

**STANDING COMMITTEE ON
ENVIRONMENT AND PUBLIC AFFAIRS**

**PETITION 42 — OPPOSE ENVIRONMENTAL PROTECTION
(ENVIRONMENTALLY SENSITIVE AREAS) NOTICE 2005**

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 11 MARCH 2015**

SESSION TWO

Members

**Hon Simon O'Brien (Chairman)
Hon Stephen Dawson (Deputy Chairman)
Hon Brian Ellis
Hon Paul Brown
Hon Samantha Rowe**

Hearing commenced at 10.55 am**Mr JASON BANKS****Director General, Department of Environment Regulation, examined:****Ms SARAH McEVOY****Executive Director, Strategic Policy and Programs, Department of Environment Regulation, examined:**

The CHAIRMAN: On behalf of the committee, I would like to welcome our witnesses to the meeting. You will have both signed a document titled “Information for Witnesses”. Did you read and understand the document?

The Witnesses: Yes.

The CHAIRMAN: These proceedings are being recorded by Hansard and a transcript of your evidence will be provided to you. I would ask that if in the course of the hearing you refer to any document, you give us the full title of the document for the record. I remind you that the transcript will become a matter for the public record and if for some reason you wish to make a confidential statement during today’s proceedings 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 that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt and may mean that the material published or disclosed is not subject to parliamentary privilege.

Mr Banks, at the outset the committee wants to thank you for all the information you have provided to our inquiry so far in connection with petition 42, which relates to Environmental Protection (Environmentally Sensitive Areas) Notice 2005 and related matters. We note that there is a large volume of material that we are referring to. Indeed, you have sought to facilitate matters by bringing along some visual aids, so thank you for that.

I have a number of questions here that we would like to put to you. The petition seeks the repeal of the ESA notice, which declares environmentally sensitive areas. Can you briefly explain the purpose of ESAs, what clearing is prohibited in an ESA, and the likely effect of repealing the ESA notice as requested by the petition?

Mr Banks: I will refer to the framework for the regulation of clearing for which we have provided a flow diagram to the committee to help understand the purpose and effect of the ESA notice within the confines of the broader clearing regulation framework. I think as has been previously advised to you, there is a presumption against clearing in the absence of the granting of a clearing permit or the existence of an exemption within the act. Within the act there are also a number of statutory exemptions. If you do not satisfy one of those statutory exemptions, the question then arises: is there an exemption available to you under the regulations? The exemptions available under the regulations are basically limited to more low-impact matters, but are constrained by the ESA notice.

Ms McEvoy: The regulations exemptions were designed with the environmentally sensitive areas in mind and, therefore, the scope of what could be allowed under exemption had regard to the existence of the environmentally sensitive areas which would require a permit if they were to be cleared under exemption. Otherwise, to achieve equivalent protection for native vegetation, you would need to have more constrained regulation exemptions.

[11.00 am]

The CHAIRMAN: The native vegetation clearing framework in the EP act 1986 has been described quite uncharitably with words the least offensive of which have been “complex” and “undecipherable”. We note that section 51C involves a double negative and interacts with other parts of the act and with delegated legislation. Does it need to be that complex, and is there any chance that if you are amending the legislation, as has been proposed, the act could be drafted in a way that people can understand it a bit better?

Ms McEvoy: The legislation is complex. I think that has been acknowledged previously. There is some difficulty in devising a set of regulation exemptions that cover all the things that reasonably should be covered and do not include anything that would result in a significant environmental impact that was unintended and basically are clear and straightforward for everyone to understand. The proposed amendments to the act to introduce a referral system are a way of not trying to go down the path of listing absolutely everything that you might want to have as an exemption, or trying to get the bar so it is perfectly aligned no matter what, because that makes it more complex. The more you do that, the more complex it becomes. The intention is that the CEO would have regard to a number of criteria in deciding whether or not a clearing permit was required and that could include things like the state of knowledge around the vegetation in that area, the likelihood of significant environmental impacts occurring if that clearing was to proceed, the amount of clearing that has occurred in that area previously—so, well-cleared versus well-vegetated areas—and those kinds of things.

The CHAIRMAN: Nonetheless, I think the request has been faithfully conveyed. My next question relates to how many properties in Western Australia include an ESA. Are you able to tell us?

Ms McEvoy: Not straightforwardly, because it would require not just the presence of an ESA as per the list of the notice, but also whether it has native vegetation on it—so, something that can have an ESA mapped for it, but if there is no native vegetation on it because perhaps a clearing permit has been granted previously, it is obviously no longer an ESA.

The CHAIRMAN: Are you able to provide, for example, a state map showing ESA locations? Is that possible?

Ms McEvoy: Could we go back to it, because we are going to hopefully get on the SLIP website?

The CHAIRMAN: So, is the answer to the question yes, you can?

Mr Banks: Yes.

Ms McEvoy: Yes.

