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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

DRAFT REPORT ON IMPACTS OF NATIVE VEGETATION AND BIODIVERSITY REGULATIONS

DR N. BYRON, Presiding Commissioner
DR B. FISHER, Associate Commissioner
PROF W. MUSGRAVE, Associate Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON WEDNESDAY, 4 FEBRUARY 2004, AT 10.44 AM

Continued from 3/2/04 in Toowoomba

DR BYRON: Welcome, ladies and gentlemen, to the public hearings of the Productivity Commission's national inquiry into the impacts of native vegetation and biodiversity legislation. My name is Neil Byron. I've been appointed the presiding commissioner for this inquiry. My colleagues are: on my right, Dr Brian Fisher and, on my left, Prof Warren Musgrave. The purpose of the inquiry is to examine legislation dealing with native vegetation controls and biodiversity conservation and to assess its effectiveness and cost-effectiveness and to look at alternative arrangements that might achieve the desired outcomes better than the existing arrangements.

The purpose of these hearings is to obtain feedback on the draft report that we released at the beginning of December. Following the hearings today, we'll be having similar hearings in Dubbo tomorrow, Albury and Hobart next week, Perth, Melbourne and so on, with a view to reporting to the Commonwealth government no later than 14 April, as required by our terms of reference. After that, the government will release the report at a time of its choosing. The commission itself does not release the report but, normally, the government will release the report within 25 sitting days of our giving it to them.

In these hearings, we're after feedback. We want to correct any errors of fact or interpretation. Particularly, we're trying to improve the proposals that we're going to make for how legislation and regulation of native vegetation might be improved in all jurisdictions. We always like to run these hearings in an informal manner, but we do take a full transcript for reference purposes, so we can't really entertain comments from the floor. However, we always invite any member of the public who wants to come forward to make a statement or ask a question to do so before the end of the day's proceedings. Even if you're not on the program for today, you will have an opportunity to state a point of view.

Participants aren't required to take an oath, but the Productivity Commission Act says that witnesses should be truthful in their remarks. You're welcome to comment on points raised by other people, either during the hearings or in written submissions that might have been on the web, whether you are agreeing or disagreeing with the other participants. The transcript will be made available to each witness for them to check to make sure that there's been no transcription errors. Once it's confirmed to be correct, it will be on the web site and will be part of the public record of the inquiry.

I think that covers most of the introductory and housekeeping arrangements, so I'd like to now call our first witness this morning, Mr Mick O'Neill, from the New South Wales Forestry Services, representing the New South Wales Forestry Products Association. If you'd like to introduce yourself for the transcript and to summarise your submission, which we've all read, then we can have a question and answer

session about it. Thank you for coming.

MR O'NEILL: Thank you. My name is Mick O'Neill. I'm director of a forestry consultancy company operating out of northern New South Wales, which is called the Northern New South Wales Forestry Services. As part of our business, we also undertake consultancy work for the New South Wales timber industry and, in particular, the New South Wales Forestry Products Association Ltd. We were asked by the New South Wales Forestry Products Association to attend these hearings today and to put a brief submission to the hearings, which we completed yesterday and emailed late yesterday afternoon.

By way of background for the commissioners, I graduated from the Australian National University with a bachelor of science in forestry in 1977. I spent about 11 years with the State Forests of New South Wales in various parts of the state and, since 1989, I've operated our own forestry consultancy company, the relevance of which to this hearing is that most of our early work as consultants - and, certainly, still a large portion of our work - is involved with private native forests management in northern New South Wales in particular. It has included extensive publications for various people, such as development boards, on the extent of the private native forest resource in northern New South Wales.

I'd like to raise very briefly a few issues that were in my submission yesterday afternoon. Age doesn't weary everyone, but I'm afraid that in the last six months I've had to resort to reading glasses. In New South Wales, the proportion of private native forest resource in terms of the general resources that goes into hardwood sawmills is significant. On the north coast of New South Wales, for instance, about 50 per cent of the native resources comes from private property and I should say that, in relation to private native forests, we're talking native vegetation. My specialty is forestry, as opposed to other forms of native vegetation.

In the red gum forests of the Murray and Murrumbidgee, it's much the same picture: about 50 per cent of the resource comes from private property; the same can be said from private cypress and ironbark forests in the west of New South Wales. To a lesser extent, the south coast provides some resource for private forestry into the industry, so the private native forest industry is quite significant in its importance to the general New South Wales hardwood timber industry. As a specific example, in the Clarence River catchment of north-east New South Wales, from studies that we have done we estimate about 60 per cent or more of the resource currently comes from forests on private property. In the Grafton area, for instance, all but a few of the larger mills in Grafton rely entirely on selective logging of private native forests.

Another measure of the importance of private native forests is reflected in the fact that since 1998 about 600,000 hectares in northern New South Wales of state

forests has gone into permanent conservation reserves as a result of the CRA and RFA processes. That's placed more importance on the private resource, and it's true to say now that, for the first time in my memory, there's actually an upward trend in the value of the private resource. In other words, the private forest resource in northern New South Wales is starting to attract significantly higher stumpage values than it did in the past.

In relation to the existing and proposed New South Wales legislation, there is a bill on the table at the moment - the Native Vegetation Bill 2003 - which will be put into law I think on 31 May, and regulations are currently being drawn up for private native forestry as well as for other native vegetation clearing. In relation to our past and future legislation, there's been the perverse situation in New South Wales where broadscale clearing encompasses private native forestry, so that the concept of selective clearing, which is really what's done certainly on the north coast of New South Wales, going into a forest and selectively removing logs - is encompassed in this term "broadscale clearing". The clearing of native vegetation statistics were produced for New South Wales, and often the government trumpets this sort of thing. It might say, "Last year, 40,000 hectares of native vegetation were cleared in New South Wales," but the real possibility is that 30,000 hectares of that was actually selectively logged. For anyone who has any experience in forestry, it certainly wasn't broadscale cleared.

Unfortunately, in terms of private native forestry, we've had to live with this situation since the 1980s, when the first state environmental planning policy came in, when forestry was described as "broadscale clearing". That definition was never changed, and there has never been any real effort by anyone in government, either in previous government or the current government, to sit down and pull private native forestry out of this broadscale clearing definition and treat it in its own right, even though the previous deputy director-general of the Department of Infrastructure, Planning and Natural Resources actually recommended to the department before her departure that private native forestry needed to be treated in its own right.

The result of this situation, where private native forestry is included under a definition of broadscale clearing, is that a number of things are either perceived or were actually seen to have happened. One of them is a misconception amongst many people in the broader community that, when people talk about vegetation clearing and forestry, people in Sydney and other big centres believe that when people go into the forests in New South Wales they go and clear the forests. In fact, this is not the case, with the exception of some silvicultural practices in the southern part of the state, where it's quite a different tree species and quite a different silvicultural practice, where clear-felling is done in co-ops. Certainly, for the bulk of the state, it's just not right.

What we're talking about, generally, is selective logging rather than clearing. This anomaly acts as an impediment to many forest owners who regard the whole process of obtaining a clearing authorisation from government departments as too difficult. In other words, this stigma is attached to private native forestry that it's clearing. A lot of people - and we get regular phone calls - are saying, "We're just not going to go through the process. We're not putting in an application for clearing. We want to do selective logging so, bugger it, we're not going to do it." Therefore, it becomes a disincentive to private forest owners to manage their forests properly.

If they're not going to manage them for some form of timber production as well as biodiversity and conservation, they're not going to do other things, such as manage fire, feral animals and weeds. By direct or indirect means, if their forests are sterilised, they're not going to put a lot of effort into managing them. Therefore it has an impact on the potential available resource from what really should be sustainably managed private forests.

If regulation is introduced that is just too difficult for private forest owners to deal with, or if it lacks real incentives for proper management, or it imposes significant compliance costs, it's more likely to act as a disincentive to proper forest management. This could, potentially, result in one or more of the following: large areas of private forest effectively being sterilised or removed from sustainable multiple use management and forest owners undertaking what we refer to as "panic logging" activities prior to the introduction of new regulations. They fear the introduction of new regulations, so they say, "Well, let's all get in now and get as much timber out as we can before the new regulations come in." It can also result in private forest owners just flouting the new regulations, rather than seeking compliance, and doing it by the back door, if you like.

Because it stifles proper management of forests, from a biodiversity point of view it can also lead to the loss of opportunities to conserve important areas of private native forests through the provision of incentives. In other words, if landowners don't perceive that it's worth their while to conserve parts of their forests and if there's no incentive provided to do so, they're much less likely to do it.

As I said earlier, the current New South Wales native legislation bill becomes law at the end of May this year. Transition provisions will be put in place so that people can continue to practise private native forestry under the current legislation. A working party has also been established to consider the drawing up of the new regulations for private native forestry, and I'm part of that working party. I speak not only for the New South Wales Forest Products Association but also from our personal viewpoint and from the personal viewpoint of a lot of people involved in the private native forests industry.

It's our opinion that the regulation for private native forestry in New South Wales - and, again, I'm specifically talking about New South Wales - must be underpinned by the following: first, there needs to be continued consultation with private forest owners, or landowners with forest on their properties, to ensure that the regulations are workable and particularly that the compliance provisions can be understood and managed by private forest owners. There is absolutely no point regulating anything if the regulation itself is (a) hard to understand, or (b) just places far too many impediments on the person who has to actually abide by that regulation.

We are seeking the development of a regulation that does not impose a significant cost burden for compliance on the forest owner. This can be achieved through a number of strategies, the most important of which is the development of simple planning pro formas and the provision of essential information by the Department of Infrastructure, Planning and Natural Resources to assist in the planning process. Again, we are saying that, under the current process - where there is no cost to the landowner to get an authority to undertake private native forestry. In New South Wales there is a cost if they want to do it under the existing exemption, in that they have to consider what impacts they're going to have, and they may have to get someone to provide specialist advice in that regard.

So we're talking about a situation of going from a longstanding arrangement, where private forest owners have always had a department to go to and to consult with and it has provided them with all the information they need and a consent to undertake the harvesting activity or the private native forestry activity, to a situation in the future where forest owners are going to have to rely very much on themselves to obtain a lot of this information, and they're going to have to go through a planning process that previously they didn't have to go through. There is going to be a cost and, in order to reduce this, it may by necessity require more staff resources being allocated to the relevant government departments; whether or not that will happen no-one really knows. However, it's quite obvious to people in the industry that unless the relevant department is staffed, regulation of native vegetation management in New South Wales is not going to be easy.

In considering the environmental and biodiversity benefits of native vegetation regulation, equal emphasis must be given to the important and positive socioeconomic benefits of private native forestry, both to the person who owns the forest and to the broader regional and state communities. We talk about triple bottom line accounting. It seems that too often in the forestry debate the environmental and biodiversity issues are given huge prominence but the socioeconomic issues tend to be pushed into the background.

There needs to be a realistic consent time frame that will act as an incentive rather than a disincentive to forest owners to continue sustainable forest

management. In other words, if we are going to have a regulation that controls private native forestry in New South Wales, there's no point a person putting in an application to undertake private native forestry in February 2004 and not getting approval until February 2005. In our experience in the north coast, the current situation with staffing in the department is such, that is, a six-month - and sometimes much longer - time frame between applications and consents.

The last point I wanted to make in relation to the New South Wales situation is that there need to be effective incentives, and they are built into this bill. If you want people to go from trying to make a living from their private native forests to conserving private native forests - in other words, if you want to change the mind-set and try to encourage people to conserve some of their forests in either an official or unofficial conservation reserve - you need to provide an incentive, and a proper incentive, that will encourage them to do so. So we're looking at a situation where we want private native forestry sustainable management to continue for the sake of the timber industry, the communities and the state economy, but we also want incentives for people who are prepared to forsake that future income and add their private forests to the conservation reserve system. They need to have proper and substantial incentives to do that. Incidentally, they are taxpayer funded incentives, so if the taxpayers of New South Wales want more conservation areas, then they have to front up with the money, via the government, to provide that on private property. I think that's really all I wanted to say.

There was one other issue in relation to the planning process in the proposed process in New South Wales that may have a significant impact on the regulation in that the provision of property vegetation plans that need to be signed off by the minister; put some sort of covenant or a caveat on that property so that it may be difficult, it may reduce the value of that property in the future or it may in fact be difficult to sell that property if it's got that type of covenant over it. That issue needs to be addressed.

As I said at the outset, or implied at the outset, I understand that this hearing is about the impact of native vegetation and biodiversity regulation. I make no apology that I come from the native vegetation or the native forest side of things, the private native forest side of things. I'm sure there's people that have put in submissions on the broader native vegetation issue, but I think I would like to leave it at that, thank you.

DR BYRON: Thanks very much for that, and for the effort that's gone into preparing the submission and so on. Did you have a chance to have a look at our draft report at all?

MR O'NEILL: Very briefly. I must say this was all a bit of a rush and, to be

honest with you, that submission was prepared yesterday afternoon. So I've had a look at as much as I can but because of my experience, I guess, in New South Wales I had a fair idea of where we wanted to come from. But, yes, I did have a look through the draft report.

DR BYRON: I'm just wondering if you had any reaction; whether our draft recommendations are basically consistent with the way you would like to see them developed.

MR O'NEILL: Yes, they are, and I note particularly in the draft overview some of the potential impacts on landowners. Whilst it dealt mainly with agriculture, it reflects in forestry as well and also the costs that have got to be borne. Certainly it's been our view for a long time that there is a very strong difference between public and private forests. Public forests are taxpayer funded forests and the management of those forests is funded by the taxpayers. The private forest is something that may have been in a family for a number of generations or, in fact, may have just been purchased; someone has purchased a property with a forest on it and has a $500,000 debt to the bank in the full expectation that some of that debt may be worn away over time by the ability to practice private native forestry.

So if the public of New South Wales want more conservation reserves and they've got to come from private native forests or they've got to come from private property, there should be an expectation that the incentives should be provided by the public of New South Wales through taxes to ensure that happens. That's a view - and it's similar with agriculture. If people don't want investitive agriculture to continue and they want a change in land use in agricultural activities, I believe that it's one of the fundamental things that someone has to fund the incentives.

The other thing I noted from the overview of the draft report was that it also talked about improving existing regulatory regimes. One of the things it talked about was statutory time frames which is another bugbear of ours. For any regulation to work where you are actually asking someone to submit to a compliance process and to put in a plan for approval, there needs to be a reasonable time frame, so that the person doesn't go to all the cost of preparing a plan - whether it's for a change in agricultural land use or whether it's for private native forestry - and then put the plan in and still have to wait 12 months for that plan to be accepted and approved.

