STANDING COMMITTEE ON PUBLIC ADMINISTRATION AND FINANCE

LAND INQUIRY

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
ON MONDAY, 19 AUGUST 2002

SESSION 2

Members

Hon Barry House (Chairman
Hon Ed Dermer (Deputy Chairman)
Hon Murray Criddle
Hon John Fischer
Hon Dee Margetts
Hon Ken Travers
Hon Sue Ellery

[10.45 am]

KENNEISON, MR JAMES
Adviser,
examined:

FERGUSON, MR JIM
examined:

The CHAIRMAN: On behalf of the committee, I welcome you to this hearing. Please state your full name, contact address and the capacity in which you appear before the committee.

Mr Ferguson: We are here to provide background to the arguments we will present on behalf of our clients at a later date.

Mr Kenneison: We have submitted 18 matters to the committee on behalf of our clients, all of which are concerned with procedural fairness - or what we see as the lack of procedural fairness - on the part of government agencies.

The CHAIRMAN: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Mr Kenneison: Yes.

Mr Ferguson: Yes.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please also be aware of the microphones. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's hearing, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that, until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that premature publication or disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. Do you wish to make an opening statement to the committee ?

Mr Kenneison: We want to present very briefly to the committee today some of the background to matters on which evidence will be adduced - especially at Dandaragan and elsewhere - regarding people who thought they had a legitimate right to use their land in the way they wished to use it. We want to emphasise that we are not concerned about land clearing issues, but property rights and due process of law being followed by government agencies, administrators and decision makers. Until two weeks ago, one could clearly say that administrative law was concerned purely with decision-making processes. Decisions are not confined only to judicial tribunals and semi-judicial tribunals; the law has been extended to cover administrative bodies, agencies or persons.

The submission presented to the committee shows that whenever certain issues arise, both the High Court and the House of Lords have consistently and repeatedly stated that agencies must act judicially. They act judicially, first, if property rights are in question; secondly, if someone's liberty is in question; thirdly, if someone's employment situation is in jeopardy; and, fourthly - this category is a nebulous concept that I do not understand nor do I think anyone else understands - if someone's common law principles, rights and liberties are affected. It is our complaint that the agencies have consistently and persistently failed to address this simple issue.

We have four years worth of correspondence to the Commissioner of Soil and Land Conservation, the chief executive officer of the Department of Agriculture, the Chairman of the Environmental Protection Authority and the Department of Environmental Protection, who are either slow learners or dense. They do not want to accept the realities of life. We have gone to great pains to point out the rules by which they should play the game when people lodge an application to use land. The normal practice, without exception, is that they insist that a person lodge an application to use the land. Then there is usually - evidence will prove this - a silent wall of about 40 or 50 days during which nothing happens. Sometimes, of course, it is one or two days. At that time, the person who has lodged the application is notified that a soil conservation notice will be imposed on the land because any activity is likely to cause salinity, offsite or on-site erosion, wind or water erosion or something else - anything at all will do. Then when one searches the title deed, one finds that a memorial has been lodged with the Department of Land Administration stating that no dealings are to be permitted on the land. That is stamped right across the title deed for anyone and everyone to see - "No dealings are permitted on this land." It is our argument that that is a travesty of justice.

If someone is to lose their property rights, we expect the authorities to comply with the rules of natural justice and ultra vires. We are simply asking that, if they intend to make an adverse finding, they tell the person concerned the allegations they intend to lodge. They should give the person the evidence upon which they are basing their conclusions or opinions. I mean all the evidence; not just what they intend to use, but everything in their possession.

Our submission refers to a finding of this committee some years ago in the matter of Rindos and the University of Western Australia. In that case, material was withheld from Dr Rindos that may have been prejudicial, but he was not told about it.

The CHAIRMAN: I remember it well; I was on the committee.

