

## **SUBMISSION BY THE INSTITUTE OF PUBLIC AFFAIRS**

### **INQUIRY INTO IMPACTS OF NATIVE VEGETATION AND BIODIVERSITY REGULATIONS**

#### **1. Introduction**

This inquiry is timely. Many would consider it too late. The native vegetation and biodiversity regulations (NVB) are a shambles. They satisfy neither the interest groups at whose behest they were formulated, nor the rural sector to which they principally apply. They are currently unadministrable.

#### **2. The Inquiry in Context**

Looked at narrowly, this inquiry could be seen as an investigation of one aspect of environmental policy, pursuing a restricted set of objectives. In fact, it lifts the corner on a very large number of overlapping policies that ought at least to be canvassed if not analysed. It will need to find some firm ground in many areas of scientific ignorance, misrepresentation and sometimes angry debate. Most importantly, the Inquiry will traverse critical matters of private property rights. In so doing it will be involved in considering some of the basic forms on which our society has been successfully organised.

The history of Australia, in common with many Western countries, has been one of the establishment of individual rights and freedoms and freely operating markets. Respect for property rights and a sound institutional framework were the foundations of this polity and the basis of our wellbeing and wealth. Detailed government intervention in economic activity was minimised. The clear evidence of the failure of centrally planned societies reinforced this approach.

Environmental policies in general and native vegetation and biodiversity policies in particular can and do strike at the heart of these established principles. They increasingly involve highly detailed and prescriptive government intervention in economic and community life. They entail the effective expropriation of property. They are often applied universally even where the problems they purport to address are confined to specific cases or regions. They have profound economic and social impacts. They are rarely amended in the light of experience.

This inquiry, therefore, is of great significance. It should not be the occasion for the mere repetition of environmental mantras. Hitherto, the environment has often been treated as an absolute good. We need to question this. And we need to reach a better balance in our responses to the demands of the human and natural environments. This submission is intended as a contribution to this balance.

Given the author's experience and geographical location, the submission is based on NSW law and practice but much is applicable nationally.

### **3. Impacts**

Assessments of the impacts of NVB should allow for the relative novelty of the legislation involved. In NSW, regional plans for conservation of native vegetation are only now being gazetted. Supervision regimes are not complete. The evaluation of specific impacts is therefore partly anticipation based on the existing regulation or drafts thereof. It is also partly based on the regimes that have already been applied to public land and to entities such as state forests and national parks.

Moreover, the NSW policy is in the process of radical amendment in the light of recommendations by the Wentworth Group. These propose the option of a much more detailed regime and are also considered below.

#### **3.1 *Direct Impacts***

The direct impacts of the regulation fall mainly on those responsible for managing the land on which the vegetation and species are present. Large areas are publicly owned land such as national parks and state forests. There are substantial costs of administering and operating these areas and this submission comments on them briefly below. The following sections are addressed mainly to the impacts on private landholders who manage a much larger area of all varieties of environment.

There appear to be three main impacts on landholders.

**First**, there is the intensity of the regulations.

The Wentworth Group refers to the "overwhelmingly complex structures that exist".

The sheer weight and diversity of NVB is indicated by the list in Appendix A. The complexity and volume of regulations generally is a continuing grievance in Australia. Few governments have taken the trouble to reduce and rationalise them. Most have used them as a convenient way to effect policy at the expense of the private sector.

NVB is applied to many thousands of large, medium and small rural businesses. The majority are ill equipped to understand and to comply with complex regulation. A glance at some of the lengthy schedules of protected plants and fauna included in the acts of the NSW parliament is sufficient to make the point. The species run into hundreds and are classified at different levels of sensitivity.

A farmer would need a team of biologists and botanists following every movement of humans, animals and machinery on his property to be sure that he was not damaging or destroying individual plants of some listed species. Protected species do not often live in small concentrated identifiable communities. They are diffused over the whole landscape. Furthermore, migratory species may appear only very intermittently for short periods implying a regular monitoring process.

An example of the uncertainties created would be the preservation of the habitat of a large owl. Its home range might be 80 to 100 hectares with indefinite boundaries. And this home range could shift. It is almost a full-time job monitoring the habits of a rare species of this kind and there are very many such. And the list of protected species grows and none are deleted.

These costs in time and money are added to all the other administrative costs imposed by government – animal husbandry, Safe Foods, health, safety, building approvals, pasture protection, use of chemicals and all the associated regimes of sampling, testing and audit for which government charges are levied.

Moreover the regulations are tightly specified and extremely restrictive. The NSW Native Vegetation Conservation Act defines clearing as “any cutting, destroying, lopping, damaging” of native vegetation. It could include the cutting (or eating) of a single blade of native grass. It also virtually defines any private native forestry activity, *ex ante*, as “clearing” and automatically subject to opprobrium.

The scientific team daily accompanying the farmer would find many causes to restrict significantly his movements and operations. There is scope for massive bureaucratic overkill. Appendix B contains some further examples.

Australia recently lost 3 million hectares of native vegetation in one bushfire season. It is interesting to observe that all of this would fall within the current statutory definition of “clearing”. We just “cleared” 20 per cent of NSW forests. In this context we need a more targeted approach to species protection than the current blanket regulations.

The struggle of government to comprehend and manage the complexity they have created is manifest in the farcically numerous and chronically conflicting supervisory committees established in legislation to deal with NVB. The Biological Diversity Advisory Committee and the Regional Vegetation Committees all have 15 members from diverse backgrounds. The Native Vegetation Advisory Council has 16 members. Numerous other committees and consultative bodies exist. The consultation processes are cumbersome and pay minimal attention to the farming population that has the direct task of managing the environment.

One result of this is the almost complete failure of the NSW government to secure agreement to Regional Vegetation Management Plans – only 2 out of 22 have been gazetted, after lengthy “consultation”. The consultation strategy seems to comprise constant repetition of a government draft in the hope that it will eventually convince the adversely affected landowners.

