with these matters to be resolved in another forum. We wish to sincerely thank the Productivity Commission for the opportunity provided to bring the issues related to the overall impacts on landowners of the regulation of native vegetation clearance and/or biodiversity regulations together in the form of a Draft, to be followed by a Final Report.

Yours sincerely

……..

J R Ferguson
for
Ferguson, Kenneison and Associates

Date: 2 February 2004

SUBMISSION

ON

THE

IMPACTS

OF

NATIVE VEGETATION & BIODIVERSITY REGULATIONS

COMMENTS ON THE DRAFT REPORT
AND
AN UPDATE ON NINE LANDHOLDERS OUTLINED IN THE INITIAL REPORT
AND ONE OTHER

BY

FERGUSON, KENNEISON AND ASSOCIATES
113 BRAZIER ROAD
YANCHEP WA 6035

DATE: 28 JANUARY 2004

SUBMISSION
TO
THE AUSTRALIAN GOVERNMENT PRODUCTIVITY COMMISSION

COMMENTS ON PART OF THE DRAFT REPORT
AND
AN UPDATE ON LANDHOLDERS INVOLVED IN THE INITIAL REPORT

1.0 INTRODUCTION

This submission will comment on some aspects of the Draft Report and provide a brief update on cases submitted to the initial Report, none of which have been decided by the Commissioner of Soil and Land Conservation and the Minister for the Environment.

This submission commences with the Key Points followed by comments on the Draft Recommendations.

Included is a comment of the failure to consider the social and economic impacts resulting from decisions by Government and public servants, arising from the regulation of native vegetation clearance and biodiversity conservation.

The regulation of the clearing notification process will have examples included, in particular the failure of the Director General of Agriculture, Dr Graeme Robertson to respond to a request for information related to the assessment process for clearing of native vegetation, resulting from the Cabinet Directive to the public servants in four agencies, the Commissioner of Soil and Land Conservation and the Environmental Protection Authority (EPA).

Also included with supporting information is an example of the difficulty that one landholder encountered from not only the public servants, but also the present Minister for Agriculture. Dr Fisher commented at the hearing in Perth on the use of “dirty tricks” being encountered in previous hearings in Australia. This example, one of many, is further evidence that we feel the expression was well justified, and has been evident in Western Australia for nine years.

Included are comments on the Environmental Protection Amendment Act 2003 and proposed Regulations for the clearing of native vegetation.

2.0 KEY POINTS

The two key points made by the Productivity Commission follow with comments related to our original nine clients named in our submission with one added, Beermullah Pty Ltd of Lot 4, Beermullah West Road located in the Shire of Gingin.

The Key Points are:

1. The effectiveness of restrictions of clearing of native vegetation has been comprised by:
    a) a lack of clear objectives;
    b) negative incentives for landholders to retain and care for native vegetation; and

c) the inflexible application of targets and guidelines across regions with differing characteristics such that perverse environmental outcomes often result.

2. Many landholders are being prevented from developing their properties, switching to more profitable land use and from introducing cost saving innovations. Restrictions on clearing regrowth and woodland thickening are reducing areas that can be used for agricultural production.

1. Addressing the effectiveness of restrictions on the clearing of native vegetation has been compromised by:

a). A lack of clear objectives: We consistently argue there have never been any clear objectives set once conservation of vegetation for its biodiversity value had been targeted through the Cabinet Directive of 1995 and the subsequent Memorandum of Understanding (MoU) of March 1997, for the assessment of notices of intent to clear, between Agencies and the EPA. Complaints had been made for many years regarding the effectiveness of the Soil and Land Conservation Act 1945 (the Act) in dealing with the matters of land degradation, salinity, eutrophication and erosion. However the then Chief of Resource Management in the Department, previous Commissioner for Soil and Land Conservation, now Director General of Agriculture, Dr Graeme Robertson wrote *the Act does have teeth but they are not used.* No clearer evidence of this is in the application of s32(1)b of the Act, with the present Commissioner constantly acting with bias, negligence and deceit and being in breach of both the Statute Law and Administrative Law Doctrines of Natural Justice, Procedural Fairness and Legitimate Expectation. The public servants, including the EPA, ran their own agenda in compiling the MoU. They implemented it, with its disregard for fact and law, without the necessary legislation requirement outlined in the Cabinet Directive. This was acknowledged by the Chairman of the EPA in his advice to the Minister for the Environment in EPA under s16(j) of the EP Act 1986, Bulletin 966. Dr Fisher's reference to "dirty tricks" at the Productivity Commission hearing in Perth on 07/08/2003 also would have validity in Western Australia for actions resulting from these and many other failures. His statement is valid and supported by us for WA.

