STANDING COMMITTEE ON PUBLIC ADMINISTRATION AND FINANCE

TRANSCRIPT OF EVIDENCE TAKEN
AT NORTHAM
ON WEDNESDAY, 11 SEPTEMBER 2002

SESSION 1

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

FERGUSON, MR JAMES,
Ferguson, Kenneison and Associates,
examined:

BAKER, MR GARRY GEORGE,
examined:

The CHAIRMAN: Welcome. We are a standing committee of the Legislative Council of seven members across all political parties and most regions of the State. Hon Ken Travers and Hon Dee Margetts have apologised for their absence today. You should not be fooled by formalities. Please feel free to speak openly.

You will have signed a document entitled "Information for Witnesses". Have you read and understood it?

The Witnesses: 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. Please be aware of the microphones and speak into them so that your voices are picked up on the tape. 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 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 hearings. Until the transcript of your evidence is finalised it should not be made public. 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.

Would you like to make an opening statement to the committee?

Mr Ferguson: Gary will provide a brief summary of his operations from the time he notified intent to clear and some of the problems he encountered. I will summarise some of the points I have made in the submission to the Legislative Council and draw attention to a few of the documents we use.

Mr Baker: About six years ago we bought our property, which was fairly run down. People from Goomalling had owned it and used to commute backwards and forwards. They spent perhaps two to three days a week there. We had a lot of work to do in the way of fencing, tree planting, building a house etc. When we first bought the property two paddocks had been cleared. We were advised that we could still clean up those paddocks because they contained only undergrowth . That was part and parcel of what we understood to be the situation when we bought it. We cleaned up one paddock of about 60 acres. We then built the house and more fencing, yards etc. We had a property on the other side of the highway, which was subdivided, and we moved everything across. We spent much time building the house so we changed priorities for cleaning up the paddocks. We planted trees and built fences to fence off water courses etc. We did not get back to cleaning up the last paddock. When we did get back we were advised that we had to contact Harry Lauk from the Department of Agriculture in Northam to get approval. He came out and looked at it and said it had to be referred to the people in Perth, so he made inquiries. I had talks with him and we made an application for the paddock to be cleared. Harry Lauk came out with Mr Dixon and, I think, Andrew Watson and took photographs. They walked all over the area and I showed them the amount of York Road and box poison covering it. In Harry Lauk's opinion 65 to 70 per cent was York Road and box poison. Standard farming practice is to remove poisonous material. Those paddocks had been fenced off to keep out our stock. As we walked over the area Harry commented

that it was the second time it had been cleared and that the situation was ridiculous because it should be allowed to be cleared.

The Deputy Commissioner said the matter would have to go back to the Commissioner of Soil and Land Conservation before it could be approved. The application went to him and he rejected it. He said that if we wanted to apply again we could resubmit it with a strategy. We had a strategy drawn up to show that we would clear it and plant tagasaste. We were told that we were not allowed to clear and put in blue gums or maritime pines, but tagasaste would be given consideration. If we submitted to plant 50 acres below the area, our application would be given greater consideration. We went further than that and submitted to plant something like 120 acres below it, but we were told no.

I have undertaken a lot of courses on agronomy with Dr Arden Anderson, Neil Kingsley and Lynn Abbott from the University of Western Australia. I finished a course last week on soil fertility. The Department of Agriculture came in with something like 52 trial plots for perennial pastures. We have in the vicinity of 180 acres in perennial pastures to combat salinity. We built drains and we have been planting tagasaste. More than 700 trees have been planted this year. However, we still have not been given approval for clearing. We have done our bit for salinity. There is no way in the world that I would allow land degradation and salinity. We have lost ground through having to plant trees and everything else. I want compensation for not having that extra ground for our livestock. We need to run a certain amount of cattle to make the farm sustainable and viable.

The CHAIRMAN: Are you saying this has occurred over six years?

