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FORESTRY COMMISSION v CORKILL

247

[SUPREME COURT OF NEW SOUTH WALES (COURT OF APPEAL)]

FORESTRY COMMISSION OF NEW SOUTH WALES v CORKILL

Mahoney AP, Meagher and Handley JJA

25 October, 1 November 1991

Environmental Protection — Protected and endangered fauna — Offence to disturb or injure — Selective logging — Common ground that fauna would be disturbed and/or killed — Statutes — Interpretation — Whether and to what extent logging operations authorised by Forestry Commission under Forestry Act contravened National Parks and Wildlife Act — National Parks and Wildlife Act 1974 (NSW), ss 5, 98, 99 — Forestry Act 1916 (NSW), ss 8A, 9, 11.

Section 98 and s 99 of the *National Parks and Wildlife Act 1974 (NSW)* make it an offence to take or kill respectively any protected or endangered fauna and are not restricted to national parks. Section 5 defines protected and endangered fauna by reference to schedules listing several species. A person is not liable to conviction for an offence against s 98 if he proves "that the act constituting the offence was done . . . in pursuance of a duty imposed by or under any Act". This is not so in respect of s 99. It provides that where the provisions of an Act or instrument under an Act "authorise or require anything to be done that would constitute an offence" under s 99 "the provisions of this section prevail".

The *Forestry Act 1916 (NSW)* makes provision for logging under licence in State forests. For that purpose forests are divided into logging compartments and harvesting plans are prepared for the various compartments. Under s 9 the Forestry Commission has the administration of the Act and is subject in all respects to the control and direction of the Minister.

The Forestry Commission granted licences under the *Forestry Act* to the second, third and fourth respondent logging companies to carry out logging operations within compartments in the Chaelundi State Forest near Dorrigo in northern New South Wales. It was common ground that protected and endangered fauna would be disturbed and/or killed. The appellant had claimed declaratory and injunctive relief.

Held: (1) The Forestry Commission is prima facie subject to the provisions of s 98 and s 99 of the *National Parks and Wildlife Act*.

(2) The duties imposed upon the second, third and fourth respondent logging companies by their licences from the Forestry Commission were duties imposed by or under the *Forestry Act* and therefore the taking or killing of protected fauna within the meaning of s 98 of the *National Parks and Wildlife Act* would not give rise to liability for conviction for an offence thereunder.

Order made by Land and Environment Court (*Corkill v Forestry Commission of New South Wales [No 2]* (1991) 73 LGRA 126), varied.

APPEAL

This was an appeal against a decision of the Land and Environment Court of New South Wales granting relief in respect of proposed logging operations in the Chaelundi State Forest. The facts are set out in the judgment.

K Mason QC (Solicitor-General of New South Wales), *M G Craig QC* and
J B Maston, for the appellant.

T F Robertson and *M W Anderson*, for the first respondent.

Judgment reserved

1 November 1991

THE COURT. The Forestry Commission of New South Wales proposed to carry out a programme of logging in the Chaelundi State Forest. It is common ground that the result of carrying out that logging would be the disturbing or killing of protected fauna. The issue to be determined is whether that will involve a contravention of s 98 or s 99 of the *National Parks and Wildlife Act 1974* (NSW).

Mr Corkill brought proceedings in the Land and Environment Court in respect of the proposal. That Court declared that the proposal, if carried out by logging and roading activities, would be "likely to disturb or injure" various endangered species within the Act.

The Commission has appealed to this Court against that declaration. It is proper to record the circumstances in which the appeal comes to this Court. The proceeding was commenced in the Land and Environment Court on 9 August 1991. On 25 September 1991, Stein J gave judgment and made the order in question. The Commission sought from this Court an expedited hearing of the appeal. The Court, at the request of the parties, listed the case for hearing on Friday, 25 October 1991. The parties have each provided detailed and helpful written submissions. The Solicitor-General, Mr Mason QC, for the Commission, and Mr Robertson, for Mr Corkill, have completed their arguments within the day. It is appropriate that the appeal be determined as soon as practicable. It is therefore appropriate that the Court state the conclusions at which it has arrived and its reasons briefly and without unnecessary elaboration.

The arguments of the parties were directed essentially to three questions:

1. whether the Commission's proposal would result in the disturbance or killing of protected fauna;
2. whether this would involve a breach of s 98 or s 99 of the *National Parks and Wildlife Act*; and
3. (if it would) whether a declaration to that effect should be made.