b). Negative incentives for landholders to retain and care for native vegetation: There is very little incentive for the landowner to retain and care for native vegetation with Government preference being to obtain the use of the native vegetation on the farm by forcing its retention without any compensation. Several points can be made related to this, the treatment of farmers in the Country Areas Water Supply CAWS, scheme area catchments, our appeal regarding an assessment on urban land in Baldivas with its ecosystem diversity related to that of land of Landowner No.9, J and M Fernie, and the inability of the Western Australian Planning Commission to provide a better mechanism than that in place, originally in Planning Bulletin No.48. This was subsequently incorporated in Planning Policy DC3.4 where only one lot can be excised for sale, this not being of assistance if over one third of the land is native vegetation.

There are no incentives and were none whatsoever provided for any of our now ten clients to preserve the native vegetation. Landowner No.3, DS & WG Johnston offered their farm to Government at what was a very reasonable price, but after two and a half years on offer, then their subsequent appeal to the Minister for the Environment against recommendations of the EPA not yet being determined, and questions of law not being answered by the Minister since 27/04/2003, gives an indication of the malaise that permeates the Office of the Minister responsible for dealing with these matters.

Landowner No.4, Mistpal Pty Ltd has an appeal before the Town Planning Appeal Tribunal, on which mediation was requested by us and granted by the President, Barrister, Mr Peter McGowan. This was undertaken on 05/02/2004 with no settlement, the WAPC being against the four lot subdivision for conservation, averaging 90.0 hectares for each lot. This will be an excellent demonstration to the farming community of the inability of Agencies to act with conformity in cases that are suitable for this type of subdivision and who fail to use their initiative and to progress variations within Planning Policy DC3.4, which has little flexibility and is useless in many situations.

With the EP Amendment Bill 2003 and proposed Regulations there are no incentives to encourage vegetation conservation, but it has an excellent array of disincentives available in both the Bill and proposed Regulations. The Presiding Commissioner, Dr Neil Byron delivered an excellent short address to the representatives of the Conservation Council of Western Australia on 07/08/2003 on the ramifications of large fines and the likelihood of them not being the best way forward. He noted that they can be less than helpful in achieving long term retention of native vegetation.

c). The inflexible application of targets and guidelines across regions with differing characteristics such that perverse environmental outcomes often result: This problem exists in Western Australia as since 1995 the application of targets and guidelines has been inflexible, this having predictable results. In Western Australia through the MoU in 1997, the Agricultural Area to which it applied was defined. This included the areas mainly affected by salinisation. It applied to proposals to clear more than one hectare of native vegetation on rural zoned land in southern Western Australia, south or west of the eastern boundaries of the main agricultural areas. When reliance by the assessing agencies is placed on a document such as the MoU, with its disregard for fact and law, this provides the opportunity for the perverse environmental outcomes in WA.

However the areas of the West Midlands and mainly west of the Brand highway were in many cases assumed to have similar problems with salinity as those areas already salinised in the east. The present problems at Binnu in the north west of the defined Agricultural Area are interesting as the Department of Agriculture are now drilling to prove their “opinion” evidence that salinity will result from clearing that took place on several properties under threat of prosecution for failing to notify an intent to clear.

Where the conservation of vegetation for its biodiversity value becomes paramount over agricultural use without the necessary legislative support, this must and has

not only resulted in perverse environmental outcomes, but a significant loss in agricultural production at a social cost to those landholders involved in the process. Unfortunately the EPA maintain they are not required to include the social impacts, or whether the proposal is sustainable over the long term, this we maintain leading to perverse environmental outcomes. This makes it much easier for the EPA in the assessment of proposals. It is of interest that the definition of "environment" in the EP Act 1986 includes the word "social," but the EPA maintain that they cannot assess on that factor, utilising a Supreme Court decision in the early 1990's to prevent their assessment of "social issues."

If sustainability of a proposal was requested of the EPA in the assessment process, the perverse outcomes which are apparent in their assessment of farming matters would largely disappear. However, with the present level of expertise exhibited by the EPA, it is unlikely that the sustainability of a proposal could be accurately determined by them.