The impracticability of the regime is also reflected in the failure of enforcement. There have been 800 alleged breaches of the NSW SEP 46 (now repealed) but only 3 successful prosecutions. A nasty side effect of these laws is their propensity to create a class of morally superior and/or malicious informers. One half of the 800 allegations came from informers. As if this were not enough, the Native Vegetation Conservation Act and the Threatened Species Conservation Act invite anyone to bring proceedings in the Land and Environment Court to remedy a breach of the Act. Increasing the opportunities to divide the community through litigation is the last thing we need.

A concomitant of the complexity of the regulation is that consent procedures are time consuming and expensive.

Under the Threatened Species Conservation Act the applicant is obliged to pay the costs (including on-costs) of a National Parks assessment, whether the application is successful or not. Add to this the applicant’s own costs and the process is clearly unavailable to any but a very small minority of large, wealthy landholders. A glance at the required content of the species impact statement (Section 110) gives some idea of the likely costs.

Under the Native Vegetation Conservation Act, any “clearing” is subject to the development consent procedures. The clearing application process involves 30 or more steps, numerous consultations, opportunities for almost anyone to object and a mountain of paper. This puts such processes beyond the reach of most landowners. They all have a day job and are already grappling with many other regulations.

**Second**, the NVB are heavily duplicative. The various NSW acts of parliament overlap extensively. The Native Vegetation Conservation Act, the Threatened Species Conservation Act and the Water Management Act all contain NVB provisions, which are echoed in the Protection of the Environment Operations Act and the Plantations and Reafforestation Act.

Apart from this difficulty of comprehension there is the duplication of effort by different government agencies. The membership of internal government environmental policy committees is typically very numerous, as each department attempts to discharge the same or similar responsibilities.

Beyond the inefficiency of the process is the risk of double and triple jeopardy for offences committed and the potential penalties for non-compliance are severe.

Appendix A contains a list of the Acts but it may not be exhaustive.

**Third**, the NVB are extremely unstable. Government repeatedly changes the rules. This is not just the continual declaration of national parks at the expense of the hapless forest industry. It involves new restrictions on private land through regional plans; catchment plans prohibitions on removal of vegetation, land care activities etc.

One illustration of this instability is the declaration of plantation forest as protected vegetation. This is unfair as it deprives the owner of the fruits of an investment made in good faith. It also seems nonsensical. If an ecosystem can be newly created in this way then why the fuss about preserving small remnants? Why not designate the parks service to create substantial newly planted reserves instead?

A more dramatic example is the history of Regional Forest Agreements (RFA) in NSW on which whole communities depended for their future. RFA were established for a 20-year term with a review at 5-year intervals. Within the first five years, before the first review was due, the NSW government transferred so-called "icon" forest areas from State Forests to National Parks thus destabilising and demoralising the industry it had promised to support. It is difficult to conceive of a more blatant and heartless breach of faith by a government to an already struggling sector of the community.

Government is also in permanent inquiry mode with the inevitable outcome being proposals for more and more restrictive regulation. The Wentworth Group is an example.

### **3.2** *Restriction of Economic Activity and Increases in Costs*

Whatever regulations are imposed will not obviate the need for management of privately held land. NVB are a heavy cost in this process.

A case study based on direct experience is at Appendix C. This analyses the impacts for an individual but not untypical case. It illustrates the far-reaching effects on normal farming operations and attempts to put some figures on the costs to the individual landowner and to indicate some broader social costs. These costs are very considerable for any property and enormous when aggregated across the state or nation. They are largely ignored in the formulation of policy or implicitly judged to be of less value than the (generally unmeasured) environmental gains.

The ongoing costs to the landowner fall into several categories:

- The cost of self-education in the legislation, regulations, codes, consent processes, regional and catchment management plans etc.
- The opportunity cost of arising from loss of rights in existing private native forest.
- The risk attaching to new native forest plantations.
- The cost of identifying and assessing protected species of plants and animals and locating and protecting their habitat.
- The cost of identifying and measuring riparian zones, rocky outcrops, steep slopes etc.
- The opportunity cost of use in and around restricted areas/ecosystems.
- The cost of the extensive permitted third party intervention (informers, objectors, inspectors) and responses to them.

The costs will vary from property to property. Some properties would incur much higher costs than others. We have neighbours whose properties are virtually completely cleared and sown to exotic grasses. Their costs of compliance will be very low. Others have maintained extensive areas of native vegetation and will now be penalised for it. This is poor equity and a perverse risk/reward structure.

There are processes for consent to or licensing of activities but, as indicated above, these are costly.

Penalties for breaches of the regulations are severe.

### **3.3 Transfers and Loss of Wealth**

NVB causes loss of current and future income. The loss of expected income feeds into the potential sale price of the property and hence has an impact on the wealth of the landowner. It also reduces the potential value of the collateral for new investment. Moreover the continual changes of the regulations and their one-way bias renders the current land value an unstable minimum.

There is an argument that the landowner reaps environmental gains from regulations but this presupposes, either that he has been criminally short sighted or negligent in his land management or that he places a very high value on marginal and/or debateable improvements in the environment on his land. These seem likely to be a small minority of cases.

For NVB to have any real justification it must presuppose the creation and transfer of well being to the community at large. The measure of this is extremely vague and contentious.

Given the existence of very extensive national park and state forest areas in Australia, the accession of vast new private forest areas is not likely to add much to recreational opportunities. There is a very substantial dilution effect and private forest is generally much harder to access.

There may be psychic income for the community from the quarantining of native vegetation areas on private land. This is hard to measure and likely to decline quickly over time. It is rather like the increase in happiness after a lottery win. It has the added downward bias that it is locked away on private land, not permanently visible in a bank account. There is a period of euphoria followed by a return to normal.

This is confirmed by observation. The level of satisfaction among environmental activist groups does not appear to register any permanent increase with gains made. This may result from the nature of such groups which see their role as quarantining much larger areas of the continent than are currently in national parks. It is also true that their continued status and life is based on the identification of new acquisitions of land and new regulations. Meanwhile, there is no check on the adequacy of the total of existing reserved land.