I might also say - and it's not covered in some of these documents - in New South Wales the proposal is that - it's not a proposal, it's a bill now - that there be catchment management authorities and there are some certain wood basket areas of New South Wales that are very important, both economically and socially, to the state. They are places like the north coast, the Riverina, the cypress forests of the west. These are areas where there are large tracts of private native forest defined as

native vegetation. There needs to be some consideration informing these catchment management authorities that private native forestry has a representation on those authorities because, after all, there are areas where most of the catchment management authority's deliberations will involve private native forestry.

DR BYRON: Okay, thanks. Just a quick point on your introductory remarks on the importance of private land as a source of log supply to hardwood sawmills: my recollection is that since about the 1920s people have been saying, "Yes, but within a few years it will all be gone," and you're saying that it still represents 50 per cent of the log supply. Is that because the privately owned forests are being actively managed on a sustainable basis, or is there some other reason why, after 80 years, it's still 50 per cent of the wood coming off private land?

MR O'NEILL: It's a combination of things. It's the sheer area of it. We've done a number of studies of all the private native forests from the Hunter River north to the Queensland border and we've produced two reports. I can't recall the area, but my recollection is that in north-eastern New South Wales there are about 600,000 hectares net of private native forest that could be accessed. That's had all the steep land taken out and all the areas that wouldn't be able to be accessed, so there is something in that order. Some of that, understandably, is not going to be subject to PNF or private native forestry in the future because of its ownership, but the vast majority of it is, so there is a big area there.

The second thing that's probably relating to it is that not all of - despite what some people in the environmental movement will say - the private native forests of New South Wales have been degraded in the past. There seems to be a bit of a relationship between the size of the property and the way it's been managed. Often the much bigger properties have been managed reasonably well because they're a bigger investment and they may well have been owned by a company rather than just a family, so there has tended to be some input from professional people over a long period of time in the bigger properties.

A lot of the smaller properties have had the top cut out of them, as we say; they've been degraded certainly in the past but they are now coming back and some of that regrowth is now maturing. There's a combination of things. I think it's a falsehood for people to say that if we keep treating out private forests like we are at the moment we'll have none left at all. The fact of the matter is that up until the early 1980s there was no control basically over the private forest management and yet those private forests are still there and they are still producing wood. So whether it's by accident - some forests, for instance, on the north coast of New South Wales like Blackbutt forest that got a hiding 40 years ago - in other words were completely cut out 40 years ago - of course because of the quality of the forest and the quality of the soils are now producing even aged stands, if you like. They're now back in

production and it's entirely by accident.

They would have been logged a different way if there had been regulation then, but when they were logged they were given a fair bit of a hiding, but now they have come back into production. It's a pretty resilient forest, a eucalypt forest, and even forests that were poorly managed 50 years ago when they were logged, are still producing timber now. I think the really important thing is to get hold of those forests now and bring them back into proper management so they are not overcut again. That's one of the big issues. If the regulation is right and it provides incentives and it's not too cumbersome and it's not too overbearing on the forest owner - and some silviculture is introduced via the regulation - there is a real opportunity there to tidy up a lot of these forests and bring them back to a condition that is more multi-aged than some of them are now.

DR BYRON: But do you think that uncertainty about the right to harvest in the future is a serious disincentive to that sort of long-term sustainable management?

MR O'NEILL: Yes. We get quite a number of calls from people asking could we come and have a look at their forest. They're very worried about what's going to happen in the future. They want to know if there's any wood there now - "We want to get it off straightaway." Yes, it's not uncommon. I know other consultants that are fielding the same sort of inquiries.

DR BYRON: Are you familiar with the Tasmanian system, where you have your private forest reserves which sort of guarantee, as I understand it, a right to harvest?

MR O'NEILL: Yes.

DR BYRON: Is that the sort of thing that you would have in mind for - - -

MR O'NEILL: Harvest rights are absolutely fundamental and we have been arguing it for a long time. I have no great confidence over harvest rights on crown forests, despite RFAs, because if the wood runs out, the wood runs out. If you can't harvest anything you've got no harvest rights left. On private property it's absolutely essential. I can guarantee that a large area of north-eastern New South Wales, if it was provided with harvesting rights, would be managed in a different way than it is currently, yes, for sure.

Again, there is a perception that landowners who own forests are just interested in - as soon as there is a tree big enough, cut the thing down - and that's not right either. We do harvest planning and management planning for private property owners who would rather leave the cut for another 15 to 20 years, for their kids, but they are talking to us and saying, "Look, we're going to have to do it sooner because

we're not sure whether our kids are going to get the timber." It's an intergenerational thing. It's people wanting to leave an asset for their children for the future and they're concerned that that asset is not going to be available to their children in the future. It's quite realistic. It's not widespread, but there are plenty of examples of that.

DR FISHER: Thanks, Mr O'Neill. These perverse incentives to harvest early, that you have just been speaking about, are they subject to the negotiation on the arrangements between now and May here in New South Wales? Is that part of what will be sorted out between now and May, with respect to the new legislation, or is that not going to be covered?

MR O'NEILL: No. My understanding is that the program - because I'm on the working party I have some idea of what the program is, but there is another meeting in a couple of weeks time and then there is another one scheduled for March. The regulation then has to go on public display and it's possible that the regulation may be July coming in, so there is a period there of maybe two months where there has got to be a transition phase and people - that will just be under the existing legislation, so they'll either operate under the exemption or they'll go to the department for consent to undertake harvesting.

Within that somewhere, people are going to go and there will be some people who will go and get as much as timber off their property and if they can't do it through the process, they'll just do it because they're just frightened that they're not going to be able to do it in the future.

DR FISHER: Okay, so what you are saying to us is that you believe the new arrangements in New South Wales will continue to leave enough uncertainty - - -

MR O'NEILL: No, the new arrangement - in any consent process what we've found is that there is always a small proportion of people who just go and do it and don't worry about it. There are people - there always have been and there probably always will be, small groups of people out there having their forests logged without seeking any consent, without saying anything to anyone, and it just happens.

My concern is that if the regulations - if the new regulation in New South Wales isn't straightforward, reasonably low cost, with incentives - all those things - the potential is that the situation is not going to be any better in the future, than it is now. In other words, there will still be people just going ahead anyway. There will be other people who just won't bother, because it's all too hard and all too difficult, and then there will still be the group of people that have always gone through the process.

So my concern is that if you're going to - and this has gone on for so long now, since 46, finally get the regulation right - if you can finally get the regulation right and you can produce information for forest owners that is easy for them to understand, so you can produce pro forma management plans so that they've actually got something to follow, when they produce a management plan - to make it easier for them, if you can do all those things and make it an incentive for them to manage their forests rather than a disincentive, then I think a lot of things are going to change. If you can't do that, I think the situation is not going to be any better than it is now. The government is saying we've got to improve it, so if they want to improve it, they've got to get the regulation right.

We were actually contracted by the Department of Infrastructure, Planning and Natural Resources last year to produce draft exemption operating protocols and forestry operating standards for private native forestry in New South Wales. That was a very long process. We held workshops in six different centres in the state where we brought stakeholders in and talked to them about what they wanted in these documents. We produced these documents, which were going to be the basis on which all regulation of private native forestry would happen in the future. Of course, parts of them are going to be incorporated in the new regulation, but they've just gone into the ether somewhere.

It's been a long and frustrating process and your hearings are about the impact and the big word in this is the "impact" of native vegetation regulation. I just hope that we can get it right this time so that the impact isn't to produce a disincentive to proper forest management.

DR FISHER: Okay. So the bottom line actually is that between now and say, July, there is still an opportunity here in New South Wales to implement some of the suggestions that you're making to improve the process beyond what we have today.

MR O'NEILL: Yes, a lot of this was done through the EOP and FOS anyway, the Exception Operating Program. Yes, the regulation - parts of the regulation, in my understanding, have been drawn up and there are still parts to go. They've field tested some of it, but we haven't - the working party hasn't seen any of it yet. We're hoping we'll see it before the next meeting which is on 17 February. The working party includes all stakeholders, so it includes the environmental groups, it includes industry, it includes departments and national parks. It's a bipartisan working group.

Yes, we need to see something before we really get a picture of whether what I'm talking about is happening. My view is the industry view, too. If you were to have a submission from the environmental groups, you know, there would be some similarities in what they are saying - "Don't make it a disincentive" - but this is purely a practitioner's view, if you like.

DR FISHER: Thank you.

PROF MUSGRAVE: Thanks, Mr O'Neill. That's a very interesting submission. Could I just get a better picture of what you're talking about. I gather that these existing private forests are remnant vegetation on farms. Is that correct? Are you talking about stand-alone forests? Are they remnant or regrowth?

MR O'NEILL: The bulk of it? The bulk of it would be forests that have been there in perpetuity. In some areas there is forest of formerly cleared land that had failed. Interestingly enough, some of the best private forests I've seen are in the Dorrigo area from old dairy farms, old cleared dairy farms and they just let them grow back to - - -

PROF MUSGRAVE: It's regrowth.

MR O'NEILL: Grow back to tallow wood, but they're 50 or 60 years old. Then there's - sorry - - -

PROF MUSGRAVE: I'll just interrupt - so such regrowth on an old dairy farm would be a stand-alone forest occupying 100 per cent of the holding, or a proportion of the holding?

MR O'NEILL: No, usually a proportion.

PROF MUSGRAVE: Proportion, thanks.

MR O'NEILL: There are large properties in northern New South Wales that are fully forested, except for roads and a bit of a clearing where there was a hut or something. Then there are the rest of the properties and it varies from a couple of acres of timber to, you know, half-timbered or three-quarters timbered. But the bulk of the forests - and I can speak for New South Wales - the bulk of the private native forest is forest that has always been there, and then there are smaller areas where it's either recent regrowth from clearing practices in the 70s and 80s, that they just worked out it wasn't going to be worth it, or clearing, say, 50 or 60 years ago.

PROF MUSGRAVE: An implication of what you're saying, it seems to me, is that forest - such private forests would be maintained in better condition as a forest than the equivalent forest as part of a public holding as a national park. Is it reasonable to draw that conclusion, or am I jumping too far?

MR O'NEILL: Yes. I don't really want to go there.

PROF MUSGRAVE: Don't, if you don't wish to do it.

MR O'NEILL: I mean, from a purely non-scientific point of view, it's always astounded me that since 1998 most of the forest that's gone into the national park estate was forest that had been logged for the last 80 to 100 years, so it's pretty good. If it's going into national park, someone has got to have done the right thing. On private property, yes, I think the - if I'm getting what you are saying as right - I think you're probably right. It's a different kettle of fish trying to convert a private patch of forest to national park, of course, but my view is that it would be better held in private tenure and managed than put in the national park.

PROF MUSGRAVE: The reason why I asked such a leading question is that many people talking to us have remarked on the poor management of national parks. When I say "poor" I mean lack of management and that's not to criticise the National Parks and Wildlife - - -

MR O'NEILL: No, that's why I didn't really want to go there.

PROF MUSGRAVE: They just don't have the resources.

MR O'NEILL: Yes. I know people in the parks and they're flat out. State forests are the same. In northern New South Wales, when I was with state forest in Casino we had three graders between two - four graded roads between two forestry districts. Now there's one grader between four, so they have to hire a grader in. It's just the general destaffing of government departments, particularly in natural resource departments. DIPNA is the same. They've got people handling this private native forest consent process that are just so overworked that they'll tell you now, "Look, it could be six months before we can finish the consent, instead of a month."

Having said that about the private property we have done quite a few over the years. We've done quite a few timber valuations on properties that National Parks have wanted to buy, so in other words they have said, "We will pay a consideration for the value of the timber that you're foregoing by selling your property to us." There is a bit of money around still from National Parks. They, from time to time, actively look for private property to add to the national park estate, but that's purely of course a business transaction; a person wants to sell and they want to buy and they'll come together and do it. By and large I think the feeling out in the industry is that the private native forests, if they're properly managed, are better left in private hands.

PROF MUSGRAVE: Another implication of what you said is that because of the rising stumpage values, there could be an expansion in private forestry. Would such an expansion come from existing unexploited stocks on farms, or would we see expansion of the stocks on farms?

MR O'NEILL: No, I think it would be the former. There are people out there who, in the past - some parts of the sawmill industry in the past paid very poor money for private property timber resources, so there is a proportion of people out there who just won't go there again. They say, "Look, we got burnt last time, we're not interested." But if the stumpage value of private native forests continues to rise because it's becoming more important, then that will bring a lot of those people back into the marketplace. So a lot of people will want to come back in and manage their forest for timber production, because they'll get a lot more money than they got last time. So there is a real positive effect in an increase in stumpage values that it will be a positive contribution towards managing a forest better, I believe.

PROF MUSGRAVE: But I assume that there is potential for expansion in supply to come from regrowth.

MR O'NEILL: Yes. Potentially, yes.

PROF MUSGRAVE: Could I say quite substantial potential?

MR O'NEILL: You're talking private forests that, what, are too young now? The regrowth is not ready now or - - -

PROF MUSGRAVE: Just locking up a back paddock and letting it revert.

MR O'NEILL: Yes.

PROF MUSGRAVE: What impresses me from this inquiry - what I've learnt from this inquiry is the amazing capacity for regeneration of Australian native forests.

MR O'NEILL: Yes. One example would be south of Casino between Casino and Grafton in the poor soil but good quality dry spotted gum forests. In other words, it's - if anyone has ever driven between Casino and Grafton, and we've been doing it for the last 20 years - you see this paddock will be cleared that had spotted gum in it, and then five years later they'll have one more go at poisoning the coppice regrowth and then five years later it's back to spotted gum and five years after that it's regrowth spotted gum. It's country that never should have been cleared, that should have been left timbered.

There's quite a bit of that sort of country that is probably 20, 25, 30 years away from producing merchantable timber, but it's that regrowth forest that was once cleared that is coming back, that they've let revert back to forest. If it's less than 10 years old it falls into the provisions of the legislation, where it can be cleared again. Once it gets over 10 years old it then becomes remnant or remnant regrowth or - there are so many definitions.

PROF MUSGRAVE: It's not regrowth, though. That's the important thing.

MR O'NEILL: No. It is regrowth, but it's not - legislatively it's not regrowth.

PROF MUSGRAVE: Not according to bits of paper in the regulations.

MR O'NEILL: Yes. I consider all old growth through regrowth, it's just regrowth that happens to be 500 years old, that's all.

PROF MUSGRAVE: I think we'll have to finish very shortly, but just quickly, a criticism in our draft report of the legislation is the lack of clear articulation of objectives.

MR O'NEILL: Yes.

PROF MUSGRAVE: To my mind that's particularly - that becomes more true the closer you get to the ground, the closer you get to regions and localities and communities. We've encountered people in communities who have been affected by regulation who have no idea of the rationale for the actions which have impacted on them.