As yet our five clients have not had the luxury of an assessment of their proposal by the EPA that has been appealed to the Minister, being determined by the present Minister for the Environment. It is clear that incompetence of her advisers, herself or the influence of the Greens in Parliament, are probably factors in the failure to provide a decision. Negotiations have commenced on a settlement through the Appeals Convenor to the Minister, but the Minister is apparently not interested in carrying out her duties through the usual process, notwithstanding up to two years to deal with them.

2. Many landholders are being prevented from developing their properties, switching to more profitable land use and from introducing cost saving innovations. Restrictions on clearing regrowth and woodland thickening are reducing areas that can be used for agricultural production.

   This is certainly a Key Point raised by the Productivity Commission and a major cause of economic loss in Western Australia to the farming community and individual landowners. This prevention of development of properties either from clearing the original native vegetation or by removal of the regrowth over two years old has caused, and will continue to cause severe economic loss to many individual landowners without any chance of redress from Government.

   Furthermore, it is clearly evident to us that in Western Australia, Government, are not interested or concerned regarding the impacts of the Agencies, the EPA and the Commissioner of Soil and Land Conservation of the severe financial losses being incurred by landholders including our clients. Government are a captive of the Greens and public servants. They tolerate and accept the loss of income to the landowner.

   The actions of the Commissioner on determining the criteria on which the removal of regrowth is determined will be brought before the Commission at the Perth hearing.

They have continued with a Policy with no legal foundation, but nevertheless have persisted with its implementation to the detriment of many landowners.

The costs and approximate losses to our clients because of the actions of the Agencies, EPA, and Government who have clearly supported those Agencies and the EPA will be produced at the hearing. Both the present and past Government have displayed a lack of intestinal fortitude when we have given a reason or reasons to bring the previous Chairman of the EPA, Mr Bernard Bowen before Cabinet, to answer for the actions of the EPA.

Following on from the Key Points we agree with the Productivity Commission that:

1. some costs could be reduced and effectiveness improved if regulatory regimes followed good regulatory practices that promoted transparency and accountability. The Agencies and the EPA have had little regard for transparency and accountability. It is doubtful if they know the meaning of the words, transparency and accountability being absent without leave throughout many of their decisions;
2. the Commission recognise that more fundamental change is required to promote better targeting of policies to address clearly specified environmental problems. However this is difficult when you are subject to a mindset by the Agencies and EPA that vegetation must be conserved for its biodiversity value, whatever the damage or cost to the landowner, the EPA setting of ecosystem sustainability percentages required for survival being just a ploy. Evidence at the hearing will be outlined on two appeals on this matter, one submitted on clearing in Baldivas in the metropolitan area and that of Landowner No.9, J and M Fernie. This will provide an insight into the duplicity and methods utilised by the EPA to retain native vegetation, whatever the cost or method used, which are reprehensible at the very least and are questionable. However the Minister for the Environment is satisfied with their assessment, but treats the landowner with contempt, having not determined their case. We also state that there has been no attempt to clarify landholder and community responsibilities. The landholder is left with all the responsibility and the community none in these matters which include the forced retention of native vegetation for the perceived good of the community;
3. it is agreed that it is reasonable to expect landholders to bear the costs of conservation that primarily benefits them individually or as a group. However in the case of all of our clients the retention of any further vegetation than that proposed will be of no benefit to them and at best an ill perceived and not proven benefit to the community;
4. it is agreed that landholders should be given greater responsibility for determining solutions to local environmental problems;
5. it is agreed that the community should pay in full and not the token amounts that may eventually be offered for the environmental services, such as conservation of vegetation for its biodiversity value that it demands;
6. it is agreed that to meet wider community demands for conservation services, Government should purchase them through voluntary transactions if the landholder be so inclined, or in cash at market value of the land when cleared, even over an extended

period of time to be agreed by both the landowner and Government. This type of long term agreement may well suit some landowners;

7. it is agreed that this approach may provide incentives for landowners to retain and manage native vegetation, thus improving environmental outcomes;
8. it is agreed that payments to landholders for public good conservation would lead to increased scrutiny of costs and benefits;
9. that by providing the true cost of the loss of the use of the land for agriculture, forestry or horticultural activities to the landholder combined with a correct publicised assessment of the costs to the taxpaying public, the issues of the need to retain native vegetation will become very much less as the public are much more concerned with the provision of health, education and law and order being preserved in the community, rather than the retention of native vegetation, unless of very high conservation value; and
10. that if the public had to pay the true cost of the retention of native vegetation instead of having the commodity stolen for them from the landowner by a willing Government, then most of the present problems we as consultants are involved with for our clients would disappear.

