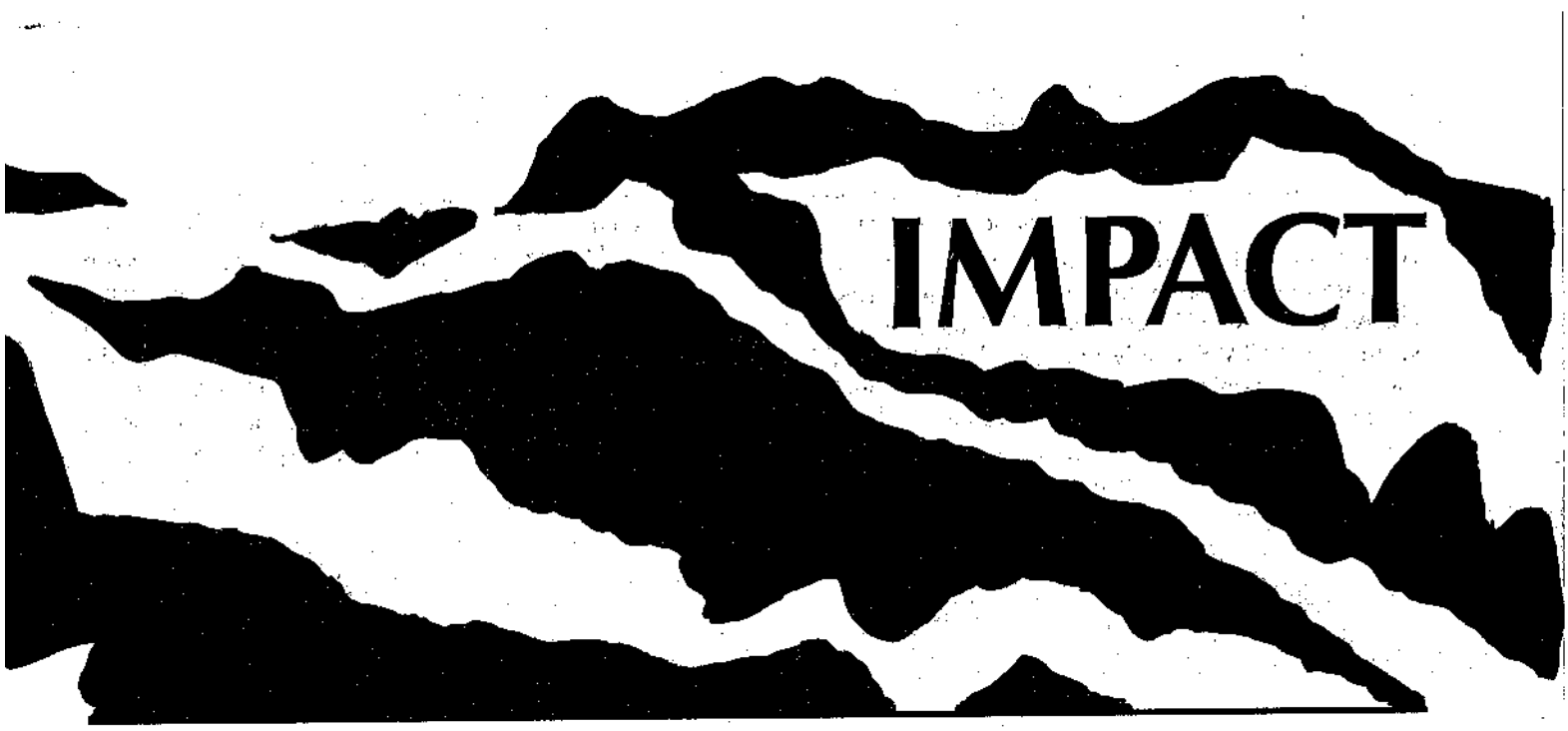

A QUARTERLY NEWSLETTER ON ENVIRONMENTAL LAW AUGUST/SEPTEMBER 1986

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1985 Qld. Kangaroo Program Not Approved

The Administrative Appeals Tribunal has recently set aside the decision of the Minister for Arts, Heritage and the Environment to approve Queensland's 1985 Kangaroo Management Program. **(Fund for Animals Ltd. v Minister of State for Arts, Heritage and Environment & Ors,** N 85/229, 6 June 1986, Gallop J. Balmford and Williams). Fund for Animals were represented by Mr. P. Prineas, an EDO Board member.