Mr Kenneison: The committee in its final report was particularly scathing of the university. The Rindos case is the tip of a little pin, if I can use that phrase. He was not told about some possible adverse material, which the committee alleged did not influence it. However, the law says it must be disclosed. The Rindos case was a pimple on a pumpkin; the 18 people we are helping have created a Mt Everest for the bureaucrats to jump over. The bureaucrats have breached every rule, without exception. There is no justification on their part that they are acting in ignorance. We have gone to great lengths to point out the law to them and we have virtually been told to run away and leave them alone; we should not trouble them; they will do what they want to do. They are not interested in the law, procedural fairness, due process or natural justice. Nor are they interested in hearings or giving these people an opportunity to rebut the allegations before they make a final decision. They will not give them a hearing or an opportunity to present their case; nor are they allowed to

have legal representation. The bureaucrats will simply make the decision and lodge a memorial on the title deed, and no dealings will be permitted on that land, full stop.

When Mr Ferguson challenges these people on environmental matters, they keep changing their bases. He is told it is a salinity problem. We have proved there are no salinity problems. He is then told it is a wind erosion problem. We have proved that wind erosion is manageable. Then he is told it is a water erosion problem. There is no water. They say they thought there might have been water, but there could be other problems. It goes on and on. Our clients are not given an opportunity to rebut any allegations made against them or to present their case. The decision makers could well make the same decision at the end of the process, and we are not complaining about that; we are simply saying that they should follow the due process of law. However, they have defiantly gone against it.

Apart from their right to a hearing and to be given an opportunity to put their case, our clients are also entitled to have legal representation and to call witnesses. That is what the law dictates and it is covered in our submission. This concept of natural justice has a very specific technical meaning as interpreted by the High Court. As I said, until two weeks ago, one could argue that this committee could only examine the process by which decisions are made. It was not inherent that any judicial tribunal could look at the merits of a decision. That doctrine was given the big heave ho two weeks ago by the High Court in Muin v the Refugee Review Tribunal and Lie v the Refugee Review Tribunal. The High Court was exceedingly caustic about how the tribunal went about making decisions on refugee status. The court indicated that we can now look at not only the decision-making processes but also the merits of the decision. That is a revolutionary development in administrative law.

The other aspect of natural justice that I want to mention to the committee is that a decision maker, when required to act judicially, must bring to the process a free, open and candid mind - that is, free from bias and prejudice - and should not prejudge the issue. The Chairman of the Environmental Protection Authority has said that there will be no land clearing approvals issued in this State when any matter comes before him, and the commissioner has made public statements to the same effect. Even when Premier Richard Court's public statement was made that that was not government policy it had no effect on these bureaucrats - they carried on merrily, defying him and the Government of the day. Are they above the law or answerable to the law?

The other matter at issue, of course, is the purpose of the Soil and Land Conservation Act. It is clear that, when this legislation was passed in 1945, Parliament's intention was that it should be for the benefit of the farming sector.

[11.00 am]

The commissioner's duty was to assist the farming sector. He seems to have completely disregarded all his duties and functions. All he seems to be concerned about is that every time we lodge an application, the commissioner should impose a soil conservation notice forthwith. When we challenge that, we either do not get any correspondence back or we are virtually told to go away and not to trouble them any more. It is arrogance.

As for the question of lodging a notice of intention to clear, the only provision in the Act is in the regulation-making section. I would argue that the regulations that have been made pursuant to those provisions are invalid. They are unreasonable and produce uncertainty. If someone wishes to clear one hectare or more, he must lodge a notice of intention. The definition of "to clear" does not include chopping down trees

for firewood, fence posts or timber. As we submitted to the previous committee under the chairmanship of Hon Kim Chance, it would appear that anyone can go around clearing all the land they want to on the basis of producing firewood, fence posts or timber. One person who will be tendering evidence to the committee, Mr Rob Chester from York, will produce a letter from the former Premier which says, "Don't worry, Robert. Just use it for firewood, fence posts or timber, and just carry on doing what you want to do." If that were made public, it would create environmental and economic vandalism, because everybody would be going out and chopping down every tree this side of the North Pole.

