STANDING COMMITTEE ON PUBLIC ADMINISTRATION

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 9 AUGUST 2000

SESSION 2 OF 2

Hon Kim Chance (Chairman)
Hon Cheryl Davenport
Hon Dexter Davies
Hon Helen Hodgson
Hon Barry House
Hon B.M. Scott

KENNEISON, MR CHARLES JAMES,
Consultant and adviser assisting Mr Martin,
P.O. Box 4,
Mt Helena, examined:

FERGUSON, MR JIM,
Consultant and adviser to Mr Martin,
P.O. Box 4,
Mt Helena, examined:

The CHAIRMAN: Welcome to this meeting of the public administration committee. You will both 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. To assist the committee and Hansard, will you please quote for the record the full title of any document to which you refer during this hearing. A transcript of your evidence will be provided to you. Your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, would you please request that that evidence be taken in closed session. However, even if your evidence is given to the committee in closed session, the committee may still report your closed evidence to the Legislative Council if it considers it necessary to do so, in which case your closed evidence will become public.

I formally invite you to make an opening statement to the committee.

Mr Kenneison: Are the documents we have filed with you official exhibits or should we formally tender them now?

The CHAIRMAN: They are already evidence before the committee, so you must name them.

Mr Kenneison: The documents are: Volume 1: Conduct of Government Agencies Related to a Clearing Application for Mr Dennis Martin of “Toe-ee Downs” Badgingarra WA 6521 For The Period August 1995-Present; Volume 2 Parts 1 to 3 and Volume 3 and the documents lodged with the Appeals Convenor to the Minister for the Environment. I request that you formally table those documents.

The CHAIRMAN: There is no reason you cannot keep them with you for now to refer to them if you need to.

Mr Kenneison: I tender a copy of the memorandum of understanding between various heads of government agencies and departments.

The CHAIRMAN: Thank you; the tabling of the document is noted.

Mr Kenneison: I will not read the contents of Volume 1, which sets out our grounds concerning Mr Martin's experience in this matter because it will take time, which is precious, and since the document has been tabled as an exhibit it should not be necessary to read it all out and include it in the record. However, can we address certain matters and bring them to

your attention for further clarification at a later date? That concerns the legal status of the memorandum of understanding. It is our argument that it is a unique development in constitutional law when heads of government departments can rewrite the law applicable to Western Australia, especially when it contravenes so many provisions of the Soil and Land Conservation Act.

The CHAIRMAN: We might want to come back to that matter, because it is an important statement, but please continue.

Mr Kenneison: The Soil and Land Conservation Act is an early Act of 1945. The Environmental Protection Act is of 1971 as amended. The Soil and Land Conservation Act specifically deals with land clearing matters. The EPA Act is a general Act. We would argue, firstly, that the specific Act prevails over the general Act, and, secondly, that when the later Act was drafted, the presumption was that that was done with the full knowledge of the existing law.

On examination of the Soil and Land Conservation Act I could see no requirement to clear. The only relevant provision is section 32, which provides that if the Soil and Land Conservation Commissioner - not the EPA or the Department of Environmental Protection or anyone else - is of the opinion that something will cause problems, he can put a conservation notice on the property. He has not done that on Mr Martin's property. In fact, the documents we obtained under the Freedom of Information Act were most enlightening, to say the very least, because they contradicted most of the information Mr Martin had been given by government agencies. The correspondence told another story, as is outlined in Volume 1 of the documents I have submitted.

The reports by Mr Whale, Mr Keen and everybody else even go so far as to say that there would not be any problems if the property were cleared. Mr Martin was not told that. I am referring to the correspondence that came to light under FOI.

The CHAIRMAN: You will have heard Mr Martin refer a moment ago to reports that had been completed in relation to his notice of intent to clear that had never been made available to him. Is that one of the things you are referring to?

Mr Kenneison: Yes. We got the shock of our lives when - after some effort we finally got the documents - under FOI we found out that information was there five years ago. In Volume 2 Part 1 are copies of the reports by Keen and Whale.