The CHAIRMAN: Good. We will look forward to getting that information a little bit later on.

Hon PAUL BROWN: Chair, can I just add one further to that? Are we going to be able to see in detail when you provide that on screen down to individual titles, or is it just an area?

Ms McEvoy: No, down to individual titles.

Hon MARK LEWIS: That includes the 50-metre buffer?

Ms McEvoy: Yes.

The CHAIRMAN: We will wait for that. There is interest. A related question is: there has been criticism—and this is included in our submissions in relation to the petition—of the wide scope of defined wetland, or the wide impact, I suppose, in the ESA notice, particularly the geomorphic maps and Semeniuk study, which has been described as only a desktop study that is inaccurate. Can you comment on that please—the proposition that it is just too wide a definition?

Ms McEvoy: I am not a wetland expert, but I will do my best. The geomorphic wetlands are actually a number of sets of wetland data, not just Semeniuk data. They include the Swan coastal

plain wetland data as well. In relation to the Swan coastal plain wetland data, it is only conservation category wetlands that are defined wetlands for the purposes of the ESA notice. The Semeniuk data is broader. As I think Mr Nixon said in his evidence, as you get into more higher rainfall areas, there are more wetlands. It is an intuitive kind of understanding, I suppose, of wetlands. It is an intention of the amendments to the Environmental Protection Act that the notice would be made as regulations to make it perhaps a bit more adaptable than it is currently. It is easier to change the ESAs if you have information around changed status or that particular wetlands no longer contain the values that would be required for them to meet the test of being an environmentally sensitive area. Currently, section 51B is quite, as you would appreciate from looking at the requirements of section 51B, a lengthy process to go through. If we are trying to keep existing environmentally sensitive areas current in terms of the status of those matters that are listed there, it would be, I think, more flexible to have them through regulations, and that is the proposal on the table at the moment being considered.

The CHAIRMAN: Did you have a follow-up question, Paul?

Hon PAUL BROWN: Not at this moment, Chair.

Hon MARK LEWIS: I am waiting for the maps. I did have a point of clarification in the maps.

The CHAIRMAN: We will come to that then when the maps are available. We need to go back a step and I do not know if either of you were involved in these processes at the time. How extensive was the consultation in accordance with section 51B before the ESA notice was issued?

Ms McEvoy: I was the instructing officer. Those 17 organisations, letters were written to all of them. There were responses from all of them, including the two agricultural organisations mentioned. Also, as part of the consultation on the regulations, there was consultation with peak bodies at that time and then a ministerial committee that was chaired by Hon Ken Travers that looked at the regulations, and that included the environmentally sensitive areas in regulations, as they were at that time.

The CHAIRMAN: Are you able to provide the advice that was provided to you in response from the organisations that were approached?

Ms McEvoy: Yes.

The CHAIRMAN: Not right now, but if you could take that on notice, please—that is, the comments that were provided in response to the request for comment under section 51B.

Hon PAUL BROWN: If I may, Chair, the 17 bodies that you chose to notify, what was the reasoning behind those 17 bodies and no further expansion on that, particularly to private landowners that might not be represented by those bodies? PGA and WAFF are membership organisations, but not every landowner is a member of those organisations and therefore might not be availed of their opinion.

Ms McEvoy: The view was that it was more practical to consult with peak bodies and that is a common practice, and still is.

Hon PAUL BROWN: But that does not satisfy what I have just put to you that not all landowners are members of those peak bodies, so they might not have an ideological agreement with the view of the PGA or the WAFF in that context.

[11.10 am]

Mr Banks: I think that is agreed. If we had not consulted with them, then clearly we would have only received the views of the peak bodies.

Hon MARK LEWIS: Would you also contend that those with a property right also have an interest?

Ms McEvoy: It depends on how you look at the way the legislation works, because it is actually a prohibition, as Mr Banks said previously, on clearing without a permit unless an exemption arises, you could say that in effect all people with native vegetation on their property, whether or not it is an environmentally sensitive area, are affected by that legislation.

Hon MARK LEWIS: It is sort of a yes/no question.

Mr Banks: Are you asking us within the construct of the 51B conservation provision?

Hon MARK LEWIS: The 51B.

Mr Banks: Clearly, at the time the view was that they were not, because otherwise they would have needed to be consulted.

Hon PAUL BROWN: I would contend that the department had chosen the path of least resistance here, in choosing those 17 bodies as opposed to trying to canvass more widely with landowners that might have an alternative opinion to those bodies.

Ms McEvoy: It is actually the view of the minister, so the department is undertaking the work on behalf of the minister.

Hon PAUL BROWN: We will not split hairs on whose view it was, but I would content, nonetheless, that it is the path of least resistance, rather than putting it out to the wider community, where there is the chance of having an alternative view.

Ms McEvoy: That was the decision of the time.

Hon MARK LEWIS: That is the issue.