The **Wildlife Protection (Regulation of Exports and Imports) Act** 1982 (Cth.)) states that the Minister can only issue export permits for kangaroo skins if he is satisfied that the kangaroos were killed pursuant to an approved management plan. Further, the Minister cannot approve a management program under s.10 of the Act unless he is satisfied of certain matters set out in cl.5 of the Regulations. These matters include that —

a) there is sufficient information concerning the biology of each species subject to the management program and the role of that species in the ecosystems in which it occurs to enable the Director of the ANPWS to evaluate a management program for that species;

b) discussions have been held by the Director with the Queensland NPWS;

c) the management program contains measures to ensure that the taking in the wild under the program of any specimen —

   i) will not be detrimental to the survival of the species or sub-species to which that specimen belongs; and

   ii) will be carried out at minimal risk to the continuing role of the species or sub-species in a manner that is not likely to cause irreversible changes to, or long term deleterious effects on, the species, sub-species or its habitat; and

c) the management program provides for adequate periodic monitoring and assessment of the effects of the taking of specimens under the program.

The Tribunal considered the 1985 Program to be deficient in a number of respects. First, the Program combined two species of grey Kangaroos, the Eastern and Western Grey Kangaroos, in one quota. Hence, the Tribunal considered there was a breach of cl.5(1) (c) in that the program did not contain measures to ensure that the taking in the wild under the program of any specimen of Western Grey Kangaroo will not be detrimental to the survival of that species or be carried out at minimal risk to the continual role of that species in the ecosystem.

Second, the Program did not contain measures to ensure that the taking in the wild under the Program of any Whiptail Wallaby specimen will not be detrimental to the survival of the species and hence breached cl.5(1) (c).

Third, the Program did not provide for adequate periodic monitoring and assessment of the effects of taking Whiptail Wallabies as required by cl.5(1) (d).

In addition to these defects, the Tribunal held that the 1985 Queensland program did not fall within any of the categories contemplated in the Act. Since the Program was not considered by the Minister until October 1985, it could not be said to be a program which had been carried out or was to be carried out. The only relevant category was that it was a program being carried out.

However, the evidence presented to the Tribunal revealed that although the Program stated that the total quota was to be 1,080,000 kangaroos and wallabies, in fact at least 1,400,000 animals had been killed. Furthermore, individual species quotas had been ignored with the result that unused tags for one species were used for an over-kill of another species. For reasons such as these, the Tribunal

held that the program submitted to the Minister was not the program which in fact was being carried out in Queensland at that date.

The Tribunal therefore set aside the Minister's decision to approve the program as being beyond his power.

A disturbing fact which was revealed by the Tribunal was the misapprehension by the ANPWS of the purposes of the Act and ANPWS's responsibilities under the Act. It seems that ANPWS simply regarded the Act as nothing more than a codification of existing practices rather than a new direction to protect and conserve wildlife. The Tribunal was at pains to dispel this misconception and emphasize that the Act's provisions must be closely considered in future.

It is too early to say whether this decision of the Tribunal will result in an improvement in management programs in the future. Certainly, there does not seem to be any change in the 1986 programs nor is there any manifest evidence that the Minister, the ANPWS or State Wildlife authorities are taking any steps to change the situation. It seems that individuals and wildlife groups will still need to keep a constant watch on the kangaroo programs.

RESIDENTS' STANDING IN COURT UPHELD

The Land and Environment Court has upheld the right of objectors to designated development to bring proceedings pursuant to s.123 of the **Environmental Planning and Assessment Act,** in addition to or in lieu of their right of appeal under s.98 of that Act (**Broomham & Owen** v **Tallaganda Shire Council & Mehilo Pty. Ltd.,** L & E 40172 of 1985, 20 June 1986, Perrignon J.)

The case concerned the validity of a development consent given by Tallaganda Shire Council to a mining company, Mehilo Pty. Ltd., to carry out open-cut gold mining near Braidwood in southern N.S.W. The Environmental Defenders Office acts for the applicants.

When the matter came on for hearing, the mining company objected to the applicants' standing to bring the proceedings.

The applicants had objected to the proposed development but did not appeal pursuant to s.98(1) of the **Environmental Planning and Assessment Act** against the granting of consent. Instead, the applicants chose to challenge the validity of the Council's consent alleging that notification had not been given in accordance with the Act.