1. The disturbance or killing of protected fauna:

It is clear that, if the Commission's proposal be carried into effect, protected fauna will be disturbed and/or killed. Both the Commission and Mr Corkill have contended that this will be so: some 1,600 pages of material were placed before the Land and Environment Court to show that this was so. Stein J, in a careful and detailed judgment, detailed the protected fauna which would be disturbed or injured. Each party contends that his conclusions in this regard are correct.

It was, of course, not the objective of the Commission that protected fauna be disturbed or killed. Its objective was — we put the matter in general terms — to have carried out such logging operations as in the circumstances would be consistent with its duty to control and manage State forests and to do so "in such manner as best serves the public interest ...": *Forestry Act 1916* (NSW), s 11(1)(a). However, it is accepted that however such a

proposal be carried out and with whatever practical safeguards, the result will be that certain protected fauna in the particular forest will be disturbed and/or killed. That is accepted to be the unintended but necessary result of the carrying out of the logging proposal.

2. Will there be breaches of s 98 or s 99 of the *National Parks and Wildlife Act 1974*?

These sections deal with protected fauna. For purposes of Pt 7 of the *National Parks and Wildlife Act*, fauna is divided into unprotected and protected fauna. Protected fauna is, in turn, divided into two groups, protected fauna which is not endangered and endangered fauna. These groups are classified according to the provisions of Schedule 11 and Schedule 12 of the Act. We shall refer to the two groups compendiously and with allowable inaccuracy as: protected fauna and endangered fauna.

Section 98 restricts the "taking or killing" of protected fauna. It provides:

"98. (1) In this section, 'protected fauna' does not include endangered fauna or locally unprotected fauna under section 96.

(2) A person shall not:

- (a) take or kill any protected fauna; or
- (b) use any animal, firearm, explosive, net, trap, hunting device or instrument or means whatever for the purpose of taking or killing any protected fauna.

Penalty: \$2,000 or imprisonment for 6 months or both.

(3) A person shall not be convicted of an offence arising under subsection (2) if he proves that the act constituting the offence was done:

- (a) under and in accordance with or by virtue of the authority conferred by a general licence under section 120, an occupier's licence under section 121, a game licence under section 122 or a trapper's licence under section 123; or
- (b) in pursuance of a duty imposed on him by or under any Act.

(4) Subsection (2) does not apply to the taking of any reptile of a species named in an order made by the Governor and published in the *Gazette* for the purposes of this subsection."

Section 99 restricts the "taking or killing" of endangered fauna. It provides:

"99. (1) A person shall not:

- (a) take or kill any endangered fauna; or
- (b) use any animal, firearm, explosive, net, trap, hunting device or instrument or means whatever for the purpose of taking or killing any such fauna; or
- (c) approach a marine mammal any closer than such distance as may be prescribed by the regulations or interfere with a marine mammal.

Penalty:

- (a) in respect of any endangered fauna of a species named in Part 3 (threatened fauna), Part 4 (fauna in imminent danger of extinction) or Part 5 (marine mammals) of Schedule 12 — \$10,000 or imprisonment for 2 years or both; or
- (b) in respect of any other endangered fauna — \$4,000 or imprisonment for 1 year or both.

(1A) Where:

- (a) a person is convicted by the Land and Environment Court of an offence arising under subsection (1) in relation to a marine mammal; and
- (b) the Court is satisfied that the person committed the offence in the course of commercial operations relating to the killing of marine mammals,

the maximum pecuniary penalty that the Court may impose in respect of the offence is \$100,000.

(2) A person shall not be convicted of an offence arising under subsection (1) if he proves that the act constituting the offence was done under and in accordance with or by virtue of the authority conferred by a general licence under section 120.

(3) Where the provisions of any other Act or instrument under any other Act authorise or require anything to be done that would constitute an offence arising under subsection (1):

- (a) the provisions of this section prevail; and
- (b) a person shall not be convicted of an offence against that other Act or instrument by reason of his failure to comply therewith in so far as compliance therewith would constitute an offence arising under subsection (1).

(4) A reference in section 112r, 120, 129 or 171 to taking or killing any fauna includes, so far as is applicable in relation to a marine mammal, approaching or interfering with the marine mammal as referred to in subsection (1)(c).

(5) In this section:

'interfere with' includes harass, chase, herd, tag, mark and brand."