The CHAIRMAN: Why do we still have a reg 6 if the ESA notice was intended to replace it?

Ms McEvoy: It is because it was a transitional provision; it was not repealed as such, it just no longer has effect. Parliamentary counsel, in their drafting wisdom, say that you cannot write it as repealed; it just no longer has effect, because it has been overtaken by the provision in 51B—it is transitional for nine months.

The CHAIRMAN: What appears on the books is that reg 6 appears to be virtually identical, I think, to the ESA notice. It just appears curious to some people picking their way through it.

Ms McEvoy: Yes; it is a drafting artefact of the way that parliamentary counsel —

The CHAIRMAN: Why not get rid of it, if it has no effect?

Ms McEvoy: It is a parliamentary counsel drafting convention. If it is not actually repealed, they do not write “repealed”. It is expired, rather than repealed.

The CHAIRMAN: I see. What would be the effect if the ESA notice was cancelled tomorrow?

Ms McEvoy: There would be no environmentally sensitive areas.

The CHAIRMAN: So reg 6 would not revive because it is actually not applicable?

Ms McEvoy: Section 110 of the amendment act actually provided for it to be in effect for nine months, noting that it will take time to do the environmentally sensitive areas notice provisions.

Hon BRIAN ELLIS: While they are getting the technical side sorted out, you mentioned permits: we were advised that since 2005 there have been 924 permits within the ESAs. How many of them relate to the actual agriculture part of the ESA? Are they all revolving around agricultural practices?

Ms McEvoy: No.

Mr Banks: The number referred to by Mr Nixon is approximately accurate in terms of 60 to 70, from recollection.

Ms McEvoy: I think may be slightly more. Obviously, when Mr Nixon looked at the purposes that were included in that number, he talked about horticulture and grazing, but that would also

include things like plantation forestry. The definition of “agriculture” includes grazing and cropping et cetera.

Mr Banks: We can certainly provide the committee with a detailed breakdown. We have it, but just not on us.

Hon BRIAN ELLIS: The 60 to 70 is a long way off 924.

The CHAIRMAN: We would be interested to know what they are for.

Ms McEvoy: Sure.

The CHAIRMAN: While you are providing that, please, Mr Banks, could you also indicate, if you cannot do so now, how many applications are received? The 924 being approved might be a little or it might be a lot, given the overall context. Is it a little, or is it a lot?

Mr Banks: I would need to pull the data.

The CHAIRMAN: If you could take that on notice as part of the other —

Mr Banks: So you would like the applications that we received that relate to ESAs—those granted and those refused. Is that what you are looking for?

The CHAIRMAN: Yes; the categories for the 924 we were told were granted, and how that compares with the total number that have been applied for. That is so that we have an idea of the scale. If it is 924 approved out of 1 000 applications, that is a heck of a lot. If it is 924 approved out of one million, that would give a different —

Mr Banks: But only in ESAs?

The CHAIRMAN: Yes.

Ms McEvoy: We did provide advice in the most recent letter for 2014, which I am not sure if the committee has received yet—I think it was sent on Monday—about last year, as a subset of the total. Just to give you an idea, 516 applications were received for 2014, of which 160 were received from within environmentally sensitive areas.

The CHAIRMAN: Right, so that is about 30-odd per cent, at a glance. That is helpful and we will look forward to receiving that supplementary information.

Hon MARK LEWIS: I note that Mr Nixon said that some of those may have been by default because of a broader clearing request. I am referring particularly only to the agricultural ones here. If you could also highlight those ESA permits that were issued unknowingly to the property owners because they had a broader clearing request outside of that.

Mr Banks: There is only the one permit process, so that is not really a delineated aspect of the process. To the extent that there is to be clearing within ESA, we will not be specifically identifying that it is an ESA-related clearing permit.

Hon MARK LEWIS: Okay, yes. So those 60 or 70 —

Mr Banks: The reason for the request may not be as a result of an exemption under the regs. Maybe that is the point; is it?

Hon MARK LEWIS: Yes.

Mr Banks: I am not sure we are able to do that. We could look at attempting to do that.

Ms McEvoy: The difficulty with doing that is that I think the exemption that we are focusing our attention on is item 14, which is around maintaining previously cleared areas. That is currently 20 years’ of previous history, so in order to work out whether something is exempt, you would really need to look at aerial photography going back 20 years for each of those areas, and to know the intent of the person concerned, which might be difficult, because they would not have put that in their application.

Hon MARK LEWIS: I think we are at cross-purposes here.

The CHAIRMAN: Just before we move on to the location of properties, which is a very important one, another matter that has been canvassed is the potential to have a CEO-level approval for trivial clearing. What can you tell us about that?

Mr Banks: Because the act is quite strict in its application in relation to needing either a clearing permit or an exemption, the degree of administrative flexibility the CEO has in administering that is limited, and the intention is to broaden that so there is greater capacity to provide a streamlined process to enable people to undertake clearing that is not going to have a material adverse impact on the environment.