Perrignon J held that the existence of a remedy granted by s.98 did not deprive the applicants of their right under s.123 of the Act to bring proceedings for a declaration that the failure to comply with s.84(1)(c) avoids the Council's consent and for consequential orders. Accordingly, Perrignon J held that the applicants had standing under s.123 to bring the proceedings.

The substantive question as to whether the consent is valid is still to be argued.

LEGAL BRIEFS

Forthcoming Function and Seminar

The EDO will be holding a seminar on aspects of environmental law on Friday 17 October 1986, 5.30 to 9pm at the Auditorium of St. Andrews House near the Town Hall in Sydney. This will be a special function to thank the Friends of the EDO for their past support. Drinks and sandwiches will be available from 5.30 to 6.30 pm. Admission is free for Friends but $10.00 for other persons. A special invitation will be sent in the near future. Please come along and bring others who may be interested.

Draft Wilderness Act

The Report of the Wilderness Working Group (May 1986) is now on public exhibition. The Report summarizes the need to protect the last remnants of wilderness in New South Wales as well as the remaining wild and scenic rivers. It proposes that a Wilderness and Wild Rivers Management Act be enacted to achieve the necessary protection. This is a vitally important initiative and deserves support. Copies of the report are available from the Department of Environment and Planning, 175 Liverpool Street, Sydney.

Recent Articles

EDO Board members and staff have been busy writing articles on environmental law. Ben Boer, Convenor of the Board, has provided an extremely useful summary on the issue of legal aid in environmental disputes. The article includes an early history of the work involved in establishing the EDO (B. Boer, "Legal Aid in Environmental Disputes", (1986) 3 **Environmental and Planning Law Journal** 22).

Brian Preston has recently written three articles. The first examines third party appeals in environmental matters. Such appeals are available to members of the public who object to a designated development under the Environmental Planning and Assessment Act. Designated developments include such developments as mines, gravel quarries, chemical factories and abattoirs (B. Preston, "Third Party Appeals in Environmental Matters in New South Wales", (1986) 60 **Australian Law Journal** 215).

The second article examines the important issue of adequacy of environmental impact statements. After an analysis of cases in New South Wales and in the United States of America, the article suggests a framework for the Courts to use in evaluating whether an environmental impact statement will be adequate (B. Preston, "Adequacy of Environmental Impact Statements' in New South Wales" (1986) 3 **Environmental and Planning Law Journal** (forthcoming September issue).

The third article looks at the issue of whether unreasonable delay by a person in commencing public interest court actions will preclude that person from obtaining injunctions and other relief from a court. Such unreasonable delay is called laches. The article examines how American courts have responded to the special problems public interest plaintiffs have in environmental cases and suggests an approach for Australian courts (B. Preston, "Laches in Public Interest Litigation", (1986) 3 **Environmental and Planning Law Journal** (forthcoming September issue).

TOTAL ENVIRONMENT CENTRE WOODCHIPPING CONFERENCE

Brian Preston, Principal Solicitor of the EDO, and Ben Boer, Convener of the Board of Management, recently delivered a paper to the Total Environment Centre Wood-chipping Conference. The paper was entitled "Matching Forestry Legislation and Administration to Modern Needs". Ben and Brian have been working on the area of forestry reform for the last five years or so. This paper was the first public opportunity to present some of the findings of the research. The following is a summary of the paper, which is to be published in full by the Total Environment Centre in the near future.

THE NEED FOR REFORM

The **New South Wales Forestry Act** was passed in 1916, but a number of its provisions can be traced back to the 1880's. Many of the concepts embodied in the present Act are quite old-fashioned and do not reflect modern day environmental concerns and practice. The paper makes the point that there has been a good deal of legislation relating to air, water and noise pollution, national parks and wildlife, natural and cultural heritage, environmental planning and assessment as well as environmentally hazardous chemicals. At present the government is considering the introduction of a Wilderness and Wildlife Management Act and is also looking at the possibility of an Endangered Species Habitat Act. All of this legislation points to a policy of protection of natural and cultural environments to which the present government is committed. In this context it is argued that the **Forestry Act** should be now closely examined in terms of environmental protection objectives. Reference was made to the Victorian and Western Australian governments, both of which have recently re-examined their administrative and legislative mechanisms in relation to forestry and other environmental legislation. In both states the Forestry Commissions have been amalgamated into larger departments, which include national parks and wildlife and land conservation.