Hon CHERYL DAVENPORT: Did you get copies of those reports that Mr Martin referred to?

Mr Kenneison: Yes under FOI, but that was the first time it came to light. We thought Christmas had arrived early when we got these documents. We did not know the existence of them and Mr Martin had not been told about them. He was under the misapprehension that he would cause great problems if he cleared the land. Under section 32 of the Soil and Land Conservation Act the commissioner must form the opinion. We argue that an opinion cannot be formed just by guessing. Substantive facts are required to prove something, not wishful thinking such as, "I would like this to happen; therefore, since it may happen, I will not allow you to clear." That is not a rational argument.

The CHAIRMAN: You became aware of these reports that had been signed off by officers acting in their capacity under the Soil and Land Conservation Act. Had these reports been before the commissioner?

Mr Kenneison: There is no written proof of that. On the other hand, the former commissioner, Mr Goss, was apt at not signing documents or acknowledging receipt of documents, although there are some handwritten notations of which he was aware.

The CHAIRMAN: In the case of applications to clear, does the Soil and Land Conservation Act require that the Soil and Land Conservation Commissioner to grant approval within a certain time, or refuse to give it?

Mr Kenneison: Yes.

The CHAIRMAN: We heard from Mr Martin that that did not occur within the specified time or at all.

Mr Kenneison: It did not occur until the Minister for the Environment finally overruled everybody and allowed him to clear.

The CHAIRMAN: Am I right in saying that there is no evidence that these reports which had been signed off by the respective officers ever got to the commissioner's desk?

Mr Kenneison: The only evidence is in the discussions between Mr Martin's former solicitors, Michael Whyte and Co. When they went to the Parliamentary Commissioner for Administrative Investigations, he was told that these reports had not been signed off and that there were no reports; in fact they were still looking at whether there would be any degrading of the land at all. I think this was three years after these reports had been finalised. From memory, that letter of, I think, December was signed by Mr Andrew Watson, who seemed to have signed all the documents as Deputy Commissioner for Soil and Land Conservation.

The CHAIRMAN: Thank you

Hon BARRY HOUSE: Are we referring to the Keen and Whale reports?

Mr Kenneison: I am referring to the Keen, Whale and Brooks reports.

Hon CHERYL DAVENPORT: Were they three separate reports?

Mr Kenneison: Yes.

Hon BARRY HOUSE: Were they generally supportive of the application to clear?

Mr Kenneison: Yes, they said there were no problems and that Mr Martin could go ahead and comply with the application. Volume 2 contains copies of the correspondence between Mr Martin, the departments, the agencies and his correspondence with the Parliamentary Commissioner. They show that at all times Mr Martin wanted to reserve certain areas of land because he believed it was pristine country that should be preserved. They determined to allow him to clear what he did not want to clear and to keep what he wanted to clear.

The CHAIRMAN: Did that include land that had previously been designated as land containing -

Mr Kenneison: Some rare flora.

The CHAIRMAN: Flora that needed to be preserved?

Mr Kenneison: There was never any evidence that led anyone to form the opinion that Mr Martin would cause any problem; therefore the commissioner could not exercise any powers under section 32 of the Soil and Land Conservation Act. Therefore, that is the end of the story. I am at a lost to find out from where this notification of intention to clear originated. There is nothing in the Soil and Land Conservation Act that creates such a document.

The CHAIRMAN: Is there nothing in the Act that creates an NOI?

Mr Kenneison: That is right. It seems to have been a by-product of a fertile mind.

The CHAIRMAN: Does not the Act require that the Soil and Land Conservation Commissioner be advised that clearing is intended?

Mr Kenneison: No. The commissioner is quite silent on this matter. The Act gives the commissioner powers to do certain things if certain things will result. The Act is completely silent on how he should find out. He must have some mystical powers to foresee these problems. The Act contains no procedure.