The other provision dealing with regulation 4 means that if somebody wants to cut grass, he must get approval from the commissioner. This means that every time I want to cut my 1.1 hectares of lawn in front of the house, I must lodge an application with the commissioner, who can then refer it to the Environmental Protection Authority for an economic and environmental assessment before I can cut it. I am sure that was never intended to be the purpose of that regulation-making power. My argument is that regulation 4 is completely invalid and unreasonable and produces uncertainty. The committee will see the submissions dealing with ultra vires. We allege that decision makers have gone beyond the limits of their power. They have either used improper considerations on an application to clear or failed to use proper considerations. Their decisions are unreasonable, and the committee will see the definition of unreasonable. There is also the question of uncertainty.

Above all else, under section 32 of the Act the commissioner cannot do anything until he forms an opinion on a certain issue. Once he has formed an opinion, those conditions precedents are fulfilled and he can do certain things. We have attempted for four years to try to find out in respective cases what was the opinion that was formed before the commissioner imposed a soil conservation notice. To every one of our requests we have received a beautiful silence. We ask the committee to look at the submission. I am not saying that it is perfect by any stretch of the imagination, but it is an attempt to pull together a whole multitude of decisions of the English and Australian High Courts, the Federal Court and the Western Australian Supreme Court as to what is required of decision makers when they are to act judicially. Unfortunately, these rules have never been followed in Western Australia.

Apart from the technical grounds, we have also lodged a document titled "Submission" and a copy of *The West Australian* of 24 December 1999, which refers to the previous Premier rejecting the Environmental Protection Authority's stand. It did not affect the Environmental Protection Authority, which carried on regardless, as did the commissioner. We have also lodged some copies of correspondence to the agencies. If the committee so desires, we can produce all the correspondence, but I do not think there is any need for it. We have gone to great lengths to point things out both in written form and verbally. Mr Ferguson will tell you about the commissioner and his attitude. The meeting was attended by him and Mr John Dival, who will also be tendering a submission to this committee.

We would like to give you some idea of the legal framework. As I have said, we stand to be challenged if what we have said is wrong. We hope that it will be of some assistance to the committee. This is a difficult area of law. I do not deny that. Only one textbook covers this area. It was published in 1985 and probably written in about 1980, because it would probably take about five years to get to the printer. It is, therefore, way out of date. Of course, decisions are available on the Internet, which is where we have been extracting them for the past four years. We have extracted every

decision of the Australian High Court and the Federal Court of Australia concerning this area of natural justice and ultra vires.

We want the decision makers to be aware of the principles that should cover their decision-making processes and to follow them, not to act in some dictatorial, arrogant, high-handed manner as if they are above and beyond the law. As I have said, we are concerned with the right to be heard and the right of the decision makers to be free from bias. Bias can be actual bias, of which we have plenty of evidence, or it can be a reasonable suspicion of bias, as the High Court has said, from looking at the conduct of somebody and asking if the person is coming to the processes from a predetermined, pre-judgmental decision. We would say that the answer is yes. Therefore, all the decisions that they have made are invalid. Of course, it raises the question that if people have been inconvenienced for eight or 10 years in some cases and not able to use their land, should there be a claim for damages against those administrators and decision makers? If that is the case, the mortgage brokers debacle will pale into insignificance. That is another matter we will have a look at later.

At the last committee, evidence was tendered by Mr Ferguson and me, and also the Deputy Commissioner of Soil and Land Conservation, the Chairman of the Environmental Protection Authority and the Department of Environmental Protection. We wonder whether we must resubmit those documents as exhibits for this committee or whether they are already part of the evidence before the committee.

The CHAIRMAN: They are already part of our documentation. That documentation has been passed to the current committee, as have been the Hansard transcripts of previous hearings.

Mr Kenneison: I appreciate that the committee has not had time to read the submission. We would ask that after Northam, Dandaragan and Perth, we could come back to the committee with a summary and matrix prepared pointing out where the rules of natural justice and ultra vires have been breached in each and every case, so the committee has the whole picture, as it were, summarised on one sheet of A3 paper or something like that to show that a consistent pattern has been emerging in this whole area and creating massive domestic problems for people, which have affected their lives. In some cases, it has cost them considerable amounts of money for advisers, and they have not got justice. As I have said, in some cases the consequences have been quite tragic. The committee will hear from particular witnesses how the decisions have impacted upon their lives and their families. If we live in a society that is governed by the rule of law, there should be no need for decision makers not to follow and apply the law. Although I will still have to look at the two recent decisions, we are not concerned at this stage with whether the question of merit should also be gone into. If it is the case, and it would appear to be the case - it is interesting that the two judgments were handed down on Thursday of last week - we will make some submissions later on this matter.