A national accounting of the costs and benefits would be a very complex task. The private costs appear to be large and the public benefits are difficult to measure but appear smaller. They appear even smaller when viewed in the light of the environmental outcomes arising from the likely strategies that will be adopted by landowners. They may even be negative (see below).

### **3.4 *Impracticality and Inequity***

Two points can be made about the inevitable practical outcome of NVB:

- The result of the intensity, complexity and instability of NVB is that it can neither be fully administered nor complied with. This will soften its practical impact but implies random and inequitable enforcement and the shadow of non-compliance over many landowners.
- Its impact will be uneven across landowners and profoundly inequitable. It will generally be costliest to those who have historically been the most responsible. Some landowners have extensive private forest, some have none, some have many protected species some have few. The costs of this essentially social legislation will be disproportionate across the community and within the rural community.

## **4. Environmental Outcomes**

An important point needs to be made at the outset. Simple preservation or quarantining of areas of land does not ensure conservation outcomes of the kind that any of the participants in the debate prefer. Land that is left unmanaged or poorly managed will not remain in its pre-existing condition for any length of time. Nor will it generally revert to some stable, ideal environmental state. It will change in potentially unexpected and possibly unwanted ways as a result of its history, its physical characteristics and the ever--changing climatic conditions.

Given this reality, some of the basic principles used to guide environmental improvement are unhelpful. The preservation of biodiversity, the precautionary principle and the concepts of ecological sustainability and intergenerational equity are extremely vague. These principles are regularly trotted out in policy debate and are incorporated in preambles to legislation and policy documents. Even at the general level they are challengeable in principle and they have no more practical use at the farm level than a United Nations Declaration. Their principal effect is at the policy level, to give automatic priority to preservation and to stifle discussion of more flexible policies.

A further serious drawback is that the general principles do not incorporate the notions of sustainability of the human communities nor their economic viability. Where economic sustainability is mentioned it is often the last on the list.

At the level of the individual property, the principles are of little practical assistance though they are not necessarily incompatible with active farming. Each farm unit is under an imperative to be viable or be lost to the owner. This pressure will normally lead to sustainable farming practices and care for the land. It is a myth that the farming community is only restrained from damaging the land by enlightened environmental laws. The combined business, economic and environmental optimum does not result in the sacrifice of any of the three.

Nevertheless, the landowner must be the agent of the government for almost all the compliance with NVB. He will do virtually all the work on the ground. His attitude is vital. And yet environmental regulation offers him almost no incentive to comply. In fact, by depriving him of many possibilities to combine economic and environmental activity, it provides a clear incentive to focus on the former and neglect the latter. The regulations then become perverse.

The landowner will minimise the time and expense devoted to those parts of his property which are subject to interventionist regulation, "Green" surveillance and bureaucratic supervision. Some practical outcomes would be:

- Minimal effort expended on control of noxious weeds. The landowner will "patrol the boundaries" but not the "quarantined" areas.
- Government will not have the resources or inclination to do weed control on such a vast area of private land when it cannot even do this for national parks.
- Feral species such as dogs, cats, goats, pigs, horses etc will not be controlled within the areas.
- The maintenance of access routes and controlled clearing and burning to reduce the incidence of catastrophic fires will cease. Major hot fire incidence will increase in circumstances where the fuel build-up is uncontrolled.

- Because of lack of access, the scientific community and the public will not even know whether rare species or other significant environmental values exist in the private lands.
- Rare plant species will not be identified and protected by the one person who is best placed to do so, the landowner.
- Moreover, even where the private landowner knows of their existence, he will have every incentive to conceal it, given his diminished interest in and control over the land and the extra costs that flow from such a discovery.
- No-one considering forest plantations will plant native trees that could subsequently be expropriated by government.
- Government will not be able to derive revenue from entry fees to defray the cost of administration and management.
- Government resources will be diverted into the essentially negative activities of employing expensively qualified inspectors to count and examine tree stumps, hollows, candidate trees, slopes, stream beds, rock formations, etc.

At worst, the land could become a badly neglected vegetation area, which would be a home to feral animals and weeds, of no recreational value to the public or economic value to anyone. In fact it will be the reverse of the outcome for which the policy was put in place.

More generally, prescriptive legislation of this kind kills the spirit of voluntarism that supports activities such as bushfire control. Eventually few will turn out voluntarily at personal risk to confront a situation created by perverse policy.

The diminished rights of landowners may well be accompanied by increased formal responsibilities as governments seek to impose a duty of care on landowners through new conservation regulations. However these will be generally unenforceable over such large geographic areas. Moreover they will be ignored or poorly complied with. The farmer will have no incentive and some disincentive to perform them at his own cost on behalf of the community. The risk of detection will be small.

On past experience, the response to such bad, failed regulation will be more regulation.

## **5. Regional and Local Outcomes**

Our landscape is extremely diverse. Our native vegetation and fauna reflect and compound this diversity. Some regions exhibit severe environmental problems; others have few; some have little remnant vegetation others have a lot. Furthermore, the concept of distinctive regions has inherent flaws. The use of catchments as regions is widespread but in some cases administrative boundaries are used. In fact any classification will be imperfect, as no region is

uniform and all will incorporate distinctive localities that resemble parts of other regions.

One way to consider regional impacts is to look at a particular case such as the Manning River region. This has its own geographical characteristics:

- It rises from sea level into the Great Dividing Range
- 61 per cent of the region (409,000 hectares) is covered in native vegetation.
- 24.4 per cent (163,100 Hectares) is National Park or State Forest.
- 36 per cent of the region has slopes of greater than 18 per cent.

Each of the above fits with the other. The slope data suggests scenic value and land suited to forest rather than cultivation or grazing.

One might ask why, with one quarter of the region locked up in government parks and forests, there is a need for heavily prescriptive regulation elsewhere. One might add that the apparent stability of another 37 per cent of the region covered by native vegetation suggests that it is safely left to private conservation. This is not a region to which the term “remnant vegetation” would seem to apply.