MR O'NEILL: Yes.

PROF MUSGRAVE: If an attempt was made to better articulate the objectives, it would be - you would feel that your organisation and your profession has something to contribute to that.

MR O'NEILL: Yes. The interesting thing is that about six weeks ago, when I was invited on to this working party at a meeting in Grafton, I said to the people, "Look, there's all these forestry people out there who still think you're going to stop them managing their forests because you regard private native forestry as clearing." You've got to get the message out. As a result of that, they produced a little newsletter about the new legislation. They sent it out to as many people as they could in the private native forestry industry, and I think they put it in the Rural Press.

That was a really positive step, because what it basically said was, "Here are the objectives of the new legislation," and it kept reiterating, "We are not in the business of stopping you from managing your native forests. We want to provide incentives and we want to help you." All of a sudden, it changed the mind-set of a lot of people in rural communities. All this legislation and all this stuff started because of clearing in western New South Wales, and they just put it over the whole state, which is how forestry never got a mention in the first place and put outside

broadscale clearing. They just said that any clearing is bad, based on western New South Wales.

Now that this has happened I'm getting some feedback from people saying that at least they're now making an effort to consult with people and let them know what's happening, rather than what has happened in the past with past land use legislation, when the farmer has often got it wrong, but he's never been "given it right," if you like. All they get is rumours. They don't get anyone telling them exactly what's happening. I agree that it's got to be the way to go if you want to get these people on side. Traditionally farmers don't like big government and, if you're going to get them on side, you've got to consult with them and tell them what's happening all the way along the process.

PROF MUSGRAVE: Thank you very much.

DR BYRON: I think that's probably the place to leave it, unless you'd like to make any sort of closing remarks.

MR O'NEILL: Thank you very much for this opportunity. It's something we make our living from, so we're a bit passionate about it. Mind you, what we tried to achieve in New South Wales - to get everything in simple for the farmers - is not going to do our business all that much good, but that's just life, isn't it?

DR BYRON: Next, we've got Mr Keith Campbell.

MR CAMPBELL: First of all, my name is Keith, not Kevin and, if you know, Gaelic, Keith means "wind"; some people say "windbag" but I prefer the Biblical - - -

DR BYRON: Divine.

MR CAMPBELL: "- - - wind blower," et cetera. I'm going to say some things which are probably highly heretical, but I hope that you won't burn me at the stake. We've been in this country for about 10 generations, if you count 20 years as a generation. If I may say, we've done a hell of a lot of damage. We came here and the country was, of course, in a somewhat pristine condition. The Aborigines used the country just as we are, but they hadn't got the technology that we have: the bush and everything else was the enemy and it had to be cleared, et cetera. If we wanted wood, we had to cut it down and so on.

Most of the people who came out wouldn't have known a farm from a piece of wood; they were mostly convicts. Some of the top people, like Macarthur and a few others, were entrepreneurs who came out here to make their fortune and who couldn't have given a damn about what happened to the country. They brought out the most dangerous of feral animals: sheep. Sheep cause more damage to the country than virtually any other animal, including rabbits, though rabbits are pretty good at it, too.

My submission is that rather than view native vegetation and the regeneration of such as a pest, it is an asset that we should encourage. The previous speaker has spoken very well on forestry and I must say that I agree with a lot of what he said. However, the whole business is the prime thing of "do it now"; if it's minerals, dig it up. This country has been said to be the quarry to the world, and it is. We mine our minerals, oil and everything and sell it off, "Quick, get money." We mine our soils - ask the CSIRO about that. In fact, our whole mind-set is that this is a country to be exploited. We've got to live here now, and if we don't live here somebody else jolly well will.

We've made a lot of mistakes, I know, but so has everywhere else in the world. In fact, the Yanks have been far worse, because they've mined their prairie: 14 feet of arable soil, and it's almost gone. They have been there only a little bit longer themselves. We haven't got much soil, and it's thin and old and we've got to superphosphate it like mad. We mine our islands, such as Christmas Island. We fertilise, cause erosion and pollute our rivers and they flood. We've poisoned the Murray so you can't drink it in Adelaide unless you purify it.

All this has been caused, primarily, by the over-exploitation of native vegetation. Where it's useful - like a forest - okay, we've got to keep some of that.

As a forester - and I am a forester - I was told we had to manage our forests in perpetuity, not just for a generation or for a hundred years but forever. It would be very nice if everybody else thought that way and if our agriculturalists, our land-holders, our graziers and our farmers thought about managing their land in perpetuity - forever, not just for a generation, or for a family, or for a hundred years. We been here only 200 years, but look at the Mallee and think of other examples, such as the Murray-Darling system. Every one of our coastal rivers is silted up. We used to be able to sail a ship up most of them, but they've got bars now. The Hunter River Valley is another example, but there are many others.

I know that we've been trying to do something about it, and there are stacks of regulations. There are regulations against murder and rape, but people still keep doing it, so it's a mind-set that we have to change. We talk about productivity, but a peasant farmer in the Far East is more efficient than a Yankee wheat farmer, who puts so much in to get so much out. The peasant farmer does the same, but he's more efficient than the most efficient Yankee farmer, and that's a fact and not just my opinion.

What about our people? What do they do? They clear the land, which costs an awful lot of money, but that cost is never put down in the economic system. How much does it cost, including sweat and labour, to take off that timber? He then farms that land, but how long will it last? If it's a grazing property, not long - and we've been here only 200 years. As I say, if we are to live here and to stay here, we've got to jolly well change our mind-set, but the mind-set at the moment is: "Get in, make a profit and get out." Whether it be business, agriculture, agribusiness, agriforesty, et cetera, it's all, "Get in and get out quick."

The regulations that are made to achieve this, such as planting forests and carbon credits - when you get down to it, it's the taxation benefits for clearing your land - and all this is well regulated. New regulations have been made about bushland and the felling of timber but people still do it flat out. With respect to the arable land around our cities, such as Hawkesbury, what are they growing? They're growing grass for lawns for new developments. The first settlers depended on pushing our cities outwards - and Sydney is still expanding - and how did they do it? They felled the bushland, of course. We create problems, we don't solve them. You could ask me to back this up, and I would write you a paper 10 pages long. All of this is to do with the mind-set.

Native vegetation is beneficial in every respect but, primarily, it stops erosion. When a property is revegetated with native vegetation, the grazier says, "It's interfering with my grazing." Usually it's because he's on unsuitable land for grazing which should never have been cleared in the first place and that's why the vegetation is coming back. As to rainforests and dairy farmers on the far north coast, I know

places where the rainforest is coming back. People say that you can't regenerate rainforest, but I can show you a place where it's regenerating naturally on dairy farms and is regenerating so well that it's not worth the farmer's while to try to clear it again.

The Murray-Darling system - and we've got hundreds of thousands of hectares of forest in Victoria and New South Wales - depends on the regular winter flooding of the flood plains for its regeneration, but what do we do? We put up the Hume Weir and we regulate right the way through for irrigation. This interferes with the normal winter flooding and so we are slowly strangling the big forests, which weren't there in Ned Kelly's days. Big floods caused these forests, when a few foresters got in, cleaned it up a bit and they are, more or less, as you see them now.

There have been big insect plagues, and I know about those because I was a forest entomologist back in the 60s. Why are they happening? These insects - the gum leaf skeletoniser moths - thrive when the weather is dry. When there is general flooding you don't have plagues, but when the flooding fails you get an outbreak. Again, we stop the flooding, we stop the regeneration and we cause plagues. I did that research back in the 1960s and submitted it to the River Murray Commission, but irrigation was very important. There is no doubt that irrigation and removing the native vegetation causes salination - and this is not an airy-fairy idea - and the salt comes to the surface. We've known that for 50 years or more and we're starting to do something about it, and that's right and good, but don't let us do any more.

This submission is not as I've written it down, but what I'm getting at is that we came to this huge country, which was mostly desert with a strip of arable land around the edges, and we immediately started to destroy the native vegetation. Look out of the window and you'll see not a eucalypt but a Schinus molle, a peppercorn tree, which comes from Peru. Why? If a botanist without any knowledge of Australia landed in Sydney and looked around the conurbation, he wouldn't know which country he was in. There are so many European and foreign trees - exotics, as we call them - that he might be in Brazil, North America or San Francisco. The pinus radiata that we plant comes from behind San Francisco, and we have plane trees from London. Our botanist wouldn't know where he was.

The mind-set is: if it stands, chop it down; it you can use it, it's timber. As to our forests, we have logged to destruction two of our major and best species - the hoop pine and the red cedar - we have been trying to regenerate them for the last hundred years. There is plenty of red cedar around, but it doesn't make logs because it's all twisted and turned because of the Tit Moth. Hoop pine was a marvellous timber for making butter boxes because it has no smell. We were selling butter to England for tuppence a pound in beautiful butter boxes - if you're old enough, you may remember them - all made of hoop pine. After we finished doing that, we

started to make matches and matchboxes out of it until it was all gone. There are still some trees, and I can show you a virgin stand of hoop pine up on the Levers Plateau on the Queensland border. That's all that's left, yet it was so commonplace that we were using it for butter boxes. Red cedar was so commonplace that the framework of every government building in Sydney was red cedar - they even made lavatory seats from it.

As to Illawarra, which is beautiful dairy country producing cheese and whatnot, where is the rainforest? There's a little patch where you can't grow anything, but it hasn't been long for it to disappear - only 150 years. There's practically none of the fantastic lowland red scrub and rainforest around Byron Bay or anywhere in Australia. There are just little tiny bits of park. If you took up land, the condition was that you had to clear it, and they cleared and burnt timber that now would be worth billions and billions of dollars - everything went. The condition of purchase said, "You must clear this, or you can't have it." Of course, this is the mind-set, that native vegetation is the enemy: "Get rid of it, cut it down. We've got to farm this country."

Now, of course, everybody is talking about carbon and what we're sending up into the atmosphere and they're saying, "Let's plant forests to get our carbon credits," and this is what the Japanese are doing with the New South Wales Forest Commission and other people. At the same time, we're woodchipping and sending it to Japan to make paper. In my day, in a forest you'd have a little mill and two men who'd be making cases for fruit and so on, but the small timbers were no good for big sawmills. I can remember tomatoes, bananas and everything coming down in wooden cases. These cases could be reused, but not your cardboard box.

What happens to it is it goes back and gets pulped up and so on. You could use a timber case for half a dozen times and then in the end you used to chop it up and put it under the copper to boil the water for the copper. That's what I call economy. I don't call chopping down trees, chipping them up, sending it to Japan, making cardboard - this must be economy in the proper sense but it's nonsense to me. I'd much rather use the timber direct and have somebody in a little mill, maybe hundreds of little mills, using up all this so-called used timber instead of sending it to Japan, enriching the Japanese. I haven't got anything particularly - I won't say anything.

DR BYRON: Could I ask you a question, Mr Campbell?

MR CAMPBELL: Yes.

DR BYRON: Sorry, I don't want to cut you off. You've spoken very eloquently about serious land and water degradation as a result of excessive clearing of native vegetation.

MR CAMPBELL: Yes.

DR BYRON: The gist of the question that we have to answer is what sort of arrangement is most likely to result in native vegetation being well-managed, well looked after sustainably into the long-term future? You've made some comments about governments trying to manage this through regulation and the example that you gave of a conditional lease says that government sometimes don't give good advice. Sometimes governments are the cause of the problem, not the solution. If we are concerned about this remaining native vegetation in this state being well-managed and well looked after, what's the best way of doing it? Should the government make it national parks? Should the landowner be paid to look after it? Should the landowner be allowed to manage it? What's your take on that, please?

MR CAMPBELL: I don't think the government was at fault on the red scrub. This was the mind-set. They wanted to put settlers on the land. The land was good, relatively good. It wasn't terribly good, actually; it's red soil. It's not very good at all. It's rainforest soil. The way they did it to get it cleared cheaply, very cheaply, was to say, "If you want the land you can have it for a quid an acre -" a quid a square mile, I mean - "but you've got to clear it." So they got the land cleared and they got the man on the land. At that time that was the important thing. That wasn't their fault. That wasn't the fault of government. That was the fault of the mind-set of the times.

The only way to change this is education. This is pretty hard. I know you can get a kid at primary school and tell him not to throw papers around and when he gets to 12 he chucks them around just the same. How do we get this over to people? Everybody? We've got to live here. I won't be alive very much longer but my grandchildren will be. I like this country. I don't want to see it buggered up. The land-holder is no more to blame because he is in that same mind-set; his idea is to use that land to live on, to make a profit. That's the big thing.

If he looks upon it as his long-term generational business, going on to - "My family have had this farm and I hope it will still be going on farming" - whether it's my family or myself, it must be well-managed and maintained, not "mined". This is what we've got to get across. It's not just - see, everybody goes back - I scream to the government, too; I'm just as bad as anybody else. Something goes wrong and I say, "Why don't they make a regulation about it?" The main thing is that it could be me that's flouting the very thing I'm arguing about.

PROF MUSGRAVE: Mr Campbell, our position is that government has made regulations to try to achieve the sense of objectives that Dr Byron has just described and we're being asked to comment on those regulations, which are calculated to

protect our native vegetation. So it would be of great interest to us if you've got any comment on this regulation which does, perhaps, go some way to reflecting the mind-set you desire.

MR CAMPBELL: Okay. There used to be a regulation. You see, I'm getting old, and whether it's still one - but one was not permitted to fell a tree within 1 chain, 66 yards or a cricket pitch, of a recognised watercourse. Not to fell a tree within one cricket pitch of a recognised - that is, any one which is on a map and recognised. Is that still extant? If that was extant, still going, it would answer all of what I said. I don't think it is, because I know for sure that it's not being obeyed. You've only got to travel along the Darling, the Murray and have a look - or any other river or creek. In fact, until 1908, the forestry was under the charge of the Department of Mines. Then they had the royal commission in 1908 and they actually formed the Forestry Commission. That was the first time that there were - - -

PROF MUSGRAVE: Earlier in your presentation you referred to the open savanna that existed over large tracts of the Australian countryside in 1788. There is every reason to think that we cannot revert to that status. There is every indication that if we were to vacate the countryside it would be occupied by dense regrowth. The challenge for us then is what do we aim for? If we can't aim for that pristine open savanna, what do we aim for? Do we aim for a dense coverage of regrowth?

MR CAMPBELL: No.

PROF MUSGRAVE: Do we aim for some managed system?

MR CAMPBELL: Not at all. Even though I don't believe it was a pristine savanna by - - -

PROF MUSGRAVE: No, it was very - - -

MR CAMPBELL: But there was a sort of savanna and a lot of it. Right.