The impacts on our individual landholder clients will be summarised, with your key points and comments being applicable to all of them, for presentation at or prior to the hearing. There has been a failure by the Government to name benefits for those forced to retain their vegetation with no compensatory mechanism from them or interest in addressing the issue.

The passage of the EP Amendment Bill 2003 with proposed supporting Regulations to follow, which in their present form being near unworkable, will also be addressed. Comments on the proposed regulations are due to the Department of Environment by 13/02/2003. We are waiting on a response to questions forwarded to that Department before responding with our submissions.

The Productivity Commission statement that the costs of existing native vegetation and biodiversity regulatory regimes could be reduced while increasing the benefits is fully supported by us, as our constant argument that cost could be reduced and effectiveness improved as the regulatory regimes and practices being followed since 1995 have not, we constantly argue conformed with both Stute and Administrative Law, with no transparency and accountability.

One example of many is worth citing, Farm Weekly 08/11/2001, Land Clearing is a low priority, where Mr Chance conceded the Memorandum of Understanding (MoU) had caused problems. He described some government agencies actions as “sins of omission” and said the MoU process had been designed to mislead growers over clearing rights. Our response in the Farm Weekly, 29/11/2001 is also enclosed for your information, with another later letter in the Farm Weekly, 11/09/2003 to the Commissioner for Soil and Land Conservation, Mr David Hartley on one of his productions, Land Clearing Proposals for Rural Zoned Land in WA, which we argue is ultra vires the Soil and Land Conservation Act 1945 (Appendix 1).

As you are aware we go much further, in agreeing with the Minister's statement on "sins of omission," but argue there were sins of commission as the MoU demonstrated a disregard for fact and law, with some of those responsible and signing the document, failing to answer pertinent questions on its structure. Enclosed as Appendix 2 is our letter to the Editor, Countryman once again providing the Director General, Department of Agriculture, Dr Graeme Robertson, the opportunity to respond in full to the six questions on the MoU, these being first placed before him on 08/06/2001 with enclosed his response of 20/06/2001 (Appendix 2).

There are other issues to support those presented in this document that will be submitted to the Productivity Commission prior to or at the hearing in Perth.

They will include:

1. matters related to the failure of the Legislative Council Standing Committee Inquiry into matters of Land Use in Western Australia and the ramifications and possible reasons for that failure;
2. the obstructions faced by Beermullah Pty Ltd through the Minister for Agriculture referring a "proposal" to the EPA which was not a proposal and was not accepted by the EPA and his motives for that referral and statements made in correspondence to us on the matter that reflect on his capacity as Minister for Agriculture;
3. statements made in Parliament by the Minister for Agriculture that can be interpreted as an attempt to mislead Parliament, the Member who asked the questions regarding the MoU and also the farming community; and
4. comments on the Draft Recommendations.

This document is to be sent by facsimile tonight, but will be sent by email by 11/02/2004.

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J R Ferguson
for
Ferguson, Kenneison and Associates

Date: 8 February 2004

FURTHER ISSUES FOR THE PRODUCTIVITY COMMISSION FOR THE HEARING IN PERTH WESTERN AUSTRALIA 17 FEBRUARY 2004

Following on from the submission presented to the Productivity Commission dated 08/02/2004 are the following relevant issues noted in that submission and others. Comments may not be made on all of them, but if time is available at the hearing it will be worthwhile bring them to the notice of the Commissioners.

They are:

1. Comments on the Draft Recommendations of the Draft Productivity Commission Report;
2. Matters related to the failure of the Legislative Council Standing Committee Inquiry into matters of land use in Western Australia to publish a report to date;
3. Comments on Section G of the Draft, pages 405-435;
4. Obstructions to Beermullah Pty Ltd in the pursuit of their lawful agricultural activities; and
5. Failure of State Governments to recognise the implications of the signing of COAG Agreements related to the requirement for compensation to landholders and not implementing the agreed actions

3.0 DRAFT RECOMMENDATIONS

DRAFT RECOMMENDATION 1

Before implementing native vegetation and biodiversity policy, a regulation impact statement should be prepared that indicates an assessment of the problem being targeted, expected costs and benefits of the proposed policy, and an assessment of alternative instruments. This assessment should be made public.