Mr Baker: No; the problem existed prior to our buying the property. We have spent all our time and money trying to rectify problems and to clear the ground. We know we have salt problems at the bottom of the land. We have been working on it. Probably half the areas have been reclaimed. We know we must put in more trees to prevent salinity. We want to reclaim the ground further up that we have paid for on the basis it was farming land that had been already cleared twice and contained only undergrowth. We have no intention whatsoever of taking out any of the trees. We only want to clear the undergrowth and reseed for pasture and tagasaste.

The CHAIRMAN: Can you explain the nature of your contact and follow-up with the Department of Agriculture, the Commissioner of Soil and Land Conservation and any other government agencies? Did you receive written advice or verbal advice?

Mr Baker: A lot of correspondence occurred between two or three of us. I rang the commission once a fortnight or once a month. I had a bulldozer contractor come in to clean up the area. It was important to get onto it over winter. Correspondence was being sent backwards and forwards very frequently, but the matter was continually being pushed aside. We complied to the letter with everything we were asked to do, but the rules changed after we had done that. We were told that people had to undertake water testing underground to find out how much water existed. We asked some geologists and a few other people to map the underground area. The rules were changed again and our application was not accepted. Then we were told that the Environmental Protection Authority would have to come in and do an environmental study. The Environmental Protection Authority was supposed to come in, but we did not see or hear from anyone from the EPA. Then we were told we had to undertake an environmental check, so we had botanists and other people come from Northam to inspect the land. After we had undertaken what we were asked to do, we were told to do something else.

The CHAIRMAN: Were you given documentary evidence to support the agency's position at any time? In other words did the agency explain why it wanted you to do this extra work and research?

Mr Baker: No. Every time we applied, we received the reply that it was standard practice to reject our application to clear, but that if we undertook certain other work, our application would be considered. We did that and we were told again that according to standard practice we could not

clear, but, again, if we did certain things, our application would be considered. That happened probably four or five times. We even prepared a full aerial photograph of the property with four plastic overlays to illustrate what we were planning over a four-year period. It might as well have been thrown in the bin.

The CHAIRMAN: What authority was provided to back up the statement that you were not allowed to clear according to standard practice?

Mr Baker: I am not a lawyer, but whatever the officers said was supposed to be taken as gospel. As I said, I did things the right way. I contacted all the appropriate people and tried to do things the right way. When the officers came out, they looked around and took photographs. They asked me what my neighbours thought. I said they had a salinity problem but the catchment for this area did not run through their properties. I replied to everything they asked about with written evidence from someone else that it would not cause a problem.

Hon MURRAY CRIDDLE: Did you say the application was to clear regrowth?

Mr Baker: Exactly.

Hon MURRAY CRIDDLE: You mentioned later that the people who visited required various things.

Mr Baker: Yes, Watson and Dixon.

Hon MURRAY CRIDDLE: Who paid for that?

Mr Baker: I did .

Hon MURRAY CRIDDLE: How much do you consider it has cost you?

Mr Baker: I could not tell you. They came out and said that any of the trees that were more than four inches in diameter and three metres high could not be knocked down. All the trees in the ground bordered on those dimensions and in six months they would be too big to take down. The officials mucked around for six months so that those trees could not be touched anyway.

Hon MURRAY CRIDDLE: I am trying to analyse the fact that you were asked to do various things at some expense when there was no likelihood of an outcome at the end. As the Chairman indicated, the committee is interested in the process and how far things go without a definitive decision being provided. If a decision had been made, at least you would know where you stood even if you did not like it. I would be interested to know how much was spent on the exercise.

Mr Baker: We have the receipts at home for the past five years.

The CHAIRMAN: What is a ballpark figure?

Mr Baker: With advertising, publishing and papers it is around $5 000 or $6 000 for people to come out and assess the vegetation, animals etc.

The CHAIRMAN: Hon Ed Dermer and Hon Dee Margetts joined the committee.

Hon SUE ELLERY: We can draw some logical conclusions about the problems you have had but for the purposes of the evidence, if you were designing the system to assist someone like you get the required permission to clear the land, what things would assist you?