PROF MUSGRAVE: Yes.

MR CAMPBELL: Nowadays, instead of allowing trees to regenerate in a small way, we put in sheep. If you've got, say, 1000 acres and you've got 20 trees on it, when it's hot weather where do the sheep go? They go and camp under the trees. I would, too; it's bloody hot. Of course, they compact the soil and they kill the trees. That is a fact. You've heard about die-back and all that sort of business. If you want to retain this, all you've got to do is put a little fence around the odd tree. The old tree will die. Small ones will come up. You'll have a clump of trees. Then you can take your fence away and you can let your sheep go in if you like.

I know I said nasty things about sheep. It's true, this is what they do. They can graze right down to the roots of a plant. They take out the seed, leave the soil like dust, but only if they are put on in such numbers that they can't get anything to eat, so there is overgrazing. Properly managed grazing is quite a different thing to what is done in many cases. This country - it's in the old poem that says "Land of drought and flooding rain" and it's been like that for centuries and probably, until the greenhouse effect takes over, then we might have more flooding rain. We've got to manage the country so that this is taken into consideration. You've got to provide that the sheep, if you're going to put them on a property, are not there in such quantity that there is going to be overgrazing in a bad season. You've got to provide them with shade.

I've been on properties - Pitt Street farmers. They get on to a place. How do I improve this property? The law says for improvement you get a tax rebate, so what do they do? They cut down all the ruddy trees. What do the sheep do? Hampton is not very far from Sydney - not Hampton, just before you go over the range there - sheep country. Very few sheep, but box trees, big box trees. The previous owner knew about this. He left them there. The Pitt Street farmer moves in. He doesn't know anything about farming so he cuts the trees down and he gets a tax rebate.

The government didn't intend that to happen; that was not the intention. The intention was that "If you improve the property we'll give you a rebate." Who's to say what improvement is?

PROF MUSGRAVE: Indeed.

MR CAMPBELL: No. I'm not against development but it's got to be sustainable. It's got to be on and on, not just get in and get out. This is the mind-set. In this country, it is - everybody, particularly big business. Get in, mine it, sell it - oil, gas, anything you like. Agribusiness, feedlots, cattle, sheep, everything. When you look at it long-term, let's think about it. I've been looking at it more or less - in an intelligent way let's say- for the last 50 or 60 years. Before that I was only a kid and I didn't know much about it; but I've been in the country quite a lot and noticed that these things happen.

I thought it was quite normal to walk along and see great gullying in the bushes, properties gullied out. I thought that was quite normal. But after I'd had a little bit of education I realised that it wasn't quite normal and it was rather nasty. I knew, too, that the government departments, like the Water Conservation and Irrigation Commission, were doing a large amount of work trying to remedy this, trying to educate farmers and graziers not to do this, to try and remediate it. Look at the Kosciusko. The Kosciusko is now a national park. Before that we had open

grazing on the high plains. Then a man, Costin, from the Department of Irrigation and Conservation, wrote a paper. He went and looked and he discovered, to their amazement, that there was accelerated erosion on the high plains. He wrote a book about it, Ecosystems of the Eden-Monaro. Then, of course, people started to worry. He became quite well known in the CSIRO after that.

Anyway, Sir Garfield Barwick and a few other people, and also a forester, Balder Byles - now dead unfortunately - got together and got the Kosciusko made into a national park. Poor old Balder, they gave him an honorary doctorate for it but he died. Now they're trying again to get grazing on the high plains, despite all we know about things. We know a lot about things; we've found out a lot. We know a lot about this country; we know a lot about what's wrong and what to do about it. I expect if the government has to do it then, of course, it must be regulation but people, especially Australians, don't like being regulated.

My answer in the basic thing is how can we educate everybody - including me, of course? I'm not immune to a bit of education - to think differently about the country. Most of us are urban.

DR FISHER: Perhaps, Mr Campbell, that's the right conclusion. Perhaps we need less regulation and more education.

MR CAMPBELL: If I were in the government - and I've been in the government - I expect you've got to have the big stick - the carrot and the stick. Most people will do things the right way if they can. But then you get the smart alecs who can get round these things, and they can pay very clever people to show them how to do it too. So I think we've still got to have regulation, but I think education is extremely important, and not only for the kids.

DR BYRON: I think on that note, Mr Campbell, we're going to have to wind it up in view of the time.

MR CAMPBELL: Thank you.

DR BYRON: I'd like to thank you very much for the time and effort you put into coming here today, and for the written submission which we've got and we've read. Thank you very much for your input.

MR CAMPBELL: Thank you.

DR BYRON: We'll now adjourn and resume at 1 o'clock with Mr Hespe.

(Luncheon adjournment)

DR BYRON: Good afternoon, ladies and gentlemen. I'd like to resume the public hearing of the Productivity Commission inquiry into native vegetation and biodiversity conservation legislation. Our next evidence is from Mr Hespe, I believe, so if you'd care to come forward. I know we've met with you before, and you know the ropes. We thank you for your submission which we've received and read, so if you'd like to summarise the main points and then we can discuss it.

MR HESPE: I suppose the main point I want to make is that the report is a very good one and covers a wide range of responses from, again, quite a wide range of people. But having said that, I think it's difficult to understand, although I'll qualify that by saying obviously the commission has had its hands tied behind its back by its terms of reference, because despite the evidence that the costs or the disadvantages or whatever you'd like to call them, significantly outweigh any possible benefits, the commission has only been able to offer a series of recommendations which implicitly say that the existing legislation stands but should be amended - that's unless I read the draft recommendations incorrectly.

To go to the beginning, on page Roman XXII, key points are listed, and as I think I said in my submission, that pretty fairly encapsulates the facts as they've emerged from the remaining 500-odd pages. It's just a pity that that hasn't been extended to recommend that the legislation as it stands should be repealed, and that the recommendations included in those key points, and later on in the overview, should be implemented. The first of those things that should be done before any new legislation is enacted, should be a thorough investigation, as one of your recommendations mentions, into recommendation 3: to improve the quality of data and science on which policy decisions are based.

That, in my view, is a very, very fundamental issue, but unfortunately you go on and just simply say, "particularly the on-ground assessment to test the accuracy of vegetation mapping". In my view, that's a very minor point in the whole spectrum of examining the science on which this legislation is based. As I said in my first submission, there are perhaps three broad areas that might be called scientific. One is the question of land degradation, which can be assessed under a number of different headings. The second is the supposed question of the greenhouse effect, to use the popular expression, and the third is the question of biodiversity.

There has been no evidence to support the question of biodiversity. As I mentioned in my first report, one of the most eminent ecologists in the country has said that these things are myths. Again, the question of the greenhouse effect as it may or may not result from the burning of fossil fuels - there is no solid evidence to support any suggestion that that should be the fact. As far as land degradation is concerned, I think it's fair to say that in the last, certainly 50 years but probably even less than that, there has been a marked increase in the reduction of degradation.

I can't remember when the first material addressing that problem was promulgated by the Department of Agriculture, or the Soil Conservation Commission as it then was, if my memory serves me right.

The question of erosion and other types of land degradation was promulgated a long time ago and farmers and others have acted on that and before it, to reduce the effect of erosion. I can recall large areas of land in quite different environments that have been revegetated since that time, as a result of the healing of erosion and the planting of appropriate species to prevent and control erosion. So the question of land degradation - again, in my view, there's no basis for using that as an argument for these types of legislation.

In regard to salinity, which is another area of land degradation, this is very much a function of locality. There are large areas of country that were showing dryland salinity when Sturt first explored down the Murray, so it's very much a subject of the type of environment and the soil structure. There was a big study done on the Murray Basin and part of the Darling Basin by a firm called Gutteridge Haskins and Davey some years ago, and they produced recommendations for the management of that basin. These were based on quite sound principles and that clearly showed what I've just said: that it's a function of the soil type and the activity on the land. Certainly, recharge areas need attention. I don't think anyone would argue with that, but that is a very special case and hardly comes into the ambit of this type of legislation.

What I want to come back to is that I agree wholeheartedly with recommendation 3, but I think it needs to be expanded very markedly, and I can't find anywhere in the report that sort of argument. There is reference in the report later on, which I'll come to, talking about possible types of legislation and I've expanded on that. In fact, I mentioned it in my earlier report. I've expanded it in my report in response to the draft report. It's only a very bare outline, but it's what I call a more appropriate legislation, which is based on reality, and reflects the necessity for protecting land in certain conditions: slope, proximity to watercourses, type of soil, et cetera.

To me, that sort of thing is the sort of legislation that should be enacted because it's based very much on reality and will go to preserve the natural environment, whereas blanket legislation, such as the ones that we're talking about, in my view, are going to - or they already have - offended farmers. They already have created an air of hostility, and that's the sort of thing that you don't want. What you want is cooperation, and cooperation was active in the period that I've been talking about - from the 50s onwards, post-war - as a result of recommendations and advice from the various government instrumentalities - agriculture, soil conservation and the WC and IC.

Farmers actually were looking for that sort of advice and acted on it, whereas this sort of legislation is going to alienate them from the process. If you consider someone who has a significant area of his property sequestered by this legislation, his immediate reaction is going to be to "Forget it." He's not going to do anything that he might have done on it beforehand to gradually improve it and keep vermin down and mitigate against infestation of weeds. All he'll do will be the minimum required to protect the rest of his property, and who could blame him? Whereas if, in the long term, he can see that as he originally planned, to gradually develop that property by way of proper clearing and selective clearing, he maintains the rest of it - but if he's told, "Well, that's the end of it," he's going to be affronted, and he could well simply neglect the whole thing. So you're going to create a harbour for noxious weeds, for vermin, and a very increased danger of fire risk, because of the increasing load of combustible material that will gradually build up over time.

We've already seen that sort of thing or both those things in operation in the national parks. There is no doubt whatsoever that the fires down in Canberra started in the Brindabellas which hadn't been cleared for 30 years. This sort of thing is going to be an ongoing problem. I think that is one of the factors that this report hasn't brought out sufficiently and that is the real dangers as opposed to costs and disadvantages. They, of course, are costs and disadvantages in themselves but in my opinion, and with respect to the compilers of the report, they haven't clearly stated the real risks in what might be called the danger area as opposed to the more common areas of loss and other impacts. So if we take all those things into account that is an added factor in the disadvantages or costs that the report has clearly highlighted.

I think, if I may, the best way for me to go on, would be to simply go from the actual draft itself. The very first paragraph on Roman XXIII is, again, one of the critical points, the desired environmental objectives, because as the report I think again clearly says, the objectives are somewhat obscure. There is no real evidence in any of the legislation as to exactly what the legislation is aiming at other than to simply prohibit clearing of vegetation. That comes under the head of, I suppose, what I said earlier about scientific investigations research, because if it's shown by proper investigation that the objectives that implicitly are included in the present legislation - that is, possibly land degradation but more importantly, from the point of view of those who desire the legislation, the question of the greenhouse effect and endangered species - if it can be shown that those objectives are not so critical or not critical at all, then that provides a much better basis for examining what the objectives of the legislation might be.

Your next paragraph, that paragraph 2 on Roman XXIII, says the inquiry is not about arguing the case for or against the promotion of environmental objectives, and

then you go on to say that the community is to determine that, but you don't go on and say how the community is to determine it. In my view the debate has been taken out of the community's area anyway and they haven't been given the opportunity of debating it properly; secondly, the information that they're provided is all of the black arm-band type of approach and they are being led to believe that the end of the world is nigh, sort of thing, so that they can't make a balanced appraisal of just what it's all about.

Secondly, there has been no suggestion in any of the, what might be called, community type of discussion or promotion about the question of the cost. It's always been implied that we'll make these regulations and whoever they fall upon will bear the cost. The commission quite rightly says - and I'm now quoting from the key points - in the last paragraph, "The community should be prepared to pay for the environmental service it demands if it believes the benefits outweigh the costs."

There has never been to my knowledge, and I stand to be corrected here, any suggestion by governments that the community should pay the costs of this type of legislation. Most of the legislations were ambush-type legislations brought in without any prior public knowledge of them, much less by the people upon whom they impacted, and there has never been any suggestion that there was a cost involved, much less a suggestion that the community should pay it. An honest appraisal of the sort of legislation we are talking about should quite clearly say, "This is going to cost money and it means that your taxes in one form or another are going to increase."

I don't think any government is likely to do anything of that sort and that's one of the big problems that we are facing here. It's far easier to simply say, "Well, let the farmers put up with it." I'm afraid that's the interpretation that's put on this sort of legislation by farmers. Coming back to that, why wasn't it in your terms of reference? We can ask that question. You can't answer it but that is a question: why wasn't that aspect included in the terms of reference, and why hasn't the commission been given the task to determine how that sort of question can be answered?

We come to the question of what's already there and, without going into any question of the accuracy of the figure we see in New South Wales, that there is more than two-thirds of the area under vegetation. The first question that can be asked about that is: how does that relate to what was there in 1788? There has been a lot of debate about that and I don't think there is any authoritative answer to it. We hear only the one side of the debate, and that is the side that says, "The land has been stripped bare." Large figures of clearing have been suggested by a number of people, but the fact remains that using historical data it can be shown that that's a very open question. There are descriptions in early literature of people galloping horses through country that you couldn't walk through today.

Again, at the Macquarie plains at Bathurst, every tree you see as you drive down the slope towards that plain wasn't there when Evans first arrived there. They are all trees that have been planted since, and there are quite a lot of them. One way you can prove that they have been planted since is that those that are eucalypts have been very hard to establish because of the absence of mycorrhiza in the soil - that is, the micro-organisms that attach to the roots of the trees so that when the seedling starts it raises its nutrients much more quickly from the soil. In the absence of those, the trees are hard to establish. I know for a fact that friends of mine have tried to establish eucalypts on the Bathurst plain and have had a problem doing it, even though they have inoculated them with a mycorrhiza from where the trees originated. So those sorts of things haven't been looked at.

All the figures say we've stripped the land bare, but there's no hard evidence to support that. At the end of the day, if these figures are correct, still two-thirds of it or more than two thirds of it, are still under native vegetation. You then ask the question: if every piece of private land was stripped bare, is that effect - and I'm not suggesting it should be, but I'm saying it's a theoretical question that should be asked - if all private land was stripped bare, from what it is even now, is that going to have the sorts of effect on biodiversity and - let's use the word again - the greenhouse effect that it's predicated to be?