But this region is subject to the same highly detailed and prescriptive rules that apply in areas with little native vegetation. These include:

- The usual restrictions on harvesting in old growth forest complemented by restrictions on “candidate” old growth forest – a broad and highly subjective category. (State Forests has had previously logged areas reclassified into both categories, suggesting no incompatibility between forestry and protection of the environment.)
- Restrictions on removal of any hollow bearing trees – this would include most mature eucalypts.
- Restrictions on removal of any alive, dead, fallen “habitat” trees – especially in riparian zones (20 metres either side of wet or dry stream beds). “Habitat” is a place “occupied or occasionally occupied” by protected species so the landowner has to check each tree or vegetation area regularly before making any application to government to disturb it.
- 21 categories of High Conservation Value. Lack of data led to HCV vegetation being modelled rather than surveyed. Very wide assumptions were used to delineate habitat. Aggregation of these areas in the Manning seems to cover much of the region, rendering the areas of relative freedom of action inconsequential.
- Extremely detailed consent processes for clearing in the non-special zones.
- Even in the limited categories where consent for clearing is not required, clearing must be “in accordance with the Regional Vegetation Management Plan” – which looks like Catch 22.

Without labouring the point, this all seems very heavy handed for a region with these characteristics. A lighter regime that concentrated on substantial unapproved clearing would be much less costly to government and governed. It would be much more valuable environmentally because it might work.

## **6. In the Longer Term**

The environment is subject to continuous slow change. There are medium and long-term climatic shifts, which alter the ecology profoundly. The cycles of fire can have long-term effects. It will take many decades to recover the billions of plants and animals lost in the last bush fire season and the ensuing pattern will be very different from what preceded it.

Most of the longer-term changes are unpredictable and hence unknowable. Too much of the regulation assumes a stable state optimum environment. It attempts to preserve this illusory state.

S 140 of the NSW Threatened Species Conservation Act requires that the Biological Diversity Strategy is to contain proposals for:

- “ensuring the survival and evolutionary development in nature of all species, populations and communities”

This is patently unrealistic. It implies a degree of knowledge of the environment and its future evolution beyond the wildest dreams of mad scientists and a degree of control beyond the dreams of totalitarian dictators. It provides for a stable state, centrally planned environment.

It also embodies an unhealthy assumption of environmental purity known only to a select elite that has the uniquely correct beliefs and the right to ignore the rights of others. Such beliefs are often not supported on a systematic factual base and are not universally held.

The statement is also enviro-centric (though not necessarily enviro-positive). Human species, populations and communities are presumably not embraced in the definition even though humans are to bring about the objectives. The subtext appears to be enforced withdrawal of human occupation and activity from large areas of the land

Given the pervasive presence and continuing impact of human populations it would be better to conceive environment policies that incorporated means of flexible, positive interaction rather than assuming a state of permanent hostility between the human and the natural environment.

## **7. The Wentworth Group Proposals**

The aim of the proposals by the Wentworth Group of scientist is to implement "a strict but workable environmental gain mechanism".

The principal components are to ban broad scale clearing, make any other clearing subject to permission to and revegetate in some areas. Regrowth with high conservation or catchment health values would be protected. The proposals for riparian zones envisage extensive protected areas.

Water catchments would be the basic planning unit for all natural resource management. This is similar to one of the planning systems now being tried. At the disaggregated level there would be property management plans. These would have to be consistent with vegetation requirements needed to satisfy the catchment care principles for each catchment.

The Wentworth Group recognises that the existing approaches are administratively unworkable and are failing to secure the expected environmental improvements. They recommend drastic institutional reform to scale back the proliferating consultative and administrative bodies. They recognise the current perverse incentives to the private landowner. They state that the community must pay for the environmental improvements it demands.

At best the Wentworth Group proposals could streamline the administrative processes and focus the environmental objectives for native vegetation conservation. They could also help remove the distortions that encourage landowners not to care for the environment and the government, which "calls the tune", would "pay the piper". This would all be very valuable.

There are two significant drawbacks to the proposals.

The terminology remains vague. Generalisations such as "high conservation value", "overcleared landscapes" and "catchment health" are open to wide interpretation and do not form the basis for even and equitable dealing with landowners. They give too great a discretion to officials to apply their personal preferences or to yield to special interest pressures when considering applications from landowners.

More important, the Wentworth Group picks up the idea of individual property management plans (PMPs). This appears to be a development of the Property Agreements under the Native Vegetation Conservation Act and Property Management Plans under the Threatened Species Conservation Act. The difference is that the PMPs would allow the landowner complete freedom within the approved PMP thus dealing with the two Acts in one plan. It also seems to be envisaged that the approval of PMPs would be decentralised to the regions where they are situated. This contrasts with the existing provisions that still

involve development consent procedures and are controlled by the Director General of the Department of Land and Water Conservation.

At first blush the PMP offers the landowner a way out of the massively complex and oppressive NVB legislation. It allows a single agreement lasting for ten years. Theoretically the landowner would know his obligations and be able to get on with making a living from the land.

Unfortunately, history is against such a flexible approach. All experience tells us that the PMP will simply embody all the existing regulation in a highly detailed approval at the individual property level, conferring no greater freedom on the landowner than there is now. It could simply extend detailed bureaucratic intervention to individual landowners. There would be one on one formulation of individual property plans, imposition of detailed covenants and regular audits, paid for by the landowner.

An existing prototype is the process of tactical plans in State Forests (SF). SF consumes an enormous annual planning budget to comply with the environmental requirements placed on it. It creates 100 page planning documents to deal with specific areas. In one plan there were 1000 conditions applied to a single licence. This is an insane focus on process at the expense of outcome. Of course it was not comprehensible let alone practicable on the ground.

Moreover, the Government's record for keeping promises in this area is so compromised that a landowner would be unwise to rely on any approval for a ten-year period. If promises cannot be kept for the first five years of a regional forest agreement what hope is there for a ten-year individual property agreement.