Mr Baker: Probably a full set of rules, going from A to Z and not dropping in a B1, B2 and B3 in the middle, so that we knew where we were going from day one until the end. They should not say that if you do this, we will consider that, and once you have done that, we will consider something else, and if you do that, we will consider this, and if you do that we will consider that and then we will still tell you no anyway, which is exactly what happened. They should come up with a full set of rules saying that they would consider it if I would knock everything down and put in blue gums or whatever. Pastures do not use X amount of pasture. We came up with evidence that pastures use X amount, perennials use X amount and tags, trees and everything else use X amount. We came up

with all the adequate information showing that we could draw down water tables by half a metre a year. We need a set of rules with no pluses or minuses in the middle, because that is all we got, which made it very frustrating.

The CHAIRMAN: To clarify that, I understand that at no stage of the process were you ever presented with the full set of rules under which you were supposed to be operating.

Mr Baker: They sent it to us when they knocked us back at the end, after it was all finished.

The CHAIRMAN: What did they send to you at the end?

Mr Baker: It was the green document.

The CHAIRMAN: Can you identify that document?

Mr Baker: It is the land clearing proposal for rural zoned land in Western Australia.

The CHAIRMAN: That was from the Department of Agriculture.

Mr Baker: Yes; the Department of Agriculture. It was put out in November 1999.

The CHAIRMAN: Can you explain the document to which you are referring?

Mr Baker: I have not seen this one.

The CHAIRMAN: Perhaps Mr Ferguson can explain what that document is.

Mr Ferguson: It is Environmental Protection Authority bulletin No 966, which we lodged at the last hearing.

The CHAIRMAN: For the purposes of Hansard, can you explain what it is?

Mr Ferguson: It is about the clearing of native vegetation. It is environmental advice on issues arising from the use of section 38 to assist clearing proposals in the agricultural area and implications for other areas of Western Australia. That was sent to Luke Atkins, who was acting for Garry and Erin Baker. The preliminary position statement No 2 on the environmental protection of native vegetation in Western Australia also was sent to Luke Atkins.

Hon MURRAY CRIDDLE: Is there a date on those documents?

Mr Ferguson: They are both dated December 1999.

The CHAIRMAN: Were they sent at the end of a long series of negotiations with government officials?

Mr Baker: Yes.

The CHAIRMAN: Not the beginning.

Mr Baker: Not the beginning, no. We started in about 1997. These were not published until November and December 1999.

The CHAIRMAN: That takes us back to the original question I put to you. Did anyone explain the authority they had to issue the guidelines that they were issuing to you in 1997?

Mr Baker: No-one ever stated any guidelines. As far as I was aware, Jim Dixon and Andrew Watson knew it all, and they were telling me what I could and could not do.

The CHAIRMAN: You took them at face value that they were the authorities.

Mr Baker: Most of that was said verbally over the telephone. I have some of it in writing, but most of it was said verbally over the telephone.

The CHAIRMAN: Mr Ferguson, did you want to add anything?

Mr Ferguson: There is a mistake on page 4 of the submission I made for Garry and Erin Baker. I thought that Mr Dixon informed Garry on the property that he could not plant blue gums or pines,

but Garry informs me that it was over the telephone. That alters just one aspect. I have two pages that can replace those pages, but I will talk to the committee clerk about that later.

The most disgraceful part is that there is a notorious problem in that area. The Bakers have done an excellent job since they have owned the property. They have not been permitted to grow blue gums or pines. It is absolutely disgraceful. They do not give the yield or provide the income that Garry and Erin need. They would much prefer to crop it. They were prepared to plant blue gums or pines, but Garry was told that he could not do that as it was government policy. It is government policy, but it is not the law. I make that quite clear. Policy is not the law if it is going against the Soil and Land Conservation Act. That is the crux of the whole problem that Garry and Erin have run into. Policy has been taken as the law. I have submitted a document from 10 April 1997, when the cabinet directive was made and started to operate. We finished up with the first memorandum of understanding, which is invalid, illegal and void. It has statements in it that are outside the law and ultra vires the Act. It will not deliver natural justice or procedural fairness.

The CHAIRMAN: Will you clearly identify the document to which you are referring?