I suggest that it's not going to be that. Even if you assume that the whole of private land is stripped bare - and that's less than 20 per cent of the total land anyway - I'm not suggesting it should be, but as a theoretical question, I think it could be pretty well shown that the reduction in the carbon sink would be not sufficient to have any real substantive effect. I have suggested in my second report that there are far easier ways of reducing the input of carbon, if you are really concerned about that, but of course that impacts on much bigger blocks of votes, and therefore it's much easier in the eyes of the legislators to concentrate the supposed effect on rural land-holders.

To come to the question of the operation of the existing regimes on Roman XXV, at the bottom of the page, you say, "Application costs can be higher because land-holders have to provide" - et cetera. That is very, very true. The sorts of applications that are often required ask for all sorts of things which, on the face of it, imply professional advice, and that's the sort of thing that the people that administer the acts will tell applicants that they need to get - environmental impact studies and all sorts of other things done. Of course, in reality, that isn't the case.

The sorts of questions that need to be answered can very well and better be answered by the applicant himself, but he doesn't realise that and he faces large sums of money to make application and, usually, to no avail. That money is just simply

down the drain because the administrators of the legislation have already decided they're not going to grant permission anyway. There's a side view on that that the Local Government Act and the various acts that local governments administer, make it quite clear that as far as the use of land is concerned, if your land is classed as agriculture 1, you don't have to make a development application if you're going to change the use of the land as long as it remains actually running as an agricultural enterprise.

In simple terms, if you want to change from crops to pasture or from pasture to crops, you don't have to make an application. You might have to apply to put a building on the land but you do not have to apply to change the use of the land within the definition of "agriculture". On the basis of that you don't have to make an application to clear vegetation, so you have got a conflict between the two acts for a start and the earlier act normally takes precedence and, in fact, if memory serves me right, most acts - and I think there is one in New South Wales anyway - has a saving cause to that effect, but I might be wrong. You've got the question of encroaching upon another act, quite apart from anything else.

We then come to the question of the indicative rates of clearing on Roman XXVI. First of all, if you look at those figures they appear big, but when you equate them to the actual total areas involved, they are not very big at all. The second question of course is: where does that data come from? I can't help feeling that a great deal of it has been exaggerated, particularly in Queensland and New South Wales. There is not much point in exaggerating what happens in Victoria because a very large proportion of Victoria was cleared before any of these sorts of acts were thought about.

On Roman XXVII you've got six dot points, all of which, I believe, point up what I've said earlier in both my submissions - that these types of legislation are ideological rather than based on reality. I won't rehearse all those points again, but I think on that page, Roman XXVII, the points that the commission has made on that page substantiate what I have said. On Roman XXVIII you say in the second paragraph at the end of it, "Those who have few or no complaints are unlikely to participate." Yes, but then you would have to ask the question why have they no complaints and who they might be, not to have complaints.

You canvassed some of those government authorities - for example, the RTA and so on - and you also talk about miners. Most of those people can pass on the costs; government instrumentalities, quite clearly. Miners in any case are probably not particularly impacted, because the sorts of areas they operate in only require smaller clearings and presumably would be dealt with under the various acts for controlled mining, anyway.

The fact that people other than farmers principally haven't complained, I don't think necessarily means that there aren't other areas in the community that are concerned about this. I think it's just simply that they are not immediately concerned. They are not immediately affected, as a great many land-holders are in the rural community, as the report has shown up.

I was very interested to see your investigations in Moree and Murweh Shires. It only goes on to show in a disinterested way the sort of costs that could be involved. You say that it might be higher in Murweh if the thickening of woodland is taken into account. Also without having looked in detail at your figures and methods, I would be inclined to think that there are perhaps some hidden costs there that haven't been immediately included. I understand that this has been done strictly on what you might call an economist's basis of estimate and I think possibly there are a number of areas that haven't been brought to light; but I don't want to go into that because economics is not my expertise and I don't want to encroach onto that aspect too much.

Down the bottom of that page, Roman XXX, you discuss briefly the effect of lending institutions reducing the valuation of properties, etcetera. There is a factor in that which I don't think has been looked at and that is the ongoing effect of farmers who borrow against a value of their property to do some improvements and then find that their property is devalued and hence their equity is reduced and the banks say, "Look, you haven't got enough equity. You are going to have to reduce your borrowings."

Now, in the past that has happened, to the distress of quite a number of farmers - not because of this, but for other reasons - and has caused a great deal of hardship by way of banks foreclosing. That is an aspect that could well happen again here. If a property has a considerable amount of debt on it - and there are a lot of properties in that category - which become devalued as a result of this type of activity, then the farmer could be facing not only having to still service his debt, but to find a sum of money to reduce the debt. That is another factor that I think ought to be taken into account.

On Roman XXIII under the heading Positive Impacts, the first paragraph under that heading - and this is a thing that I do criticise the report about - the statement that says, "Individual land-holders receive benefits from fodder for stock, timber for fencing, reduce soil erosion," etcetera. We will take them one by one. You don't need this legislation to get fodder for stock from trees. Since settlement fodder for stock has been derived from native vegetation and that will continue.

Secondly, as far as eucalypts are concerned, there are only very, very few of those that can be used as fodder and then only in particular circumstances. For

example, the boxes - white box and yellow box - if they are pollened, sheep will eat the young shoots coming from the new growth from the pollened trunk, but they won't eat leaves from mature trees. They will eat the young shoots from the old trunk, but you can't cut branches off a eucalypt and expect stock to eat them, because they won't; so you have got to cut the tree down before the stock will eat the new shoots. In point of fact, cattle won't eat even that. Goats will, of course, but we're not talking about goats.

The same thing applies to timber for fencing. I can't see how you could possibly include that as a benefit from this sort of legislation. Timber for fencing has been used and will be used no matter what this legislation says or does. It certainly won't increase the availability of timber for fencing, because it's so small in relation to the total stock of timber.

I have already covered the question of soil erosion. There's no doubt whatsoever that the best way of reducing soil erosion is a dense sward. That can be best produced by introduced species, not native species. In fact that system has been used in drainage channels, not just to prevent erosion, but to provide the bed of drainage channels. That is a false statement, quite frankly, "Reducing soil erosion." Again, the question of soil and water degradation - the commission commented later on about a claim made by the ACF in regard to the supposed improvement of the Great Barrier Reef because of the reduction of clearing and it commented that it found that to be the case. I also note my friend, Bob Katter, commented in that same way. Of course, that's true, because the run-off from a forest is greater than the run-off from grassland, so that retention of forest doesn't, ipso facto, mean that you're going to reduce the run-off. Quite the contrary.

These sorts of things which are listed as hard benefits, with respect, I think are just not the case. Somewhere else there is talk of - yes, here we are on Roman XXXII, "Potential positive impacts on regions include increased ecotourism." Maybe you will get ecotourism - if I understand it to be what I think it is - from national parks and large areas of native vegetation, but not because of the native vegetation per se; it's because of the total environmental effect - for example, the Blue Mountains. People don't go there to look at the eucalypts, they go there to look at the rock formations and the landform itself and so on.

Secondly, I think it's quite wrong to suggest that any private land-holder is going to benefit from ecotourism. There have been a number of land-holders who have found themselves becoming quasi boarding house proprietors, but they don't offer it for ecotourism. It's called farm stay and the people that go there are thinking of the farm side of it, not the eco side of it. Again I think that is just, quite frankly, a preposterous claim. I have already touched on the lack of interest from other people.

You mention here again, on Roman XXXII the apparent lack of interest from infrastructure providers - that again applies to the RTA and so on. They are not going to be really too affected by it, anyway, and, secondly, if they were, they can pass it on. I do know that later in the report someone has made a submission in regard to trees close to the pavement causing trouble with heave in the pavement because of the root forms and so on.

All I can say to that is the RTA, for example, in its road design guide, very clearly specifies the minimum distance from the edge of the pavement before any obstruction can exist. That is called the clear zone and the clear zone varies in accordance with the number of vehicles per day and the speed regime and so on. It seems strange to me that there could be trees so close to a pavement - although I think it was in Victoria that that report came from.

DR BYRON: That's right.

MR HESPE: It certainly wouldn't or shouldn't happen in New South Wales and if I might say so, I have successfully got damages from public authorities because of that very thing. When motor vehicle accidents occur and people hit trees, for example, that are too close to the road verge, the courts take account of that in assessing the culpability and eventually the damages. It's rather strange that these sorts of things can happen and it points up the unbalanced approach to the whole question.

Again on Roman XXXIII at the first paragraph, the commission says, "No-one could make an assessment about the cost. Indeed this lack of information about relative costs and benefits is a fundamental problem with the current regimes." Yes, it certainly is, except that expression goes against the weight of evidence that this report produces. I would go so far as to say that if this was evidence before a court, there's no judge that would find in favour of the legislation. That's not even going to the criminal extent of beyond reasonable doubt; it's going on the balance of probabilities. The weight of evidence in this report, in my view, clearly shows that the costs outweigh the benefits to such a degree that it becomes incomprehensible how the legislation was enacted in the first place. I have just got a note here in your box 3 on Roman XXXIII - towards regulatory best practice. Again that implies that what we're looking at is to make some adjustments and amendments to the existing legislation. I just repeat again that my view of the existing legislation is best dispensed with, and start again.

On 34 in the second paragraph, the commission proposes a much larger role for this regional decision-making. Certainly in principle and philosophically, that is absolutely correct, but the basic problem is: who constitutes the committee or whatever it is that makes those sorts of decisions? Unfortunately the present regime - that committee is usually heavily biased in favour of the act and therefore you're up

against the problem that we were talking about earlier; that a land-holder makes application at considerable cost usually and then finds that the committee that makes the decision about whether his application is agreed with or not has already made its mind up.

So while it's certainly clear that these sorts of things need assessment by people on the spot, because nobody sitting in Sydney can decide what's going to happen out at Ivanhoe, for example, the question of the selection of those committees is a fundamental problem and that needs to be addressed in any future legislation. But, again, having said what I said earlier about the sorts of legislation, you wouldn't need those committees if you had a legislation which was based on proper scientific and historic principles.

In the next paragraph you say there's a need to upgrade the quality of data. I've already covered that. But, again, the implication there is for the existing environment of legislation. My assertion or my belief is that the quality of data is the sort of data that you need to start a new type of legislation altogether. Again, I agree with your second paragraph after that, where you say that land-holders will still bear the cost, potentially encouraging the community to seek more, because while the community, unquote, is getting it for nothing, they will want more, and I think that's a thing that has been brought out in your report very clearly.

DR BYRON: Mr Hespe, this has been very valuable but, in view of the time, I was wondering if I could ask you to start to wrap up - - -

MR HESPE: Please do, yes. Okay.

DR BYRON: - - - or summarise. We've got the detailed commentary in your written submission already.

MR HESPE: Yes, but that doesn't cover it. As I think I said, practically every paragraph in the report could create another paragraph of comment, and that's no disrespect to the commission, I might say.

DR BYRON: As you say, we don't want to write a longer report. We want to write a shorter one.

MR HESPE: Yes, exactly, precisely, and I think that you should have only written Roman XXII - key points. Is there anything that you would like to ask? I was hoping that you might have had some criticism of what I'd said and asked me about it.

DR BYRON: Yes, there might be one or two things.

PROF MUSGRAVE: I think that you've given us many things to think about and suggested areas where we are guilty of over or understatement or indeed, error, and many of these we've only just heard and they'll be on the transcript and we want to just look into them. But I wonder if I could ask you a question - - -

MR HESPE: Please.

PROF MUSGRAVE: - - - to get your opinion as to the possible nature of the regional bodies that you just referred to. In this state we have these catchment management authorities which have just been created which will have resources available to them, budget and staff. People have suggested to us that local government could play a greater role in activities such as regulation of native vegetation and biodiversity matters. Other people have referred to the myriad of regional committees that already exist and the difficulty that might be encountered in getting any one formal committee that could be effective at this level. Have you got any advice for us?

MR HESPE: As I think I've made clear, my advice is to throw away the existing legislation and start again, on the broad basis of what I said here on my page 2, more appropriate legislation. If that type of legislation was introduced, you wouldn't need any of these committees. I haven't had any personal experience of these catchment management authorities but I've heard a number of comments about them, not the least being that the money that will be provided to them will be eaten up in the bureaucracy rather than achieving any positive result.

But without, again, personal knowledge, my perception is that they come under the sort of criticism that I made; that the constitution of them is biased and that the aim of the committee is to prevent clearing. That's perhaps being a bit too prescriptive but I think that's my view of what I've heard about these committees; that they have already decided that there will be no clearing so that any application to them is starting behind scratch from the beginning. I might be quite wrong, but that's the perception I've received, and that's what I meant earlier when I said that if you're going to have committees of any sort to deal with local situations that the membership of that committee becomes the crucial factor.

Anything that I would suggest as membership or qualification for membership for that committee would probably be taken as bias on my part, but I certainly believe that any government appointee should not have a vote on the committee but should only be there in an advisory capacity to answer questions that other members of the committee might have, and that the voting members, if you like, of the committee should represent people only from the area over which they're going to make a decision, and that they should be balanced in terms of their constituency, if I

can put it that way. For example, you'd have farmer representatives. Their constituency is the farmer land-holders. You might have representatives of the various environmental bodies. Their constituency of course is self-explanatory, but they should only be resident in the area over which they make decisions. But, as I said earlier, the ideal legislation wouldn't require committees.

PROF MUSGRAVE: I think we could talk about that for some time.

MR HESPE: Yes.

PROF MUSGRAVE: But I don't think we have time for it.

DR BYRON: I was wondering about the sort of legislation that you propose there on page 2 of your written submission. A lot of that, it seems to me, probably wouldn't really be necessary, for a lot of it is in the landowner's own interest to retain riparian vegetation and so on.

MR HESPE: Yes.

DR BYRON: So I was wondering whether, given codes of practice and so on - as you say, that sort of legislation wouldn't be difficult to enforce because a lot of the farmers would see it as making good commonsense anyway.

MR HESPE: That's very true, and it has been applied by farmers for quite some time, but the only reason I'd put it in that form is that there are certain things - as I think somewhere else I said in that - about them requiring technical information and so on, which naturally farmers don't have, such as geomorphological information and that sort of thing. If that's included in the legislation it will be more of a guide but it will be, if you like, as a last resort enforceable.

Such things as contour planting are not broadly available. That sort of thing is not broadly - how can I put it? - encouraged; whereas if you've got it embodied in a form of legislation it's a very important factor - the provision of tree belts on the contour above a certain slope and it's the sort of thing that isn't widely considered, although it is used by some farmers and elsewhere. But if you embody these sorts of things, even though they might be just good practice and often already used, I don't think it does any real harm to embody it in a form of legislation, and it creates a situation that the people reading the legislation will understand it and will appreciate that it's got a great deal of sense and value in it. But I do take your point that a great deal of it has already been done.

