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Appendix A.

National Farmers' Federation

Submission to the Senate Environment, Recreation, Communications and the Arts Legislation Committee Inquiry into the Environment Protection and Biodiversity Conservation Bill 1998

August 1998

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1. Introduction

NFF welcomes the opportunity to submit our views to the Senate Environment, Recreation, Communications and the Arts Legislation Committee Inquiry into the Environment Protection and Biodiversity Conservation Bill 1998. The proposed legislative package appears to be a commendable attempt by the Commonwealth to provide more certainty to industry, reduce duplication and offer better environmental outcomes.

In principle NFF supports the need to update legislation so that it is more relevant to our understanding of environmental issues and is in line with developments in international environmental law. We welcome the attempt by this legislation to clarify the roles and responsibilities of the Commonwealth and State/Territory Governments. We believe there is a need for a more consistent and strategic role for the Commonwealth, with implementation and delivery responsibility in the hands of the States.

In particular we support the six criteria by which the Commonwealth intends to improve the quality of Commonwealth environmental regulation – ie. clarity and simplicity, transparency and accountability, consultation with key stakeholders, certainty, removal of unnecessary duplication and overlap and efficiency and timeliness.

NFF supports an inclusive planning process that increases understanding of issues and ownership of recommendations. Such a process should in turn decrease the need for enforcement of compliance. We also agree with the conservation and wise use principles for wetlands and the acknowledgement of significant other values in addition to biodiversity values.

NFF supports the implementation of new regulation that places greater reliance on self-regulation in order to minimise the existing deficiencies in 'command and control' regulation. We believe there has been considerable success in improvements to environmental management through cooperative and voluntary approaches. The new legislation places considerable emphasis on penalties for incorrect action and this has lead to concern that the new legislative package places a high degree of dependence on command and control approaches. A return to the command and control approach would be a retrograde step

The Government's approach however to consultation with stakeholders on the new legislative package has been disappointing and has lead to considerable concern and uncertainty about the intent of the new package. The brief consultation period on the Consultation Paper and then the Legislation has made it very difficult for NFF's members to seek comprehensive input from farmers nationwide.

There are also a number of critical questions that NFF believes need to be answered before our members could make an assessment as to whether or

not to support the Bill. These issues primarily arise the dependence of the legislation on Bilateral Agreements, Regulations and Administrative Guidelines.

NFF believes that these three components will dictate how the Bill will ultimately operate and should therefore be provided for scrutiny in conjunction with the Bill. The Bill should only be submitted to Parliament following the successful negotiation of Bilateral Agreements and should be accompanied by the Regulations and Administrative Guidelines. Stakeholders should also be given the opportunity to view and comment on the Regulations and Administrative Guidelines.

The success or otherwise of the new legislation will be dependent on the successful negotiation of Bilateral Agreements. It is crucial that the Bilateral Agreements are *negotiated* and not simply a process whereby the Commonwealth imposes its authority on the States. It is not the jurisdiction of the Commonwealth to impose controls over existing State responsibilities for natural resource management.

A number of the key points which we believe will have a critical impact on the action of this Bill that have been left to the Administrative Guidelines and Regulations including the ability for the Commonwealth to use regulations to prescribe any other matters of national environment significance as it sees fit and the lack of definition of key terms such as "*significant impact*".

2. Bilateral Agreements and Accreditation

NFF supports the intent of the legislation to enact the outcomes of the COAG Review which recommended that the Commonwealth's role should be focussed on matters of national environmental significance and not on matters of local or State significance. We also support the removal of ad hoc triggers for environmental assessment and approvals.

The negotiation of the Bilateral Agreements will determine the success or otherwise of the clarification of roles and responsibilities of governments. The operation of the Bill is also dependent on these Agreements. NFF believes that the Government should therefore endeavor to negotiate and sign off on these Agreements prior to the Bill entering Parliament.

The accreditation of State processes could only be supported if it occurs through a process of negotiation and agreement between the Commonwealth and States. Accreditation must also lead to streamlining of processes and not duplication. Accreditation must also be such that once completed the Commonwealth cannot arbitrarily override the States. States must also be able to devolve management to regions.

NFF recommends that the development of Bilateral Agreements be transparent, accountable and have provision for consultation with stakeholders.

3. Final Decision-Making

NFF is concerned that the final decision making powers on a project proposal should not lie solely with the Commonwealth Environment Minister. Decisions on project approvals should include consideration of social and economic issues, as well as the environment. The other relevant Ministers should therefore have greater powers than just consultation in final decision making.

4. Compensation

NFF is encouraged that the Bill does provide some mechanisms for the payment of compensation to landholders, although this is within limited boundaries. Compensation appears to be provided in cases of acquisition and through the provision of incentives for biodiversity. NFF believes that landholders must have access to adequate compensation should the property and productive amenity value be decreased due to restrictions on land use and the implementation of a Management Plan. An outline of NFF's Position on Compensation is given at Attachment 1.

We believe that should the Commonwealth make a commitment to an area of national environment significance, there should also be a commitment to adequate resourcing of compensation for landholders affected by that nomination. We are concerned that there is no indication as to which party to a Bilateral Agreement would be responsible for the provision of compensation.

There is also concern that the Commonwealth does not propose to introduce mechanisms to compensate States and Territories and landholders who may be affected by Commonwealth decisions. This approach appears inconsistent with State based resource management regimes.

Rights to develop and use natural resources, which have derived from an accredited process, will need to be certain, and in many cases, such as water and plantation forestry, be tradeable and transferable. Such rights must be compensateable.

5. Administrative Guidelines

The Administrative Guidelines and Regulations will impact significantly on how the Bill will operate and therefore need to be provided in conjunction with the Bill. Of particular concern to NFF is how the term "*significant impact*" will be defined. Without the definition of this term it

is impossible for NFF to determine what activities by landholders may be considered "significant" and which are not.

For example, Part 3, Chapter 2, each subdivision commences with the following first point, ie. World Heritage states:

"(1) A person must not take an action that:
(a) has or will have a significant impact on the world heritage values of a declared World Heritage Property;"

Without the definition of ***"significant impact"*** it is impossible to ascertain the effect of this clause. The definition of this term will determine in many cases whether or not Commonwealth involvement will be triggered. The Bill should therefore contain the definition of this term and not leave it to the Administrative Guidelines.

This clause also raises concerns about how the term ***"action"*** is defined by the Bill. ie. Definition: Chapter 8 (Division1, Subdivision A) 523 Actions.

"(1) However, a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of this Act is not an ***action***. For this purpose, an enlargement, expansion or intensification of use is not a ***continuation*** of a use."

NFF is concerned that the current wording of this definition of ***"action"*** could be used by the Commonwealth to preclude a land holder from undertaking any changes to their farming operation, such as increasing their stocking rate, or diversifying their activities. The definition leans heavily towards preventing any departure from the status quo. This is a blunt and inflexible management approach and does not reflect the need for flexibility, diversity and innovation that are now accepted to be integral components of modern land management.

6. Regulation

NFF is concerned with the Bill's dependence on the Regulations. The Regulations should be made available with the Bill so that stakeholders can establish how key components of the Bill, which are dependent on regulations will function. We believe the dependence of the Bill on regulation undermines the certainty for industry that is supposed to be provided by this Bill. An example is Chapter 2, Division 1, Subdivision G – Additional matters of national environmental significance. This subdivision in effect allows the Commonwealth to add by regulation any other actions it may choose to list as being of national environmental significance.

NFF is of the firm view that the listing of new matters of national environmental significance must be subject to full Parliamentary scrutiny.

We believe that if the Commonwealth is truly committed to meeting its COAG commitments and restricting itself only to matters that are truly of national environmental significance, that there is no need for dependence on a further clause to allow for addition of further matters of national environmental significance.

A further example is found in Chapter 5, 179 Categories of threatened species, where eligibility for listing of species that are subject to certain levels of threat will *"be determined in accordance with the prescribed criteria."* Again the definition and explanation of what the "prescribed criteria" will be is being left to the Regulations. This leaves another significant portion of the Bill open to interpretation and generates considerable uncertainty as to how the section will operate.

7. World Heritage and Ramsar Wetlands

NFF welcomes the commitment under Part 15 – Protected areas that prior to the submission of a property for inclusion in the World Heritage List or listing of a wetland of international importance that the agreement of relevant States, self-governing Territories and land-holders be sought.

NFF existing policy on management of World Heritage properties, which we believe is also relevant to management of wetlands of international importance states that Commonwealth and State Governments should formulate consistent and equitable arrangements that:

- Give all genuinely affected parties early notice of possible nomination.
- Take full account of local community and state government views.
- Provide for assessment on scientific basis.
- Provide for socio-economic impact studies prior to nomination as part of assessment.
- Ensure management plan is developed and agreed with the local community before steps are taken to nominate and area for world heritage listing. And
- As a matter of justice, persons or enterprises who suffer economic loss must be entitled to full compensation.

The new Bill goes someway to addressing these key points. However, there are still some outstanding issues of concern. For example the Bill recommends development of Management Plans for World Heritage/Ramsar properties after listing. However NFF is strongly of the view that Management plans should be developed prior to listing. Further, actions that are in accord with any approved/agreed management plan should be automatically approved and not subject to assessment.

8. Endangered species and biodiversity

The inclusion of endangered species in the list of matters of national environmental significance represents an extension of the Commonwealth's legislative authority. Powers in relation to endangered species appear to transcend state boundaries and are not limited to Commonwealth land and marine areas. This extension of authority could potentially impinge on the State's constitutional authority with respect to land and resource management. NFF does not agree with any action that the Commonwealth may take to override State authority in land management.

A further concern within this section of the Bill is the definition of the term "nationally threatened species". This term was used in both the consultation paper and again referred to by the Explanatory Memorandum, however there is no definition of it in the Bill itself.

