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The role of local government in the conservation of biodiversity

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THE ROLE OF LOCAL GOVERNMENT IN THE CONSERVATION OF BIODIVERSITY

A thesis submitted in fulfilment of the requirement of the degree of

DOCTOR OF PHILOSOPHY

from

UNIVERSITY OF WOLLONGONG

by

ANDREW HARLEY HERON KELLY

BTP, LLB (UNSW), GradDipLegPrac (UTS)

FACULTY OF LAW
2004

CERTIFICATION

I, Andrew H. H. Kelly, declare this thesis, submitted in fulfilment of the requirements of the award of Doctor of Philosophy, in the Faculty of Law, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

Andrew H H Kelly

30 August 2004

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GLOSSARY

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ACIR: (former) Advisory Council for Inter-Government Relations.

ACLAGA: (former) Australian Council of Australian Local Government Associations.

AIP: Area Improvement Program.

ALGA: Australian Local Government Association.

AURDR: Australian Urban and Regional Development Review.

BDAC: Biological Diversity Advisory Council.

Biodiversity Convention: UN *Convention on Biological Diversity*.

Biodiversity Planning Guide for LG: Biodiversity: Planning Guide for NSW Local Government.

CAR: 'comprehensive, adequate and representative'.

CCC: Cumberland County Council.

CCPS: County of Cumberland Planning Scheme.

CDPWR: (former) Commonwealth Department of Post-War Reconstruction.

CENTROC: Central Western Regional Organisation of Councils.

CGC: Commonwealth Grants Commission.

CLA: *Crown Lands Act* 1989 (NSW).

CLPS: Coastal Lands Protection Scheme.

CM: catchment management.

CMA: *Catchment Management Act* 1989 (NSW).

CMAA: *Catchment Management Authorities Act* 2003 (NSW).

CMArea: Conservation Management Areas under the Coonabarabran Shire Council's Vegetation Management Plan.

CMAuth: Catchment Management Authority under the *Catchment Management Authorities Act* 2003 (NSW).

COAG: Council of Australian Governments.

Commonwealth/LG Accord: Accord between the Commonwealth of Australia and Local Government (1995).

CPDWR: (former) Commonwealth Department of Post-War Reconstruction.
CSCVMP: Coonabarabran Shire Council's Vegetation Management Plan.

DCP: development control plan.

DEP: (former) Department of Environment and Planning (NSW).

DIPNR: Department of Infrastructure, Planning and Natural Resources (NSW).

DLG: Department of Local Government (NSW), formerly the Department of Local Government and Co-operatives.

DLWC: Department of Land and Water Conservation (NSW).

DoP: (former) Department of Planning (NSW).

DSRD: Department of State and Regional Development (NSW).

DUAP: (former) Department of Urban Affairs and Planning (NSW).

DURD: (former) Department of Urban and Regional Development (Cth).

EFIPA: (former) *Endangered Fauna and Interim Protection Act* 1991 (NSW).

EIS: environmental impact statement.

EMP: environmental management plan.

EPA: Environment Protection Authority (NSW).

EPAA: *Environmental Planning and Assessment Act* 1979 (NSW).

EPAR: *Environmental Planning and Assessment Regulation* 2000 (NSW).

EPBCA: *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth).

EPI: environmental planning instrument.

ESD: ecologically sustainable development.

ESL: environmental/environmentally sensitive land.

FAG: Federal assistance grant.

FMA: *Fisheries Management Act* 1994 (NSW).

HA: *Heritage Act* 1977 (NSW).

HROC: Hunter Regional Organisation of Councils.

IBRA: Interim Biogeographic Regionalisation for Australia.

IDO: interim development order.

IGAE: the Intergovernmental Agreement on the Environment.

ILAP: Integrated Local Area Planning.

IMROC: Inner Metropolitan Regional Organisation of Councils.

IROC: Illawarra Regional Organisation of Councils.

KTP: key threatening process.

LAP: local approvals policy.

LARP: local approvals review program.

LA21: Local Agenda 21.

LEC: Land and Environment Court (NSW).

LEP: local environmental plan.

LGA 1906: *Local Government Act* 1906 (NSW).

LGA 1919: *Local Government Act* 1919 (NSW).

LGA 1993: *Local Government Act* 1993 (NSW).

LGA&SA: Local Government Association and Shires Association (NSW).

LGBC: Local Government Boundaries Commission (NSW).

LGDP: Local Government Development Program.

LG(FA)A: *Local Government (Financial Assistance) Act* 1995 (Cth).

LGGC: Local Government Grants Commission (NSW).

LGGR: *Local Government (General) Regulation* 1999 (NSW).

LG National Agenda: National Agenda for Australian Local Government.

LGSAs: (former) Local Government and Shires Associations of NSW.

Model Provisions: *Environmental Planning and Assessment Model Provisions* 1980.

National Biodiversity Strategy: National Strategy for the Conservation of Australia's Biological Diversity.

National LG Biodiversity Strategy: National Local Government Biodiversity Strategy.

NCRC: National Committee on Regional Cooperation.