DR BYRON: Thanks.

DR FISHER: Thanks, Mr Hespe. I just wanted to briefly come back to your earlier comments about negative incentives or disincentives. You made the point that you felt that the current legislative arrangements led to a situation where if a farmer had a block of native vegetation internally in his farm that there would be no incentive to manage that. Is that actually the case?

Presumably if, for example, that block is left to go wild, so to speak, and becomes a fire hazard, then the potential is that the farmer's homestead might get burnt down, so there must be some incentive at the margin for managing that block, even if there's no direct payment being made by the government, merely to save yourself from those sorts of problems.

MR HESPE: Yes, I said that; that he'd do that. I think what I said was that - I can't remember, I can't find the place - that he would only do just what he saw to be absolutely necessary to protect the rest of his property. Certainly I agree with you, he would do that. If I can expand on that a bit, although the report doesn't make these sorts of silly comments, there is an impression put about that farmers don't really look after the country anyway. Somehow or another they're categorised as polluters and destroyers of trees and so on. But the fact of the matter is that the farmer depends on the property he lives on for his livelihood, and he wants to keep it for his children, and so on. There are very real incentives for him to look after the land, and he does it to the best of his ability. That ability is increasing over the years, as I think I mentioned earlier, as a result of further and better information.

As I think I said in the report, there's a rising plane of information about these sorts of things. He will certainly look after his whole property. But if some of it is sequestered, he'll only do what he sees to be absolutely the minimum necessary to protect the rest of it. For a start, his homestead is not going to be in amongst the trees - that's the first point. It's extremely unlikely that a fire starting in that country is going to impact on his homestead or any of his improvements. It could well impact on crops and livestock, so he'll make sure that the rest of his property is adequately protected against that sort of thing. In that area he is not going to have any fencing, for a start. It will be a block of vegetation with no dividing fences, so he hasn't got to worry about fences. He will have a boundary fence appropriately cleared. There is very little in that area that he will care about.

DR BYRON: So we are saying the same thing, basically: that there is a mix of private and public benefit.

MR HESPE: That's right.

DR BYRON: And trying to get the private and public benefit mix correct is the nature of the task.

MR HESPE: Exactly. I don't think anyone would say that a farmer - and I keep using "farmer" because they are the ones most affected - but a land-holder - if he is going to get a personal benefit from what he does on the land, well, he has to pay for whatever inputs go into that. If he is not going to get any personal benefit then someone else should pay, or at least share, the cost. Put it this way, he will pay his share of the community benefit anyway because he pays his taxes. There is no reason, in any form of equity, that he should pay the total cost of whatever perceived benefit - and I've got to come back again - I've got to have it proved to me that there is a benefit from this type of legislation.

DR FISHER: Okay. Thank you.

MR HESPE: I could speak all day, but I won't.

DR BYRON: Thank you very much for making the effort to come here today, and for your very detailed comments and feedback.

DR BYRON: The next evidence is from the Australian Network of Environmental Defenders Offices. Mr Smith, is it?

MR SMITH: Yes.

DR BYRON: If you would like to just come and make yourself comfortable in front of one of the microphones, and introduce yourself for the transcript. Thank you very much for your submission.

MR SMITH: I'm Jeff Smith, the director of the New South Wales Environmental Defender's Office. The Environmental Defenders Office, or EDO, is a community legal centre which specialises in environmental law. We do case work and advice, we do policy and law reform and we do community education work.

This particular submission was the original submission we did. It was on behalf of the network, which are the nine offices around Australia. Because of logistical issues, I suspect, the office in Western Australia wasn't able to sign on to this submission because it was in between their board meetings; so the board wasn't able to consider it. So, this particular submission was on behalf of eight of the offices.

The other thing, just to note in introduction, is that the Environmental Defenders Office were the legal representatives to the green groups in the recent native vegetation reforms in New South Wales. It was the Native Vegetation Reform Implementation Group, which had farmer, community and government representatives on it. We advised the green groups and for the most part that advice was just tabled to that committee, chaired by the Honourable Ian Sinclair, and used by the group as a whole. I presume that you just want me to briefly summarise this and then any questions will come out. Is that the way to go?

DR BYRON: That would be great. Thank you.

MR SMITH: I think I can do that fairly succinctly in maybe a little more than five minutes or so.

DR BYRON: Terrific.

MR SMITH: This particular submission is limited to issues around compensation. Again, I'm a lawyer and not a scientist or a campaigner, and that's where our expertise comes from. I really come to the table with that in mind, just to clarify that, and also most importantly, today, to talk about some of the implications of moving away from the present legal approach in Australia. I think the law is well -

it's not even fairly well - settled. The law in this area is settled on the question of compensation constitutionally and as interpreted by the High Court. I will spend most of the seven minutes or so chatting about the implications.

Just briefly, what are property rights? Property rights envisage the exclusive use or enjoyment of a right and are usually tradeable across time, or to your successor when it's land title. The situation has changed enormously under statute. Whatever the common law rights might be - as in most legal regimes in Australia - whatever the common law once said legislation used to just come along and supplant that, whether it be environmental or criminal law. A lot of those principles that we may attach to our understanding of the law have been bypassed by legislation. So you often need to look to the specifics of the legislation - in New South Wales, or Victoria, or indeed the Commonwealth - to get your specific answer to the question.

The courts, including the High Court, have interpreted property rights extremely broadly. For example, they include tangible and intangible things like licences and permits. There is no doubt that a permit to clear in New South Wales - an approved development application; those kinds of mechanisms, whatever they might be called - would be a property right. So there's no argument in that respect.

The real legal issue is around the circumstances in which compensation would be required. The situation - just to summarise it very quickly - is that all jurisdictions around Australia, under their statutory law, require compensation where property is acquired. The Commonwealth constitution requires compensation where property is acquired. The only other constitution that does require it is the Northern Territory constitution. I guess, just stepping back from that, for example, in New South Wales there is no constitutional requirement to compensate on the acquisition of property or indeed to do it justly. But all states recognise that that is appropriate and I think it's appropriate for legal, political and moral reasons that that is the case.

What acquisition means - without delving into the case law, which I'm sure you are not interested in - is essentially two circumstances, just in very simple terms, and I think it is simple to understand. The first is, clearly, where the state - be it the Commonwealth or state government - comes along and takes your property away; they want to build a highway and so they acquire your property. The usual scenario. Fairly uncontroversial.

The second one is slightly more controversial but is no less difficult to understand, I think, in the abstract. It's where the state comes along and sterilises your property, where they effectively acquire your property and take away whatever rights you have. The court case in that regard was the case of *Newcrest*, where essentially a mining company had a lease and what the government did is they declared the land to be a national park, and so the lease was of no use. They just

extinguished or sterilised the rights that lay under that lease. So that's quite clear, I think. That's the way that acquisition of property which gives a right to compensation has been interpreted. You either buy it outright or it's a kind of de facto acquisition. That distinction, where the state or the crown is obliged to compensate when they acquire property as against no right to compensate where they simply regulate, goes back a long way. What I want to just talk about, very briefly, is what is the rationale underpinning that and why we should hold to that line.

There are a couple of arguments that are set out in the submission. The primary one is probably a very practical one, and I guess this is not to say that a structure could not be devised where this problem wouldn't arise. The historical experience has been that where compensation has been provided, where the state merely regulates - and I use that expression to distinguish it from the other - they become reluctant to regulate and so they don't do it and it's easy to understand why. Usually the money is left with a particular agency and that becomes part of their budget.

If they allow a development to go ahead, whether it be native vegetation clearing or just a planning development generally, they bear no costs. If they disallow it then they bear costs because of whatever the statutory regime has been. And that was the case in South Australia for many years where, for political reasons again, at the time they compensated where they were regulating and disallowing the clearing of land. So there's a reluctance there of governments to regulate. I guess there are broader policy implications of that, of whether it's desirable. Clearly I am of the belief that it's not desirable; that one, for financial considerations, puts those kinds of impediments on governments' ability to regulate. We want governments to regulate in the public interest and according to best practice and public policy, not according to whether the particular agency has the money or not.

The second one - and I can appreciate as an environmental lawyer there are enormous differences between the urban environment and the rural environment, and we struggle with those every day; our practice is almost exclusively rural at the moment. In other areas of social and public life it's recognised that regulation does not give rise to compensation. In the property we own we recognise on a daily basis that I can't knock that down and turn it into a condominium and I can't, in some sense, claim that despite the regulations that exist in relation to that property or that business - be it occupational health and safety standards or public safety standards - that the state hasn't every right to come in and regulate in those circumstances. You can't claim compensation on that basis except to the extent, of course, where it would sterilise the business or the development.

Just to emphasise, I guess, that those considerations apply not only to the environmental sphere of it - I have already mentioned occupational health and safety

- but also public safety provisions and so on where the state, quite rightly, is putting in place a regulatory regime. Indeed, in relation to road offences, or truck drivers, or whatever it is, that any change in the circumstances under which that business operates shouldn't give rise to compensation.

The third one - and I guess it's up to the commission to draw any distinction between us and the US, in this regard - but the US has gone down the path of compensating for regulatory takings. My reading of that and the reading of others in the area - property lawyers and so on; which is mainly what it is, of course, a question about property - that it has been an unhelpful path in that regard. It has come up again in the context of the Australian-US Free Trade Agreement negotiations, where they have sought to change the guidelines, which will be enormously disadvantageous to Australia. It has been costly. It has taken up a lot of time in the courts. It has really led to, as I note here, an acrimonious, divisive, and ideologically driven debate over there about that. It is, at least under the present approach in Australia, fairly clear where the lines are. I think the circumstances are well settled as to when you can be compensated.

The other more practical aspect of course is that if what we desire from all of this is security - and I don't think that anyone wants the opposite of security - then that movement towards compensating for regulation doesn't really achieve that if, of course, it does usher in that kind of litigious approach and lots of cases in the courts trying to clarify what are the appropriate circumstances or not.

I talk there [in the written submission] also about the logistics of deciding what is public regulation and what is private regulation and how you determine that. There's nothing to say that one could not come up with a legislative approach which did manage in some way to distinguish between those, but again it might feed back into a level of uncertainty around that. I note that the native vegetation reforms in New South Wales have envisaged an approach whereby financial incentives will flow onto farms, where clearly a farmer is engaging in an activity for a public benefit over and above their private benefit. If they're just engaging in an activity for soil conservation reasons or to maintain riparian flows and so on, they will be at a cost, but if it's over and above that and they are actually trying to engage in public conservation, if you like, the new laws will allow for that and are, in fact, predicated on that very basis.

Finally, or nearly finally, there's the issue about - maybe if the government is prepared to compensate, maybe they should give it to farmers and then let's move on. I guess the problem with that is coming from the perspective that you always, of course, need to use public monies in the most efficient and effective way. We would say - and I don't think it's merely a sematic argument - that the approach here should be not to compensate where these regulations brought in, but to offer a package of

measures - financial incentives, as envisaged under the upcoming laws in New South Wales, tax relief, structural adjustment packages and so on - as a better use of public monies.

Again, in the New South Wales context, I note that essentially what that legislation does is it recognises that there is a public interest in private conservation. To do that, it recognises that money needs to be provided to that end, and there's $406 million that has been earmarked in New South Wales to the new reforms. I think it's probably fair to say that, on all sides of the debate in that implementation group, it wouldn't have got past the first meeting if that $406 million hadn't been on the table, which is an extraordinary amount of money, an order over and above what anyone was expecting. That was clearly a welcome and legitimate part of that whole exercise.

Maybe it's kind of a legalistic take on the whole debate, but compensation, as lawyers understand it, is not appropriate in these circumstances, according to law but also in terms of policy, because it is relatively inefficient and doesn't give the kinds of incentives that one would want to give to achieve a sustainable landscape. I think that the answer there lies in the kinds of structural adjustment packages that governments put together politically, which target not only the employers but the workers and the industries and the communities in those areas who've been disenfranchised by a new regime. Coupled with the structural adjustment package would be the kinds of mechanisms that are envisaged in New South Wales under the current law, which are things like voluntary conservation agreements, property vegetation plans, grants, financial incentives and so on. I think that was all I wanted to say actually at this stage.

DR BYRON: Thank you very much for that. I must say I really did find your submission extraordinarily helpful.

MR SMITH: Thank you.

DR BYRON: I hope you've got plenty of time this afternoon, because I've got a few questions for clarification.

MR SMITH: Okay.

DR BYRON: I don't really know where to begin. We've actually had a lot of discussion about these issues with other environmental lawyers, who you're probably quite familiar with - Gerry Bates, Neil Gunningham, Tim Bonyhady and so on.

MR SMITH: Yes, indeed.

DR BYRON: We've had sort of expert advice from various barristers and so on. To a certain extent - and we've been criticised for doing this - we've avoided the question of compensation. We hardly ever use the word in the draft report, partly because, as you say, the interpretation of the law is very clear, in that states don't have to pay compensation. At a more pragmatic level we thought that, even if the states have the power to require certain actions without payment, it may be wiser not to exercise that power but, rather, to engage in some voluntary agreement with the landowners, because ultimately in the long term, if the land is going to be well-managed sustainably and productively into the future, you've got to have some sort of partnership type of approach. Even if it's quite clear that the state has the power to demand that certain actions be taken or not taken, with no legal requirement for compensation, it may be wiser not to exercise that power.

The other argument that has come up in evidence in quite a few places is that landowners have said something along the lines of, "We wish that the state had acquired the land outright from us, because what they've done through the legislation is require us to continue to be responsible for managing it and protecting it from fire and weeds and feral animals and to continue to pay rates on it, but without the beneficial use of it. It would be kinder if they had just taken the whole bloody lot without any payment, because they've taken the beneficial use and left us to continue with all the recurrent costs."

You're probably familiar - I'm not, I've just read it once or twice - with a decision of the Queensland Supreme Court in 2002, I think, where the three judges say things like, "Yes, it's quite clear that Mr Bone cannot use his land for any purpose except to permit native vegetation to grow upon it. It is questionable whether he still has the right of walking across it. The only privilege he has is to continue to pay rates on the land, but this is the law," and so his application was dismissed. I think a resolution to the apparent contradiction we're getting is that in a legal sense it's quite clear that the state doesn't have to pay compensation, but a lot of the landowners appearing before us think that it ought to. It's not a question of what the law does say, but what they wish the law would say.

MR SMITH: Sure.