The CHAIRMAN: And that requires a legislative change?

Mr Banks: Yes. I think we have tried to introduce some greater administrative flexibilities, but we are starting to bump up against the degree to which that can be introduced without legislative change.

The CHAIRMAN: Okay; so with legislative change there is the prospect of that happening sometime down the track. Would it be contemplated that it is all done at a CEO level or would you be able to delegate down to a more local level?

[11.20 am]

Mr Banks: It would be likely to be done in a delegation.

The CHAIRMAN: It occurs to me that it is still getting a permit or getting permission.

Mr Banks: Sure.

The CHAIRMAN: That to my mind reinforces the claim by the petitioner that landholders and farmers in particular are suffering serious impositions for trivial purposes. So, would it not be another option that you could examine, that there could in fact be an exemption in the case of trivial clearing, rather than requiring people to identify what they are doing—in effect, seek permission and have to go through a process of getting permission?

Mr Banks: I guess that is the purpose of those exemptions in the regulations in that they are the low-impact matters, so it would need to be some form of refinement to those to achieve whatever the policy objective of the government of the day was. This is without changing the policy settings; this is more trying to ease the administrative burden, rather than a change to the policy settings about how the regimes operate.

Hon PAUL BROWN: As part of that trivial clearance, I suppose you would call it, would you be looking to publish a list of what you consider trivial clearing, because in the guidelines even grazing is considered to be substantial damage? Therefore, with “trivial”, would grazing be covered by that? What would be covered in your view at the moment by “trivial”?

Mr Banks: I guess that is a draft document that is being developed that articulates where we are at and the current regime, so we are going to change. In the parameter of policy settings for that it would reflect that, because that is what the law says.

The CHAIRMAN: Mr Banks, the petition noted that owners of land with an ESA are not aware that they have an ESA applying to them, but they are potentially subject to a fine of up to \$250 000 if convicted of clearing an ESA. Can you show us how a person can identify whether there is an ESA on their property?

Mr Banks: Sure, I will get Mr Jaques to take us through the available public database.

Hon PAUL BROWN: Are we able to start from scratch, like from a server page, because most people will be starting at home from a server page, so that way the gallery might know what they are looking for?

Hon MARK LEWIS: How many people would know to go here?

Mr Banks: The link to it is on our website.

Hon MARK LEWIS: How many people would know to go to the link?

Mr Banks: I do not think I can really comment on that with authority. There is a high understanding in the affected community of the fact that there are clearing laws, so if they were looking for information in regards to those clearing regulations, I hope they would know to come to our site. We certainly publicise it to the extent we participate in those things.

Hon MARK LEWIS: So you have notified people that this site is available?

Mr Banks: No, to the extent that when we go to stakeholder forums or whatever, we promote them coming to our site to gain further information.

The CHAIRMAN: For the sake of the record, Mr Banks, could you just talk us through how anyone can get to the place we need to get to?

Mr Banks: There are two ways of accessing it, I guess. One is directly through what is called the Landgate platform, but is also accessible via our website under the clearing and regulation page.

Ms McEvoy: It is known as the native vegetation map viewer. It includes the environmentally sensitive areas that are listed in the environmentally sensitive areas notice. Mr Nixon and, I think, Mr Zaklan raised rare flora as an example of something that needed to be notified. The reason for that is that every other one of those environmentally sensitive areas has a map layer already. The rare flora does not have any public details around it; it just has a buffer area and no exact location, so you would not reasonably know that you had it. It is part of the process of the Department of Parks and Wildlife to notify those. The instructions for reading the WA Atlas are on our map viewer page with some information around environmentally sensitive areas.

Hon PAUL BROWN: There is a clear link on your homepage to view it?

Ms McEvoy: To clearing, yes.

The CHAIRMAN: So we are looking at a page that says “Native Vegetation Map Viewer” and that page then contains the —

Ms McEvoy: The link to the WA Atlas that contains environmentally sensitive areas.

The CHAIRMAN: Let us go there, shall we? Now we are at the WA Atlas. An interested party who might have been a principal petitioner has asked whether we can locate Swan location 305.

Hon STEPHEN DAWSON: The suspense is killing me!

Mr Banks: It requires a certificate of title or a street address.

The CHAIRMAN: Brian, will you nominate an address?

Hon PAUL BROWN: How about lot 302, Smith Road in Katrine?

Ms McEvoy: That is the environmentally sensitive area for that location there—the green stuff. If we want to, we can make a scale at which we can see a bit more.

The CHAIRMAN: As I understand it, Ms McEvoy, you would go to this map, which has a number of features including cadastral information, aerial photographs and so on, and you would then find on your property whether there is any ESA on it and that is your answer.

Ms McEvoy: Except that you also need to know whether you have native vegetation on that area as well, obviously.

Hon SAMANTHA ROWE: How do you search for that?