At the worst this proposal could be seen as the familiar slippage into ever more interventionist and prescriptive regimes as previous detailed regulation fails to come up with the goods. This is a classic totalitarian pattern of failure piled on failure, with accumulating loss of freedom and flexibility on the way. The end result could be a massively inefficient, state run landscape. It is a political and economic outcome still atavistically beloved by some but totally discredited by history. On the way the landowner surrenders valuable property rights under threat of an alternative regime that would appropriate them anyway.

A better approach would be to enlist the private sector landowners in cooperative programs to conserve and improve the environment.

Finally, we should beware of prescriptions by any one group of specialists. The Wentworth Group are no more likely to have the complete answer than any other qualified group. There is a tendency to see scientists as having a more complete view, particularly in environmental matters. The scientific approach can provide some of the factual basis for policy, particularly at the micro level. It has less to

offer on the questions of practical management of the environment at the farm and regional level than the advice of the farmer and forester. Scientists and bureaucrats have no experience in managing the land or in handling the risks that are involved. Much more practical input to policy is required.

## **8. Management of National Parks and State Forests**

National Parks were once means of preserving areas of outstanding scenic beauty. They also tended to be in areas of relatively low economic value. More recently they have been seen as a means of quarantining areas with special environmental characteristics other than just visual beauty. The aim has been to preserve these characteristics – a sort of steady state theory of the environment.

As the environmental vote replaced the rural vote as the swing factor, so parks replaced dams as the preferred election winner. Governments declared new park areas at regular intervals to protect desert, mountain, forest, grassland, scrub, reef, shoreline and other unique features. Their mode of park operation is largely passive with the exception of limited visitor accommodation and control of exotic species.

The parks have been the prototypes for NVB and contain some lessons for its extension onto private land.

In particular they demonstrate that the environment is not steady state. Forest areas expand and contract naturally, reefs grow and die and species become extinct. There is evidence that the landscape was subject to continual modification in the pre-colonial period. For example, large areas of the Manning basin were often burnt. Large marsupials disappeared. Attempts to sustain every species in situ will not only be unsuccessful but are unnatural.

If our concept of what a park is and should be is flawed, this has implications for those elements of NVB that turn private land into the equivalent of national parkland.

Some of the results of inadequate management could be seen in the recent catastrophic fires, which destroyed 3 million hectares of native vegetation last summer along with thousands of unique habitats, millions of fauna (including some extremely rare), destroyed hundreds of millions of dollars of private and public property and released millions of tonnes of greenhouse gases into the atmosphere. There was also a multi-million dollar cost of fire fighting.

This was failure on a scale that would normally cause governments to fall.

Park and forest policies overseas may offer some better approaches. The UK allows mixed use of parks. Selective grazing and forestry might well have reduced the impact of recent fires without serious loss of biodiversity. The US

government is legislating for more extensive controlled burning to reduce intense blazes, which destroyed 2.8 million hectares of forest last northern summer.

State forest operations are in retreat. Their areas of operation have been severely reduced to provide for new parks. They are subject to increasing restrictions in these designated areas. They are forced into short-term extraction policies in the remaining forest at the expense of long-term sustainability. Much of the Australian forest domain would not exist without the long history of silvicultural practice in reserved forest operations. The suitability of those forests for nomination as parks, even to the point where previously logged areas are redesignated as “old growth”, indicates the both the generally responsible conduct of those operations and the enormous resilience of the Australian forests.

The absurdity of the restrictive approach to forest management is graphically illustrated by comparing the ten thousand hectares logged annually in Australia and the three million hectares destroyed in the last round of fires, including 20 per cent of the reserved forest areas of NSW, 40 per cent in Victoria and 70 per cent in the ACT. Early estimates indicate that the fires released the equivalent of 25 per cent of total annual Australian greenhouse emissions. Sensible sustained use of our forest domain could reduce these losses and emissions and derive some economic and forest health benefits.

## **9. Policy Formulation**

The policies that generate NVB are formulated with a unique mixture of emotion, scientific fact and practical land management. Too often the first dominates, the second is inadequate and the third is neglected.

### **9.1 *Bias in Policy Formulation***

There is an inherent bias in formulation of new regulation.

The structures and processes for dealing with NVB are a response to pressures mainly from numerous non-government organizations (NGOs). Government normally manages the processes. The demands of the NGOs are generally for sweeping prohibitions on human activities of specified kinds. Their broad objective is preservation rather than conservation.

The features of the process are:

- Specific demands in extreme language by concentrated, well organised, sometimes government funded groups for concessions which they think will benefit them and will cost them nothing.
- Emotive and deceptive language to justify regulation – see Appendix D for some examples of this Newspeak.

- A diffuse, generally poorly organised farming sector responding to demands that have uncertain effects and costs.
- A government that is seeking a resolution of the conflict this creates, is aware that there is generalised public sympathy for the environment and very superficial public knowledge of the costs and benefits.
- The readily available regulatory option, exercisable at easily concealed/deferred cost.

There are many personal and institutional biases involved here but the fact is that the process is biased in favour of restriction of private landowners operations.

Once created, the edifice of regulation is so large and repetitive in different instruments that the landowner has very little hope of comprehending it and none of reforming it.

It should be added that NVB is only part of the straitjacket. There are regulations covering treatment of riparian zones, slopes of more than 18 degrees, rocky outcrops, aboriginal rights, heritage sites and other restrictions on use of land.

Nor are the regulations the end of the story. Governments also routinely exhort landowners to add voluntary obligations to their statutory duties. Such efforts range from the huge voluntary annual effort containing the damage of bushfires to the generalised pleas to landowners to do more to protect the environment.

## **9.2 *The Failure of Policy***

We have suggested above that NVB fails substantially in concept and practice. The inference is that the underlying policies are flawed.

A major weakness is that NVB tries to do too much – to embrace too many species in too many environments. It is an attempt to apply recognisably flawed national park philosophies to the whole state.

Worse is that NVB policy focuses mainly on processes rather than outcomes. The results are:

- Over detailed regulation and costly compliance.
- The stifling of innovative means to achieve desired outcomes.
- Rigid, overplanned outcomes.