NHT: Natural Heritage Trust.

NHTAA: *Natural Heritage Trust of Australia Act* 1996 (Cth).

NLP: national landcare program.

NPWA: *National Parks and Wildlife Act* 1974 (NSW).

NPWS: National Parks and Wildlife Service (NSW).

NRMPA: Natural Resource Management Partnership Agreement.

NVA: *Native Vegetation Act* 2003 (NSW).

NVCA: *Native Vegetation Conservation Act* 1997 (NSW).

OROC: Orana Regional Organisation of Councils.

PEAA: *Protection of the Environment Administration Act* 1991 (NSW).

PEC: (former) Planning and Environment Commission (NSW).

PSO: planning scheme ordinance.

RAC: Regional Advisory Council.

RDB: Regional Development Board.

RDC: Regional Development Committee.

RDO: Regional Development Organisation.

RDP: Regional Development Program.

REEP: Regional Environmental Employment Projects.

REP: regional environmental plan.

RLE: rural land evaluation.

ROC: regional organisation of councils.

ROS: recreation opportunity spectrum.

RP: recovery plan.

RS: regional strategy.

RVC: Regional Vegetation Committee.

RVMP: regional vegetation management plan.

RVC: regional vegetation committee.

RVMP: regional vegetation management plan.

SCMCC: NSW State Catchment Management Coordinating Committee.

SEPP: state environmental planning policy.

SIS: species impact statement.
SoER: state of the environment report.

SPA: (former) State Planning Authority of NSW.

SSROC: Southern Sydney Regional Organisation of Councils.

TAP: threat abatement plan.

TPO: tree preservation order.

TSCA: *Threatened Species Conservation Act* 1995 (NSW).

UNCED: United Nations Conference on Environment and Development (1992), otherwise known as the Rio Earth Summit.

VROC: Voluntary Regional Organisation of Councils.

WHPCA: (former) *World Heritage Properties Conservation Act* 1983 (Cth).

WMA: *Water Management Act* 2000 (NSW).

WMC: water management committee.

WMP: water management plan.

WSROC: Western Sydney Regional Organisation of Councils.

NOTE: each of the above, when used in a particular chapter, is introduced by both the full title and the abbreviation. The one exception is the term ESD, which enjoys common usage.

ABSTRACT

This thesis comprises a critical review of the role of Local Government in the conservation of biological diversity (or 'biodiversity'). Whilst the vast majority of the text relates to NSW, much of the broader commentary may extend to other Australian jurisdictions. The nub of the thesis is that despite the rhetoric in key documents – including the *National Strategy for the Conservation of Australia's Biological Diversity*, the *NSW Biodiversity Strategy*, the *National Local Government Biodiversity Strategy* and various plans and policies made at the municipal level – the outlook is grim without fundamental policy, legal and fiscal change.

The topic is huge but crucial to any person concerned about the mammoth decline of biodiversity in Australia. Whilst being intrinsically transdisciplinary in nature, the thesis attempts to contribute to the 'new production of knowledge'.[1] It raises issues, problems, ideas and recommendations.

The work is based on:

- A literary search until 2001. The long gap between this date and thesis submission is due to a severe illness suffered by the author, which arose in late Dec 2001.[2]
- Empirical research into:
    - nine 1998/1999 'state of environment' reports prepared for by councils located roughly in or around the 'NSW South-western Slopes' bioregion that is recognised for the extremely limited extent of remnant native vegetation;
    - conservation related clauses in all gazetted 'comprehensive' Local Environmental Plans - i.e. those applying to entire Local Government areas - prepared by councils between 1995 and 2000 inclusively and which remain in force;
- Personal discussion with various officials and onlookers directly involved in, or concerned about, biodiversity conservation at the municipal level.

Brief summaries of each chapter are provided herein. The introduction initiates discussion on (i) the meaning of 'biodiversity', including its shift from a scientific concept to a populist

[1] See ch 1 at 2.

[2] On 31 Dec 2001, after hospitalisation for 9 days, the author was diagnosed as suffering from a malignant brain tumour, known as astrocytoma. It was removed in 2002, followed by heavy radiotherapy and chemotherapy, and a long period of torpor during which I lived the life a cat, sleeping for over twelve hours per day. I returned to this thesis in July 2002, then spending about 30 minutes per day which expanded over time, and recommenced part-time academic work in 2003. I am now convinced that I have left the cancer behind, being one of the fortunate 20% of astrocytoma sufferers to survive, supported by a medical team of professional excellence.

expression, (ii) the position of councils in Australian government and (iii) the significance of biodiversity conservation at the local sphere. It also introduces two related concepts that are met throughout the thesis, which arguably erode council conservation capability: Local Government's 'historical and cultural baggage' and the 'ratepayer ideology'.