There is concern that the current wording of the Bill in relation to biodiversity leaves too much room for interpretation of the concept. This could lead to the Government experiencing considerable difficulty in differentiating between legitimate appeals to biodiversity and those which are vexatious.

9. Scientific Committee

Chapter 5, Division 5 – Plans

274 Scientific Committee to advise on plans
"(3) in giving advice about a threat abatement plan, the Scientific Committee must take into account the following matters: (a) (b) (c)"

NFF recommends that there should be a further point (d) that the Scientific Committee should consider when giving advice. Given that the new Bill is endeavoring to enact the principles of Ecologically Sustainable Development (ESD), we believe that this section offers a prime opportunity for consideration of ESD. Given that most decisions will include environmental, economic, social and equity issues we recommend that the Scientific Committee should also take into consideration the principles of ESD when giving advice.

10. Recovery Plans and Threat Abatement Plans

The legislation provides the ability for the Commonwealth to prepare both recovery plans and threat abatement plans for all areas of Australia. Should the Commonwealth wish to prepare such a plan for an area that is under a State's jurisdiction the Commonwealth is only required to seek cooperation but is not dependant on getting that cooperation.

There is however a joint implementation responsibility for plans between the Commonwealth and States. The concern that this structure raises is that should a state be unwilling to participate in preparation of a plan and the Commonwealth undertakes the activity anyway. The Commonwealth plan may be used by third parties to rate the conservation performance of a state in a deleterious light.

NFF believes that both preparation and implementation of plans should be a joint responsibility.

11. Conservation Agreements

NFF welcomes the expansion in scope of conservation agreements beyond Commonwealth areas. With a note of caution however that once again this represents an intrusion of the Commonwealth into the states' land and resource management responsibilities.

Owners of private land manage a significant proportion of Australia's biological diversity. Positive incentives entered into voluntarily by land holders to conserve biodiversity, such as Conservation Agreements are supported by NFF.

12. Conclusion

NFF supports the need to update existing environment legislation so that it is more relevant to our understanding of environment issues. We also welcome the attempt by the Commonwealth to focus its role and responsibilities to matters of national environment significance. We would like to reiterate however, that natural resource management responsibility should lie with the States.

There are a number of critical questions for NFF that need to be answered before a decision could be made as to whether we agree with the reforms. These questions primarily arise from the uncertainty generated by the Bill's dependence on the negotiation of Bilateral Agreements, Regulations and Administrative Guidelines.

Appendix B.

Deacons Legal Advice regarding EPBC (Attached)

Mr Larry Acton
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Dear Larry

EPBC ACT – LISTING OF BLUEGRASS AND BRIGALOW AS ENDANGERED ECOLOGICAL COMMUNITIES

We refer to our fax of 27 July and to our subsequent discussions concerning your brief to us to consider the implications of the above listings. This advice is organised under the following headings or topics:

1. Executive Summary
2. What are the Relevant Ecological Communities?
3. What is an "Action" in the Context of the Relevant Ecological Communities?
4. What Constitutes a Significant Impact?
5. What is the Meaning and Effect of Section 523(2) of the Act in Relation to the Continuation of a Use?
6. Enforcement Action by Commonwealth
7. The Uncertainties of Significant Impact on an Ecological Community
8. Injunctions
9. Nature Conservation Act 1992
10. Vegetation Management Act 1999
11. Comparison of Commonwealth and State Controls
12. Conclusions

Executive Summary

The analysis we have conducted has generated 3 main criticisms of the *EPBC Act,* in relation to the listing of Brigalow and Bluegrass ecological communities.

Existing Use Protection

The first of these criticisms relates to the limits placed upon the "existing use" exception to the Act's application. Senator Hill, in his letter of 10 April 2001, states that:

"However it is important to note that the *EPBC Act* does not regulate an action that is a lawful continuation of a use of land occurring when the Act commenced on 16 July last year. This is particularly relevant to the ongoing

operation of farmers in Queensland and elsewhere. The potential application of Part 3 of the Act will be limited to new actions (including intensified, expanded or enlarged land use) that will, or are likely to have, a significant impact on a listed ecological community ..."

The Commonwealth has drafted the existing use exception so that it does **not** protect an enlargement, expansion or intensification of the relevant use. This is a concept taken from planning law, and the terminology has been interpreted by the courts as placing severe restrictions on the extent and scope of existing use rights. The legal consequence of this restriction is that it will always be necessary to consider how a rural property was being used on 16 July 2000 in terms of the areal extent of the farming activities and the nature and quality of those activities. The scope of operations on a rural property as at 16 July 2000 will provide the relevant baseline regardless of when the application of the *EPBC Act* to the property is triggered. For example, if after 10 years a particular plant is listed and that affects a property, it will still be necessary to go back to 16 July 2000 to determine the nature and extent of the existing use rights. This is, of course, totally impractical. Moreover, the limits upon the existing use exception pays no regard to the cyclical nature of farming activities which ebb and flow and increase and decrease depending upon a range of factors such as market forces, weather patterns, bushfires and other land management practices. Why should stocking levels, for example, be frozen at the levels which applied on 16 July 2000, when those levels may be well below the carrying capacity of the land? Why should a farmer be prevented from planting a paddock which had been lying fallow for 2 years at 16 July 2000? These are just 2 examples of the absurd and unfair results caused by the limitations upon the existing use exception.

See section 0 of this advice for more detail on this point.

Uncertainty in Identifying Ecological Communities and Impacts

The second criticism concerns the uncertainty surrounding the precise identification of the Bluegrass and Brigalow ecological communities, and the practical difficulty of determining whether an action will have a significant impact on them. The Commonwealth proposes to publish guidelines to assist in this regard, but they will have no legal standing and will not be binding. Compliance with them will not necessarily protect the land holder from criminal prosecution or civil action. The bottom line is that defining the relevant ecological communities is a scientific exercise, as is determining whether an action will have a significant impact. Criminal and civil sanctions for contravention of the Act will turn upon expert scientific opinion. It should be fundamentally unacceptable in contemporary Australian society for criminal or civil liability, involving what would otherwise be a normal day to day farming activity, to depend upon the land holder making a value judgment about scientific issues which he or she is not qualified to determine. If the courts are not going to be able to decide guilt or innocence without expert opinion, how is the ordinary land holder expected to do so?

Some practical examples of the uncertainty involved are:

- Determining whether Bluegrass is the dominant species, and whether a patch of grass is or is not part of the ecological community.
- How does increasing stocking levels impact on the Bluegrass community – over what period do you measure the impact?
- How do you assess the impact of ploughing or clearing a patch of Bluegrass on one property, in the context of the total community? What account should be taken of clearing undertaken elsewhere?
- Is a land owner obliged to consider the cumulative impacts of his activities over time?
- How does a land owner find out what the full extent of the community is? Who holds the records and are they accurate?
- Might the same amount of clearing have a different consequence in terms of impacts depending upon the location?

These uncertainties are just the tip of the iceberg. This list will become longer and the issues more complex as scientific analysis of these issues is undertaken.

See sections 0, 0 and 0 of this advice for more detail.

Divergent Commonwealth and State Regulatory Regimes

A third criticism is the provision of divergent regulatory regimes at the Commonwealth and State levels. The State specifically excepts grasses from the operation of the *Vegetation Management Act* and only affords protection, under the *Nature Conservation Act,* to 2 rare and vulnerable species of Bluegrass which are extremely limited in their distribution. There are several other species of Bluegrass which are widely distributed, the clearing of which is not regulated under Queensland law. At a State level only the clearing of **remnant** patches of Brigalow is regulated.

In contrast, the Commonwealth has applied potentially very severe penalties to the clearing of Bluegrass and Brigalow occurring within the defined ecological communities. It is unfair to land holders that 2 different levels of government should apply different standards in this way, particularly when the legislative standards are all supposed to be drawn from the same international treaties and inter-governmental agreements applying the same principles of ecological sustainability and biodiversity conservation.

See section 0 for further detail.

What are the Relevant Ecological Communities?

The *Environmental Protection and Biodiversity Conservation Act ("**EPBC Act**")* allows for the listing of both threatened species and ecological communities. Consequently, the listing of a ecological community must mean something different from the listing of a species. When a species is listed, each individual specimen of the species is potentially protected from actions which might have a significant impact on it.

The Act contains a definition of ecological community which is as follows:
"Ecological community means an assemblage of native species that:

(a) inhabits a particular area in nature; and

(b) meets the additional criteria specified in the Regulations (if any) made for the purposes of this definition."

We have not been able to find any criteria in the Regulations that have been made for the purposes of this definition. In that regard it should be noted that the definition is not dealing with **listing criteria**, which is a separate issue. The listing criteria are contained in Regulation 7.02 of the *EPBC Regulations 2000.* Regulation 7.02 has been applied by the scientific committee in making its recommendation that the Bluegrass and Brigalow communities be listed, and on which the Minister has acted, as he is required to do according to law under the Act.

So what, then, is the scope of the ecological communities covered by the listings? What is the "particular area in nature" inhabited by the assemblage of native species constituting these communities? The relevant baseline for determining the parameters of the community must be the listing document itself. The gazetted document specifies:
"Brigalow (acacia harpophylla dominant and co-dominant); and

Bluegrass (dicanthium spp dominant grasslands of the Brigalow bio-regions (north and south))."

In our view, the ecological communities listed are the whole of the communities so specified. This follows from the listing process which has identified what is left over of the original communities of these species. The consequence of this is that when looking at what constitutes a significant impact, it is the impact on the whole community which is relevant.

For Bluegrass, the ecological community is not just the dicanthium species, but the association of other plants which make up the communities dominated by the dicanthium species. Conversely the dicanthium species must be the dominant grasses in order for pasture to fall into the classification. In this regard it is worth repeating that it is the community as listed which is protected, not the species itself.

What makes a species dominant? The dictionary definition of "dominant" is:
"1. exercising chief authority or rule; ruling, governing, most influential;

2. occupying a commanding position."