This flaw is compounded by the creation of a regime that relies on prohibitions, penalties and expropriation applied to the very people who are vital to the success of environmental conservation.

## **10. Where To From Here?**

It is difficult to draw together so many strands of regulation and make sensible recommendations for change. However it is worth remembering that the regulations, unlike the environment, are entirely man-made and can be radically reformed.

There is a case here for the government to sort out some fewer priorities and express them much more succinctly and clearly in legislation. At the same time there is a case to streamline the policy processes so that they do not become bogged down in factional fighting and give proper weight to the broader public interest.

Government also needs to recognise the value of conservation and do more to fund it.

Government should cease trying to apply the standards for national parks to private land. The NBV can be characterised as a means of getting more national park on the cheap. National parks do not have to make an economic return or bear the capital cost of land. The standards a government might wish to set in parks are highly prescriptive but are not adhered to in detail nor is there any penalty for non-compliance. Parks are not an unchallengeable success in their own terms. Extending the model to private land is not justified.

We also need to put away the idea that anyone, park manager, farmer, forester can micro-manage the environment to the degree envisaged by some scientists and much of the environmental movement. This is not only impossible to do but impossible to administer. We are not in an area of a simple prohibition of one of the seven deadly sins. It is hard enough to administer the law for that purpose. We are engaged in a foolish and doomed attempt to control the deliberate or accidental damage to any one of billions of individual plants or animals.

There needs to be flexibility in the regulations so that the absolute, minutely detailed proscriptions aimed at individual plants and animals are replaced by sensible rules designed to tackle the more serious environmental problems and protect the significant areas of value.

These could take the form of voluntary conservation agreements, which would be like a lighter handed version of the existing native vegetation Property Agreements but covering all aspects of NVB. It is important that they embody financial incentives for the outcomes desired by the community. This both ensures the desired outcome and places the cost on the community. The latter is not only equitable but would force the government to consider the cost of its actions and trade them off against all its other priorities.

This could be accompanied by the further development of markets in environmental goods. We already have a market operating for greenhouse credits and the market in water rights is expanding. There is no reason why

private landholders should not sell environmental goods directly to the government or other interested parties. Green NGOs could then raise funds to buy the outcomes they demand rather than forcing private landowners to pay for them through confiscatory legislation.

In all this we should consider careful **use** of the environment rather than an ever-expanding list of prohibitions. Encouraging positive behaviour is the better solution in our society than savage punishment for perceived and often-trivial misbehaviour.

As we go forward, we need a new philosophy that embodies both the environmental aspiration and recognition of the human element that inhabits and manages the environment.

## 11. Conclusion

The main impression derived from any review of government regulation of native vegetation and biodiversity is confusion. The confusion in the regulations stems from confusion in the state of knowledge leading to confusion in policy objectives. The debate is often highly subjective and revolves around a myriad of belief systems about the proper level of conservation.

The overlay of bureaucratic rivalry and nine legislatures leads to a state approaching anarchy and chaos.

Meanwhile, the actual managers of the land must attempt to make sense of the regulations, deal with the regulatory enthusiasts and make a living out of supplying produce to their fellow citizens from their diminished domain. We have not seen a single official responsible for environmental management on our property. Nor are we convinced that they would be of much help.

There is virtually a complete disjunction between the day-to-day managers of the land and those who are attempting to micro manage it from afar. There is also a disjunction between the broad aims of various conservation activists and the aims of those on the land.

This is grossly inefficient and unfair. Laws are meant to be applied in a form that makes compliance feasible. If they do not then the citizen is rightly entitled to declare them unjust.

We need to reorient our thinking away from prohibitions on activity towards a careful **use** of the environment.

Finally, we should resist the expropriation of property rights that form part of the structure of our society established over centuries at great cost and which are at the heart of the functioning of our economy and society. Where one section of

our society is required to surrender valuable rights to please another then the cost of this should be borne by the community as a whole.

## **12. Recommendations**

The terms of reference ask for recommendations that minimise the adverse impacts while achieving the desired environmental outcomes. These recommendations are directed to governments, State and Commonwealth, which have created the current mess and are the principal means of clearing it up.

We recommend as follows:

- 1)** Review the principles (precautionary, inter-generational equity) to give them practical scope and greater recognition of the human dimension to the environment.
- 2)** Introduce careful use of the environment as a guiding principle.
- 3)** Simplify regulation by:
  - merging the multifarious environmental Acts,
  - concentrating responsibility for the environment in no more than two agencies in each government,
  - focussing on environmental outcomes rather than micromanagement through processes,
  - producing a genuine definition of clearing that does not apply on a plant by plant basis,
  - reducing the categories of prohibition, and
  - applying a more reasonable penalty regime.
- 4)** Enlist the private sector in conservation and regeneration through:
  - voluntary arrangements that encourage good environmental practice on private land,
  - incentives to achieve this,
  - formation of markets in environmental goods where the public, through government and NGOs, would purchase environmental improvement,
  - more liberal exemptions for private native forestry,
  - simplified, inexpensive, decentralised processes for consent for sustainable private forestry, and
  - a more pragmatic set of exemptions to permit routine farming activity.
- 5)** Focus on regions with serious problems and regulation of large scale clearing, backed by aerial surveillance.
- 6)** Allow mixed use of national parks to reduce the catastrophic loss of biodiversity brought about by major fires.

7) Give greater weight in consultative processes to those who have a genuine stake and experience in managing the land and will suffer the direct costs of regulation.

**Jim Hoggett**

**Senior Fellow**

**Institute of Public Affairs**

**July 2003**

## **REFERENCES**

1. NSW Native Vegetation Conservation Act 1997.
2. NSW Threatened Species Conservation Act 1995 – Amendment Act 2002.
3. Guidelines for clearing vegetation under the NSW NVCA- June 1999.
4. NSW draft best operating standards for private native forestry – November 2000.
5. Wentworth Group of Concerned Scientists – A New Model for Landscape Conservation in NSW – Report to Premier Carr 3 February 2003.
6. NSW Protection of the Environment Operations act 1997.
7. NSW Water Management Act 2002.
8. Bush Telegraph – State Forests of NSW – Winter Edition 2003.
9. Draft Manning Regional Vegetation Management Plan – July 2002.
10. Lower North Coast Catchment Blueprint – Department of Land and Water Conservation – February 2003.