The term "take" is defined by s 5(1) of the Act to include: "hunt, shoot, poison, net, snare, spear, pursue, capture, disturb, lure or injure". There was before Stein J detailed discussion of the ambit of the definition of "take" and, in particular, of the meaning in that definition of "disturb". It is not necessary to consider such matters: it is, as we have said, clear that the Commission's proposals will necessarily involve the taking and/or killing of protected fauna within the meaning of these provisions.

But the Solicitor-General has submitted that the carrying out of the proposals will not involve a breach of either section. He has relied, in the main, upon two contentions: (a) that s 98 and s 99 do not apply to what is done by the Commission; and/or (b) that the sections do not apply to what the other defendants, as loggers, would do in carrying out the Commission's proposals.

(a) In our opinion, both s 98 and s 99 apply to what the Commission proposes to do.

The Commission is a corporation sole: s 5(1) and s 7(1). Its objectives are set forth in s 8A and its powers and duties are referred to in s 9 and s 11 of the *Forestry Act*. The powers and duties which, in its present proposal, it proposes to exercise and carry out involve at least the management of the Chaelundi State Forest and the taking of timber and products from it. These are powers which the Commission may exercise and, in appropriate circumstances, it will be the duty of the Commission to exercise them. It is proper to infer that its present proposals are made in the exercise of its powers and for the purpose of giving effect to the duties imposed on it. Its proposals envisage that licences will be or have been given to, inter alia, the

other defendants for the purpose of carrying out the logging and ancillary activities envisaged by the proposals. In general terms, the licences impose contractual or statutory obligations upon the logging companies to do those things which, alone or together, will result in the taking or killing of the protected fauna in question.

The essential question to be determined in this regard is therefore whether s 98 and s 99, in proscribing or restricting the taking or killing of protected fauna, apply to the taking or killing of such fauna by the Commission or by those who do it under obligations which have been imposed by it on them in the course of the exercise of the Commission's powers and duties.

It is in our opinion clear that it was the contemplation and the intention of the legislature when it enacted the *National Parks and Wildlife Act* that the restrictions imposed by it in respect of forests and fauna prima facie would apply to the Commission.

In determining whether it was contemplated and intended by the legislature that the *National Parks and Wildlife Act* should apply to the Forestry Commission, it is relevant to consider first the general nature of the Forestry Commission's powers and activities, what the *National Parks and Wildlife Act* does in the areas in which those powers and duties would be exercised, and what provision has been made in this regard by the *National Parks and Wildlife Act*.

As we have said, the objects, powers and duties of the Forestry Commission are set forth in the *Forestry Act* 1916: see, eg, ss 8A, 9 and 11. Stated generally, the relevant powers and duties of the Forestry Commission involve that, in the control and management of relevant forests, including State forests, it will do what is appropriate to plant, maintain and cut down trees. It is the exercise of such powers that is involved in the proposal now in question.

The *National Parks and Wildlife Act* deals, as far as is here relevant, with two main things: the areas of land brought within its scope and the trees and other things growing on that land: see Pts 4, 5 and 8; and the fauna and marine mammals on or in the relevant areas: see Pts 7 and 7A. (We have referred only to the portions of the Act of direct relevance to the present proceeding.)

There is, in respect of the land and things growing on it, clear indication of the contemplation and intention of the legislature that the *Forestry Act* will apply to the areas in respect of which the *National Parks and Wildlife Act* will operate or will apply except to the extent to which specific provision is made in the *National Parks and Wildlife Act* to exclude that operation.

The areas contemplated as falling within the *National Parks and Wildlife Act* are, by the Act, divided into a number of different categories: reference is made, for example, in Pt 4 to: National parks and historic sites: Div 1; State recreation areas: Div 1A; Nature reserves: Div 2; State game reserves: Div 2A; Wilderness areas and wild and scenic rivers: Div 3; Aboriginal areas: Div 4; Protected archaeological areas: Div 5; and Wildlife districts, wildlife refuges and wildlife management areas: Div 6. If the Forestry Commission exercised its powers in respect of any of these areas, it would, inter alia, undertake operations for the planting, maintenance or cutting down of trees. Accordingly, in the *National Parks and Wildlife Act*, specific provision has been made, in relation to some at least of the areas in which that Act

operates, to prohibit or qualify the exercise of those powers by the Forestry Commission. Thus, in respect of national parks and historic sites, s 42, under the heading "Application of *Forestry Act 1916*", provides:

"(1) The *Forestry Act 1916* does not apply to or in respect of lands within a national park or historic site.