However, in this context, whether a species is dominant is a scientific question. Arguably, if dicanthium species constitutes 50% of the grasses and other plants in the locality, it is not the dominant species. On one view, the dicanthium species needs to constitute substantially more than 50% of the grasses in order to be dominant. Just where one draws the line is difficult to say, but the term

"dominant" suggests that the species should substantially outnumber other species of grasses. This is an area where expert opinions may differ and highlights the difficulty in determining whether grassland falls within the community or outside it.

In consequence of this analysis:

- The mere presence of dicanthium species on a land holding does not mean that the *EPBC Act* is triggered – dicanthium must be the dominant species.

- Determination of whether dicanthium is in fact the dominant species is a scientific question which requires a qualitative and quantitative botanical study of any particular land holding. We doubt that such an exercise would be within the competence of the ordinary land holder.

- The status of current coverage of dicanthium species of grasses is a matter of scientific fact. If the dicanthium species is degraded, overtaken by other native or non-native species of grasses or weeds or otherwise does not constitute significantly more than 50% of the grass cover, it is not dominant and therefore not within the Commonwealth listing.

In his letter of 23 July, Senator Hill makes the following comments:
"Firstly, Agforce has stated that Queensland legislation does not regulate activities affecting the Bluegrass grasslands. This is incorrect.

Within the Bluegrass grasslands, there are several species that are listed as protected under the Queensland *Nature Conservation Act 1992* – for example, dicanthium queenslandicum (King Bluegrass).

I have received advice that confirms the taking of a protected species (such as King Bluegrass) requires a permit from the Queensland Government under the *Nature Conservation Act*. There is no general exception for agricultural activity. There are limited exceptions that apply, for example, to actions covered by a conservation plan. Agricultural activities that result in the taking of protected species in the Bluegrass grassland community (and which are not covered by the limited exceptions) will require a permit under Queensland legislation."

These paragraphs of Senator Hill's letter are based on incorrect advice. Our investigations of the *Nature Conservation (Wildlife) Regulation 1994* and our enquiries of the Queensland Herbarium have revealed that there are only 2 species of Bluegrass – dicanthium queenslandicum and dicanthium setosum - that are listed under the *Nature Conservation Act*. Both of these species are very rare. Mr Gordon Guymer of the Queensland Herbarium informed us that dicanthium queenslandicum, which is listed as vulnerable, is now mainly confined to roadside verges where it has not been subjected to grazing or ploughing pressure. The other species, dicanthium setosum, is listed as rare. On the other hand, we are informed that there are several other species of Bluegrass which are quite widespread. The clearance of those species is completely unregulated, because the VMA does not apply to grasses (see section 9 of this advice).

What is an "Action" in the Context of the Relevant Ecological Communities?

"Action" is a defined term under the *EPBC Act.* It is defined in section 523 of the Act as follows:
"Actions

(1) Subject to this subdivision, action includes:

- **(a) a project; and**
- **(b) a development; and**
- **(c) an undertaking; and**
- **(d) an activity or series of activities; and**
- **(e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d)."**

This definition is extremely wide and potentially encompasses everything that a rural land owner might wish to do on his or her property. However, section 523(2) contains the following exception:

"(2) However, a lawful continuation of a use of land, sea or sea bed that was occurring immediately before the commencement of this Act is not an action. For this purpose, an enlargement, expansion or intensification of use is not a continuation of a use."

The subject matter of this exception is dealt with separately later in this advice.

The relevant provision of the Act in relation to the taking of actions having significant impact on listed threatened ecological communities is section 18(6) of the Act, which is as follows:
"(6) A person must not take an action that:

- **(a) has or will have a significant impact on a listed threatened ecological community included in the endangered category; or**
- **(b) is likely to have a significant impact on a listed threatened ecological community included in the endangered category.**

Civil penalty:

- **(a) for an individual - 5,000 penalty units;**
- **(b) for a body corporate – 50,000 penalty units."**

Section 18A prescribes certain criminal offences in relation to the same activities. These provisions are as follows:
"18A Offences relating to threatened species, etc.

(1) A person is guilty of an offence if:

- **(a) the person takes an action; and**
- **(b) the action results or will result in a significant impact on:**
  - (i) a listed threatened species; or
  - (ii) a listed threatened ecological community.

(2) A person is guilty of an offence if:

(a) the person takes an action; and
(b) the action is likely to have a significant impact on:

(i) a listed threatened species; or

(ii) a listed threatened ecological community;

and the person is reckless as to that fact;

(3) An offence against sub-section (1) or (2) is punishable on conviction by imprisonment for a term not more than 7 years, a fine not more than 420 penalty units, or both.

There are certain exceptions to the application of section 18 and 18A. These are contained in sections 18A(4) and 19. For present purposes there is no need to discuss them.

For an "action" to be relevant for the purposes of the Act, it must have a significant impact on the relevant ecological community. It is not sufficient for there to be a nexus between the action and the relevant species. The nexus must be between the action and the whole of the ecological community as listed. In other words, although the "action" may take place on a particular land holding, the focus of section 18(6) is wider in that it looks at the whole ecological community, which does not necessarily recognise the boundaries of a land holding. This is one of the consequences of listing a community rather than a species.

What Constitutes a Significant Impact?

Section 524B of the Act provides as follows:
"In determining for the purposes of this Act whether an impact that an action has, will have or is likely to have is significant, the matters (if any) prescribed by the Regulations must be taken into account."

We have considered the Regulations and have not been able to find any matters prescribed by them that are relevant to this issue. There are, however, some published administrative guidelines. These guidelines do not govern the interpretation of the Act, however they are a non-binding indication of the position of the government as to what constitutes a significant impact. The relevant part of the guidelines which are published on Environment Australia's website are as follows:

"Critically Endangered and Endangered Ecological Communities

Criteria

An action has, will have or is likely to have a significant impact on a critically endangered or endangered ecological community if it does, will, or is likely to:

- lead to a long term adverse effect on a ecological community; or

- reduce the extent of a community; or
- fragment an occurrence of the community; or
- adversely affect a habitat critical to the survival of an ecological community; or
- modify or destroy abiotic (non-living) factors (such as water, nutrients or soil) necessary for the community's survival; or
- result in invasive species that are harmful to the critically endangered or endangered community becoming established in an occurrence of the community*; or
- interfere with the recovery of an ecological community.

In addition to the above information, Commonwealth adopted Recovery Plans may also provide further guidance on whether an action is likely to be significant.

* Introducing an invasive species into the occurrence may result in that becoming established. An invasive species may harm a critically endangered or endangered ecological community by direct competition, modification of habitat or predation."

Whilst it is likely that the Courts will, in the very near future, provide an interpretation of the term "significant impact", and in doing so will not consider themselves constrained to apply the guidelines, the guidelines do provide some assistance. It is necessary to apply the guidelines to the ecological community in its broader sense as defined in the listing. It seems to us that there are certain difficulties in determining if and when a particular farming activity is likely to satisfy the criteria when applied to the broad ecological communities of Brigalow and Bluegrass as gazetted.

It is probably unnecessary to go through each of the criteria in turn, but we will comment upon some of them:

"Lead to a long term adverse effect on an ecological community"

Given that the community covers the whole of the bio-region, how is a land holder supposed to know whether his proposed activity, for example increased stocking, is likely to have a long term adverse effect on the community? Surely that consequence is a matter for scientific botanical assessment, which it is impossible for a land holder to meaningfully answer?

"Reduce the extent of the community"

Clearly this does not mean what it says, because it is not any reduction which is relevant for the purposes of the Act. The only reduction of the extent of an ecological community which will be relevant for the purposes of the Act is one which is considered significant in terms of the overall extent of the community.

"Fragment an occurrence of the community"

This criteria suggests that the "community" may be broken up into sub-communities, but the Act itself speaks of a single community. It remains to be seen whether the Act will be interpreted in that way by the Courts. It also begs the question of what is meant by "fragment". The map which shows the ecological communities of Bluegrass and Brigalow suggests that the community is already fragmented. It is a moot question as to whether further fragmentation, for example developing a road through a patch of grassland, will be significant for the purposes of the Act.

"Modify or destroy abiotic (non-living) factors (such as water, nutrients or soil) necessary for the community's survival"

This criteria is somewhat uncertain as to its meaning and potential application. An example might be extensive ring-barking of trees which may cause the water table to rise thereby increasing salinity and adversely affecting the grassland. However, again, the issue arises as to what constitutes the relevant ecological community and whether the effect is significant.

The criteria seem to us to be broad and general and unhelpful in determining whether a particular activity might have a significant impact on the listed communities.

The Shorter Oxford Dictionary defines "significant" as primarily "full of meaning or import" and secondarily as "important or notable". The same dictionary defines the impact as "the act of impinging; the striking of one body against another; collision".

His Honour Judge Skoien of the Queensland Planning and Environment Court referred to the secondary dictionary definition in *Pacific Exchange Corporation Pty Ltd v. Gold Coast City Council and the State of Queensland* (1997) QPELR 129 at 135E. The context in which the term was being considered by His Honour was "... have a significant adverse impact on a State controlled road" and "... have a significant impact on the planning of a State controlled road or future State controlled road". His Honour said:
"The primary meaning of the word "significant" given by the Shorter English Dictionary is "full of meaning or import". The word does not make sense if read that way in either paragraph (ii) or (iii). It must, in each case, bear the secondary dictionary meaning of "important, notable". It is frequently, perhaps most commonly, used in that sense, often, one suspects, by people ignorant of its primary meaning.

So the test to be applied is whether the subdivision will have an important or notable adverse impact on the Gold Coast Highway (paragraph (ii)) or whether the subdivision will have an important or notable impact on the planning of the Gold Coast Highway (paragraph (iii))."