DR BYRON: You can understand why they'd wish that, but bad luck. We've sort of said, "Well, let's go past the backward-looking question of compensation for diminution of a bundle of property rights. Let's go forward and say, 'How do we get good environmental management on the ground in the future.'" If that requires payment of, say, structural adjustment or incentive payments, it's not necessarily an admission by the state that it is acquiring or diminishing property rights - - -

MR SMITH: Legally liable or - - -

DR BYRON: - - - or admitting any liability. It's simply saying, "Because we need your cooperation on the ground in the future, we are going to make a payment of some sort of money." To me, in a sort of pragmatic sense, that may be a more helpful way of going forward than arguing about whether or not there are demands for historic compensation.

MR SMITH: I would have to agree that structural adjustment - those kinds of arrangements whereby you look at the specific circumstances surrounding a particular community and their situation and you assess that and then you give, as I said, not only the employer but the communities that sustain those farmers and you look at that, but just in the way that - and I don't know this in any detail, I must admit, but the way that it's been played out in the timber industry and the fisheries industry, particularly in New South Wales, is a much more equitable solution than simply a kind of rights based legalistic analysis of, "Is this acquisition? Is this not acquisition? Is this property? Is this not property?" and so on.

It's played out at a much broader political level than under some legislation which is backward-looking and quite clumsy and means a one-off payment to a farmer, but still means that they have this land which they can't do anything with. That doesn't seem to promote sustainable management of land at all, to simply give them money and then they make a decision, "Well, do I flog it off for not as much as I could have or what do I do?" If you actually give money to those communities and also try and offer some financial incentives around the management of that land, then you can come to a more forward sustainable looking model.

DR BYRON: Just jumping to your five arguments of why compensation shouldn't be paid, in Tim Bonyhady's book he gives one of the few exceptions in British law - the case where, if a building is declared heritage under the National Trust or something like that, the crown agency is required to compensate the property owner for the diminution in market value of the property. That sort of arrangement, it could be argued, puts a sort of discipline on the number of properties that you declare. If the agency which is going to impose heritage orders has to compensate for the diminution in market value, it then has to prioritise. It has to say: is it really worth spending X hundred thousand dollars of the taxpayers' money to get this particular property declared?

I guess in our draft report we were wondering whether that line of argument might have a place in the native veg situation. There seems to be a precedent for that with the Tasmanian private nature reserves argument. If the government thinks that an area of land is of very high conservation value, they then negotiate with the owner and make it worth his while to both set it aside and to actively manage it for biodiversity and conservation into the future. It also makes it very clear and publicly transparent that there are costs in setting that land aside to be managed for

conservation.

MR SMITH: Costs to the landowner?

DR BYRON: There are costs very generally to society. Somebody has to pay.

MR SMITH: Yes.

DR BYRON: Whether the state goes and acquires the land and then puts National Parks managers in to manage it or whether they make some sort of deal with the existing landowner for setting aside and for management, there are costs and there seems to be a negotiation process to equitably share those costs. What we have at the moment is where society seems to be saying, "We want you, the landowner, to set that area aside and manage it for conservation purposes, but you can bear all the costs of doing that." The argument has been put to us by landowners that they're being basically forced to set up quasi national parks at their own expense, and they see that as inequitable.

MR SMITH: Sure.

DR BYRON: It may not be a case for compensation for acquisition of rights, but it may be a case for positive payments for future management.

MR SMITH: I would agree with that absolutely. I think that is the way to go. You used a couple of examples. You used the one where you put National Parks managers on. That's an acquisition example. That's essentially where they say, "We really like that bit of land or the community likes it or whatever, so we want to buy it," and that's the end of that. In those other examples you're talking about where there's a kind of negotiated approach and they say, "Well, we want you to put this land aside for public conservation, essentially, and preserve this land and we'll give you certain monies and we'll give some kind of logistical help and so on," I would fully support that as well.

We have a version of that in New South Wales - and I think it could be a lot better - called "voluntary conservation agreements", where you get rate relief, for example - you're exempt from rates - but our experience in that - and we've tried to help people do some of those - it takes people with the will to do it upwards of 18 months and endless negotiations and I don't think - you know, that's in no-one's interest at all and you're never going to get a take-up of that kind of regime if you've got that kind of slowly-slowly approach, but that's something that is worth exploring and worth building in real incentives.

Quite often the government will talk about and will play up those kinds of

mechanisms about, you know, "We have voluntary conservation agreements, where we've got a whole range of private conservation initiatives and tax relief and so on, but clearly the bottom line is - if you look at the empirical evidence, or whatever you want to call it - that they're not enough for people to take them up. I don't think it is that people don't know about them. They're too hard. They're too complex.

DR BYRON: They're not attractive.

MR SMITH: They're not attractive, which means they're not an incentive, essentially, and that's the present approach in New South Wales and that will be coming in on 31 May. You say, "I would agree with you in New South Wales at the moment." You made the point before that the landowner is forced to bear the cost himself, and there are arguments around that, but the new regime - which is coming in on 31 May - moves away from that premise and actually that's why I mentioned that $406 million - that that's supposed to go on farm to help - - -

DR BYRON: I guess my point was that if you think of the acquisition to make a national park and then have park managers, the cost of that is transparent in the budget papers.

MR SMITH: Yes.

DR BYRON: If the Victorian government sets aside a million dollars a year to go out and buy conservation management agreements with land-holders, the public can look at that and say, "Yeah, that's good value. Next year we want twice as much of it," and you say, "Well, we're spending a million dollars a year to buy conservation. Are we getting value for money?" but under the system that has occurred in the past, the costs haven't been visible to either governments or to taxpayers and voters because all the costs were being left with the land-holder, which is both why the land-holders have been complaining to us and it is also why consumers say, "Well, yes, of course, we want twice as much of this because we're not paying for it." One of our arguments is, let's be up-front; see how much we're spending to acquire conservation, so we can see whether we want twice as much or half as much or a bit more.

MR SMITH: Yes.

DR BYRON: Sorry, I am making speeches rather than making questions. Brian, did you want to - - -

DR FISHER: Yes. I just wanted to first make an observation and then ask a question and, that is, there has been a bit of a tradition in Australia when we are dealing with the agricultural sector of compensatory payments in one form or

another; not in a legal sense, but in a political economy sense. If we take the instance of the dairy industry, for example, around about 1901, or just thereafter, governments decided to distort arrangements and pay subsidies and cause consumers to be paying more for their dairy products than they would have otherwise been doing, and then in about 1988 governments decided to compensate dairy farmers for taking those distortions away, so there is this history of compensation in a political economy sense. I think you made some comment to the effect that lump sum payments - or those sorts of compensatory payments are not necessarily efficient, but it's probably the case that a lump sum one-off payment to buy somebody out in those circumstances is the most efficient way to go, but I - - -

MR SMITH: Can I just clarify. Certainly if the government says, "We'll buy your property" - that may well be the most efficient way if they want a public conservation outcome. But for them to simply say, "Oh, yes, we recognise that these regulations have hit you hard" have some money and you still retain the property, then that doesn't seem to achieve anything. It just gives more money for the person in their pocket. The land is still essentially - not totally or legally, but essentially - locked up, and how have we moved forward?

DR FISHER: That was the point I wanted to clarify; namely, that you seem to be making a distinction between "compensation" - and we're not necessarily talking about it in a legal sense now - and then payments for future management.

MR SMITH: Yes.

DR FISHER: It seems to me that there is a distinction there, at least in an economic sense, that if you're asking farmers - or somebody else in the community - to provide a service, then there is a difference, operationally, between paying for that service and encouraging people to provide a service into the future compared with compensating them for having lost a right to something.

MR SMITH: Yes.

DR FISHER: It wasn't clear to me that you were making that distinction.

MR SMITH: You do get caught up in these sematic debates about it, because there is a legal idea of compensation. A lot of people use the term "compensation" when they might just be talking about structural adjustment or something like that, but I guess when I use "compensation" I use it in terms of, and this is not talking about legally, where you simply say to someone, for whatever reason (politically or whatever) "Here's some money for the harm that has been done to you," and then walk away. That's quite different from a series of ongoing payments - or even a lump sum - where it's tied to commitments to the land. You

might be right - I'm not an economist - but, I imagine, on first principles, that a lump sum is better, in many respects, than a series of ongoing payments, depending on what it is. The point, I guess, I would emphasise is that if we want to have sustainable management then it needs to be tied to outcomes rather than just, "Here's some money," full stop, end of story.

DR FISHER: Yes, so in fact we are making the same point.

MR SMITH: Yes.

DR BYRON: I just think, when you're talking about that, historically, property to land - and we talk about "a bundle of rights" or some people now express it in terms of, "GIS layers," and say you've got the right to plough the land. You may have a right to minerals underneath it. You may have rights to water that attach to that land. You might have the right to the commercial utilisation of vegetation that grows on that land.

Now, once upon a time, we used to bundle it all up and say, "You own the land," but what we tend to be doing now is separating those strata or layers and so A may own the right to plough the field; B owns the minerals under it; C owns the water and it's sold down to Mildura or something, and maybe the Titles Office needs to also start to stratify and say, "Who owns the different components of that bundle of property relating to a particular hectare of land?" so if I owned some land, freehold or fee simple or whatever, and I had all these various rights in my bundle and the crown comes along and says, "Okay, we're going to remove this element from your bundle. You're no longer going to be able to sell timber off it," for example.

I guess previously I might have been able to sell that timber right to a sawmiller down the road, even his right to come and take trees in 20 years' time or something, so in a sense I have been able to - I could have sold my water right to somebody else, my timber right here and mineral right somewhere else. Is there an argument there that the vegetation component of that bundle used to have a market value. If the crown is then saying, "Well, we're now exercising ownership over that vegetation component," is that acquisition of one of the elements of property?

MR SMITH: I see what you are saying.

DR BYRON: I am probably confusing myself here, but - - -

MR SMITH: No, no. It's enormously complex this whole area of property rights and so on. I'm sure it's only the High Court that really understands it. I guess ultimately, under the common law - it comes back to what I was saying before - that

it would be true in the sense that, at the end of the day, the Crown - you know, these are in a sense legal fictions - owned everything, notwithstanding what you were saying, which is correct.

Then under statute law you've actually got to look at the specifics and say, "Okay, how does that actually play out?" but, in terms of the native vegetation issue, I guess in terms of a rights analysis of it, if you have a permit you have a right to clear, but just having it doesn't give you the right to do whatever you want with it - I guess would be the legal answer. As I say in the submission, there are other dimensions, legal dimensions, but that's legally the distinction, so the law under the legislative regimes isn't actually taking that right to do anything away, unless you've been given the right to clear under a permit, a licence or a lease or something.

DR BYRON: If it had been made explicit in a piece of paper that you had a right to sell timber and that was taken away then there might be grounds, but if you - - -

MR SMITH: There would be, in fact.

DR BYRON: But if it hadn't been explicitly made as a right to do something with vegetation?

MR SMITH: Yes.

DR BYRON: Okay, I think the penny is starting to drop.

MR SMITH: That's probably the best way of thinking of it in terms of - because the difficulty is that we all think of property as "things", but it's really a legal relationship.

DR BYRON: Yes.

MR SMITH: And it can be a licence to make that, which is a relatively intangible thing. To make it tangible, I guess, just in lay terms, you usually do have a piece of paper that says, "Yes, I have an approval to do this."

PROF MUSGRAVE: It has to be transferable?

MR SMITH: Sorry?

PROF MUSGRAVE: Has to be transferable?

MR SMITH: To be a property right? Yes, pretty much. I guess you could say yes, full stop.

PROF MUSGRAVE: Yes. Transferable in isolation from the rest of the rights to that area of land.

MR SMITH: Yes. You've got your timber - let's use your permit to clear, and a permit to clear is transferable across time, I guess. Like if you sell your property the next person who comes on has the benefit of that, so it's just like getting a DA approval as to - - -

PROF MUSGRAVE: It would then have been transferred as part of the bundle of rights to the land, wouldn't it?

MR SMITH: Yes.

PROF MUSGRAVE: Towards the end of my interruption I was asking about whether it needs to be transferable as a stand-alone right; that is, it can be transferred separately from the remainder of the bundle of rights. Somehow you can sell the rights to the vegetation - - -

MR SMITH: It depends on the particular context. Ultimately this depends on legislation nowadays - whether there is a law in place. I'm not sure in legislation, but there are laws around carbon sequestration and you might be able to sell the right away of that, but certainly water you can sell. You can pick it up and go - - -

PROF MUSGRAVE: Yes.

MR SMITH: Because it's detached. The water right now under New South Wales legislation at least - I don't know what the situation is in other jurisdictions - under the old law it used to be attached to the land, but now it is detached from that, so you can actually pick it up and go and sell it to someone else.

PROF MUSGRAVE: That's right, yes. I'm very familiar with that and that is what drove me to ask you that question. I think you have covered a lot of the ground, so I've just got some clarification of some very specific points to ask about. First of all, assuming you have read the draft report in minute detail, are you comfortable - could I say, if you are uncomfortable with any of the treatment of compensation issues, I think we would like to hear about your discomfort in a specific way. If of course you have read the report in great detail you might be able to tell us now if you do have some discomfort or not. You don't have to go into detail though.

MR SMITH: I have read the report in terms of the compensation stuff and I deliberately - because of a whole variety of reasons - restrict myself to that (mainly because it is where our expertise lies). I don't think there was anything wrong with

what was said, but it just didn't seem to be as clear as it could have been - and perhaps that was deliberate, as you seem to be suggesting. It wasn't as clear in terms of the legal analysis as to the position. There wasn't much discussion about some of the implications of that. Again, that might have been deliberate, because we did put in an original submission on some of this stuff.

PROF MUSGRAVE: Yes.

DR BYRON: It may also be because we're not actually lawyers.

MR SMITH: Yes, I appreciate that.

DR BYRON: We're sticking to what we do know a little bit about.

PROF MUSGRAVE: I've asked that or suggested that because I think that this report will be very important in aiding the ongoing debate about compensation, perhaps in putting it over there and let us proceed with these positive dimensions that we think perhaps could be helpful in resolving some of the issues that are outstanding.

MR SMITH: Sorry to butt in. I think it is very useful. This issue has been bubbling around since I've been at the EDO. You were suggesting you're familiar with the water reforms and so on. It is probably no exaggeration to say that it is one of the primary issues at the moment - from a legal point of view- in the bush, property rights. Is that a property right; are they taking it away? - and so on. To actually clarify that in people's minds and say, "When we're talking about compensation we're talking about X and this is the way the law interprets it," I think it would be useful for the final report to do that.

There is a lot of difficulty in understanding, and in some cases I guess dissembling about the legal situation; a lot of use of compensation in a non-legal sense, which kind of confuses everyone because we don't know whether they're using it in a legal sense or in a broader political sense, so I think it would be useful to do that. Then I can only urge the commission to consider some of those implications that would flow from moving away from the present regime, which it doesn't seem that you're suggesting anyway, from what I can gather.