Mr Ferguson: It is the 1997 memorandum of understanding between five government agencies and the Environmental Protection Authority for the protection of remnant vegetation on private land in the agricultural regions of Western Australia.

The issue of the regrowth follows on from that. When challenged on regrowth at a Pastoralists and Graziers Association meeting on 11 July 2002, Andrew Watson clearly stated that if the place were to be cleared for agriculture, it could be cleared. An extract of the EPA bulletin No 966 contains the advice and the Government's position. The government position of 1995 lists items (a) to (i). These are extracts from the government position statement by Bernard Bowen. The first three items are outside the Act. It needed a regulation or a change to the Act to bring those three points into line. Item (e) was to amend the soil and conservation regulations in accordance with the agreed position. That is in 1995. In 1997 the MOU was brought out for the protection of remnant vegetation. Six people signed that and they should have fully known that they were signing a document that had no legal backing. The 1999 document states that some of the above components have been implemented and others have not, including the modification of relevant regulations and the Soil and Land Conservation Act. What does that tell you? The Chairman of the Environmental Protection Authority knows that that document is probably worthless and the others should know it as well. That document is worthless. It has some good technical information in it. It is not up to Garry and Erin to pay for and be sent on a wild goose chase. The onus is clearly on the commissioner. The committee should read the advice of the Environmental Defenders Office to the Soil and Land Conservation Council. I am a member of that organisation. I did not get it from that organisation; I got it from the Commissioner of Soil and Land Conservation. The EDO's office was paid $5 000 to do it. It clearly states on pages 11 and 12 that the land is there for an agricultural purpose, not for conservation. This is where the waters get extremely muddy. Conservation issues have been taken on as part of the Soil and Land Conservation Act, but they are not. Ferguson, Kenneison and Associates is not worried about the clearing per se; it is the fact that public servants have blatantly gone outside the law. I allege they have known they have been going outside the law for quite a few years. We have consistently told them that but they take no notice.

Hon DEE MARGETTS: Is it not the case that in environmental law in Western Australia, almost no environmental law is absolutely clear that some particular action is illegal and enforceable by the community? In the end, just about all environmental laws, considerations and prosecutions are ultimately at the discretion of the minister. I argue that the clearing laws have been unclear and inadequate for a long time. However, is it not also the case that almost any environmental law in Western Australia is ultimately at the discretion of the minister?

Mr Ferguson: No. With all due respect, I believe you have confused the issues. The Soil and Land Conservation Act deals wholly with soil and land degradation.

Hon DEE MARGETTS: No, I am not confusing it.

Mr Ferguson: It is not an environmental law as much. I know what you are driving at. It is quite explicit on nutrification, salinity, wind erosion and a couple of other issues. The protection of native vegetation for its biodiversity value does not rate with it. The EDO's office made that quite clear on pages 11 and 12 of that document. The Environmental Protection Act comes in. They ran into tremendous trouble with the MOU and they have tried to do with the MOU what the Soil and Land Conservation Act does not do. I believe that when they went down this track, Cabinet said that it would bring in a regulation. We dispute that; the regulations may not even be valid. However, that is another story; we will not talk about that here. Even if the regulations are valid, I cannot see how they could have brought in a regulation. The whole Act needed to be reworked, so everybody just stood aside, the MOU came out and they let it run. Clearing native vegetation is not a particularly good life for most people, except for those who want to or have to do it for their livelihood. It gets shoved aside. There must have been plenty of people who knew they were acting outside the law on this issue and acting ultra vires the Soil and Land Conservation Act. So what? It is a noble cause; it is preventing clearing. Gradually tightening things without changing the Act is a disaster. That is what has caused the problem that Garry and Erin and a lot of other people have run into. It was the gradual tightening that came from the cabinet directive. The Act should have been rewritten at the time. There are no two ways about it. I do not think I need to say any more.

Hon ED DERMER: Can you describe to us a specific instance in which an officer from a government agency has, in your opinion, breached the law?

Mr Ferguson: Whoever put this forward.

Hon ED DERMER: Can you explain to me one specific instance in which it breaches the law?