In *Tasmanian Conservation Trust Inc. v. Minister for Resources* (1995) 85 LGERA 296 at 324, His Honour Mr Justice Sackville was considering whether a proposed action would have a significant effect on the environment in terms of the administrative procedures under the *Environment Protection (Impact of Proposals) Act 1974*. His Honour said:
"If the word "significant" needs elaboration in this context, I use it in the sense of "an important or notable effect on the environment": *Drummoyn Municipal Council v. Roads and Traffic Authority (New South Wales)* (1989) 67 LGRA 155 at 163."

The issue of significant impact on world heritage values for declared world heritage property arose in *Booth v. Bosworth* (2000) FCA 1878. That was the case involving the spectacled flying foxes heard before His Honour Mr Justice Spender in the Federal Court last December. In that case His Honour refused to grant an interim injunction to stop the use of the electric grids. The decision turned on the balance of convenience in regard to the few remaining days of the picking season for lychees, and accordingly there is no interpretation in the case of the meaning of "significant impact". However, there is extensive reference in the judgment to conflicting scientific evidence as to the number of flying foxes killed or likely to be killed by the grids. This issue has been revisited recently in another case between Booth and Bosworth, which was heard before Justice Branson in the Federal Court on 18-20 July 2001. The judgment is pending, and it is likely that it will contain an interpretation of the term "significant impact". However, in our view, it is unlikely that the result will be different from the "important or notable" approach referred to above.

In practical terms none of this is of much help to land holders because, as the cases demonstrate, the judges are inevitably assisted, in deciding whether there is likely to be a "significant impact" on the environment, by a considerable body of expert scientific opinion.

Indeed, assuming for the moment that a proposed action is referred to the Minister, the Minister will himself be assisted by scientific opinion. The Minister has all of the resources of his Department at his disposal to help him reach a decision. A land owner has no such resources at his or her disposal. A land owner has practical experience of land management and common sense available to him or her, but not expert scientific opinion, unless that advice is sought from a third party. How, then, is the land owner supposed to make an assessment? If, as the Act requires, the land owner directs his or her mind to the question of whether the proposed action is likely to have an important or notable impact on the ecological community, the answer will more than likely be "I don't know".

The obligation to refer a proposed action to the Minister arises under section 68 of the Act. That section provides as follows:

> "68(1) A person proposing to take an action that the person thinks may be or is a controlled action must refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action."

This has to be read in conjunction with section 67 which defines what is a controlled action as follows:
"An action that a person proposes to take is a controlled action if the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be prohibited by the provision. The provision is a controlling provision for the action."

The requisite state of mind is "... that the person thinks may be or is ...". If in truth the person simply doesn't know, then this section is not triggered. However, it must be remembered that even if the obligation to notify is not triggered, the offence of having a significant impact on the listed community may still be committed. The duty to notify and the duty not to have a significant impact on a listed community are separate issues.

What is the Meaning and Effect of Section 523(2) of the Act in Relation to the Continuation of a Use?

As stated above, section 523(2) provides as follows:
"However, a lawful continuation of a use of land, sea or sea bed that was occurring immediately before the commencement of this Act is not an action. For this purpose, an enlargement, expansion or intensification of use is not a continuation of a use."

The words "enlargement, expansion or intensification of use" are taken directly from a provision of the New South Wales *Environmental Planning and Assessment Act 1979* dealing with existing lawful uses. The relevant provision is section 109 of that Act and insofar as is relevant provides:
"(2) Nothing in sub-section (1) authorises:

(a) ...;
(b) ...;
(c) without affecting paragraph (a) or (b), any enlargement or expansion or intensification of the use therein mentioned ..."

The New South Wales Court of Appeal considered this provision in *South Sydney City Council v. Houlakis* (1996) 92 LGERA 401. The provision had previously been considered by the Court of Appeal in *Vaughan-Taylor v. David Mitchell-Melcann Pty Ltd* (1991) 73 LGRA 366. In the latter case, His Honour Priestley JA said at 373:
"The effect of s 109, as it was interpreted in light of the High Court decisions, was radically changed by the addition to it, operative from 3 February 1986, of subs (2). That subsection requires that "use" be understood in a much narrower sense than before; its effect was, in my opinion, to limit the continued use previously permitted by ... s 309 and s 109 without consent, to the actual use of the land on the day when the planning laws otherwise would have affected it, that actual use being confined to the land actually (as opposed to potentially) physically being used, and the extent of the use of that land likewise being limited to its extent on that day."

In the former case, Beazley JA provided the following interpretation of the words "enlargement", "expansion" or "intensification":
"The three words used in s 109(2)(c) are each words of ordinary English meaning. They are each separated in para (c) by the word "or", which, upon a proper construction of the paragraph, is a true disjunctive. Thus, the paragraph is not to be read "ejusdem generis" and each word is to be given its full and ordinary meaning. It is appropriate, when considering the ordinary meaning of the words, to use in aid, their dictionary meaning. The dictionary meaning of each word is as follows:

> *Enlargement*
> **The act of enlarging; increase; expansion; amplification.**
> **[Enlarging]**
> **to make larger; increase in extent; bulk or quantity; add to:** ***The Macquarie Dictionary***
> **an increase in size, extent or scope:** ***The Shorter Oxford English Dictionary.***
> *Expansion*
> **1. The act of expanding.**
> **2. the state of being expanded.**
> **3. the amount or degree of expanding ...**
> **[Expand]**
> **to increase in extent, size, volume, scope:** ***The Macquarie Dictionary.***
> **spread or stretch (a thing) out, esp. to its fullest extent, extend, open out**
> **... widen the boundaries or increase the area, scope etc., or enlarge, dilate:**
> ***The Shorter Oxford English Dictionary.***
> **Intensification**
> **[Intensify] to make intense or more intense:** ***The Macquarie Dictionary.***
> **The action of intensifying.**
> **[Intensify]**
> **Make intense; augment, strengthen, heighten, deepen:** ***The Shorter Oxford English Dictionary.***

It is apparent from the above definitions that the words have overlapping meanings. It is not necessary, for the purposes of this appeal to explore their similar or differing nuances. In my opinion, the operation of the hotel for the extended hours for the sale of on-site liquor is an "enlargement" of the use of the premises. It does not matter, therefore, whether the extended hours of operation have resulted in increased patronage, increased liquor sales or increased revenue from one or more areas of the operational centres of the hotel. Whether those matters are relevant factors to be considered in determining whether there has been an "intensification" in use does not arise on the approach which I consider should have been taken on the facts here."

There is no reason to think that a court in interpreting section 523(2) would approach the matter any differently from the New South Wales Court of Appeal in

relation to the similar words of section 109(2) of the *Environmental Planning and Assessment Act.* Section 523(2) of the *EPBC Act* is clearly a provision about existing lawful use rights, and it clearly adopts a similar limitation upon existing use rights as the New South Wales provision. It does so in order to counteract earlier decisions of the High Court of Australia which held that existing use rights included and protected the right to intensify the existing use. The law in those decisions of the High Court, namely *Parramatta City Council v. Brickworks Limited* (1972) 128 CLR 1; *Eaton & Sons Pty Ltd v. Warringah Shire Council* (1972) 129 CLR 270, and *Norman v. Gosford Shire Council* (1975) 132 CLR 83, is clearly not applicable to the concept of lawful continuation of use under the *EPBC Act.*

The result is that a land holder's use of land is categorised and defined in terms of its areal scope, level of intensity and quality as at 16 July 2000. This is, of course, appallingly draconian in its consequences. It gives no consideration to the ebb and flow of rural life, the highs and lows of seasons, weather patterns nor the normal approaches to land management. If the law is strictly applied in accordance with the judgments referred to above, then a property which had its stock levels reduced on 16 July 2000 because of market forces, drought or other factors, cannot have the stock levels increased again. The provision is impractical and unworkable, and there are very strong arguments as to why it needs to be changed or clarified so that it accords with the administrative approach which the Department appears to be (misguidedly) applying. Apart from anything else, it is ludicrous to freeze a land use as at 16 July when the *EPBC Act* may have had no application to the land at that time, because of the absence of a relevant trigger applying to the land. As time marches on it will become more and more difficult to determine the precise extent of a use as at 16 July 2000.

Enforcement Action by Commonwealth

A person who, or a body corporate which, does something that has or will have or is likely to have a significant impact on the bluegrass community may be guilty of an offence (sec. 18A) or may be liable to a civil penalty (sec. 18(6)).

The punishments that flow from a breach of these sections are very severe.

For an offence under sec. 18A, the punishments are as follows:

- for an individual: a fine of up to $46,200 and/or imprisonment for up to seven years (sec. 18(3))
- for a body corporate: a fine of up to $231,000 (up to five times the fine that can be imposed on an individual – this is permitted by sec. 4B(3) of the Commonwealth *Crimes Act* 1914)
- for an executive officer of a body corporate (in some circumstances): the same as for an individual (as a result of a combination of secs. 495(2) and (3) of the *EPBC Act* and sec. 4B(2) of the *Crimes Act*).

The civil penalties that can be imposed under sec. 18(6) are up to $550,000 for an individual and up to $5,500,000 for a body corporate.

There is no need to prove that the person charged with an offence intended to cause a significant impact on the bluegrass community.

However, for the offence of taking an action that is likely to have a significant impact on the bluegrass community, the prosecution has to prove that the defendant was reckless about whether or not his actions would have that impact (sec. 18A(2)). Recklessness means that defendant is aware that there is a substantial risk of the likely significant impact and that, in the circumstances known to the defendant, it is unjustifiable to take that risk (sec. 5.4(2) of the Commonwealth *Criminal Code*).

It is possible that proof of recklessness is required for the other offences in sec. 18A – taking action that results or will result in a significant impact on the community – although the section itself does not refer to the need for this (sec. 18A(1)). (We say this is possible because sec. 5.6 of the Commonwealth *Criminal Code* says that "recklessness" is to be taken as a general element of an offence when a particular result is also an element of the offence.)

However, the presence or absence of recklessness is irrelevant to civil penalty proceedings.