The basis for this paper is a draft revised **Forestry Act** developed by the authors on the basis of amending the existing Act. This draft is available from the Environmental Defender's Office for interested persons.

OBJECTS OF THE FORESTRY ACT

Section 8A was inserted into the **Forestry Act** in 1972, and remains one of the only substantial amendments in the last two decades. This section indicates the primary thrust of the Commission's activities as being the conservation and utilisation of timber "to the best advantage of the state" and "to provide adequate supplies of timber . . . for building, commercial, industrial, agricultural, mining and domestic purposes". The provisions relating to "use as a recreation and conservation of birds and animals" is a residual provision which makes it clear that non-timber production uses are subservient. The way in which the provisions are drafted gives the Commission a great deal of discretion to achieve its primary objectives. The paper redrafts the objects section by inserting a new object, as follows: "the primary object of the Commission will be the perpetuation of native forests on Crown timber land". There are then a number of secondary objects inserted which are to be pursued only as far as they are consistent with the primary object. The paper argues that the conservation and utilisation of timber on Crown timber lands should be to the best advantage of the "community". The community is defined in the draft Act to mean:

> "the lands in general, both present and future, the waters in general, both present and future, the wildlife in, on or above the land or waters, both present and future, and human beings both present and future."

A further amendment provides that:

> "the Commissioner shall ensure that to the fullest extent possible public participation will take place throughout the Commission's planning processes with regard to its activities on Crown timber lands".

The rationale behind the change is to

1. reverse the orientation of the present objects of the Act, and to give primacy to conservation goals;
2. give the Commission the statutory obligation to look to the needs of the ecological and human community
3. place an emphasis on the **efficient** use of timber (i.e. make use of all trimmings, offcuts, etc);
4. ensure that the Commission is required, without qualification, to take all practicable steps to preserve and enhance environmental quality;
5. ensure that the Commission carries out its responsibilities in terms of public participation as a fundamental requirement.

The paper argues that the public participation provisions found in the **Heritage Act** 1977 and the **Environmental Planning and Assessment Act** 1979 should be followed on the basis that the **Forestry Act** is not fundamentally different in nature from more recent environmental legislation found in this State. Part of the public participation argument is the introduction of a broad standing provision so that "any person" is able to bring an action in the Land and Environment Court to remedy or restrain a breach of the **Forestry Act** in much the same way as such actions can be taken under the **Environmental Planning and Assessment Act.**

ECOLOGICAL RESERVES AND WILDERNESS AREAS

The paper examines the adequacy, sufficiency and suitability of the present flora reserves found under the

Forestry Act as a means of preserving these areas as ecological reserves or wilderness areas. The present approach to flora reserves is that their principal purpose is considered to be scientific, to be used as laboratories for study and classification as well as silos or stockpiles of genetic diversity. The paper suggests that the scientific thurst should be broadened in order to include preservation objectives for the whole of the eco-system; thus the title "Ecological Reserves". The paper also suggests that in appropriate situations, wilderness areas, as presently identified under the Act, should be incorporated under the **National Parks and Wildlife Act** or under the proposed **Wilderness and Wild Rivers Management Act.** Comparisons are made with practice in the United States under the **Wilderness Act** 1964.

ENVIRONMENTAL IMPACT ASSESSMENT

The paper notes that the provisions of Part V of the **Environmental Planning and Assessment Act** apply to all operations of the Forestry Commission on Crown timber land. The paper refers to the report by Prineas ("The Forestry Act, A Review with Suggestions for Reform", Total Environment Centre, July 1985) where he states that there is evidence of an attitude in the Forestry Commission that it is not appropriate to apply the **Environmental Planning and Assessment Act's** environmental impact procedures to forestry activities, and that recent calls for the production of environmental impact statements have not been heeded. Prineas notes that the Commission has responded by moving to less sensitive forest areas and biding its time (a number of representative EIS's were prepared in the early 1980's). The paper concludes that because of the overarching effect of the **Environmental Planning and Assessment Act** and its regulations, it is not necessary to amend the **Forestry Act** at the present time in relation to environmental impact assessment.

CONCLUSION

A further area that the paper touches upon is the possibility of the Federal Government becoming involved in the production of legislation to manage forestry in the States, either on the basis of agreed uniform legislation, or through a separate Federal statute. It was noted that since the **Franklin Dam** case it has become clearer that the Federal Government can exert a great deal of influence over environmental matters by virtue of the corporations power and external affairs power under the Commonwealth **Constitution.**

The paper generally endorses the report prepared by Peter Prineas (above) and endorses his agenda for reform. The paper suggests that it is time for reform of the **Forestry Act** to be brought into focus in the political arena and expresses the hope that the parliamentary draftspeople will have a clear and unambiguous framework for reform provided for them by the New South Wales Government in the not too distant future.