(2) Notwithstanding anything in subsection (1), all licences and permits under the *Forestry Act 1916* affecting lands within a national park or historic site shall, unless sooner cancelled under that Act, continue in force until the expiration of the respective terms for which they were granted, and that Act shall continue to apply to and in respect of those licences and permits until they respectively expire or are cancelled."

That provision evidences the contemplation and intention of the legislature that, had it not been for s 42, the *Forestry Act* would apply in respect of national parks and historic sites and the Forestry Commission would be empowered, for example, to cut down trees in such an area.

There is no provision of that particular kind in respect of State recreation areas. However, a similar provision is made in respect of nature reserves and State game reserves.

In respect of wilderness areas and wild and scenic rivers, s 61A provides:

"(1) Where a plan of management is in force with respect to any river or part of a river within lands reserved or dedicated under this Act, a declaration shall not be made under section 61 with respect to that river or part of that river except in accordance with the plan.

(2) A statutory authority shall not carry out development in relation to a wild and scenic river unless it has consulted with, and considered any advice given by, the Minister in relation to the development.

(3) In this section, 'statutory authority' and 'development' have the same meanings as they have in Division 7."

It is clear that the Forestry Commission is a "statutory authority" within s 61A(3); see s 69A(1).

It is, therefore, apparent that, in the enactment of the *National Park and Wildlife Act*, the legislature gave attention to the extent to which the Forestry Commission should be able to exercise its powers in areas falling within that Act. And, as we have said, the contemplation and intention was that, in general, the Forestry Commission should be able to exercise its powers in such areas and that the extent to which those powers should be able to be exercised there would be affected by the provisions of the *National Parks and Wildlife Act*.

Before the learned judge and before this Court, attention was given to the question whether the Forestry Commission is, in the conventional sense, the Crown and whether, if it is, it should be inferred that it was not the intention of the legislature that the *National Parks and Wildlife Act* should apply to it: see generally *Bropho v Western Australia* (1990) 171 CLR 1 and the cases there referred to. We do not think that the extent to which the Forestry Commission may exercise its powers within areas brought under the *National Parks and Wildlife Act* or what it may do in such areas is to be determined by the application merely of such general principles or presumptions of statutory construction. The *National Parks and Wildlife Act* has in terms given indications of the legislative intention in that regard.

We come now to the significance of these conclusions in respect of the operation of s 98 and s 99.

If, as we have indicated, the legislative contemplation and intention was that the extent to which the Forestry Commission could exercise its functions in the relevant areas and the restrictions upon it in doing so are to be provided by the *National Parks and Wildlife Act*, then in our opinion the inference to be drawn is that the provisions in relation to fauna and consequently s 98 and s 99 were contemplated and intended to apply to the exercise by the Forestry Commission of its powers.

The Court has been referred by counsel to the judgments of the members of the High Court in *Bropho v Western Australia* and to the manner in which at the present time the application of legislation to government servants or statutory authorities is to be understood. It is not necessary, for the purposes of the decision of the present proceeding, to examine in detail what was there said. By the provisions to which we have referred in relation to the areas falling under the *National Parks and Wildlife Act* that Act has regulated the extent to which the powers of the Forestry Commission may be exercised in those areas and it has done so upon the assumption that, unless provision be made for the purpose, those powers may be exercised in such areas. It is, in our opinion, proper to infer that it was the legislative intention that, except to the extent otherwise provided, the powers of the Forestry Commission could be exercised in a manner which would affect fauna and that the exercise of those powers would be subject to the general restrictions in respect of fauna set up by the Act. Indeed, in both s 98 and s 99, the legislature has contemplated that what may be done in taking or killing fauna may be done "in pursuance of a duty imposed" by or under an Act: cf s 98(3)(b) and s 99(3); and it has made provision in respect of such matters which assumes that the sections do apply in respect of things done by persons in pursuance of a duty such as imposed upon the Forestry Commission by the *Forestry Act*.

Reference has been made in some of the cases to the nature of the protection or immunity accorded to bodies or persons who are or are within the immunity of the Crown in the relevant sense. It has, for example, been said that the true nature of this is not an immunity from prosecution but an exclusion from the provision in question: see *Bropho v Western Australia* (at 14 et seq 27). But such questions arise and such principles operate only where, on the proper construction of the legislation, it is concluded that the body or person is in the relevant sense the Crown and that the proper inference is that the statute was never intended to have application. But, for the reasons to which we have referred, that is not the position in the present

This does not, or at least it may not, entirely dispose of questions which arise and the application of s 98 and s 99 to the Forestry Commission. It is necessary to consider the application of each of the sections to what in fact is proposed by the Forestry Commission.