RESPONSE

This recommendation is supported in its entirety. As the main targets of the policies of Government in Western Australia are the landowner, there should be an inclusive process which provides the opportunity for comment from that section of the community most disadvantaged by changes in policy.

Also there has been little assessment of the likely costs and benefits of native vegetation and biodiversity regimes. Examination of two documents, EPA Bulletin 966, December 1999, Advice to the Minister for the Environment under s16(j) of the EP Act 1986 and Position Statement No.2, Environmental Protection of Native Vegetation in Western Australia on

clearing of native vegetation with particular reference to the Agricultural Area. They were published by the EPA and clearly indicate the inability of that Statutory Authority and its advisers to provide accurate and unbiased information both to the Minister and to the public.

Furthermore, over a period of four years, we have constantly argued that representatives of the Statutory Authority, the EPA, the Agencies and Commissioner of Soil and Land Conservation concerned with implementing policy outlined in the Cabinet Directive of 1995, failed to comply with its directions in full which were implemented through the MoU, with its disregard for fact and law. The MoU was never placed before the farming community for comment prior to its implementation.

There was no assessment of alternative instruments to implement policy, but in one instance the Native Vegetation Working Group recommended to the Minister for Agriculture that the compensation paid to those refused clearing in the Country Area Water Supplies Catchment, should have that compensation reduced to that on offer to those in the agricultural areas. With "friends" recommending policies such as that one, the farmer did not need any enemies.

DRAFT RECOMMENDATION 2

All policies should be subject to ongoing monitoring and regular reviews of all costs and benefits in the light of articulated objectives. Reviews of performance should be published.

RESPONSE

Recommendation 2 is fully supported, the ongoing monitoring and regular reviews of all costs and benefits of policies, while acknowledging the articulated objectives, is a very important point. The public and particularly those landowners negatively impacted by the policies must be provided with the opportunity for participation in this process.

One "review" of the MoU, through an implementation document, was the authorisation by the Commissioner of Soil and Land Conservation, Mr David Hartley of a document, Land Clearing Proposals for Rural Zoned Land in Western Australia, November 1999. Our argument is that his actions provide an example of a bureaucracy being prepared to act in contravention of the Soil and Land Conservation Act 1945, with a disregard for the outcomes and the resultant damage inflicted on those who were forced to conform with its policies.

It is our argument that in any future inquiry into the operations of his Office, his actions in imposing that policy document, among other actions, require a full and thorough investigation.

However it is our concern that any review and monitoring process could not be effectively undertaken by those involved in the assessment process. We have consistently argued for a period of four years, that the public servants involved the assessment process have been unable to implement policy in conformity with both the Statute and Administrative Law. Therefore we contend that they could not be involved in any review process, except to respond to questions by an independent Review Committee. Our argument is also that the Ministers responsible for the assessment process have been prepared to accept advice from the public servants involved

in these matters without question. Further to our argument, Ministers often have as their advisers party favourites with insufficient knowledge of the relevant issues, from which many Ministerial decisions are then derived.

The Commissioners' witnessed the Commissioner of Soil and Land Conservation, Mr Hartley, in defence of criticism leveled at Government representatives Australia wide regarding the assessment of land clearing on 07/08/2003, hold a copy of the MoU aloft and indicating that it was the document that had been used for the assessment of notices of intent to clear by his office and other Government Agencies in Western Australia until recently.

The Minister for Agriculture, under questioning in debate regarding the environmental Protection Amendment Bill, maintained that the MoU had not been used by his Office in the assessment process since the change of Government on 10/02/2001. However later, under further questioning he had to retract that statement. It is worth examining the questions asked in Parliament and his following Ministerial Statement of Friday 21 November 2003 (Appendix 3). Then ask why would a document, the MoU, launched with such a great fanfare in April 1997, slavishly followed for well over four and a half years by the public servants, be then confined to the waste bin in December 2001 if it conformed with the law.

The Minister for Agriculture, Premier of Western Australia and Minister for the Environment have all been informed that the MoU disregarded fact and law. This has been constantly denied by them and those concerned with the assessment of clearing of native vegetation.

We further argue, wishing to make it quite clear, that no better recipe for disaster in the future would be available than providing the opportunity for review of the changes to the Soil and Land Conservation Act 1945, the Environmental Protection Amendment Bill 2003, now the Act, and its attendant Regulations still to be tabled, to the public servants concerned, or employees in the offices of the present Minister for Agriculture & Minister for Environment.