The difference between the two types of enforcement proceedings lies in the required standard of proof of the elements of the charge. The elements of an offence have to be proved beyond reasonable doubt. The elements of conduct said to contravene sec. 18(6) will have to be proved on the balance of probabilities – a much lower standard than "beyond reasonable doubt".

In either case, however, the difficulty for prosecution and defence – and the measure of unfairness to the prosecuted person and pastoralists in general – is the vagueness of the concept of significant impact on an ecological community.

It is unsatisfactory that the range of activities which the Commonwealth wants to prevent and for which it has prescribed very severe penalties should leave landholders in doubt about the extent to which they may safely continue their normal business operations and land care.

This is especially so given that the *EPBC Act* strikes directly at day to day activities of pastoralists and graziers and exposes them and their contractors to the punishments mentioned above.

It is easy enough to say that the deliberate eradication of all bluegrass on a holding puts that landholder and his clearing contractor at risk of being punished. But the *EPBC Act* does not say clearly where the dividing line is to be drawn in any case. True, if a landholder is in doubt, and he has formed a view that what he wants to do might be a controlled action (sec. 68(1)), he can apply for approval for planned activities. But that will involve delay and expense and, unless the

Department says approval is not needed, that delay and expense might be substantial.

There is another problem for landholders here. If, as we think is the case, a landholder's activity is to be judged significant (or not) according to the impact it has on the bluegrass community considered as a whole, similar activities by other landholders will have to be taken into account. For instance, landholder X's intended destruction of 20 acres of bluegrass might, by itself, be regarded as insignificant, but be regarded as significant if other clearing or destruction of bluegrass is occurring in different parts of the community (perhaps with the Minister's approval). How is landholder X expected to know of these other activities?

The landholder's difficulty here is increased by the fact that activities infringing secs. 18 and 18A need not take place within the bluegrass community. All that is required is that the activity have a significant impact (or be likely to have such an impact) on the community. In theory, then, a landholder on whose property there is no bluegrass may still contravene the Act because something he does on his property has a significant impact on the bluegrass community – spraying, for instance. There may be few examples of activities carried on outside the boundaries of the bluegrass community which will have a significant impact upon it but, once again, all the risk attached to normal business operations has been left with the landholder.

Again, the Department's answer would probably be that this is all the more reason to ask it whether approval is needed. But this means that, for safety's sake, a landholder would have to ask whether approval was needed for any activity affecting bluegrass. If that was the Commonwealth's intention, it should have said so in the legislation.

The Uncertainties of Significant Impact on an Ecological Community

A landholder is left not knowing whether anything he does which does not preserve or improve the bluegrass on his property or elsewhere may open him up to criminal liability or compensation proceedings. That is quite unsatisfactory. It arises from the following areas of uncertainty:

(1) There is no definition of "significant impact".

(2) Judging whether an action has a significant impact involves considering its impact on the whole of the bluegrass community. How is a landholder to know what the condition of the entire community is? How is he to know what other actions are taking place elsewhere in, or close to, the community which, considered alongside his, might make his action one that has a significant impact?

(3) A consequence of point 2 is that "significant impact" might have a different meaning in different parts of the bluegrass community. Is the destruction of 20 acres of bluegrass significant if it involves the loss of 50% of an isolated

patch and not significant if it involves the loss of a fraction of 1% of a huge body of grass?

(4) Separate and unrelated activities by a landholder, done over a long period of time, might be aggregated to produce an action having significant impact on the community.

The primary difficulty is the lack of definition of significant impact. That difficulty is increased by the need for that impact to occur upon a listed community – that is, upon that community as a whole.

The *EPBC Act* does not define the expression "significant impact". Although it says a decision-maker must take certain matters into account in assessing whether a significant impact has occurred or is likely to occur (sec. 524B), none of those matters has been prescribed.

The department has offered its own opinion on what amounts to a significant impact in its guidelines. But these, although detailed and considered, are not law. They are binding on no one. And they simply add to the existing uncertainty – e.g., how much reduction of the community is a significant impact? what exactly is fragmentation? over what period of time should one determine whether there is a long-term adverse effect on the community?

"Significant impact" must involve both quantitative and qualitative factors. That is, how much bluegrass is affected and how badly? But the Act is silent about these factors and the relative importance of each of them in any particular case.

Finally, there is uncertainty whether the word "significant" is used to denote something of substance or importance (its dictionary meaning) or to cover anything that can fairly be regarded as not insignificant – which sets a lower threshold. The two planning decisions mentioned earlier suggest the courts would choose the dictionary meaning of "significant". In enforcement proceedings, we expect the court would choose a meaning which was more favourable to the charged person, and that is the dictionary definition. Still, there is a doubt which it is unfair to leave over the heads of landholders.

Then there is the difficulty posed by the oneness of a listed community. The offences created by sec. 18A are to do with "a listed threatened ecological community". The activities penalised by sec. 18(6) are to do with "a listed threatened ecological community included in the endangered category".

There is no specific offence or prohibition relating to part of the listed community. Consequently, whether infringing activity has taken place must be judged according to the impact that the activity has or is likely to have on the bluegrass community as a whole. And yet, enforcement proceedings will, inevitably, be based on activities in a part of the community because no single landholder will be able to affect every sector of the listed bluegrass community.

Given the dimensions of that community and the existence within it of small and quite isolated patches of bluegrass, the effect of these problems is that "significant impact" may mean something different in every area in which an activity affecting bluegrass is carried out.

For instance, the destruction of 20 acres of bluegrass in a sub-community of thousands of acres might not be thought to have a significant impact on the overall community (or even on the sub-community). A quite different view might be taken if that cluster is the only patch within hundreds of miles of any other body of bluegrass and its removal ends any chance of revival of bluegrass in that area.

On the other hand, one might ask why, if the listed community is measured in millions of acres, the destruction of 20 acres of bluegrass anywhere should be thought to have a significant impact on the community as a whole?

The legislation is also unclear about the extent to which a range of activities might be aggregated in order to form an action having significant impact. An "action" can include a series of activities (sec. 523). It is possible, then, that a prosecution or penalty recovering proceedings could be based on a series of activities by a landholder which took place on different (and not adjoining) sections of his property and had different effects on the bluegrass in those areas.

And those activities might have taken place over a number of years. The *EPBC Act* does not set a period of time within which activities are to be judged as amounting to significant actions.

A prosecution for an offence under sec. 18A can be commenced at any time after the offence is thought to have occurred. That is because of the maximum penalties involved. Sec. 15B of the Commonwealth *Crimes Act* says that a prosecution for an offence against a Commonwealth law can be commenced "at any time" if the maximum penalty for an individual is more than six months (as is the case under sec. 18A) and if the maximum penalty for a body corporate is more than $16,500 (as is also the case under sec. 18A).

Proceedings to recover civil penalties for a breach of sec. 18(6) can be started at any time within six years of the supposed breach.

Given the other examples of "action" – project, development, undertaking – the term might be thought to be confined to a pre-planned scheme, taking place in a single area and for a particular purpose, so that a random series of activities affecting bluegrass (for instance, heavy grazing in one month, pasture improvement elsewhere six months later, necessary earthworks in a third place a year later – none of them individually having a significant impact) should not be able to added together to create an action having a significant impact. But the possibility exists and that seems unfair.

Injunctions

The Act allows the Federal Court to grant injunctions – and preliminary injunctions pending trial – to prevent actions that would contravene secs. 18 and

18A (sec. 475). The Minister can apply for the injunction. So too can environmental organisations and individuals with a particular concern for the environment (sec. 475(1), (6) and (7)).

To obtain a preliminary injunction – the sort that was applied for in the flying fox case – the applicant need show only an arguable – not a conclusive – case that a landholder's activities or proposed activities do infringe or will infringe sec. 18 or sec. 18A. To obtain a final injunction, after a trial, the applicant will have to prove the existence of such an infringement on the balance of probabilities.

Preliminary injunctions – called interim injunctions in the Act – are granted to hold the *status quo*, to prevent any worsening of the situation (as far as the applicant is concerned) until it is decided at trial whether a permanent injunction should be granted.

Normally, preliminary injunctions are applied for and granted as a matter of urgency, and before both sides have a chance to assemble all their evidence. For that reason, an applicant usually has to give the court an undertaking as to damages. This is a promise to pay compensation to the person whose activities are restrained, if it turns out at trial that the preliminary injunction shouldn't have been granted, and the fact that it was granted has caused financial loss to the person restrained.

No such undertaking can be required of an applicant under the Act (sec. 478). This is a recognition by the Commonwealth, we think, that it will have to depend on environmental organisations and activists to do some of its work. The risk this carries for landholders, however, is "nuisance lawsuits" by activists. On the other hand, a preliminary injunction is not there for the asking. As we mentioned earlier, whether an activity contravenes or is likely to contravene secs. 18 or 18A will depend on respectable and reliable scientific evidence being placed before the court.

Resisting an injunction application is certain to be costly and there will be delay involved if the case goes to a trial. No doubt the Commonwealth sees this delay and expense as an incentive to landholders to apply for approval before commencing activities that will affect bluegrass on their property. As we mentioned earlier, however, that could mean that a landholder will have to apply for approval of anything touching upon bluegrass.

Nature Conservation Act 1992 ("NCA")

Under section 89 of the NCA it is an offence to take a protected plant other than under:

(a) a conservation plan applicable to the plant; or

(b) a licence, permit or other authority issued or given under a Regulation; or

(c) an exemption under a Regulation.

The term "take" is defined as including:
"In relation to a plant –

(i) gather, pluck, cut, pull up, destroy, dig up, fell, remove or injure the plant or any part of the plant; or

(ii) attempt to do an act mentioned in sub-paragraph (i)."

The maximum penalty for breach of the section is 3,000 penalty units or 2 years imprisonment.

Under the NCA wildlife includes both animal and plants.

A protected plant for the purposes of this section is defined as a protected plant that is prescribed under the Act as rare or threatened wildlife and is in the wild.