However, a provision in the regulations deals with the definition of the words "to clear". Notification is required under the regulations. However, the definition "to clear" states that trees are not to be chopped down, and many other things cannot be done. However, it does not include any person who wishes to remove vegetation either for firewood or fence posts.

The CHAIRMAN: Is that in the regulations?

Mr Kenneison: Yes. Under the MOU and in the definition of "to clear" the last section has been conveniently omitted. Anyone reading the MOU would have the impression that no vegetation whatsoever can be chopped down. In fact, Mr Martin did not have to apply because, technically, he could demolish 100 per cent of the property for firewood and fence posts now. That, I can assure you, is something that Mr Martin would not do. Even under the MOU, the public have been misled about the definition of "to clear". In a previous matter, Mr Robert Chester of York - this is how it all started - was informed by the Premier of the State, not to worry, he should just knock it down for firewood and fence posts and not mess around with NOIs or MOUs. That is in writing and the letter can be produced. He also wrote to Max Trenorden in the same vein.

The CHAIRMAN: The committee would be grateful if you could produce that advice.

Mr Kenneison: I give that undertaking. I would like the committee to realise we have deliberately kept this knowledge under wraps, shall we say. If it goes to the public domain, I would not like to see Western Australia become like Queensland in 1999.

The CHAIRMAN: I regret to advise that, having said it, it is now in the public domain and will be internationally available in about 10 days.

Mr Kenneison: I also refer to whether Mr Martin was afforded natural justice throughout the whole proceedings. We would postulate it in two steps. Firstly, is Mr Martin's matter one that would attract the rules of natural justice? In Volume 1 of the documents before you are the arguments that he fully qualifies under all the definitions and legal authorities to date. If a person's property is affected or his livelihood could be jeopardised, according to Lord Denning in the House of Lords and in the High Court of Australia, that is sufficient nexus to allow the rules of natural justice to be invoked. We argue that government agencies and departments, whilst not acting as judicial, semi-judicial or quasi-judicial tribunals are acting as administrative tribunals. However, due to their powers and the ramifications of their decisions, particularly as they affect Mr Martin's rights to the use of his property and his livelihood, the first part of the test has been satisfied. The authorities are shown in the first part of Volume 1 of the submission.

The CHAIRMAN: You are arguing that Mr Martin has been denied one of the basic tenets of natural justice, which is that procedural fairness requires a fair hearing before an unbiased adjudicator.

Mr Kenneison: He has a right to be granted a fair hearing and to be informed of all the materials before the decision-makers. In this case, even though administrative bodies were involved, as Denning said in many of his judgments, the moment anyone interferes with somebody's property or his livelihood, whether it is a judicial body or an administrative body, the law demands they act judicially. That means they must follow the dictation of the principles of natural justice. Therefore he should be entitled to a free hearing, to be given all the information that is available to the decision-makers with none withheld. Even though it

may not influence the decision-maker, he should be given that information and the opportunity to refute it in the light of all the available information.

<003> E

The decision-maker should proceed free from bias. Authorities in the past two years have raised this question of bias in the modern age. It is almost impossible for Governments to operate without some practices, procedures and guidelines for administrative bodies and departments to work by. This is what Lord Denning refers to as "administrative bias". We do not take any umbrage with practices and procedures, but they are only guidelines; they are not legislation passed by Parliament and set in concrete. People predicate the outcome by saying, "We do not care what you do, we will not give you authority to clear." That was stated in letters to some of the people whom we are assisting and who have made submissions to this committee. Even the head of the EPA said, "We do not care what you find, I will not approve clearing."

The CHAIRMAN: You have raised an issue with the committee by way of a telephone conversation with the former clerk. You referred in that to an article that appeared in *The West Australian* on Monday 10 July 2000, which is a matter before the committee at the moment. I have noted in that article a statement attributed to Mr Bowen of the EPA to the effect that we have come to the end of land clearing - people wanting to clear can just forget it. Is that the nature of the bias to which you are referring?