Although a lot of people seem to think that courts are the only judicial tribunals in this land, I would draw the committee's attention to the fact that Parliament is also a high court of law. Whether it exercises the function is probably another question altogether. However, historically there is nothing to contradict the proposition that not only does the State have the Supreme Court and the District Court as courts of law, but it also has the high court of Parliament. If it is the case, I would ask the committee to look at the decisions and make an adverse finding if it is satisfied that the rules of administrative law have not been complied with in each and every case.

Mr Ferguson will handle the environmental and scientific matters, which are not my domain at all, and also mention to you the conversations he has had with the commissioner.

Mr Ferguson: I will be fairly brief. I will start with the first thing last; that is, the use of opinion evidence. To put it quite plainly, I have not got much time at all for the way in which the Commissioner of Soil and Land Conservation works on opinion evidence. I will briefly state one particular case. We submitted an application for 760 hectares of remnant native vegetation to be replaced with *Eucalyptus globulus,* or blue gums. A soil conservation notice was imposed on that property at the end of 90 days because salinity would occur. People have to put up with that sort of thing. The statement was plainly that 760 hectares of native vegetation was to be removed and 720 or 730 hectares of *Eucalyptus globulus* was to be planted for a coppice crop, to be followed with perennial or other deep-rooted vegetation, which would mean that salinity would result.

[11.15 am]

Most people know the capacity of globulus and its uptake of water.

Last week or the week before, I was in one of the Department of Agriculture offices, and one of its tree farming notes was on coppice blue gums. Lo and behold, when I examined it I found that in its trials in the Wellington catchment it is having some problems with the coppice growth of blue gums. It looks as though it will produce only 75 per cent of what the original blue gums produced in the first crop. The reason is lack of water. They are doing such a good job that they are reducing the water. That is just one example of the rubbish that we got pushed on us. A soil conservation notice is on that person's property today. That person was also put under a public environmental review. I have not seen any clearing applications of late go under a public environmental review, but that is what happened to that person as well at the end of the 90 days. I ask you to recognise the fact that we have to put up with that sort of thing. There is a similar situation at Moora, but I will not go into that. They are asking us to believe that salinity occurs through continual tree cropping. When they examined that case at Williams they did not take any notice at all of the fact that the land on one side of the brook has been cleared for many years. The person has put in 380 hectares of blue gums. They are up to three years old now. In its assessment of it, no notice was taken of that. I find that particularly reprehensible. I cannot believe that public servants can act like that. I will leave that alone.

Another area is the advice to the Minister for the Environment from the Environmental Protection Authority under section 16J of the Environmental Protection Act. Mr John Dival of Toodyay and I had had a meeting with the Commissioner for Soil and Land Conservation, Mr David Hartley, on 24 March 1994. I will bring up the technical issues and some of the other issues in our subsequent appearances for clients. I ask the committee to think about the fact that we have advice to the minister under section 16J saying that there will be no more clearing in Western Australia unless it is for a social good. It is a small point, but the Chairman of the EPA told us that he cannot comment on social or economic matters; that is a question for the minister. However, he then turned around and commented on that in section 16J. I asked for that section to be removed, but it has never been removed. When I asked for it to be removed in the preliminary position statement on native vegetation, he did change it, but he did not put that out to the public. However, this one is still sitting there as advice to the minister. The other point I make is the point

that Mr Kenneison made regarding bias. How can you have a document advising that there will be no clearing when the Soil and Land Conservation Act is clearly structured, as the Environmental Defender's Office has said, for the productive use of agricultural land? It is not to deal with conservation issues whatsoever. It is clear, and it is written there. That is on pages 11 and 12 of its advice to the Minister for Agriculture. We have Bernard Bowen's advice to the minister. We also have the Commissioner for Soil and Land Conservation, who in that meeting with Mr John Dival and me on 24 March stated, among other things, that enough land has been cleared in Western Australia and there is no need for any more clearing. He made that statement. On the one hand the commissioner has made that statement to Mr Dival and me, and I think his actions reflect that, and on the other hand we have the statement from the Chairman of the EPA. Where does the poor old farmer sit with that lot? It is biased to the extreme.