Examine our constant argument that public servants have been in control of their respective Ministers on these matters, the Cabinet Directive and resulting MoU for years. Then take the consistent statements by Ministers and public servants that the present assessment process has had the support of Law, both Statute and Administrative. We argue a failure has occurred to acknowledge these problems with the MoU combined with an inability to ensure that the landowner notifying an intent to clear is assessed in conformity with both Statute Law and the Doctrines of Natural Justice, Procedural Fairness, Legitimate Expectation and Ultra Vires. These are all excellent reasons to divorce the Ministers and public servants connected with the process from being directly in control of any implemented review process. As noted previously, our argument is that the rural community have suffered enough over the last nine years from the activities of incompetent and biased public servants and a failure of the relevant Ministers to address the problem in the assessment of notices of intent to clear.

That all policies should be subject to ongoing monitoring and regular reviews of all costs and benefits in the light of articulated objectives, with the reviews of performance being published is agreed. Under no circumstances should the reviews of performance or of any regulations be

conducted by the public servants concerned with the process, but by an independent committee with some concern and knowledge of the law.

DRAFT RECOMMENDATION 3

Ongoing efforts to improve the quality of data and science on which policy decisions are based are required, particularly 'on-the- ground' assessments to test the accuracy of vegetation mapping based on satellite imagery.

RESPONSE

This recommendation is important and supported. The continued use of "opinion" evidence without scientific support has been a well demonstrated and utilised tactic by the Office of the Commissioner for many assessments. The EPA are also careless to the extent that, we will argue, there has been an intent to deceive the landowner in some of their decisions.

In Western Australia it is acceptable to argue that the clearing of native vegetation for replacement with Tasmanian Bluegums, *Eucalyptus globulus*, will lead to salinity (Department of Agriculture, Office of the Commissioner Soil and Land Conservation, J F Morgan, Landowner No.7). As another example the clearing of 580.0 hectares of native vegetation and its replacement with 500.0 ha of Pines, *Pinus radiata*, according to both the EPA, the Department of Agriculture and Office of the Commissioner of Soil and Land Conservation, will lead to salinity, both on and off-site (Landowner No.1, R and P Powell).

Other examples of failure in the assessment process and apparently sanctioned by the Minister for the Environment who fails to make decisions, are that of DW and SM Meade, Landowner No.5, where the circumstances of the "opinion" evidence on salinity can be considered within the "dirty tricks" category. B and C Sorgiovanni, Landowner No.2 is also of interest because of the failure of the Commissioner to implement the SCN on the area where wind erosion was plainly evident, it being imposed on the areas that there was no wind erosion.

The matter of J and M Fernie, Landowner No.9, provides further evidence of the bias and inability of the EPA to act consistently in providing advice to the Minister for the Environment.

The actions of the Agencies and the Statutory Authority, the EPA, demonstrate that they have little regard or knowledge of what the word scientific means. What becomes evident is the bias exhibited by these Agencies and the EPA, with the willingness of many in the community, public servants and Ministers, to accept that bias as being scientifically based. The EPA's performance in the assessment process of notices of intent to clear also demonstrate either very little knowledge of greenhouse issues or their inability to present a balanced and unbiased argument on that issue. This matter and those outlined above can be referred to in the hearing if further substantiation on greenhouse matters is required by the Productivity Commission.

DRAFT RECOMMENDATION 4

Current regulatory approaches should be amended to comply with good regulatory practice, including:

- *Clear specification of objectives of the legislation so that guidelines and decisions link back to these objectives, and performance of the regimes can be monitored and assessed;*
- *Minimizing duplication and inconsistency by amalgamating and simplifying regulations and permit requirements, for example, by rationalizing legislation and regulation within each State and Territory and/or by coordination between Agencies;*
- *Assisting landholders to meet their responsibilities by providing accessible information about those responsibilities, and about sustainable land management practices and environmental problems;*
- *Inclusion of statutory time frames for assessing permit applications;*
- *Consideration of economic and social factors where applications to clear otherwise would be rejected on environmental grounds (a 'triple bottom line approach') with reasons for decisions to be given and reported; and*
- *Provision of accessible and impartial appeals and dispute-resolution mechanisms.*

RESPONSE

The six points in this recommendation are supported, but with these notations.

Point one is essential with our comments outlined on Recommendation 3 being applicable in the process.