Mr Kenneison: That is very clear evidence of bias. He gave advice to the minister in December last year stating that, in his opinion, there should be no land clearing whatsoever, and that there would be no land clearing under section 43 of the EPA Act. The next day, *The West Australian* reported the Premier as saying that that was not acceptable to the Government of Western Australia and that it would not be implementing any such policy. Notwithstanding that rejection, Mr Bowen is still making public comments and he is still writing letters in the same tone. He has written to Mr and Mrs Kent and Mr and Mrs Meade saying that he does not care what they do, they will not get permission to clear.

The CHAIRMAN: Will you table those documents?

Mr Kenneison: Yes. We will collect the rest of them, too.

The CHAIRMAN: I know you have much more to say and we have questions. Please identify those issues to which you want the committee particularly directed in the analysis of your written submission.

Mr Kenneison: The question of the doctrine of legitimate expectation should be addressed; that is, Mr Martin is entitled to have his application processed expeditiously and competently by an unbiased assessor and to be kept informed. The other matter is the doctrine of ultra vires. The chairman of the EPA has no jurisdiction in this area.

The CHAIRMAN: Please indicate the volume of the submission in which this appears.

Mr Kenneison: All this is in Volume No 1; Volume Nos 2 and 3 contain the FOI documents. The document tendered to the appeals convenor includes some of the arguments in Volume No 1, but it also contains a lot of evidence dealing with botanic and environmental issues which impinge upon this case but which are not before this committee. We submitted this information as background data to show what happened in this matter.

The only person who can make a determination is the commissioner. We concede that the commissioner can consult anyone he wishes - he does not have to be restricted. However, he is the person who must make the decision. If he makes the decision and we are not happy with it, we can appeal to the Minister for Primary Industry. Somehow or another, with Mr

Martin and others, the game changed and the goal posts were moved. Suddenly the Minister for the Environment became involved in the matter through the EPA.

The CHAIRMAN: The MOU does that.

Mr Kenneison: We submit that it is invalid because it is ultra vires the Act.

The CHAIRMAN: When referred to the four levels, the fourth level was the EPA.

Mr Kenneison: Yes, but when the EPA makes its assessment, it should report back to the commissioner, not make the recommendation itself. That is why we say it has usurped powers it does not have.

The CHAIRMAN: That is an interesting point. You are saying that the EPA decision arising from a level-four referral - in the level-four memorandum of understanding instance - should be conveyed to the commissioner and no-one else.

Mr Kenneison: Yes.

The CHAIRMAN: That is not happening.

Mr Kenneison: No.

The CHAIRMAN: The EPA is operating as though it has the power of the commission.

Mr Kenneison: Yes. If it is referred back to the commissioner dealing with soil and conservation, how do they explain away the reports of Keen and the others, who said there would be no problems?

There is also the issue of the person making the assessment having a duty to act fairly and the necessity for procedural fairness, which on our submission has been consistently violated. We submit that on the 11 grounds that constitute the rules of natural justice, Mr Martin has been very poorly done by.

The CHAIRMAN: Not all of my questions relate directly to the issues you have raised. One is apposite to ask at this stage. I refer to a farmer's right to clear. In the work you have done on this issue and the reading I have done, I keep running into the phrase "presumed right to clear". The basis of the MOU was said to have been to clarify the limitations on the presumed right to clear. Do you have a view about whether a farmer has a right to clear? Is that right real or presumed? If it is real, how is it limited?

<4>C

Mr Kenneison: According to the United Nations Convention on Human Rights nobody is to be arbitrarily deprived of his rights and property. The Australian Government is a signatory to that convention. On the other hand the Soil and Land Conservation Act is drafted in such a way that it appears to start with the premise that we have a right to clear and a right to use our land as we see fit. However, if in our use of the land we are likely to cause salinity either on site or off site, siltation, erosion and so on, the commissioner can intervene and either order us to cease doing what we are doing or, on the other side of the coin - which we have asked him to do time and again but he has refused - order a person to do the rectification work so we do not have these problems. Therefore, unless it can be proved negative effects will occur, the commissioner must start with the premise that no-one is to be deprived of his right to use the land.