The commissioner is not prepared to act under his own Act. When we appeal to the Minister for the Environment against the recommendations of the Chairman of the EPA, where does the appeal go? It goes straight back to the person who wrote it - the Chairman of the EPA! That is really great! That should not be allowed in a society like ours. We have the appeals convener, but as soon as an appeal is lodged the odds are that it will go straight back to the EPA, and the EPA will get first go at it again. It is a no-win situation, and I believe that at the end of the day there will be a big price to pay, as Mr Kenneison said.

The main submission you have in front of you is on natural justice. We will do a short summary of that for you. Mr Kenneison alluded to the fact that the public servants have been informed time and time again that they are acting outside the law. Rather than put a great bundle of documents in front of you, I will go through them and put them in table form. That will probably be only a 10-page document. We will give examples of each person who has been notified, and the other documents will be listed, whether it be procedural fairness, natural justice, bias or whatever. That will make it very easy for the committee.

The CHAIRMAN: Thank you. Did you say you are a consultant for 18 parties, some of whom will appear before us at our meetings in Northam and Dandaragan to give us their personal case studies?

Mr Ferguson: Yes. Mr Kenneison and I will appear for several of them.

The CHAIRMAN: Is your basic contention not only that the process is flawed but also that the decisions that have been made are invalid?

Mr Ferguson: Yes.

The CHAIRMAN: Can you give us an overview of the sorts of effects that you have seen on individual property owners as a result of the claims you are making?

Mr Ferguson: The first one is Mr Craig Underwood from Dandaragan. He is still fighting the system - on water now. We got his right to clear through, but he is still caught up in an entanglement about water. It is costing him a huge amount of money. This has gone on for eight years. Another classic example is Mr Johnson of Watheroo. He had 44 appeal points against the Minister for the Environment. They did not put a soil conservation notice on his property. The EPA took it on and wanted to examine it. Johnson said he would do the right thing and address the issues. At the same time, he offered his property to the Government. It is 1 500 acres, or 600 hectares, cleared, and the balance is uncleared. He offered that to the

Government for $498 000. The Government has had that offer for two-and-a-quarter years. We have pushed it along, and hopefully he will be allowed to clear. I cannot believe that a person can have that done to him. The Government came back and said he would have to do the subdividing. He just wants the Government to buy his property. He has 1 500 acres of land, on which he averages nine bags of wheat. That is far better than the rest of the Watheroo country this year. The other 1 500 acres, or 600 hectares, that he applied to clear would be serving him well now if that had happened. However, he has to wear this mess. The worst thing - this is what I find hard to believe - is that if the Government had taken the bull by the horns and taken his property off him at $498 000, it could have cut it up and could have put 600 hectares back into the Boothendarra nature reserve and it would have had about another 1 500 acres of land cleared. Johnson would have had his money, and the Government would have had, for about $140 000 - that is my estimate - 600 hectares of bush that it could add to the nature reserve, and the 1 500 acres that was cleared could have been reserved under a conservation covenant. That will be brought up fairly shortly. Minister Edwards is making a decision on that, but she will say no clearing. That is what we will get. The Government has had the opportunity. I am not having a go at the Labor Government on this. That opportunity was there for the previous Liberal Government. It cuts across both Governments. The public servants have got no interest in making these sorts of things happen. It is all too hard.