## **APPENDIX A**

### **REGULATION**

#### **Commonwealth**

*Environmental Protection and Biodiversity Conservation Act 1999* (eg World Heritage Areas – Barrington Tops)

#### **State (NSW)**

1. *Threatened Species Conservation Act 1995* 138+62 pages (Endangered/threatened species, populations, and ecological communities, vulnerable species and ecological communities, keystone species, indicator species, key threatening processes, critical habitats, threat abatement plans, indefinite stop work orders, joint management agreements, conservation agreements, licence applications, species impact statements, recovery plans, property management plans, Biological Diversity Strategy, Scientific Committee – 10 members, Biological Diversity Advisory Committee – 15 members).
2. *Protection of the Environment Operations Act 1997*
3. *Protection of the Environment Administration Act 1991*.
4. *Waste Avoidance and Resource Recovery act 2001*
5. *Environmental Planning and Assessment Act 1979* (State Environmental Planning Policies, eg No 44 Koala Habitat Protection, REPs, LEPs).
6. *Native Vegetation Conservation Act 1997* 60 pages (protect native veg, prevent clearing, RVMPs, property agreements, stop work orders, powers of forced entry, Regional Vegetation Committees – 15 members, Native Vegetation Advisory Council – 16 members, native Vegetation Management Fund, Native Vegetation Codes of Practice)
7. *Plantations and Reafforestation Act 1999* (Approvals for plantations, protection of environment).
8. *Rural Fires Act 1997* (bush fire risk management plans).
9. *Catchment Management Act 1989* – (Lower North Coast Catchment Blueprint – Regionally Significant Vegetation targets – non-regulatory strategies).
10. *National Parks and Wildlife Act 1974* (Conservation Agreements, protection orders).
11. *Wilderness Act 1987*
12. *Water Management Act 2000*
13. *Ozone Protection Act 1989*
14. *Fish Management Act 1994* (fish habitat, threatened species, marine vegetation).
15. *Rivers and Foreshores Improvement Act 1948*
16. *Murray- Darling Basin Act 1992*
17. *Landcare*
18. *Rural Lands Protection Boards – Weeds, stocking rates.*

## **Regional**

1. *Manning Regional Vegetation Management Plan* 60 pages (advisory notes, native veg, raptors, bats, gliders, hollows, old growth, corridors, koalas, TS registers, zones) There will be 20 or more of these.
2. *Lower North Coast Catchment Blueprint 2003* 44 pages (10 year plan, catchment management boards, catchments, offshore areas).
3. *Murray-Darling Basin Agreement.*

#### 4. *Rural Lands Protection Board*

##### **Local (Gloucester Shire)**

Local Environment Plan  
Development Application Conditions  
Tree Preservation Orders

##### **NSW Regulatory Authorities**

Department of Land and Water Conservation, Environmental Protection Agency, National Parks and Wildlife Service, State Forests, Bushfire Brigade, Local Authorities, Police, Department of Urban and Regional Planning, Department of Agriculture, Land and Environment Court.

## **APPENDIX B**

### **Restrictiveness of NVB**

- Prohibition on crossing a designated streambed, which may be a minor stream and dry 99 per cent of the year. Such crossings are numerous in hill country.
- A “tree” includes a sapling or a shrub or scrub.
- A “river” includes any stream of water whether perennial or intermittent.
- A “lake” is a lagoon, wetland or other body of still water, whether permanent or temporary (how big does a puddle have to be to qualify?)
- “Land” includes the sea.
- Removal of a log from a river block after flooding. Landowners would need to seek permission for every log or branch that floated down a stream against a river block.
- Removal of dangerous trees.
- Removal of a fallen paddock tree. It will almost certainly be habitat to some possibly protected fauna. If not, it will be intermittent or potential habitat.
- Habitat is an area occupied or periodically or occasionally occupied by a species.
- In legislation we have endangered animals (65), endangered plants (272), endangered populations (16), endangered ecological communities (37), species presumed extinct (78), vulnerable animals (163), vulnerable plants (212), key threatening processes (9) and critical habitat – 852 items.

## **APPENDIX C**

### **A CASE STUDY- BERLLANBER**

Our property is of just over 200 hectares in the Manning River catchment close to Gloucester. It is in the foothills of the Great Dividing Range and rises some 300 metres from the Bowman River to a ridge. It is in a relatively high rainfall area (1200 mm pa) with medium reliability. The lower slopes of the property are grassland including 10 hectares of river flat. About one half of the total area, on the upper slopes is open woodland, forest and rainforest. This half has been logged but has regenerated to diverse forest.

The area is traditionally beef and dairy cattle country. The property is now too small to support a viable beef cattle operation and no longer has the characteristics for a modern dairy cattle farm. The future of such holdings can be through consolidation (difficult, given potential returns/property prices), weekenders (of doubtful value for this property size) or some more diverse higher value-added activity.

In this case the choice is a blend of the original beef cattle, goat cheese production and native and plantation forestry. We estimate that this combination could support a family at a reasonable but not lavish standard of living. It involves a significant initial investment in animals, production facilities (buildings, plant, machinery) and trees.

Our property is not untypical of the Australian east coast farm sector but is only one of an almost infinite number of variants of very large, large, medium and small properties in NSW. Some have always been clear of forest, some have been completely cleared since colonisation, some are more or less partially cleared, some have extensive regrowth of varying ages, some have plantation forest and all will have some native vegetation, unique drainage characteristics and native fauna. The native vegetation would number hundreds of thousands of trees millions of plants and hundreds of species of plants on a property of our size.

The timbered area of our property has been logged in the past, within the last 10 years and previously several times. The logging has been selective as there are no uniform growth areas that would indicate clear felling. (Some areas nearby were inappropriately cleared but the owners desisted and these have also completely regenerated.) There are also numerous mature and old trees throughout the timbered area. We have rainforest but no old growth or candidate old growth but the woodland, if quarantined, will become candidate old growth in time.