Denning in the English House of Lords and the High Court have said time and again that a person has a right to use his property as he sees fit, subject to the general law of nuisance and the effect on his neighbours or the environment. We start with that premise and take away

from it if certain consequences will occur. We do not start on the basis that the land cannot be used and we must prove it will not cause problems.

The CHAIRMAN: Is that the same as saying a common law right exists but is limited by various statutes?

Mr Kenneison: Yes. You must look at the statutes, not at government procedures or departmental documents. They are simply guidelines to assist the administration.

The CHAIRMAN: Is there a statute that implies a right to clear?

Mr Kenneison: There is no statute that implies the right to clear; it is only a common law.

The CHAIRMAN: The statutes in existence of which we are aware are only statutes that limit, and a common law right, including the Soil and Land Conservation Act?

Mr Kenneison: That is right.

The CHAIRMAN: I understand that section 38 of the Environmental Protection Act is that section which has been used in this instance and the EPA has prepared a bulletin that critiques, in effect, section 38. Are you familiar with the content of that bulletin?

Mr Kenneison: Yes.

The CHAIRMAN: I read that over the weekend and found it useful in the circumstances.

Hon BARRY HOUSE: Is it your allegation that certain government agencies have interpreted the Act incorrectly, then acted outside the law in certain cases and even misrepresented the position to the Ombudsman and others, such as individual applicants?

Mr Kenneison: Yes to all those questions.

The CHAIRMAN: We have left you with four minutes to make a closing statement if there is something you believe has not been covered adequately or something you wish to draw to the committees' attention.

Mr Kenneison: When Mr Martin comes back and gives more evidence we can produce more facts. A meeting was held at Jurien attended by the head of the Department of Environmental Planning where, in the presence of 20-plus people, he emphatically said, "There will be no more land clearing in this State."

The CHAIRMAN: When was that?

Mr Kenneison: In 1998.

The CHAIRMAN: Was that the chairman of the EPA ?

Mr Kenneison: No, Mr Jenkins the chief executive officer of the Department of Environmental Protection.

Hon BARRY HOUSE: Not the Soil Commissioner?

Mr Kenneison: No. Although in a meeting attended by Mr Ferguson with the commissioner, he intimated it to Mr Ferguson.

Mr Ferguson: When the rules were changed in March 1999, Mr Dival and I had a meeting with Mr Hartley, who stated that the new rules would prevent land being cleared and that there would be very little land clearing. However, they could not prevent land clearing because the Soil and Land Conservation Act prevented them from banning land clearing. That was made clear to Mr Dival and me that day.

The CHAIRMAN: Are you saying in effect that for one reason or another those persons aimed to limit land clearing but, because they found they could not achieve that objective through the responsible Act, they sought to use section 38 of the EPA Act to achieve it?

Mr Kenneison: Yes, notwithstanding that the advice to the Minister for the Environment was overruled by the Premier.

The CHAIRMAN: One of the reasons I referred to that bulletin on section 38 of the EPA Act is that the EPA itself referred to the great difficulties it had using that section of its Act for the purpose for which it wanted to use it. That was quite revealing. It was not suited to that purpose.

Mr Kenneison: The definition of "environment" in the Act requires them to balance environmental issues on the one hand and economic issues on the other hand. That has been decided by the Supreme Court of WA on two occasions. It is its mandate. This is what it is required to do; it cannot base a judgment on only one side and abandon the other side.

The CHAIRMAN: That is the mandate of the EPA.

Mr Kenneison: The definition of the word "environment" means the EPA must consider economic, social and environmental matters. It refers to the effect on living animals and living beings of which man must surely be one.

The CHAIRMAN: It is an interesting question sometimes. Thank you very much for your valuable assistance. You have left us with some major reading to do. We particularly appreciate the manner in which you have been able to point to the key issues so that the committee can focus its attention on them in your submission.

Committee adjourned at 3.30 pm