It is not clear from the arguments addressed to this Court whether the Commission's proposals involve that all of the work in the relevant State must be done by the logging companies or whether the Commission itself will do some or part of the relevant work. If the Commission itself will do some or part of the work and what it is to do will involve the taking or killing of protected fauna, then, in our opinion, prima facie the provisions of s 98(2)

and s 99(1) will apply to the Commission. If, for example, the proposal involved that the Commission itself would do all of the relevant work and consequently would take or kill protected fauna, then it would be a contravention of s 98 and/or s 99. Reference was made in passing during the argument to the question whether, in such circumstances, the Forestry Commission, if it be the Crown in the relevant sense, could be the subject of a prosecution. It is not necessary for present purposes to determine that question. What the Forestry Commission would do would be done by individuals and such individuals would, within the contemplation of the two sections, prima facie be liable to prosecution. The issue would become whether they would be entitled to invoke the protection given by s 98(3)(b) and/or s 99(3).

However that be, in the present case it is clear that some at least of the work is to be carried out by logging companies who have, in the terms of their respective licences, accepted obligations which will involve the taking or killing of protected fauna. It is therefore necessary to determine whether such logging companies will be involved in breaches of one or both of the sections.

(b) In our opinion, a person who takes or kills protected fauna within s 98 is not liable to conviction for an offence against the section if he proves "that the act constituting the offence was done ... in pursuance of a duty imposed on him by or under any Act" (s 98(3)(b)). The duty imposed upon logging companies by the relevant licences is, in our opinion, a duty imposed by or under the *Forestry Act* and therefore the taking or killing of protected fauna within s 98 would not give rise to a conviction for an offence.

The position is, however, different in respect of s 99. That section relates to endangered fauna. Section 99(3) provides that where the provisions of an Act or instrument under an Act "authorise or require anything to be done that would constitute an offence" under s 99(1), "the provisions of this section prevail". That means that, notwithstanding that what was done may have been done pursuant to another Act, the taking or killing of endangered fauna will constitute an offence under s 99. Therefore, what is here proposed by the Forestry Commission will involve, at least, the commission of an offence by the logging companies under s 99.

3. *Should declarations be made?*

Stein J declared that "... the proposed logging and roading activities by the respondents and their servants, agents, licensees or contractors ... are likely to disturb or injure" endangered species "in breach of section 99 ...".

The Solicitor-General, Mr Mason QC, referred to the submission which had been made that, if the present proposals of the Forestry Commission are seen as involving a breach of s 99, logging activities in State forests throughout New South Wales and, it may be, in other areas will be brought to an end. It was, it would appear, accepted that logging activities in forests, no matter how carefully planned and carried out, will involve the taking and/or killing of protected fauna within the terms of at least s 99 of the *National Parks and Wildlife Act*. If this be so it is, of course, a consequence of particular seriousness. But this Court is not in a position to determine, nor has it been asked to determine formally whether it is so. However, in view of the suggestions which have been made before Stein J and, if and in so far as they have been made before this Court, it is proper to indicate the nature and extent of what is involved in this decision.

First, the application of the *National Parks and Wildlife Act* to the *Forestry Act* and the restriction which it has imposed upon the powers of the Forestry Commission do not arise by legal inadvertence and are not available to be dealt with by this Court on such a basis. It is clear that, when the *National Parks and Wildlife Act* was passed, the Parliament gave — at least the Government of the day through its draftsman gave — detailed attention to the relationship between that Act and the *Forestry Act* and to what the Forestry Commission might do. The Act provided for the circumstances in which the powers of the Commission should or should not be available for exercise in areas coming within the *National Parks and Wildlife Act*. In respect of the restrictions imposed by, inter alia, s 98 and s 99, the Parliament made particular provision for the relationship between the proscriptions enacted by those sections and things done under other Acts of Parliament. Had it been the purpose of the Parliament to make particular provision in respect of the *Forestry Act* so as to exempt it from those proscriptions in a manner different from other Acts of the Parliament, it could of course have done so. It did not.

Secondly, the Parliament, by what it provided, drew a careful distinction, no doubt on policy grounds, between the protection given to endangered species and that given to other "protected fauna". It chose, no doubt as a matter of policy, to provide that the powers given by "any other Act or instrument under any other Act" should be restricted by the proscriptions in favour of endangered fauna set forth in s 99(1). The provisions made by s 99(3) in this regard indicate that this was the deliberate choice of the Parliament of the day.