Ms McEvoy: It is there or it is not.

Mr Banks: I think what we are acknowledging is that the dataset is imperfect and so there will be areas shaded where there is not native vegetation, because I think the task of maintaining that currency is a huge one across the state. What we are saying is that even though it is green, if for whatever reason there is not native vegetation there, there is not a prevention from doing activities because you are not clearing native vegetation.

The CHAIRMAN: So there has got to be the presence of an ESA.

Mr Banks: And there actually be vegetation on the ground.

The CHAIRMAN: Together with the vegetation on the ground. How was this map created in relation to the wetlands?

[11.30 am]

Ms McEvoy: It is all of the individual datasets that make up the defined wetland list, so that includes the Ramsar wetlands, the geomorphic wetlands of the Swan coastal plain, the Swan coastal plain lakes EPP, the nationally important wetlands and the two Semeniuk datasets. They are all part of the environmentally sensitive areas layer that Landgate maintains.

Hon MARK LEWIS: Given that I am from Mining and Pastoral, I am wondering if you could just pull up both 41AB, which is —

The CHAIRMAN: Hang on, do not do that now.

Hon STEPHEN DAWSON: We have just given them the Gingin address.

The CHAIRMAN: Sorry; this is the Gingin address we were searching for.

Hon BRIAN ELLIS: While we are looking for it, is there someone in the department a farmer can just ring and ask?

Ms McEvoy: Yes, there's a general number for clearing and —

Hon BRIAN ELLIS: Okay, because some people do not have internet access anyway, so I am just thinking it is a shortcoming. Not everyone is as computer literate as you people are.

Ms McEvoy: Well, we are not, otherwise we would not be asking our colleague to do it for us!

The CHAIRMAN: So in order to access this, people need to know their lot number, it would appear.

Ms McEvoy: Or their street address.

The CHAIRMAN: Or a street address.

Ms McEvoy: Or a title number, if people get a title reference.

The CHAIRMAN: Or have a title so they can access —

Hon MARK LEWIS: And a technical person, like our good friend here.

The CHAIRMAN: All right, thanks for that demonstration. How on earth Hansard would that, I do not know! But we have now had that demonstration and I thank you for that. Some people, of course, would say that it should not be up to us to go out and find out if something has been imposed on us by statute. Is it realistic to write to all property holders to advise them that they have an ESA on their property? Has that ever come up in the last 10 years?

Ms McEvoy: Not to my knowledge.

Mr Banks: I think it would be an extensive task, obviously. I think an analogy that can be drawn is relevant; there are other things that exist across titles that are not registered on titles, things like requirements to obtain building approvals and that sort of thing, so I do not know if it is unique in that regard.

The CHAIRMAN: I do not know if this has ever happened, but if, for example, there were an ESA declared over a particular discrete area in some corner of the state—has that happened?

Mr Banks: With the threatened ecological community —

Ms McEvoy: But they are more like rare flora; they are quite small areas.

The CHAIRMAN: Okay, let us take my example then. This may have happened already, but a need arises for an ESA to be declared over a discrete area—let's say of a five-kilometre square corner of the state somewhere—in that case, would section 51B include a consultation with the landholders in that area?

Ms McEvoy: If it was a new environmentally sensitive area?

The CHAIRMAN: Yes.

Ms McEvoy: I would expect so.

The CHAIRMAN: Similarly, once the notice had been created, would those landowners be advised of its existence, do you think?

Ms McEvoy: As part of the creation of the new notice? Yes.

The CHAIRMAN: So it seems to me that the difference between what's happened with the 2005 notice and the example we have just hypothesised, is the scale. If you've got something that is just a generic declaration over wetlands all over the state, it is too hard to advise landowners administratively. Is that a fair observation?

Ms McEvoy: I think there is an element of the scale being a barrier to advising all landholders, yes.

The CHAIRMAN: But it occurs to me that if you are affecting a discrete landholder by some imposition being placed on the uses they can put on their land, they should, indeed, have the opportunity to be consulted. They should be told of the existence of the imposition, yet when it is done on a massive scale, they are not consulted or given the opportunity to comment and then they are not told about it after the fact. Is that a fair observation of what has happened here?

Mr Banks: I think one thing to observe within the current process is going back to those threatened ecological communities, so where there is not a mapping of it, where it is specific to a person's property, they are specifically advised and served with a letter to advise them, whereas I think those original datasets are, as you say, a far more generic application of that. In the hypothesised example, the most likely thing would be a recasting of a forward scale dataset rather than application to a specific area.

Hon MARK LEWIS: I have a real-life example of exactly what you are saying. Under the notice 41B is areas register of national estate under the Australian Heritage Council Act, so when national heritage is put in place and agreed to by the state, and more recently that was in the Kimberley, which overlaid a whole heap of pastoral places. Can you pull those up and can you also say whether you notify those people that they now have an ESA on their whole pastoral lease?