"Threatened wildlife" is defined as wildlife prescribed under the Act as:

(a) presumed extinct wildlife;

(b) endangered wildlife; or

(c) vulnerable wildlife."

Section 7 of the *Nature Conservation (Wildlife) Regulation 1994* is as follows:

"Rare Wildlife

7. Native wildlife specified in Schedule 4 Parts 1 and 2 is rare wildlife."

Schedule 4 Part 2 provides a list of rare plants which includes "dicanthium setosum".

Schedule 3 Part 2 of the *Nature Conservation (Wildlife) Regulation 1994* lists vulnerable plants and includes "dicanthium queenslandicum".

Therefore, of the above 2 species of dicanthium, both are subject to the prohibition on the taking of the plant.

Section 89(3) contains certain defences to a charge, namely:

(a) the taking happened in the course of a lawful activity that was not directed towards the taking; and

(b) the taking could not have been reasonably avoided."

While it may be possible to argue that, for example, ploughing, which has the effect of digging up either dicanthium species, is not directed towards the taking of that plant, it would be impossible to satisfy the second limb of the defence, namely that the taking could not have been reasonably avoided.

Section 8 of the *Nature Conservation (Protected Plants) Conservation Plan 2000* also regulates the taking of protected plants. However, it provides for an exemption from the Regulation in the case where a plant is taken under a clearing permit or is taken in the course of an activity under an authority given under another Act by the Governor-in-Council or someone else and the Chief Executive under the NCA approves the taking in the course of that activity.

Moreover, Regulation 44 of the *Nature Conservation (Protected Plants) Conservation Plan 2000* provides as follows:

"Exemption for Taking or Using Particular Plants for Grazing Activities

(2) A licence, permit or authority is not needed for taking a protected plant on State land if the plant is taken by stock grazing under a lease, licence, permit or other authority, or an exemption, given under another Act."

For this purpose "State land" means all land in Queensland that is not:

(a) freehold land, or land contracted to be granted in fee simple by the State; or

(b) a reserve under the *Land Act 1994;* or

(c) subject to a lease or licence under the *Land Act 1994;* or

(d) subject to a mining interest.

Essentially, then, this exemption only applies to unallocated State land which is the subject of a licence or permit for the grazing of stock.

Under section 29 of the Regulation:

"(1) The Chief Executive may grant a clearing permit taking of protected plants only if the Chief Executive is satisfied -

(a) the applicant is the land holder, or has the approval of the land holder, of the land on which the plants are located; and
(b) the taking will not adversely affect the survival in the wild of the plant; and
(c) (not relevant).

(2) Also, the Chief Executive may grant a clearing permit for taking protected plants in an area identified under a conservation plan as, or including, a critical habitat or an area of major interest, only if –

(a) the plan does not prohibit the granting of the permit; and
(b) the chief executive is satisfied the taking of the plants will not have a significant impact on a viable population of protected wildlife or a community of native wildlife in the area."

Accordingly, insofar as farming activities would involve the digging up or destruction of dicanthium setosum or dicanthium queenslandicum, such an activity would only be lawful if it is the subject of a clearing permit under the NCA or the taking happened in the course of an activity authorised under another Act.

As indicated above, both dicanthium setosum and dicanthium queenslandicum are protected species under the NCA. However, as indicated in section 0 of this advice, those 2 species are only a minor component of Queensland's Bluegrass grasslands. Species such as dicanthium sericeum and dicanthium affine are much more widespread. Accordingly it is not correct to suggest that the Commonwealth listing is merely covering species that are already regulated in Queensland.

Brigalow (acacia harpophylla) is not listed as rare, endangered or vulnerable under the NCA. Therefore, by definition, it is a "common plant", and is not regulated under the NCA.

Vegetation Management Act 1999 ("VMA")

For the purposes of this Act "vegetation" is defined by section 8 as follows:
"8. Vegetation is –

(a) **a native tree; or**
(b) **a native plant,** other than a grass **or mangrove."**

Accordingly the discussion which follows is relevant to Brigalow, but has no application to Bluegrass.

The purpose of this Act is to regulate the clearing of native vegetation on freehold land. This is achieved by rolling into the IDAS system under the *Integrated Planning Act 1997* ("**IPA**") all native vegetation, subject to certain exceptions. Schedule 8 Part 1 of the IPA specifies what is assessable development. Item 3A was added by the *Vegetation Management Act No. 90 of 1999* and amended by Act No. 35 of 2000 before it took effect on 15 September 2000.

The principal exception under Item 3A is clearing which is:
"(c) necessary for routine management in an area that is outside –

(i) **an area of high nature conservation value; and**
(ii) **an area vulnerable to land degradation; and**
(iii) **a remnant endangered regional ecosystem shown on a regional ecosystem map."**

The terms in (i), (ii) and (iii) are defined by reference to the meanings given to them in the VMA. Routine management is defined as follows:
""Routine management" means clearing native vegetation –

(a) for establishing a necessary fence, road or other built infrastructure that is on less than 5 ha; or

(b) that is not remnant vegetation; or

(c) for supplying fodder for stock in drought conditions only."

Item 3A also exempts clearing that is necessary for essential management with "essential management" being defined as meaning the clearing of native vegetation –

(a) for establishing or maintaining a fire break sufficient to protect a building, property boundary or paddock; or

(b) that is likely to endanger the safety of a person or property on the land because the vegetation is likely to fall; or

(c) for maintaining an existing fence, stockyard, shed, road or other built infrastructure; or

(d) for maintaining a garden or orchard.

The essential effect of these provisions is that the clearing of any native vegetation on freehold land will be assessable development and will require an approval under IPA unless it is necessary for essential management or necessary for routine management and is not in one of the 3 categories of vegetation referred to in 3A(c) of Schedule 8. This boils down to an exemption for clearing native vegetation which is not remnant and not in one of those 3 categories.

Therefore it is incorrect to conclude that a development permit is only required to clear vegetation that is in an area of high nature conservation value, an area vulnerable to land degradation or is a remnant endangered regional ecosystem. The clearing of any remnant native vegetation would require a permit.

The VMA defines remnant vegetation as follows:
"remnant vegetation" –

1. "Remnant vegetation", for an area of Queensland with a regional ecosystem map, means the vegetation mapped as being within remnant endangered regional ecosystems, remnant of concern regional ecosystems and remnant not of concern regional ecosystems shown on the map.

2. "Remnant vegetation", for an area of Queensland within a remnant map, means the vegetation mapped as remnant vegetation on the map.

3. "Remnant vegetation", for an area of Queensland for which there is no regional ecosystem map or remnant map, means the vegetation, part of which forms the predominant canopy of the vegetation –

(a) covering more than 50% of the undisturbed predominant canopy; and
(b) averaging more than 70% of the vegetation's undisturbed height; and
(c) composed of species characteristic of the vegetation's undisturbed predominant canopy."

The VMA also focuses on remnant endangered regional ecosystems which can be determined in one of 2 ways, namely by reference to a regional ecosystem map

which shows an area as mapped as a remnant endangered regional ecosystem or, if not mapped, then by applying a formula as set out in the definition of remnant endangered regional ecosystem.

The terms "area of high nature conservation value" and "area vulnerable to land degradation" are defined in the dictionary to the VMA, and in each case depend upon there being a declaration made by the Governor-in-Council under section 17 of the Act.

Vegetation clearing offences are offences against the provisions of the IPA which prohibit a person from undertaking assessable development (i.e. clearing of native vegetation on freehold land) without a development permit. Other offences involve non-compliance with the conditions of any development approval in relation to the clearing, non-compliance with any identified codes relating to the clearing of vegetation, etc.

The *Vegetation Management Regulation 2000* contains a list of endangered regional ecosystems in Schedule 1. Part 1 deals with the Brigalow bioregion, and it lists several separate regional ecosystems based upon acacia harpophylla or dicanthium species. These regional ecosystems which are listed by number in column 2 correspond to regional ecosystems specified in Sattler & Williams *"The Conservation Status of Queensland Bioregional Ecosystems"*. Senator Hill has indicated that there is some correlation between the endangered regional ecosystems listed in the Brigalow belt bioregion and the ecological communities listed for the purposes of the *EPBC Act,* however the exact extent of the correlation is unclear.

If the clearing of native vegetation requires an IPA development permit, the application will be decided by the local government, with the Department of Natural Resources as a concurrence agency, or by the Department of Natural Resources as assessment manager. The application will be assessed against any regional vegetation management plan, or if there is no such plan, any State policy on vegetation management. Alternatively, the application may be assessed against any declaration that the relevant area is of high nature conservation value or vulnerable to land degradation.

Senator Hill has stated in his correspondence that the *EPBC Act* does no more than regulate clearing which would have a significant impact on the listed ecological communities. However, the *EPBC Act* and the VMA operate in quite different ways. The VMA tips the clearing of all native vegetation into the integrated development assessment regime. That does not mean that such clearing is prevented. Rather it means that an application is required for a development approval. Whether that development approval will be forthcoming will depend upon compliance with the plans or policies referred to above. Obviously, the *EPBC Act* sets up a separate process to that under the VMA/IPA. The EPBC processes are less clear and certain. For example, they do not involve the application of vegetation management plans which have been developed in consultation with the community.

Comparison of Commonwealth and State Controls

The approach taken under the NCA is quite specific because it targets particular species of rare or threatened plants. Those plants cannot be lawfully "taken" without a clearing permit or some other lawful authorisation under another Act. The consequence of this is that the clearing of the 2 species of Bluegrass listed in the Regulations is more strictly controlled under the NCA than it is under the *EPBC Act*.

Under the IPA and the VMA, the clearing of any native vegetation, subject to the limited exceptions referred to above, requires a development permit. The principal exception for farmers falls under the term "routine management" which allows clearing of vegetation that is not remnant vegetation and not in the 3 areas defined by the NCA and described in Item 3A(c) of Schedule 8 of the IPA (discussed above).

Thus, the clearing of remnant native vegetation as defined under the VMA requires a development permit in all instances.