Point two will be difficult to implement with the present performance of the EPA, Agencies and the Commissioner, providing evidence that they can effectively combine over a period of years to prevent landowners from progressing their notifications of intent to clear. An example of the inability to gain coordination between Agencies is provided by the ongoing case of Mistpal Pty Ltd, Landowner No.4. The Western Australian Planning Commission are preventing the resolution of this case, but refuse to provide us with a letter that states their preference is for the clearing of native vegetation for agricultural and silvicultural purposes when they refuse the application of Mistpal Pty Ltd for a four lot subdivision for conservation, average over 80.0 hectares in each lot.

Fulfillment of the recommendation in point three has one major problem. This is readily available and on exhibition for all those interested, in the present and ongoing example of those responsible for implementing the proposed regulations to the Environmental Protection Act 2003. They willingly demonstrate that the expertise and competence is not available to them in the promoting of the regulations. They demonstrated an inability to provide information on the proposed regulations and certainly were incapable of providing information on landholder responsibilities, let alone outlining the environmental problems and providing information on sustainable land management practices.

Further evidence should be provided to the Productivity Commission as this matter is progressed to enable the inability and incompetence of those presently involved with the current regulatory approach for the EP Act 2003 to be brought to the attention of the public.

We argue that the expertise is not available in Western Australia in the Government Agencies and public service concerned with the EP Act 2003 Regulations to amend this current proposal in the regulatory approach to encompass good regulatory practise and provide the information about sustainable land management practices and environmental problems. It is probably difficult for those that are not being impacted on to gauge the depth of incompetence endemic within those in the public service responsible for determining these matters.

On this point, Brian J O'Brien, 06/03/2002, who stated that there are other agencies and developers (and we would include farmers in this category) that have greater environmental knowledge and skills. Also mentioned in the article by Dr O'Brien is an interim Report of the Independent Review Committee chaired by Dr Michael Keating, which included the statement that "the Environmental Protection Act cannot take sustainability issues into account." This is indeed fortunate as the EPA have enough difficulty in providing accurate environmental advice, let alone advice on sustainability issues related to a proposal or a farming operation.

The farming community outlay considerable sums of money on advice and have a vested interest in the sustainability of their farm. We argue the EPA and Agencies have little idea of what is required to achieve sustainability in the rural areas. Also argued is that the farming community with their advisers are far better equipped to achieve sustainability on their farms than through advice from both the EPA and Government Agencies.

Point four is certainly well made as cases before the Productivity Commission emphasise the necessity for this inclusion. It is relevant, as mentioned earlier that the Minister for the Environment has not made one decision related to assessments of our clients before her. These are No.1, R and P Powell; No.2, B and C Sorgiovanni; No.3, DS and WG Johnston; No.5, DW and SM Meade; No.7 J F Morgan and No.9, J and M Fernie.

Point five is agreed as the social factors, notwithstanding what the EPA state, are part of the environment and must be included in the assessment process. The reasons for the decision must be given, reported and substantiated by scientific evidence, not the unsubstantiated "feel good " material promoted and accepted by the EPA. This also applies to their decisions on greenhouse issues and lack of knowledge on carbon exchange issues.

Point six is also important as we are waiting on information from the Department of Environment on the appeals process. What has been endured to date by the farming community, both from the EPA and Commissioner of Soil and Land Conservation, is nothing short of disgraceful. There must be a provision of accessible and impartial appeals and dispute resolution mechanisms.

DRAFT RECOMMENDATION 5

Greater use should be made of the extensive knowledge of landholders and local communities. Greater flexibility should be introduced in regulatory regimes to allow variation in requirements at a regional level. Regional committees and bodies should be given greater autonomy (and support) to develop appropriate requirements. Subject to regional priorities, some across-the-board rules, particularly those applying to native vegetation regrowth, should be relaxed.

RESPONSE

This Draft Recommendation is supported. Emphasis by the Productivity Commission being placed on the relaxation of "rules" applying to regrowth is welcome. Relevant to this Recommendation is the failure of the Office of the Commissioner to demonstrate certainty in their policy on regrowth vegetation. That uncertainty is evident when Mr J Dixon of the Office of the Commissioner in relation to an alteration of their policy in a Draft acknowledged that perhaps the Regulation prevails over the Guidelines.