Ms McEvoy: That is actually not the National Heritage List, it is the old Register of the National Estate, so it is not actually the West Kimberley example. That is a matter of national environmental significance under the Environment Protection and Biodiversity Conservation Act.

Hon MARK LEWIS: So the National Heritage listed stuff is not on the register?

Ms McEvoy: No.

Hon MARK LEWIS: Okay, thank you.

The CHAIRMAN: Can I ask, are ESAs impacted in any way by the Land Acquisition Legislation Amendment (Compensation) Bill 2014, which is before Parliament?

Ms McEvoy: Not to my knowledge.

Mr Banks: No, not that we are aware.

The CHAIRMAN: Would it be viable, do you think, for there to be a compensation regime whereby the community bore the cost of ESA protection, or not?

Mr Banks: I think that is really a matter for government policy, I would have thought.

The CHAIRMAN: Okay. Is there a compensation scheme for land similar to ESAs with clearing restrictions in existence in other jurisdictions?

Ms McEvoy: Not to my knowledge. South Australia has a heritage scheme that is probably much like the Country Area Water Supply Act here, but it is positive obligation and funding attached with it, but I am not aware of that in other regimes.

The CHAIRMAN: Okay. Are there any further questions at this stage?

[11.40 am]

Hon PAUL BROWN: We have been talking about the ESA on the title, and the responsibility of the landowner. Going back to those 17 bodies that were consulted as part of the stakeholder engagement, after the engagement with those 17, and after any submissions made by those 17 bodies, given that some of those were membership organisations, was there any undertaking by the minister of the day and the Department of Conservation and Environment, as it was then, that those 17 bodies would notify their memberships? Was there any discussion about how there might be some notification going to the landowners?

Ms McEvoy: There was an expectation during consultation, as there always is with these kinds of things, that peak bodies will discuss these issues and disseminate information to their members.

Hon PAUL BROWN: Therefore, anyone not captured by that, how were they going to be notified?

Ms McEvoy: Notified of the new onus?

Hon PAUL BROWN: Notified of the potential for submissions, and the potential for this to affect their land.

Ms McEvoy: There is no notification other than the fact that it was in the regulations.

Hon PAUL BROWN: So there was no discussion around it, and there are no minutes of any meeting and any discussion around how the minister and how the department might seek beyond those 17 bodies to notify potentially large and small landowners that may be affected by this? I know you probably put this in *The West Australian* but not a lot of people scour the public notice section every day. Was there any discussion about putting it into local publications?

Ms McEvoy: No.

Hon PAUL BROWN: To local farm care groups, or land care groups?

Ms McEvoy: No, there was substantial consultation at the time that the legislation was introduced, including writing to all of the landholders on the Department of Agriculture and Food database of farmers, and including radio and television advertisements. Because the regulations referred to substantially the same environmentally sensitive areas there was not a belief that there was additional consultation required.

Hon BRIAN ELLIS: I would like to ask a question along a similar line, because I represent an area that has had a lot of criticism of the department. I am sure you are aware of that criticism, and I have had plenty of complaints from the constituents in this area. I know it would be onerous and, following up on the Chair's question about informing the landowners, in light of people going to court, people losing their land and people going broke, there is confusion over ESAs. I would like your comment on some of my comments now, but I am just putting the case to you that, even though it would be onerous, just to say that we have got ESAs right across the state, I think there is an onus on the department to inform people, particularly in the light of the confusion. The very

reason we have a petition here today is confusion, and it is affecting people's lives. I know you have answered the question about why you have not informed those landowners, but due to the criticism and the conduct of the department in the past, I want to know what you think your next direction would be, and how you would inform those landowners.

Mr Banks: I think we are certainly cognisant of some confusion around the application of the ESAs, even in the context of the prosecution that has been raised and referred to and its relevance to that. I think there is some confusion from my perspective around its relevance in that matter. The department is endeavouring to try and build credibility in the relationship with the affected stakeholders, and I guess I am happy to continue to work to try and do that. I am not sure a cold letter from me is necessarily going to resolve that. I guess it would be keen if we moved to a point where there was confidence between the landowners and the department and we are able to provide advice, and so if they are not technically skilled to access the SLIP viewer, they are quite comfortable giving us a call, rather than having us fire a letter out to their property, but the commentary I have received is that there is quite a degree of scepticism and a lack of trust with the department and that is something we need to work to rebuild. I guess that my response to your comments is in terms of I think there is a broader issue than just firing a letter to people saying here is the ESA on your property. To the extent we are going to have controls over clearing of land in this state, there needs to be a workable—administratively and also operationally from the land manager's perspective—relationship between the two.

Hon BRIAN ELLIS: I am trying to be fair here, and I know the minister and the department are trying to clarify some of the confusion around the ESAs. Would it be helpful, do you think, to just lift the ESA notice altogether and relook at the legislation and regulations?