Taken together the NCA, VMA and IPA provide a very comprehensive package of controls on the clearing of remnant native vegetation and rare, endangered or vulnerable species of plants. In comparison with that package, the *EPBC Act* is far less certain and much weaker in its effect with respect to both Brigalow and Bluegrass. The reason for this is twofold:

(1) The triggers under the NCA with respect to the taking of Bluegrass do not involve any value judgments to determine precisely what vegetation is affected or regarding the consequences of the relevant impact. The taking of the 2 protected species of Bluegrass without the necessary authority is simply prohibited.

(2) The triggers for development approval for clearing native vegetation under the VMA and IPA are relatively clear and certain, and the clearing of all remnant vegetation requires approval. The only value judgment involves determining what is "remnant vegetation" and in most instances the results are likely to be fairly clear when the tests contained in the definition of "remnant vegetation", as discussed above, are applied. The more remnants that are mapped, the clearer it will become.

The most obvious difference between the Commonwealth and State regimes is that under the latter the clearing of Bluegrass (save for the 2 protected species) is not regulated, whereas it is regulated under the Commonwealth legislation. However it is regulated under the Commonwealth legislation in a very uncertain way. We regard this as fundamentally unfair to land holders for the reasons outlined in sections 0 and 0 of this advice.

Conclusions

The above survey and analysis of the law leads us to make the following conclusions:

- There is considerable uncertainty as to the precise definition and extent of the Brigalow and Bluegrass ecological communities.

- The *EPBC Act* potentially applies to virtually anything a land holder might do on his or her land holding.

- There is considerable uncertainty as to whether an action by a land holder will have a "significant impact" on the Brigalow or Bluegrass ecological communities. This uncertainty infects the legislation with basic unfairness because of the difficulty faced in achieving compliance with it.

- The existing use protection built into the *EPBC Act* is drafted in a very restrictive way, and this will result in unworkable/impractical and unfair outcomes.

- There are fundamental differences in approach between the Queensland and Commonwealth law in relation to clearing of Brigalow and Bluegrass. Save for 2 endangered species of Bluegrass and remnant Brigalow, farming activities involving the clearing of these plants is not regulated under Queensland law, whereas it is potentially regulated under the *EPBC Act.*

Do not hesitate to contact us if you require further advice on these issues.

Yours faithfully

David Nicholls
Partner
Deacons

Appendix C.

Case Study – Alistair Hughes (Queensland)

What was?

Alistair Hughes purchased 'Inderi' in Central Queensland for $3.3 million in August 2001 with the view to develop further a background cattle grazing and fully operational feedlot operation. In line with best practice sustainable farm management techniques Alistair has developed 'Inderi' through carrying a conservative stock capacity and engaging in activities such as paddock rotation so as to allow for the resting of both native and improved pastures.

What happened to Alistair Hughes?

To increase the cattle carrying capacity, Alistair planned to plant 2500 acres with the highly productive leguminous fodder tree 'Leucaena.' 3500 acres of the property been planted with 'Leucaena' prior to Alistair's purchase of the property and it is expected that the further planting would provide a 60% increased return on investment. The proposed development would involve the ploughing and planting of 4 metre wide rows of 'Leucaena' spaced approximately 10 metres apart leaving the native grass to benefit from the increased nitrogen levels which result from the leguminous scrub.

The proposed development had to be referred to the Commonwealth Minister of the Environment under the *Environmental Protection and Biodiversity Act (EPBC)* following the listing of bluegrass as a species under the Act. The referral process involved the filing of mapping and preliminary documentation outlining environmental impacts of the proposed development. After 20 days the proposed development was deemed to be a 'non-controlled' action however it was to be done in a 'prescribed manner.'

Whilst Alistair had approval to go ahead with development under the Commonwealth Act, he was required to gain approval under the *Vegetation Management Act* for the same development from the Queensland Department of Natural Resources (DNR) When Alistair contacted the DNR, he was advised that even though he was not clearing any trees and even though he already had approval under the *EPBC* he would be required to complete a full application for tree clearing and develop a Property Management Plan.

Once Alistair compiled the Application and Property Management Plan at his own expense (the relevant official maps costing between $200 and $1500) he would be required to wait a further 30 working days for a response. Of concern to Alistair was the fact that he was told by the one DNR Vegetation Management Officer, responsible for a region the size of Victoria, that he was unlikely to receive approval to proceed for a significant period of time. The statute provided for approval within 30 working days plus 'extensions'. However, he was told that a decision being made within the 30 working days was extremely unlikely. He was

told he was 'lucky' compared to those on leasehold land who would be waiting up to 12 months or more under the approval process.

What has been the effect on Alistair Hughes?

Alistair had initially planned to begin the development in March 2003 with an expected completion date of May 2005. Notwithstanding current drought conditions, the protracted dual application process has made it extremely difficult for Alistair to develop a budget and development time frame for the planting of the 'Leucaena. With the uncertainty regarding the decision making process in Queensland, Alistair will potentially miss the required seasonal planting conditions whilst also having difficulty securing contractors for the proposed planting. Alistair is not only bearing the direct cost of a slow and duplicated application process but he is unable to manage his farm business effectively due to delay and uncertainty as to development plans.

Appendix D.

Case Study – Robert and Anne Klassen (Western Australia)

What was?

Robert and Anne Klaassen purchased their freehold 'Badgingarra' property in January 1995 with a view to developing a mixed cropping and grazing business.

What happened to Robert and Anne Klaassen?

In September 1997 Robert and Anne Klaassen lodged a Notice of Intention to Clear (NOI) with the Western Australia Commissioner of Soil and Land Conservation (the Commissioner) relating to their proposed development of 477 hectares of previously uncleared native vegetation. Robert and Anne planned to sow deep-rooted perennials and pasture and develop a 205-hectare Agro-Forestry operation. The Commissioner of Soil and Land Conservation was to advise Robert and Anne within 90 days from the lodgement of the notice whether the proposed clearing of native vegetation could occur pursuant to the *Soil and Land Conservation Regulations*. In December, Robert and Anne were advised by the Commissioner that whilst the proposed development was unlikely to create soil degradation it was identified as one likely to 'have impact on nature conservation values.' They were not advised at this stage whether the proposal could take place.

Robert and Anne's development proposal was subsequently referred to the Environment Protection Agency (EPA) pursuant to the then *Memorandum of Understanding* between the key environmental protection agencies in Western Australia. The EPA was to assess whether Robert and Anne's proposed development would have a 'significant effect on the environment' as per Section 38 of the *Environment Protection Act.* At this time, the Department of Environmental Protection (DEP) advised Robert and Anne that the EPA was more likely to allow the proposed development if they placed a significant area of land under a *Soils and Land Conservation Act* Agreement to Reserve (ATR) 'voluntary' conservation agreement. During the negotiations the DEP proposed a number of agreements that seemed to have little reference to the protection of specific biodiversity values on areas of land and seemed more focussed on the protection of 'any' section of uncleared land. Under the final proposed agreement, Robert and Anne would have been required to preserve 348.1 hectares in perpetuity, which represented approximately 20% of the entirety of their property. Robert and Anne were 'advised' that there were schemes available to assist with some fencing and management which they could apply for after the ATR was finalised. Schemes available at the time arguably would not have provided sufficient funds to account for the on-going costs of weed and pest management required under the agreement. Furthermore, any funds available to the Klaassens would provide no recognition of the lost land value and lost potential income resulting from the agreement. Robert and Anne decided not to enter into such an agreement pending the outcome of the EPA assessment.

In June 2001, some 4 years after lodging the NOI and after enduring extensive discussions and site visits, Robert and Anne received the following advice from the EPA;

> *"The Environment Protection Agency (EPA) has been required to assess a number of land applications over the past few years which have proved to be difficult and time consuming. The EPA provided advice to the Minister for the Environment in December 1999 indicating the difficulties in assessing land clearing proposals under the Environmental Protection Act (1986). In particular the report recognised that the EPA could not consider financial or social equity issues relating to individual applications, and that the challenge to Government now is to establish a response to the applications in terms of addressing the equity issues rather than to continue to allow clearing* (EPA Bulletin 966)
>
> *The EPA has been progressing the land clearing assessment it has had before it, including yours, slowly in the anticipation that the EPA's advice given in December 1999 report and the report of the Working Group would be given attention by Government. Given the time which has now elapsed, however, the EPA appreciates it should finalise your assessment if it is still your desire to proceed with the clearing, and therefore have your proposal determined by the Minister"*

The EPA advice went on to advise Robert and Anne that in light of a Position Statement (Paper No 2. *Environmental Protection of Native Vegetation in Western Australia. Bulletin 1029)* published in December 2000 (three years after the lodging of the NOI) the department was likely to recommend to the Minister of the Environment that their proposal should not be allowed go ahead. According to the Minister, EPA Position papers are non-binding guides intended for proponents and decision makers. Anne and Robert's application was therefore assessed under guidelines with no status in law that were released three years after they lodged their NOI to clear.

The above EPA statements demonstrate the manner in which the flaws in the approval process forced the EPA to stall the assessment process despite the detrimental impact that such uncertainty was having on Robert and Anne. The EPA also admits that their inability to even consider the financial concerns of applicants such as Robert and Anne was likely to result in key equity and social concerns not addressed in the operation of the legislation. Robert and Anne were informed shortly after this advice that they were not allowed to proceed with the proposed development of their farm.

Despite their frustration and the substantial amount of time involved in this application process, Robert and Anne decided to appeal to the Minister of the Environment. Already they had lost the development potential and income from the four-year delay. Their appeal to the Minister was unsuccessful. In their appeal,

Robert and Anne drew the Minister's attention to the extremely long approval process. The Minister's response was that this delay resulted from the lack of available scientific information provided by Robert and Anne despite the fact that the EPA already admitted that the approval process delay was a result of resource shortages and concerns regarding the social and economic impact of the legislation on landowners.