PROF MUSGRAVE: I think if there's anything that bothers you greatly and particularly, it could be helpful to us if you would raise them with us, because that might help us to facilitate the debate.

MR SMITH: The only thing I would be worried about, I guess - and it is nothing more than I've already stated - I think it would cause a lot of difficulties to move

away from that present legal approach to compensation and that the focus should be on money; there's no doubt about that - that is tied to ongoing obligations to the land, so that we can actually have a sustainable management. As I mentioned in the submission, in the national parks area there's an old debate about whether it's a useful thing to lock up land, whether that's the best way to manage it. Everyone recognises that it's not.

Why would we then go for a compensation model which essentially does the same thing on private land and just give a one-off legal lump sum and say, "There's your money. That's your compensation and now become an artist or something." It would be much better to use that money to have positive outcomes, make farmers, if the state is interested enough in throwing money at it, make farmers the land managers, just like the National Parks actively manage that body of land as well.

DR BYRON: I think we have looked at the US situation, the legislation and the constitutional protections against regulatory taking and all that sort of thing. Again, as with the water debate, I think there's been a lot of confusion injected by people saying, "Well, in California they do X, Y and Z. Why can't we do it in New South Wales?" without appreciating they're fundamentally different legal systems.

MR SMITH: And constitutional provisions, exactly.

DR BYRON: Yes. One of the features, though - having said that - of that US system is that if governments decide that the benefits to the public at large are greater than the costs that are imposed on a particular individual, compensate the individual and then everybody is happy. If you don't compensate the individual, then this is where militias are born and revolutions and so on.

If we as a whole, as a society, think that having more biodiversity conservation, more native vegetation on private land is a good thing and we want more of it and to do that, if the benefits are worth hypothetically a billion and it's going to cost us a million to ease the pain of the people at the pointy end, why not do it? Then everybody is better off. There are no losers. If the potential benefits are greater than the losses, of course we should do it; but in the process be honest about who the losers are and treat them equitably. I guess that's an argument which is probably different from the strictly legal reading of it.

MR SMITH: Yes. No, I appreciate that. You mentioned Tim Bonyhady. I presume you're talking about the 1992 book and the article he did on property rights. That recognises clearly historical circumstances where the government has, for political reasons, basically said, "Yes, okay." That was the case in South Australia where they kind of came along out of the blue - and it was pretty much out of the blue - and said, "Okay, the game has changed," and they recognised that it was one

of the political costs, if you like, that they were prepared to pay. That didn't actually - I could be wrong here; I'm pretty sure I'm not - but you're going to South Australia anyway; or have you been?

DR BYRON: Going.

MR SMITH: Going? You can clarify it there. I'm pretty sure that that system didn't last very long, because - and then they brought in the system that I'm envisaging, anyway, which is a more financial incentives based approach. So in many ways, we're not very far away at all in terms of what we're suggesting. I'm just suggesting that we both seem to be - I don't want to put words in your mouth - that there need to be public monies devoted to this issue, and significant public monies. I just don't think that that should be in the form of a backward-looking compensable payment that doesn't have any ongoing obligations outside of acquisition of the land and saying, "Okay, it's all over. I'll take that land off you and we'll manage it." Outside of that, I don't think it should just be a one-off payment. It should be financial incentives, either in a lump sum that carries ongoing obligations or a series of payments that carry ongoing obligations tied to outcomes.

DR BYRON: Can I change the subject slightly, because you might have heard Mr Hespe just before talking about savings clauses and that if land had been - you know, agricultural land was still agricultural land. A number of other people previously in written submissions and hearings have put that argument, that if they have the freehold title and they've been farming it for years, they can still farm it. They're basically rejecting the position that we take in the draft report and still arguing it along the lines that they have the right to do as they wish with their native vegetation. How would you suggest we respond to that?

MR SMITH: Sorry, so the position is they're saying that under planning law, it's something that they don't need consent to do?

DR BYRON: Yes, because it's still agriculture.

MR SMITH: Yes, and that's a permitted use in that area?

DR BYRON: Yes.

MR SMITH: And the commission is saying that - - -

DR BYRON: We haven't actually said very much about that at all, yet.

MR SMITH: The response to that would be that - so it's a permitted use on day one and on day two the government brings in laws and says, "This is no longer an

agricultural zone. This is an environment protection zone." Subject to that being wiped away in a statute, you would have existing use rights to continue to do that activity. There are all sorts of laws around existing use rights that say you can't intensify and expand and so on and so forth; but otherwise you would have the right to continue to do that under New South Wales planning law, notwithstanding a change of zoning. I don't know whether that's too specific an answer.

DR FISHER: So that means, basically - and we've received some evidence to this effect - that the planning laws effectively continue to override whatever happens in May this year, under some circumstances. Is that what you're saying?

MR SMITH: You're talking about May this year? I'd have to have a look more closely at that particular provision. There are provisions around existing use that allow that to survive. I think it's section 21 of the Native Vegetation Act 2003. There are other provisions around - no, they're exclusion ones; I think it's mainly section 21, so the commission might want to look at the scope of that. But the intention of that is that if you have an existing use, then it's a permitted use and you don't need an approval to clear or a property vegetation plan and so on.

PROF MUSGRAVE: We have several submissions from a group calling themselves the Constitutional Property Rights Group, who make much of this existing and continuing use concept, to the point of saying that it's a fundamental human right and can't be taken away from a freehold owner. I understand that's a highly debatable proposition under law.

MR SMITH: Yes.

DR FISHER: I think just to clarify, there are two levels of this. There's one level that's almost a fundamental human right.

PROF MUSGRAVE: Yes, under the Magna Carta, I understand.

DR FISHER: Under the Magna Carta. But then there's another version of this that says under the existing Planning Act or regulations or whatever they are in New South Wales, if you've been farming there, there's nothing in the current legislation that would stop you from continuing to do what you're currently doing.

MR SMITH: The position is that the Magna Carta doesn't help them, notwithstanding the fact that we have legislation nowadays; but even if was 1688 or whatever it was, the Magna Carta always made that distinction between compensating for acquisition but not for regulation. In terms of the planning law issue, the native vegetation laws would - there is a relationship in New South Wales between the planning laws and the native vegetation laws, the current ones and the

ones that will take over at the end of May, but the existing use provisions under the planning laws would not help you. What helps you here is - I said it was section 21, it's actually section 23 of the Native Vegetation Act. Do you want me to just read it?

DR BYRON: Please.

MR SMITH: It's only short. "The continuation of existing cultivation, grazing or rotational farming practices" - so it's only restricted to those - "is permitted if it does not involve the clearing of remnant native vegetation" - which is the highest level of protection - "or in the case of the western division" - there's a kind of a complicated formula - "native vegetation comprising trees not less than three metres" - blah, blah, blah. In this section, "existing" means existing at the commencement of the act. So if you were undertaking that activity on 30 May or whatever it is, and it's not remnant, which is the highest, so it's still - generally 90 per cent of existing, I would have thought; I don't know and you might want to ask the farmers what percentage it would capture - but they wanted that provision and they were happy with it.

PROF MUSGRAVE: Can I ask you to clarify something in this most recent submission. On page 7, the second-last paragraph which starts with, "Finally," in bold, you refer to equity considerations. You refer in the third sentence to the Productivity Commission openly acknowledging such equity effects, but that, "In relation to the national competition policy has highlighted broader community benefits and sought" - I think the missing word is "to" - "encourage and assist people to cope with the changes."

MR SMITH: Yes.

PROF MUSGRAVE: Then you go on to say, "Yet in the context of the management of natural resources, strong support has been given to an approach" et cetera. Do you mean that strong support has been given by the Productivity Commission?

MR SMITH: No, I don't.

PROF MUSGRAVE: It's a bit elliptical there. Some strong support has been given by others, by some, by people.

MR SMITH: Yes. No, I'm happy to clarify that for the record as well. That's not meant.

PROF MUSGRAVE: Thank you. I thought you might have been accusing the Productivity Commission of hypocrisy. Perish the thought.

MR SMITH: Of encouraging undeserving recipients? No, not at all.

PROF MUSGRAVE: Okay; but I might just comment that a lot of our conversation this afternoon was about not being backward- looking, being forward-looking and not just compensating for a lost right - let's think of payments to achieve objectives and yet the "equity" word keeps on intruding in the debate; you know, "It's not fair, it's not fair."

MR SMITH: Right.

PROF MUSGRAVE: That sort of tends to cloud the issue in relation to our pragmatism, doesn't it?

MR SMITH: Are you asking me for a response or - - -

PROF MUSGRAVE: You might care to respond to it, but it seems to me that sometimes a payment is made on compassionate grounds and it's conceivable that such payments could be made or contemplated in relation to native vegetation.

MR SMITH: Sure. That's what I'm arguing for. I guess equity is probably like the moral equivalent of compensation, as it were. It's particularly unhelpful. Everyone argues it in a sort of relatively clear context.

PROF MUSGRAVE: Yes, on the one hand and, on the other hand, all the time.

MR SMITH: Yes. What I'm trying to argue there - and it's not entirely clear, I must say - is just the set of arguments around structural adjustment. Clearly there should be money devoted to this issue; public money devoted to this issue. The most equitable way of doing that is to hit not only the land-holder, but also the employees and the communities and the industries more generally. That's mainly the point I'm making. If you bundle it up with a property right, then people take longer to - - -

PROF MUSGRAVE: Here is that wider focus.

MR SMITH: Yes. That's all.

DR BYRON: The other aspect of the "E" word - equity - that keeps coming up in the submissions to us; that the comparison across land-holders at a particular point in time - if landowner A has retained a lot of native vegetation on his property while his neighbours have cleared it and probably received concessions or tax deductions or something in the process 20 years ago, those who got rid of all the native vegetation aren't affected in any way by this legislation, whereas those who have been "doing the right thing" are the ones who now find themselves most constrained. Their

neighbours are free to put in new irrigators or a new type of farming machinery or something, but those who have got native vegetation can't.

They are claiming to us that this is clearly unfair; that they are being penalised for having, either through choice or coincidence, done what society at large wanted them to do in terms of retaining a lot of native vegetation and now finding that they are disadvantaged vis-a-vis their peers. I guess that proposes two courses of action. One again is the lump sum backward-looking compensation sort of payment. The other one would be to devise some new set of rules, whereby having a lot of native vegetation on your property was better than winning lotto. You know, it was a positive asset, rather than being seen as just a deadweight liability around your neck.

MR SMITH: Sure.

DR BYRON: Any reaction to that?

MR SMITH: It probably requires a mind far greater than mine. I don't know the answer. I agree that that is unfair. I guess the question is where you go from that and to what extent. Lots of things are unfair. Life is unfair, but it's probably the kind of thing where I would say that it's probably the type of scenario I'm talking about where you would be talking about structural adjustment; although you're talking about particular farms all around New South Wales who haven't cleared vis-a-vis farms who have cleared, aren't you, so it's not as if - - -

DR BYRON: Yes. In any cluster of 10 there's one who is singularly disadvantaged by the legislation, compared to all his neighbours, and yet he's paying the same price for all his inputs. He's selling his output for the same price as all his neighbours and yet he's got this big expensive additional issue to deal with and he's dealing with it in the public interest and yet it's clearly handicapping him commercially.

MR SMITH: Yes. I guess partly the answer is probably what you were saying, that it should be the equivalent of winning lotto to have that and that's what I would say about the present regime. There is a gap there between - I'm talking about in New South Wales - what the government is saying, and talking about financial incentives. There's clearly a gap between that and the take-up, because there's virtually no take-up at all. The government is talking in the rhetoric of financial incentives at the moment, but clearly the system doesn't facilitate them at all and they aren't incentives in any real sense.

The question will be whether the $406 million will actually allow that kind of situation to arise, but I'm not sure how that would work on a farm that has still got lots of native vegetation on it. It should work in the way to give incentives to those people to retain it and money should go on to those farms - - -

DR BYRON: But the argument that was put to us is that some guy who has got a totally treeless property and he plants 100 trees along the fenceline and he gets a gold star and a big tick and he's farmer of the year in the region and everything else and, meanwhile, the guy who has retained 100,000 trees for the last 50 years, if he wants to cut down one or two of them he's threatened with all sorts of prosecutions. Again they see this as inequity between neighbours.

The government will give you money to plant 100 new seedlings on bare land, but they give you nothing for looking after a million old seedlings, because they say, "Well, that's your duty of care. You have to do that."

MR SMITH: No, I appreciate that. I think there is probably a lot in that, but it's a little bit of a misreading of the present legislation, because while there is money for tree planting or rehabilitation, clearly the whole system contemplates the preservation of existing - and should tie money to the preservation of existing trees. You know, there are the two issues: there is some money. I am not sure how they are going to carve that up, because there's only one bucket of $406 million. It has been my clear understanding that the emphasis is on - as you would expect, the best way is to actually retain the trees and to pay people to retain them. The next step will be then to start thinking about planting more trees in a meaningful way.

PROF MUSGRAVE: What you're saying is that now we have the bucket and there's some money in the bucket, maybe this issue will be much diminished in importance; this type of situation.

MR SMITH: That's the hope. Certainly $406 million is a lot and a lot of that was federal money, so, yes, there are big expectations in New South Wales about what the new laws can deliver. They haven't started yet, of course.

DR BYRON: Is there anything you wanted to say by way of concluding remarks?

MR SMITH: I don't want to say anything. You mentioned before that you spoke to a number of other environmental lawyers. What did they say of - - -

DR BYRON: All those conversations were before the draft report. I haven't met with any of them since.

MR SMITH: Okay. I was just wondering whether what we were saying was consistent with - - -

PROF MUSGRAVE: It's broadly consistent.

DR BYRON: What is in your submission is very consistent with what we have been hearing from - and including - was it Bryan Pape that you - - -

PROF MUSGRAVE: Yes, I don't think Pape's position is exactly in line with yours, but I think in terms of the basic questions of law it is pretty much - - -

DR BYRON: As you say, the law is - - -

PROF MUSGRAVE: The law is this, yes.

MR SMITH: The Environmental Defender's Office is obviously not a property law firm, but we did run it by people like Peter Butt, who is an expert in the area and he was entirely happy with that legal analysis. That's all we asked him to have a look at.

DR BYRON: I really do thank you very much for the effort that you have put into this.

MR SMITH: Thank you.

DR BYRON: And for tolerating all our naive questions. I think I can now declare the meeting adjourned, unless there's anybody else who wants to come forward. We will reconvene tomorrow morning in Dubbo. Thank you.

AT 3.12 PM THE INQUIRY WAS ADJOURNED UNTIL
THURSDAY, 5 FEBRUARY 2004

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