Mr Banks: I think if the ESA notice was to be lifted, the issue is the consequence of the policy settings, and so what you are actually doing is probably fundamentally changing people's access to those exemptions. Now, if you want a similar environmental outcome, how do you maintain that? Do you then remove access to those exemptions for everyone, and does that have a broader implication across a whole range of landowners that currently do not have ESAs on their property? I am not sure that lifting of the notice of itself is a simple solution to what is a complex problem.

The CHAIRMAN: I think what people would like to see is not the proverbial throwing out of the baby with the bathwater, but the revision of the ESA regime to exclude the elements of it that make people feel threatened. Is it not a practical thing to vary the notice to achieve that?

Mr Banks: In terms of the dataset that is contained within the notice, or in terms of its application to the exemptions? Obviously, the revocation of the notice means that the exemptions would apply regardless of the fact that they are in ESAs. The amendment of the exemptions, I guess that is an open dialogue. That is a dialogue I would continue to have with the stakeholders in terms of whether they think the policy settings are right or not. At the end of the day, these are matters for government.

Ms McEvoy: I guess the other angle to come to it from is maintaining the currency of the dataset to ensure that it properly reflects the values as they are most recently, so if there have been any changes to the condition or status of the vegetation within some of those environmentally sensitive area categories, to make sure that they are reflected. We are talking about ground truthing and maintaining datasets. That is an issue for the custodian of the data.

The CHAIRMAN: How it has been put to us quite strongly—perhaps it has been put to you, and I would ask you to comment on it—is in terms that wetlands, particularly in Western Australia, are recognised as prime agricultural land. It is the place where, worldwide, civilisations have developed, firstly as agrarian societies, and flourished. In many aspects, agriculture could be seen as a beneficial use of wetlands. If we look at the map, we see that all of the wetlands coincide with our most productive farmland in the south west. What is your response to that?

Mr Banks: I think it is two things. You may see large areas of ESA overlay. The question is: is there native veg there any more, or has there been native veg there recently? I guess that is one aspect of it, so if to an extent the land is being used for productive purposes and is continued to be used for productive purposes for 50 years, I guess it is hard to imagine that there is necessarily extensive native vegetation there.

Ms McEvoy: I guess the other thing from the wetland point of view is that there has been substantial loss of wetlands since European settlement, so the other side of wetlands is that they are high value for conservation and they have a number of significant environmental value features and, where they are in their original condition, they have particular conservation values.

The CHAIRMAN: So how it affects agriculturalists, for example, would be that if someone wants to acquire a farming property, as people have been doing for more than a hundred years, they are not necessarily going to be able to carry on a farm there because it might be subject to an ESA and they cannot clear the area they need to, unlike their neighbour down the road, who cleared the property 100 years ago and has been farming there ever since.

[11.50 am]

Ms McEvoy: I guess to the extent that it has been used, as Jason said, for that time and the condition reflects that use, they can carry on doing that. If it is in very good pristine condition, you would need to apply for a clearing permit and that would be decided on the merits of the application.

The CHAIRMAN: If you were not aware that it was an ESA and did not apply for that, then you would be —

Ms McEvoy: In terms of grazing or in terms of other agriculture?

The CHAIRMAN: In terms of grazing.

Ms McEvoy: We have not prosecuted anybody for grazing in an ESA.

Hon PAUL BROWN: Why is that?

Ms McEvoy: We have had seven letters of warning since the introduction. That is not just for grazing; that is for other maintenance of existing land uses in ESAs. I suppose it is educational. You need to make sure that people do understand what the requirements are. Often they wanted to do more and then applied for a permit once they were aware that there was a requirement for them to have a permit. It was informing them of those requirements. The majority of applications for clearing within ESAs are for areas that are much more substantial than the exemptions. Again, we decide applications on their own merit.

Hon PAUL BROWN: Given that there have been only seven notices, which areas have they been given in?

Ms McEvoy: Mostly within the Perth metropolitan area; that is the majority of them.

Hon PAUL BROWN: For grazing of stock down in Baldivis or somewhere like that?

Ms McEvoy: Yes, and bulldozing as well. It is not just grazing. Yes, for things that would potentially be exempt if it were not for the presence of ESAs.

Hon PAUL BROWN: If we can hypothesise just a little longer. If I am a DER employee—an assessor, inspector, whatever you want to call it—and I am driving through the areas of Bindoon, Chittering, Gingin, through some quite substantial wetland areas where farming encroaches right to the border of some of those lake systems and I am an inspector and I see some cattle that are basically within a 50-metre exemption area of some of those wetlands but in amongst trees and potential regrowth area, am I obliged to then either prosecute or notify those landowners that they are basically breaking the law?

Mr Banks: All the prosecutorial decisions are determined by the CEO, not by any departmental officers. Are they required to uphold the laws of the state? Yes.