EPA ACT NOT INCONSISTENT WITH CTH. ACT.

The High Court of Australia has unanimously decided that N.S.W.'s **Environmental Planning and Assessment Act** is not inconsistent with the Commonwealth's **Broadcasting and Television Act** 1942, as amended (**Commercial Radio Coffs Harbour Ltd.** v **Lynette Carol Fuller on behalf of Save Our Scenery Committee and Ors.** No. 105 of 1985, 1 August 1986, Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).

The case had its genesis in the Land and Environment Court of New South Wales. A large number of residents were concerned at Commercial Radio Coffs Harbour Ltd's proposal to erect two large radio towers at Raleigh on the north coast of New South Wales.

They formed a committee which they called Save Our Scenery Committee and decided to commence legal proceedings to challenge the validity of the development consent which had been given by Bellingen Shire Council to the radio station for the erection of the towers. The Environmental Defenders Office was engaged to act for the residents.

One week after commencing the proceedings in the Land and Environment Court, Commercial Radio Coffs Harbour Ltd. filed a Notice of Motion seeking, among other orders, a declaration that the Land and Environment Court had no jurisdiction to hear and determine the proceedings by reason of inconsistency between the **Environmental Planning and Assessment Act** (NSW) and the **Broadcasting and Television Act.** (Cth.)

In due course, the issue of inconsistency was removed to the High Court for determination.

The primary submission of Commercial Radio Coffs Harbour Ltd. was that

> "the scheme established by the Commonwealth Act reflects a legislative intention completely, exhaustively and conclusively to state the law with respect to the provision of radio broadcasting services throughout Australia. The alleged inconsistency arises by reason of the controls placed on development by the State legislation. A broadcasting service might be authorized by a licence granted under the Commonwealth Act and yet that authority might be frustrated or denied by the State Act which, if valid, could prevent the erection of the transmission towers and necessary supporting facilities" (per Wilson Deane and Dawson JJ at 8-9)

The members of the High Court were unanimous in holding that the Commonwealth Act does not purport to state exclusively and exhaustively the law with which the operation of a commercial broadcasting station must comply.

> "The Act prohibits broadcasting without a licence. The prohibition is removed upon the grant of a licence, subject to certain conditions. Failure to comply with the conditions may result in a revocation or suspension of the licence thereby reinstating the prohibition. The licence confers on the grantee a permission to broadcast. There is nothing in the Act which suggests that it confers an absolute right or positive authority to broadcast so that the grantee, because he has a licence, is immune or exempt from compliance with State laws. On the contrary, in concentrating on the technical efficiency and quality of broadcasting services, the Act leaves room for the operation of laws, both State and Commonwealth, dealing with other matters relevant to the operation of such services. For example, the applicant was required to obtain, as in fact it did before the issue of the licence, the consent of the Department of Aviation to the erection of two radio antennas, subject to conditions relating to marking and lighting under reg.92 of the Air Navigation Regulations. Another example is the purchase or lease of the land, upon which the broadcasting station is to be built, in accordance with State property laws. So also is the obtaining of development consent pursuant to the State Act for the building and use of the broadcasting station."

There was a slight divergence of opinion on the construction of s.132(1) of the Commonwealth Act which makes it an offence for a person to fail to comply with a provision of the Act. In this case, the radio station submitted that the State Act might have the effect of causing the radio station to be in breach of s.89C of the Commonwealth Act which

provides that "the holder of a licence shall commence the service in pursuance of the licence on such date as is determined by the Tribunal."

The majority (Wilson Deane and Dawson JJ) held that s.132 is directed to acts or omissions which relate to the actual carrying on of the broadcasting service and not the mere failure to institute the service. The minority (Gibbs CJ and Brennan J.) held that s.132 does not apply to a failure to comply with the requirements of s.89C where compliance would be impossible without contravening another law. Hence, s.132(1) does not authorize a contravention of a State planning law.

The matter now goes back to the Land and Environment Court for a determination as to whether the development consent which was granted under the State law is valid and since the towers have now been erected, whether the towers have been erected illegally.