What is still happening to Robert and Anne Klaassen?

Despite the fact that the appeal to the Minister was apparently unsuccessful, Robert and Anne still do not have a definite answer as to whether they are able to go ahead with the proposed development due to the complex and unworkable legislative system in Western Australia. Whilst the EPA ruled that Robert and Anne could not go ahead with the proposed development, neither the Minister nor the relevant state agencies have been able to definitively tell the Klaassens how this decision operates with respect to the initial NOI lodged over 5 years ago. Robert and Anne never received an objection to the NOI from the Commissioner within the specified 90-day period.

The uncertainty of the operation of the Western Australian laws is best explained by a transcript of evidence given by the Commissioner of Soil and Land Conservation to the Western Australia Parliamentary Standing Committee on Public Administration in November 2000:

> **The CHAIRMAN:** *I think it is clear but I want to be absolutely certain. In a hypothetical case in which a farmer submits to the commissioner a notice of intent to clear, the commissioner could decide that his responsibility requires to advise the EPA...Notwithstanding that the commissioner has advised the Environmental Protection Authority, and provided the commissioner does not issue a soil conservation notice, the proponent may go ahead and clear the land.*
>
> **Mr Watson:** *Correct*
>
> **The CHAIRMAN:** *Even though the EPA is still looking at it?*
>
> **Mr Watson**: *Correct.*
>
> **The CHAIRMAN:** *Why do we bother referring things to the EPA if people can go ahead and clear land?*

In light of this uncertainty, Robert and Anne sought clarification as to what law they would be breaking should they commence clearing the land. They received the following responses from the relevant departments and Minister;

"...I am unable to provide the requested confirmation on the information currently available to me.... The above comments should not be taken as an approval to commence clearing. In particular, I assume you will obtain all necessary approvals and clearances from the Environmental Protection Authority before the commencement of any clearing" - Letter from Commissioner of Soil and Land Conservation 8 Jan 2003

"In relation to your question as to whether you may be breaching any law if you commenced clearing, the Commissioner of Soil and Land Conservation has advised me that he is of the view that your 1997 Notice of Intent (NOI) to clear has lapsed." - Letter from Minister for Agriculture, Forestry and Fisheries 11 March 2003

While I am not in your terms "directing" you not to clear, I must again point out that you do not have approval to clear the land. I think you will agree that there could be significant cost to you as a consequence of unlawful clearing and I would therefore urge you not to do so" – Letter from Parliamentary Secretary to the Minister for Environment and Heritage 24 December 2002

Robert and Anne were further advised that even if their NOI was valid and they could have gone ahead with proposed development, the NOI would have now expired following two years and thus any development at this time would be illegal.

Robert and Anne were understandably confused by these responses and angry at the manner in which they have been treated. They still have not been provided with any appropriate legal justification as to why they have not been able to proceed with the proposed development of their farm business even though they have repeatedly been threatened with prosecution should they proceed.

<u>What has been the impact on Robert and Anne Klaassen?</u>

" The difficulties associated with the uncertainty of whether we could develop the remaining 37% (bush) on our farm are very real. Trying to develop our business with purpose and direction has been impossible. Not knowing if we need to launch a legal challenge to the Minister, keep the budget for the clearing if it is allowed to proceed, use the resources to develop more intensive agriculture such as irrigation...The strain on the family has been tough. The disillusion with the process if profound..." - Robert Klaassen

The indecision and inability to provide Robert and Anne with certainty as to whether they can proceed with proposed development has effectively removed their ability to plan for the future, invest for the growth of their farm let alone also engage in environmental protection activities.

Assuming that Robert and Anne were allowed to proceed with the development as planned and projecting only a conservative profit of $200 per hectare per annum, they have forgone approximately $94 000 net income per year. Over the 5 year period of uncertainty and unwillingness of the government to provide a decision this equates to lost net income of $470 000.

Appendix E.

Case Study – Craig and Jane Underwood (Western Australia)

What Was?

In 1994, Craig and Jane Underwood purchased a 4,200 acre, largely undeveloped property near Jurien Bay in the Dandaragan Shire. When the property was purchased it had a permit from WA Agriculture to clear a significant portion of the 72% remnant native vegetation cover. The Underwood's planned to develop the property as a cattle-grazing enterprise, based on Tagasaste and perennial pastures. While cattle-grazing was envisaged as the primary focus for the business, Craig and Jane had major plans to maximise Jurien's mild climate, average rainfall, yellow free draining sand and abundant ground water to diversify their enterprise and establish horticulture and aquaculture projects.

What happened to Craig and Jane Underwood?

Craig and Jane Underwood's case is a telling example of the legislative disarray that continues to exist in Western Australia.

After purchasing the property in 1994, the Underwood's applied for a digitised copy of the map of their property. At this time, the Underwoods were told that the approved development plan obtained by the previous owner would no longer be honoured, and that they would need to reapply.

In order to commence the development of their new property the Underwood's immediately lodged a revised Notice of Intent to clear. Despite the notice being endorsed by Agriculture Commissioner of Soil and Land Conservation, the WA Environmental Protection Authority (EPA), requested a formal assessment under Section 38 of the *Environment Protection Act.*

This EPA request marked the commencement of five years of tiresome liaison and wrangling with government agencies, including the initiation of a consultative environmental review. The review process involved rigorous on-property assessments of hydrology, aboriginal heritage, botany and fauna, farm planning, shire controls and soil conservation requirements.

Apart from the obvious bureaucratic impost on the Underwood's operations, Craig and Jane were also required to foot the bill for a significant number of the assessments. The complexity of the paperwork involved in the process meant the Underwood's had to find additional funds to employ a professional consultant to prepare the required documents in the appropriate format. Despite professional assistance, the process was stalled on a number of occasions, when studies completed by certain government agencies were disputed by other agencies. In order to break these impasses the Underwood's recommissioned the research and again shouldered the cost burden.

On completion of the formal property assessment and after extended lobbying to demonstrate their gross mistreatment, the Underwood's were granted approval to clear some of their land. Of a proposed 1000 hectares, the Underwood were given development approval to clear 870 hectares of their property in December 1998. This limited development approval was on the provision that the Underwood's entered into an agreement with the Soil Commission to reserve approximately 20 percent (or 355 hectares) of the remnant vegetation on their property, an amount equivalent to the land area they intended to conserve under their original property plan. Under this Agreement, the Underwoods were still required to pay rates on the land that could no longer be utilised.

Whilst the limited development approval was less than their original application, the Underwood's were satisfied that the endorsement would at least allow them to realise the economic potential of a component of their property. At this point, the Underwood's set about preparing a revised property plan to identify a sustainable production system within the confines of their vegetation approval. Whilst doing this, the Underwoods suffered a further setback where they were required to place the land covered by the proposed Agreement to Reserve under land to be placed under and Agreement to Reserve was to be place on a sub-divided area of land distinct from the property. This application process involving the Western Australian Planning Commission took two years, involved two Reconsiderations and one Appeal and cost the Underwoods approximately $7,000 in surveyors fees and further consultancy fees.

In May 2001 the Underwood's received an approach from the WA Water and Rivers Commission. The Commission notified Craig and Jane that the State Water Corporation might require subterranean water on their property for the nearby coastal town of Jurien Bay. The Underwood's were also advised that under the operating protocols of the State Water Corporation, that should their property fall within a proclaimed water course protection zone, farming activities would be severely restricted.

Highlighting the bureaucratic ineptitude in the West, the Commission adopted a 'wait and see' approach, suggesting it may be up to four years before they could identify whether the water would be required for the township. This administrative hiatus effectively placed a de facto moratorium on development on the Underwood's property.

Three years after the initial notification, the WA Water Corporation attempted to enter the Underwood's property to undertake test drills. Committed to avoiding a repeat of their vegetation experiences, the Underwood's refused the Corporation entry, and called upon the Government to provide a clear undertaking to address the issues of equity. The Corporation refused to negotiate and drilled around the boundary and on road reserves.

As a result of the drilling program, in 2002, the Water and Rivers Commission and Water Corporation, advised the Underwoods that they would be placing a P2

Water Course Protection Zone designation on their property effectively banning all agricultural production on the majority of the Underwood's property (2-6 km around each bore). Following the declaration of the intention to place a P2 Water Protection Zone over their property, the Underwoods lost their ability to access ongoing finance to develop their property.

What has been the impact on Craig and Jane Underwood?

This Water and River Commissioner's decision resulted in an overnight reduction in the value of the Underwood's land from $1,000 an acre ($3.5 million) to around $400 an acre ($1.4 million), a loss of $2.1 million. The decision also enforced limits on the ability of the Underwood to trade the property title.

Since 1994, in addition to the diminished value of their property, the Underwood's have lost at least $2 million in gross proceeds, $300,000 in cash reserves, and were in debt to $290,000. To meet this debt the Underwoods have had to sell their family home in Jurien Bay and are now renting. Three potential sales of parts of the property have also fallen through due to buyer concerns about the restrictions being placed on the existing and future land-use capacity of the property. The constraints placed upon the productive use of their property, also mean that Craig and Jane have no realistic possibility of earning the income required to either develop their property or service further debts.

What is happening to the environment?

The Underwood's are required to attempt to earn a living from the 28% of their property permitted for production. This has resulted in Craig and Jane having to place significantly greater grazing pressure on this area of land. While ever mindful of their stewardship obligations, the reality is that the level of grazing required to generate any income is not sustainable and conflicts with any triple bottom line management approach. The enterprise that is the Underwood's operation today, is vastly different from the sustainable and integrated production system that Craig and Jane had mapped out in their original farm plan.

Given the constrains upon Craig and Jane's income, the Underwood's do not have the disposable income required to reinvest in the active management of the remnant vegetation on their property. Over the nine years since the Underwood's took ownership of the property, they have attempted to manage the remnant areas from becoming weed and pest infested yet this has become increasingly difficult as the burden of the regulations and the related financial constraints have grown.