Hon PAUL BROWN: I am not asking you to race out now and prosecute all those people. I see that quite regularly in some of those areas, and wider areas, where the interface between grazing and farming and wetlands is very much apparent. I would be asking: why is that farmer being chosen to be prosecuted and that one over there is not when, in fact, under the regulations and under legislation, they should all be? Therefore, they do not have any confidence in what they are doing is or is not breaking the law.

Mr Banks: Obviously, with the prosecution aspects, a discretion is applied in terms of when we do and do not receive the prosecution, so not necessarily will every contravention result in a prosecution. As Sarah was saying, some will result in a letter or warning. I guess if it is very minor, it could just be a conversation between the landholder and the officer. A lot of our program is satellite based, so in terms of compliance with the law, we are focused on the material loss of native vegetation. I have a finite resource to target to compliance with the legislation, so it is targeted on a risk basis.

Hon STEPHEN DAWSON: I have some questions in relation to the amendments that are being drafted to the EPA to deal with this issue. Where is that process at at the moment and what consultation is happening with organisations to ensure that we are, I guess, including any concerns that outside organisations have with the existing package?

Ms McEvoy: The proposed amendments are being considered, developed and drafted. The decisions around consultation are a matter for the government.

Hon STEPHEN DAWSON: Are you working to a time line?

Mr Banks: We are, but the process is subject to cabinet consideration. I would prefer not to articulate a time frame.

Hon STEPHEN DAWSON: The other question I had related to our earlier hearing. Mr Nixon had a draft document. I have written down the name of it. What is the status of that document currently?

Mr Banks: It has not been finalised.

Ms McEvoy: It is still in draft form.

Hon STEPHEN DAWSON: Again, are you working to a time line to finalise that document or is that linked in to the drafting?

Ms McEvoy: No, that is outside of the drafting. That is based on current legislation. That was sent to WAFF and to the PGA for comment.

Mr Banks: We will consider those comments and look to finalise the draft.

Hon STEPHEN DAWSON: Again, no time line?

Mr Banks: I do not really mind giving a time line on that. It should be finalised in the next three weeks.

Hon PAUL BROWN: Why just WAFF and the PGA?

Mr Banks: Primarily because it directly impacts their members.

Hon PAUL BROWN: Why not the Gingin Private Property Rights Group? Why not a whole host of other groups along the coastal plains that are directly impacted? They have different membership to WAFF and the PGA and their membership is actually directly impacted. They are actively campaigning on this issue. I would suggest that perhaps there would be a wider list. Perhaps a better way to do that would be for the local members of Parliament, both upper house and lower house, to be notified because most members of Parliament are in direct conversation with all of those

groups. We can probably give you a better understanding of who you should be asking for submissions from.

Mr Banks: I am happy to take that on board and probably happy to look at doing a broader whole-of-public consultation process on it.

Hon PAUL BROWN: That would be very appreciated by all those groups.

Mr Banks: Fair enough. We will take that statement on board.

Hon PAUL BROWN: Thank you.

Hon MARK LEWIS: Why would you have a notice when you have never ever used it? If you have never used it and probably never intend to use it, why not repeal it?

Mr Banks: I guess the question is: what effect is the notice having? From my perspective, it is a vexed argument. The notice is having effect and preventing people from clearing areas that would otherwise be —

Hon MARK LEWIS: There is ample evidence that people are still clearing by grazing on most of the ESAs. There is ample evidence to say that.

Mr Banks: I guess that is the alternative proposition, is it not, that it has no effect?

Hon MARK LEWIS: And therefore why not repeal it? If it is having no effect, it is not being enforced, it is causing concern and it is causing angst, why not repeal it?

Ms McEvoy: There are also other exemptions and regulations other than item 14 that the environmentally sensitive areas notice applies to.

Hon MARK LEWIS: Go back to reg 6.

Ms McEvoy: It has no materially different effect, whether it is in regulations or whether it is a notice. It has exactly the same effect.

Hon MARK LEWIS: No, because no-one enforces it.

The CHAIRMAN: I might ask you to take this one on notice, Mr Banks; you might want to reflect on it. The background is that a number of members in debate in the house suggested the idea that people could be made more aware of an ESA on their land if the ESA was noted on a certificate of title. Obviously, that has some implications for Landgate that need to be addressed with them. In terms of presumably providing the information, I was wondering if you could reflect on and perhaps advise us what issues might arise from your point of view if the prospect of noting ESAs on certificates of title would be explored.

Mr Banks: Yes, thanks, if I could take that on notice.

The CHAIRMAN: If you would like to take that on notice. It is probably a good way of our bringing this hearing to a close because time is tight. Again, for the benefit of the hearing and also members of the public who are observing proceedings, this complements a lengthy chain of correspondence we have been having and will no doubt continue to have. We thank you for your assistance with all of that. Today, we are going to have to declare this hearing closed. We thank you for your attendance here today.

Mr Banks: Thank you for the opportunity.

Hearing concluded at 12 noon