Thirdly, it is to be emphasised that the prohibition upon the taking or killing of endangered fauna enacted by s 99(1) is not absolute. In the relevant sense, the effect of the Act is to place the protection of such fauna within the control of the Director of National Parks and Wildlife. The Act empowers the Director to grant licences of various kinds in respect of fauna. Reference was made in argument to, for example, the provisions of Pt 9 and in particular to s 120, and to the power of the Director to authorise persons to take or kill fauna given by s 171. It is possible for the Director, in the exercise of one or more of the powers given to him by the *National Parks and Wildlife Act*, to grant to the Commission such a licence or authority as would allow logging operations to be carried on notwithstanding that they had the result of the taking or killing of fauna in circumstances which otherwise would be contrary to s 99. Any exercise of such powers would, of course, necessarily take into account the terms of the Act and the principles which govern the exercise of administrative discretions. We do not, in so doing, express any opinion upon the precise proposals now made by the Forestry Commission or whether consent or authority may be granted to them in the form in which they presently stand or the form of any consent or authority which might be given. These are not matters which have been argued before this Court. But it is proper to record our opinion that, in general, it is within the power of the Director, by an appropriately drawn consent or authority, to enable logging activities to be carried on in a State forest in an appropriate manner. It may be that there are proposals for logging which are in such a form that it would be difficult or impossible for a proper consent or authority to be framed but, in our opinion, a properly

drawn proposal for logging would, in general, fall within the relevant power of the Director.

Fourthly, this is a case appropriate for the making of a declaration. There are circumstances in which, by reason of the generality of the declaration sought or otherwise, it is inappropriate that the declaratory power be exercised. But in this case the acts which are proposed to be done pursuant to the Forestry Commission's proposals are appropriately clear and precisely formulated and the Court may therefore properly declare whether they are or are not in breach of particular statutory provisions: see *The Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297. The form of declaration which is to be made will be framed accordingly.

Fifthly, it is not necessary or appropriate that formal injunctions be granted against the doing of acts pursuant to those proposals. Where the Crown or a statutory authority of the present kind is involved, it is ordinarily appropriate that the relief granted be merely declaratory: it is to be assumed that, when the position in law is declared, the Crown or the relevant authority will act in accordance with the law: see *Cantarella v Egg and Egg Pulp Marketing Board for the State of New South Wales* [1973] 2 NSWLR 366 at 382-385 and the cases there referred to. In the present case, licences have been granted to individual logging companies some at least of which are parties to the present proceeding. Those companies have, before this Court, taken no part in the proceeding and have, as the Court has been informed, relied upon the Forestry Commission to establish their respective positions. It is proper to reserve liberty to apply should it be necessary to seek more specific orders in relation to the Commission, to these or to other logging companies.

Sixthly, it would no doubt be open to the Director, in considering whether and to what extent he should grant a consent or authority, to take into account the proposals for logging made by the Forestry Commission and the precautions proposed to be observed in the carrying out of those proposals. It would, for example, be open to the Director to authorise the taking or killing of relevant fauna to the extent involved in carrying out, in a specified way, particular logging proposals. It has been said in argument that the proposals made by the Forestry Commission have been the subject of examination, under the *Environmental Planning and Assessment Act 1979* (NSW) or otherwise. The form of the proposals made by the Forestry Commission and the stipulations to be made in respect of the carrying out of them would, within the terms of the *National Parks and Wildlife Act*, be a matter for consideration by the Director.

Upon the basis of the matters put before this Court during argument, it would appear appropriate for a declaration to be made in the following form: (a) That the acts done to carry out the proposals now made by the Forestry Commission of New South Wales for logging and roading activities in compartments 180, 198 and 200 of Chaelundi State Forest will cause the taking or killing of certain endangered species within Schedule 12 of the *National Parks and Wildlife Act 1974* in breach of s 99 of that Act.

However, the Court will reserve leave to the parties to apply to argue the form of the declaration to be made. If notice is not given to the Court within seven days of delivery of this judgment that such is desired, the declaration set forth will take effect as from the date of delivery of this judgment.

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The appeal has otherwise been unsuccessful. It should therefore be dismissed with costs.

*Order of Land and Environment Court varied,
otherwise appeal dismissed with costs*

Solicitor for the appellant: *H K Roberts* (State Crown Solicitor).

Solicitors for the first respondent: *Woolf Associates*.

TFMN