Mr Kenneison: On the question of personal effects, evidence will be given that a lot of domestic tension has been generated, and that has had an effect on wives and children. There have also been health effects. Mr Underwood has nearly had a nervous breakdown about this and has incurred substantial debt. Nearly all of these people have had to incur substantial debt to try to make their property viable. The decisions keep on going on and on and we are not getting any finality. When we send the matter to the minister, the minister sends it back to the bureaucrats, and the bureaucrats then will not answer the correspondence. There are personal problems, financial problems and health problems. Domestic relationships have been strained, to say the very least, resulting in family break-ups. These people do not have the financial resources. As has been intimated on a few occasions, the farming sector does not have the financial resources to take this matter to the Supreme Court, because we know what that will cost.

[11.30 am]

We have the might and resources of government at our disposal. It is a David and Goliath situation. They know jolly well that if it were not for this committee, these people would have no avenue for redress whatsoever because they do not have the financial resources to commence litigation. I admit that we have tried to get people to do the wrong thing with a view to their being prosecuted. The reason behind that was that the moment the matter came before a magistrate, we would have immediately challenged the validity of the soil conservation notice which the party was alleged to have breached, and if it was not valid, it could not have been breached. Therefore, the party could not be prosecuted. Having got to the Magistrates Court, we would then have asked for the case to be stated to the Full Court of the Supreme Court on the issues of natural justice and ultra vires. We could have got to the Supreme Court very cheaply. Somehow or other, our plans have never come to fruition because I suspect that they have worked out exactly what we wanted to do. Evidence will be given, for example, by Mr Baldo Lucaroni, who blatantly and defiantly burnt some bush that had been cleared on his property and invited the media to watch. That incident was

reported on page 1 of *The West Australian* of 17 November 2001. He burnt everything in complete defiance of the order. However, he has not been prosecuted. He probably will not be prosecuted because this is one case in which financial resources would probably be available - Mr Lucaroni's partner is Nick Tana. Perhaps that is why the commission has not proceeded against him for acting in defiance of the soil and land conservation notice.

Hon KEN TRAVERS: I just want to make sure that I have understood what you have been saying; that is, that the Commissioner for Soil and Land Conservation should be acting in a judicial manner and that he is not applying natural justice to the decisions.

Mr Kenneison: Yes.

Hon KEN TRAVERS: In your submission, you asked the committee to declare some of the issues illegal and commented that the Parliament has the capacity to act as a court of review. Although that might be the case, and I do not disagree with that, this committee is not empowered by the Parliament to do that. It is worth clarifying, for any future hearings that you might attend, that this committee is not in a position to inquire into a decision made by a person who was acting judicially. The committee can look into the existence, adequacy or availability of merit in judicial review of administrative acts or decisions. If my interpretation of what you have requested is correct, the chairman might make a ruling at some point, but I am not sure that this committee is able to do that.

Hon DEE MARGETTS: In terms of the clients that you are dealing with, what is the scale of land clearing that is involved?

Mr Kenneison: In terms of acreage?

Hon DEE MARGETTS: Yes.

Mr Ferguson: Individuals?

Hon DEE MARGETTS: Yes. You mentioned a couple of cases involving 670 hectares of land etc.

Mr Ferguson: The smallest involves about 30 to 40 hectares at Bakers Hill. Mr Kenneison mentioned Mr Lucaroni. It is of no consequence that he was mentioned. He had no intention of going to the commissioner. That matter involves about 600 hectares. The Johnston's have 600 hectares, Mistpal Pty Ltd has 260 hectares, Mr Morgan has 760 hectares and Mr Powell has 580 hectares. Many of the owners want to make use of the farms they have purchased but still want to leave a reasonable amount of remnant vegetation in place. The size of Mr Morgan's block is about 1 000 hectares and the 760 hectares that I mentioned comes out of that. Ninety per cent of previously cleared land - 386 hectares - will be planted with blue gum. At the end of the day he will finish up with 90 per cent of his property under perennial or deep-rooted vegetation.

Hon DEE MARGETTS: Are you lucky or are you a magnet for these types of concerns? Are you aware of many other people in your profession who are also attracting these types of cases?

Mr Ferguson: No, I am not aware of others.

Hon DEE MARGETTS: I am just trying to find out how widespread you think the concerns are.