Their predicament in decisions on regrowth was further exemplified when the Deputy Commissioner Soil and Land Conservation, Mr Andrew Watson, when asked by Mr C J Kenneison, regarding the necessity to notify the clearing of regrowth, if the land had been previously cropped or pastured, he stated with words to the effect that notification of an intention to clear was not required. There were approximately 16 people in attendance at this meeting on 11/07/2002 on the premises of the Pastoralists and Graziers Association (PGA). Mr Watson had been given a prior warning of questions on these issues being likely to be asked at this meeting by Mr John Dival of Toodyay, a member of the Pastoralists and Graziers Association.

DRAFT RECOMMENDATION 6

Governments should seek to remove impediments to, and facilitate, increased private provision of environmental services. Actions could include:

- ***removal of tax distortions or lease conditions that discourage conservation activity relative to the other activities;***
- ***removal of impediments to efficient farm rationalization and/or operation;***
- ***research into and facilitation of sustainable commercial uses of native vegetation and biodiversity; and***
- ***provision of education and extension services to demonstrate to landholders the private benefits of sustainable practices.***

RESPONSE

This Draft Recommendation is supported. As noted in Draft Recommendation 4, most farmers have a vested interest in sustainability of their operation.

There is no problem with point 4 but if there is a higher and better sustainable use for the land then there should be no impediment to the farmer clearing for that use. If prevented from clearing for that sustainable use then sound scientific reasons should be given for its preservation. Compensation would become payable to the farmer if the retention of vegetation does not adds to the sustainability of the farming operation.

DRAFT RECOMMENDATION 7

Landholders should bear the costs of actions that largely benefit them individually or as a group. Landholders and local communities should be given greater autonomy to devise and possibly implement innovative solutions to regional environmental issues, the benefits of which will accrue principally to landholders in the region. Local 'solutions' could include development of market mechanisms, voluntary efforts (individual and/or joint), local codes of practice, local regulations or simply education.

This recommendation is supported with some reservations.

In regard with all of our clients, the clearing for the purposes outlined in their notification will not lead to land degradation. Therefore the retention of their vegetation will certainly be of no benefit to them. If it is perceived to be of value to other farmers or the communit then compensation should be payable.

Our argument is that if the determination of the value of the vegetation is the responsibility of those who are part of the present process, then the farmer would be foolish to subject himself to an assessment by known incompetents such as those, who although designated by the Minister for the Environment or the previous Chief Executive Officer of the Department of Environment to have the ability to respond to questions on the new clearing regulations, failed miserably in the Farm Weekly to respond to submitted questions through that newspaper.

A further example, among our clients is that of R and P Powell, who if their vegetation is deemed necessary for the good of the farming community, having then being forced to retain their vegetation, which can be cleared without causing land degradation by planting to pines are then forced to retain their vegetation for the benefit of those farmers in the catchment who have caused the greater part of their land degradation on their property.

DRAFT RECOMMENDATION 8

Over and above agreed regional responsibilities, conservation demanded by the wider community (for example, to achieve biodiversity, threatened species and greenhouse objectives), should be 'bought' from landholders where intervention is deemed necessary and cost-effective. Mechanisms may include voluntary agreements, auctions or even compensated regulation, targeted to the particular problem.

RESPONSE

This recommendation is supported. However vegetation demanded by the community from the landholder for a public good must be compensated.

Of interest is who determines for the community that the vegetation requires preservation. Also relevant is the scientific evidence to prove that the vegetation is worthy of preservation and who would be responsible for the decision. Perhaps it will be unsubstantiated decisions without scientific support, such as that outlined the case of J and M Fernie, presented by the EPA to the Minister for the Environment for her determination.

APPENDIX 1

ARTICLE: FARM WEEKLY, NOVEMBER 8 2001, PAGE 13
Land clearing is low priority

LETTER TO EDITOR: FARM WEEKLY, 29 NOVEMBER, 2001, PAGE 5
Land clearing answers sought

LETTER TO EDITOR: FARM WEEKLY, SEPTEMBER 11, 2003 PAGES 24 & 25
More confusion over clearing

APPENDIX 2

CORRESPONDENCE 08/06/2001 TO DIRECTOR GENERAL, AGRICULTURE
DR GRAEME ROBERTSON
ON
THE CABINET DIRECTIVE OF 1995 AND MOU OF MARCH 1997

RESPONSE OF THE DIRECTOR GENERAL OF AGRICULTURE, 20/06/2001
DR GRAEME ROBERTSON
TO
THE CORRESPONDENCE OF 08/06/2001

LETTER TO EDITOR COUNTRYMAN 29/01/2004
BY
FERGUSON, KENNEISON AND ASSOCIATES
Farmers treated like mushrooms