Mr Ferguson: There are about 20 things in the memorandum of understanding on clearing. I did this once for the Minister for the Environment. Crown Law said that this document was a lawful document. It has put an extract of the regulations in a nice box on this page and underneath that is the definition of the words "to clear". In relation to any land, it means to cut down, destroy or otherwise damage trees, shrubs, grass or other plants on that land which brings about a change in land use. The phrase "which brings about a change in land use" was added. There is no problem with that, but it goes on to say that it does not include the cutting of trees, firewood posts or timber. They also added the phrase "for reasonable use on the property". That is completely illegal. There is a definition of the words "to clear" in the regulations. Whoever drew this up wrote that. You can bet your life that it was a bunch of public servants who thought that this would stall people as they would not be able to cut the property for timber. That is a good example.

The CHAIRMAN: What page is that?

Mr Ferguson: It is page 4 of Kevin Goss's document.

Hon ED DERMER: Do I understand correctly that your allegation is that the publishers of that document presented as a properly gazetted regulation something that was not a properly gazetted regulation?

Mr Ferguson: The extract of the regulation is there. The definition is not included with that; the definition has been quite craftily put in underneath it.

Hon ED DERMER: Is the definition wrong or different from that in the regulations?

Mr Ferguson: The definition in the regulations is wrong. Any person with any push - this applies especially in country areas that have not been cleared - can cut the whole lot down, because it will coppice and regrow and there will not be much change in the land use if it is done over a period. I see that as deliberate. Nothing was more interesting than the Buckeridge case in the Supreme Court.

Hon DEE MARGETTS: At the Lakes.

Mr Ferguson: Yes, the BGC (Australia) Pty Ltd case. The judge did not use the example that they had stuffed up here. However, he made sure that Buckeridge could cut whatever timber he wanted to.

Hon ED DERMER: Are you saying that that document states that this is the definition for the regulations, but it is not the correct definition?

Mr Ferguson: It does not state that it is the definition for the regulations. Item 1.1, which is an extract of the regulations, is in a box at the top of the page. Underneath it is item 1.2. It is deceit. What would the ordinary person think? Would the ordinary person take that as the definition?

Hon ED DERMER: Are you suggesting that that is a breach of the law?

Mr Ferguson: Yes. That definition is definitely outside the law.

Hon DEE MARGETTS: Are you saying that it is a lawful and good thing that someone such as Mr Buckeridge might encourage people to take firewood in order to clear land that he was otherwise not able to clear?

Mr Ferguson: No, not at all. I am talking about the deceit and breaking the law by the public servants.

Hon DEE MARGETTS: This is a standard clause. I have been led to believe that the firewood and fence post exceptions are in a standard clause, and because it is a standard clause, there is an understanding about what that standard clause means to reasonable people. Are you suggesting that that standard clause could and should be used as a means of totally clearing a place and that that would be a reasonable thing to do?

Mr Ferguson: One client who has 2 700 acres of bush on his property in one block will appear before the committee in a few weeks. He has always used woodcutters. It is not classed as clearing because it is not being used on his property; it is taken away for milling. If a person owns timber, he can bring in a timber miller to cut the timber. That would go against that ruling to clear. The judge in the Buckeridge case was quite emphatic. He laid it straight on the line that in the Lakes, timber can be cut and it is not for reasonable use on the property.

The CHAIRMAN: Mr Baker, do you want to add anything about your personal situation?

Mr Baker: We are a demonstration site. We are also a major contractor for a lot of farmers in the Bakers Hill district. We are a demonstration site for sustainable grazing systems and holistic management. I also do a lot of work on soil and that sort of thing. A lot of people come onto our site. The Department of Agriculture also conducts trials. There is no way in the world that I want to turn it into a disaster. Whatever I do, I will make sure that it is done damned properly and that we do not suffer any bad results from it. I have done the groundwork. I know that if we clear it, no-one else will have a salinity problem because I have put in place measures. You can see in the photographs and the plan, which are based on a four-year period, that there will be no repercussions from it. We are a demonstration site for people to look at, so I do not want it to go the other way.

The CHAIRMAN: This session is finished. Thank you very much.