There are many areas of regrowth, which is extremely vigorous over much of the grassland section of the property. We do not have data on the net revenue derived from timber. Estimates below are on the basis of current timber yields and prices and steadily reducing supplies of quality hardwood.

By outright prohibition or an impossibly expensive licensing process, the various native vegetation regulations will effectively quarantine the timbered sections of the property, most of the individual trees on the grassland and cropped areas and a swathe along the rivers and certain streams. The economic/human use of these areas is therefore very restricted.

The effect is something like a partial expropriation of 115 hectares by the government. The diminished rights will result in a diminished interest in and sense of responsibility for the land involved. This will occur even where the land is not now intensively used

### **The Costs**

To assess the impact of restrictions on the property a number of assumptions have been made.

The first is that we would not be subject to the extreme version of the Wentworth Group proposals enforcing a property plan. However, the proposed RVMP for the Manning region is already very restrictive. On this property there are, conservatively, 40,000 substantial trees. The proposed take, for on-farm use only, is 30 trees per year in the Manning Regional Vegetation Management Plan. This is less than 10 per cent of the rate of extraction that could be sustained with good silvicultural practice. It indicates the extreme restrictiveness of the regulations.

The second is that the property would fall into two zones. The first zone would be the wooded area, which would be effectively quarantined apart from minimal extraction for farm uses. There may be opportunities for native forestry but it is clear that the application processes will be very expensive very slow and the permission will be both restricted and accompanied by onerous and costly conditions. We have assumed that the permitted use will be only the minimal concession for on farm use.

The second zone would be the pasture where the main impact would be restrictions on our operations to comply with NVB.

Of the timbered area of 115 hectares some fifty would have slopes precluding forestry. Fifty-five hectares is of moderate to high productivity forest, growing high quality species. It has a full forest cover despite frequent past logging. It has high species and structural diversity promoted by past logging practices. This is consistent with much of the region and gives the lie to the frequent depictions of forestry activities having a permanent effect on the forest environment. With active silviculture the area could be sustainably managed on a 60-year cycle producing a conservatively estimated yield of between 2 to 5 cubic metres of timber per hectare per year.

This implies an annual yield of 110 to 275 cubic metres of timber per year in perpetuity. The value to the property could vary from year to year depending upon timber prices and extraction costs. The latter would not be significant as the extraction infrastructure is already in place. The return would be unlikely to fall below \$30 per cubic metre and could be as high as \$120. This implies an annual net return of between \$3300 and \$33,000. A sound estimate would be to the upper end of the range allowing for the inevitable relative increase in high quality hardwood prices ensuing from our shortsighted forestry policies. An estimate of \$20,000 would not be unreasonable.

Given the structure of our business it would also be optimal to plant more native species on the more marginal pasture. This is not something that any sane person would do now given the bad faith shown by the government. About 40 hectares of additional area could be involved. Allowing for the opportunity cost there could be a net return of \$8000 per annum.

To this we would need to add the costs of maintenance of the newly created "park". It is unlikely that this could be done responsibly in less than 2 weeks per annum to cover:

- the cost of acquiring detailed knowledge of the regulations,
- regular inspection of the protected areas,
- control of noxious weeds and feral animals (dogs, pigs, goats, rabbits),
- identification and protection of protected species and
- the maintenance of fencing and some access for the purposes of government inspection.

A conservative net cost based on a park ranger's salary and oncosts would not be less than \$4000 per annum. This is the equivalent of a landowner's labour contribution of environmental goods to the community.

As in much of Australia, the forested areas of the Manning are subject to regular fire. The incidence of fire is much higher in the park areas than in the managed forests as the recent catastrophic bushfire season showed. Managed forest also has a significantly more beneficial greenhouse effect than park as timber is extracted and fixed in construction, furniture etc whereas park eventually burns. Smaller controlled burns do not affect standing timber nor generate the same level of greenhouse gases. Woody undergrowth is more likely to be retained and recycled into the soil.

The net cost/value of this is difficult to estimate but even for our small area it could be up to 500 tonnes per annum. To this should be added the wholesale destruction of fauna, which occurs in any intensive blaze. The maintenance of biodiversity is generally accorded a very high value by environmentalists. Presumably the loss of biodiversity generates a comparable loss. Indeed, loss of biodiversity is often characterised as having an almost infinite cost.

Restrictions on activity in the second zone, the pasture area, would include reduced grazing areas where native vegetation (including native grasses) is to be protected, construction and maintenance of several new stream crossings to protect riparian zones, substantial time losses from discovery, inspection and protection of protected flora and fauna, additional operational costs to avoid protected areas (coppices, logs and other habitat). We would estimate these costs to be not less than \$5000 per annum.

### **The Net Result**

A broad estimate of the all up cost of the regulations would be in the region of \$35,000 per annum plus the adverse environmental effects of additional greenhouse gases and loss of plant and animal species.

The loss of wealth is hard to measure, as it will not simply reflect the capitalised value of the expected changes in costs and revenue. That will be one factor. The effective expropriation of one half of the property and the associated new responsibilities as unpaid park manager will affect the potential sale price and its value as collateral as the parcel becomes less viable. The fact is that future uses of land are often unknowable. The existence of a larger more diverse area comprises a potential that is realisable in many ways.

Clearly the NVB detract significantly from the value of the property as an ongoing enterprise and a saleable asset.

## **APPENDIX D**

### **Newspeak**

RVMPs provide “a period of resource security to.....farmers” – this means a period of resource immobility will be imposed on farmers.

DLWC Pamphlet September 2002

“A more effective approach is to.. ban the broad scale clearing of remnant native vegetation...” this means except for the massive periodic hot bushfires which “cleared” 40 per cent of the reserved forest area in Victoria in 2003.

“...catchment care principle... maintaining fully functioning and productive landscapes.. “ this does not mean European style rural landscapes, it means government planned ossified rural structure.

Wentworth Group 2003