The following three chapters provide the 'historical and institutional' context. Chapter Two focuses on changing societal perspectives towards the biophysical environment, together with resultant statutory and environmental trends that have paralleled the advancement of Local Government. Chapter Three traces the history of NSW Local Government, demonstrating its entrenchment in the political landscape. It examines major changes, especially functional expansion and managerial reform. Chapter Four scrutinises a particular aspect of municipal experience, namely top-down and bottom-up cooperation between neighbouring councils. This chapter adds consideration of state appointed regional bodies that may arguably sideline Local Government. The regional context is fundamental to environmental management due to the inappropriateness of many council boundaries.

The next three chapters concentrate on legislative and financial detail. Chapter Five reviews the *Local Government Act* 1993 (NSW), which provides wide service powers, limited regulatory opportunity and special requirements for council-owned land. Chapter Six explores the land-use planning system under the *Environmental Planning and Assessment Act* 1979 (NSW), especially the ongoing influence of its urban background. It raises the perennial influence of 'developmentalism' in the determination of applications for development, which directly benefits property interests. Recent statutory change, especially in relation to 'threatened species' law, may do little more than support informed habitat destruction. A closely related matter is funding, as discussed throughout Chapter Seven. The issue goes beyond insufficiency. It is argued that Local Government's primary financial source - i.e. rating, a property tax - works *against* biodiversity conservation. Not only is there no policy rationale to support rating in the conservation context but the system can provide a 'perverse incentive' to rural landholders to clear their lands. This problem is exacerbated by the type of valuation and differential rates. The system demands major overhaul, including consideration of increased conditional Commonwealth funding.

The following two chapters relate to attitudes towards the biophysical environment that are popular amongst the general community. Chapter Eight considers the provision of vegetated, passive recreational open space whilst Chapter Nine deals with securing and enhancing local amenity. These approaches, however, can be directly inconsistent with biodiversity conservation.

Parochial 'green' desires of local constituents can lead to environmental damage. Notwithstanding this, Chapter Ten provides some impressive examples of Local Government supporting biodiversity conservation. But these are isolated and rely on committed individuals.

Whilst the pervasive prospect throughout this thesis is one of gloom, the concluding chapter builds on previous discussion by presenting ideas and recommendations to improve the role of Local Government in conserving biodiversity. It emphasises the need for regional approaches, improved funding mechanisms and fresh visions. Councils with bigger areas, supported by community structures to maintain 'grass roots' public participation, together with massive change to Local Government funding, may provide a desirable path for municipal reform and retention of Australia's precious biodiversity.

The law discussed throughout this work stands at 1 Jan 2003. Major changes since then are noted in the Postscript.

ACKNOWLEDGEMENTS

At the outset, I wish to express gratitude to my longstanding and patient supervisor, Professor David Farrier. His eye for detail, rigorous reading of my lengthy drafts, willingness to argue and expertise in a volatile area of law and policy have all served to help me complete this tome.

David is also someone with a golden heart. When I lay in Sutherland Hospital in the summer of 2001/2002 with a suspected stroke, later diagnosed as a malignant brain tumour, he attempted to visit me by public transport but was prevented due to fierce bushfires. My memory of that time, which included subsequent chemotherapy and radiotherapy, is hazy. But I do remember David as a strong friend and colleague who was anxious to see me return from the 'otherland'.[3]

Other colleagues at the University of Wollongong also deserve acknowledgement that goes beyond gratefulness. These include Professor Stuart Kaye, the Dean of Law, for his kind support in 'easing me' back into academia and helping create a happy Faculty that is moving from strength-to-strength. I also thank Professor Martin Tsamenyi for his humour and various practical suggestions. Other colleagues I wish to explicitly thank are Margaret Bond, Freya Dawson, Scott Grattan, Carla Mooney and Thomas Musgrave for help in various ways. I extend this list to *all* my academic colleagues who were concerned about my health and recovery. Special reference is made, however, to Damien Considine whose own experience placed him in a unique position of understanding and encouragement.

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Without wanting to remind the reader of Oscar's night – which is generally an extremely boring affair – there is a band of professional people outside the University whom I wish to thank. These include Paul Bateson, Peter Creaser, Martin Fallding, Gerry Holmes, Stuart Little, Robbie Mellor, Graham Sansom, Ian Sinclair, Peter Williams and two extra-special people, namely Kevin Sproats and Danny Wiggins. Particular acknowledgement is given to Tania Pilkington, consultant planner extra-ordinaire, former student of the author and firm friend, who generously read all the draft chapters for obvious errors.

---

[3] This term is borrowed from C Koch, one of the author's favourite novelests albeit used here in a very different context.

Special mention should be made of my nextdoor neighbour, Nola James, who, coincidentally, is the daughter of the late Fred Larcombe, the chief historian of local government in NSW. Nola found books for me in her own garage as well as at the home of her mother, Moira Larcombe, who originally typed up the materials that her husband scribed in ink. There are considerable references to Larcombe's impressive work throughout this thesis.

Finally, I wish to express heartfelt thanks to my parents and, most of all, my wife Kim, the love of my life. A counsellor advised me once that those who have experienced the edge of the 'otherland' often become emotional at the drop of a hat. This is often the case with me. When I consider Kim's major role in helping me to leave the cancer behind and complete this mammoth of a thesis, my eyes soon moisten.

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