Mr Ferguson: Many people have not applied or provided notice because they know that they will get short shrift and become involved in a system that will give them no positive benefit.

Hon DEE MARGETTS: People are looking at various tree crops - *Eucalyptus globulus* and -

Mr Ferguson: *Pinus pinaster*.

Hon DEE MARGETTS: Pine, *Eucalyptus globulus* and olives?

Mr Ferguson: Yes.

Mr Kenneison: It is generally timber.

Hon DEE MARGETTS: People are taking out remnant vegetation.

Mr Kenneison: The other point is that, in probably every case, we are not dealing with virgin remnant vegetation but with regrowth - land that was cleared in the past and has been allowed to degenerate. A bit has been left here and there. Although it might appear that these farmers wish to clear large areas, what they want to clear is regrowth. In many cases they want to get rid of the rubbish, such as parrot bush and things of that type, and replace it with *Eucalyptus globulus* or pine.

Hon DEE MARGETTS: Parrot bush?

Mr Ferguson: Dryandra.

Hon DEE MARGETTS: Oh, rubbish dryandra.

Mr Kenneison: Finally, after nearly five years of trying to pin down what regulation 4 means and whether it applies to regrowth, at a Pastoralists and Graziers Association meeting attended by the Leader of the Opposition and the opposition spokesperson on environmental matters, I confronted the deputy commissioner and asked whether regulation 4 applied to regrowth. I said that we had waited long enough for the answer. He finally capitulated and said that it did not apply to regrowth, but only to virgin timber. We have the minutes from that meeting, which I will table as soon as they are printed. I made it clear to the president of the Pastoralists and Graziers Association and the person who took the minutes that I wanted the section in which Mr Watson had conceded that the Soil and Land Conservation Commission had no authority to stop clearing regrowth to be reported verbatim.

Hon DEE MARGETTS: If it is low shrub, and I assume that includes banksia bushland -

Mr Kenneison: Yes, usually it is stuff that comes up after an area has been cleared and is then neglected because of a lack of money or other reasons. Now, of course, they have an opportunity to make money.

Hon DEE MARGETTS: Sorry, I had not asked my question. I know that banksia bushland is required to be burnt in some areas. Low, shrubby bushland often has a fire schedule because it will regrow after fire. Legislation is obviously on the books to make these issues clearer. It appears that some of these departments have been flaying around in the absence of clear legislation. If the legislation becomes clearer and states that shrubby bushland, dryandra etc cannot be cleared, would that not provide the certainty that these people need?

Mr Kenneison: No. Personally I think the Government is going from the frying pan into the fire with the Environment Protection Amendment Bill, which has been mooted around the place. Everybody has lost sight of the fact that a whole body of

administrative law is not being followed and is not being provided for in the legislation.

Hon DEE MARGETTS: We have heard from you that soil and land conservation orders have been used to deal with biodiversity issues. If your main concern is that government departments have been acting in an ultra vires way, if the law were to become clearer and provided a mechanism for dealing with biodiversity, would that not remove a number of these concerns about ultra vires decisions?

Mr Kenneison: No, because they are still defying the common law principles of natural justice and ultra vires. The proposed amendment Bill does not address that issue. It is trying to put the cart before the horse and it will not do a very good job. It will probably create more problems than it is worth. We are concerned because the process does not comply with these rules of natural justice. The amendment Bill to which I think you are referring does not address that issue at all. It leaves it on the sidelines.

Hon DEE MARGETTS: From the point of view of farmers, the issue obviously is about land value and use. There has been a lot of discussion. Our committee will obviously have a chance to talk about issues such as carbon credits and other potential income-earning opportunities in the future for people whose land contains remnant vegetation. In my view, there will not be enough remnant vegetation to meet demand. People will vie for this market for remnant vegetation. Given that we are in this difficult in-between position, can you not see that there might be some point in Governments, in the meantime, clarifying the situation in order to prevent what could almost be called pre-emptive land clearing of dry woodlands by large numbers of people?

Mr Kenneison: I agree with your basic premise that the problem is that the amendment Bill that is being mooted still does not address the procedural requirements that have to be fulfilled. There is no mechanism. Because the Bill is completely silent on this issue, the common law doctrines of ultra vires and natural justice still automatically apply. The federal legislature has made several attempts to try to take away the rules of natural justice and ultra vires and make somebody's decision final and conclusive and not subject to challenge or review or able to be reviewed by a court of law etc. Every attempt that the Commonwealth Government has made, in any combination of language, has been overruled by the courts, which have said that the inherent jurisdiction of the courts to supervise people who must act judicially cannot be removed.

[11.45 am]

Hon DEE MARGETTS: Mr Kenneison, in your view, is the natural justice and main common law principle the right to farm or the right to clear?

Mr Kenneison: Both the High Court of Australia and the House of Lords - I have provided the authorities - have consistently stated that the moment we interfere with people's property rights and make an adverse decision which affects their rights, we have to act judicially. If we have to act judicially, we have to comply with each and every rule of natural justice and ultra vires, regardless of what people think. If that is not the case, the decision will be declared invalid and it will be quashed.

Hon DEE MARGETTS: At this stage, the committee is not dealing with a land clearing Bill. I will be keen to follow up this matter when specific aspects of the

cases have been put forward. Mr Kenneison, you stated earlier that, at the end of the day, there will be a big price to pay - are you talking about compensation?

Mr Kenneison: No, because compensation requires legislative provisions -

Hon DEE MARGETTS: Yes.

Mr Kenneison: And there are no legislative provisions.

The CHAIRMAN: We are talking about the potential for damages.

Mr Kenneison: Mr Lucaroni and Mr Tana have huge contracts for the supply of vegetables to the Middle East. They have gone a long way to try to develop these markets - the Minister for Agriculture has been to the Middle East to try to cement a market for the vegetables - and they have booked space on Emirates airlines. However, they have been thwarted -

Hon DEE MARGETTS: Did you say that they have booked cargo space on Emirates airlines -

Mr Kenneison: To take the vegetables to the Middle East, to Dubai -

Hon DEE MARGETTS: For uncleared land?

Mr Kenneison: They had been wanting to clear the land and to have it cleared properly. Mr Ferguson prepared management plans, and consultants were brought in at a considerable cost - I am talking about environmental consultants who prepared management plans for the area in question - so that they could fulfil their contractual obligations to produce vegetables for the overseas markets.

Hon DEE MARGETTS: They signed a contract for land they had not cleared?

Mr Kenneison: They had been messed around ad infinitum. A considerable area of land had been cleared, which, in particular, produced carrots. However, the demand outweighs the existing potential. Therefore, in a sense of almost absolute frustration, they set to work and cleared the other areas of land. They challenged the authorities to prosecute if they did not like what they were doing.

Hon DEE MARGETTS: They cleared the land on your advice?

Mr Kenneison: Of course, they have not been prosecuted because they knew there would be a case before the Supreme Court.

Mr Ferguson: The land to which we have referred was cleared in 1985-86 and was sowed with lupins and oats. The regrowth, which grows fairly well in that country, was removed from most of the property in 1992-93. The people on the property were told by the Department of Agriculture that they had to give notification before clearing the property. There is no reason why they should have notified the department, and that is why the regrowth was again removed. This matter is not about clearing; it is about the Department of Agriculture making false statements about the clearing of the regrowth. It had no right to make such statements and, at the end of the day, it will cost them dearly. On that particular block they also put a soil conservation notice on the houses and on the cleared land surrounding the houses, which demonstrates the competence of the people with whom we are dealing. The land was cleared, and the agricultural activities carried out by Beermullah Pty Ltd were lawful. That is what it was doing by removing the regrowth. Mr Watson validated this at the pastoralists and graziers meeting that was held the other day.

The CHAIRMAN: Do you have any concluding statements?

Mr Ferguson: I would like the right to put forward a concise summary at the end of the day.

The CHAIRMAN: The committee is open to submissions on an ongoing basis. Mr Kenneison and Mr Ferguson, thank you very much for your time and input.