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THE FORGOTTEN FORESTS

THE ENVIRONMENTAL REGULATION OF FORESTRY ON PRIVATE LAND IN NEW SOUTH WALES BETWEEN 1997 AND 2002

A thesis submitted in fulfilment of the requirements for the award of

Doctor of Philosophy (Law)

from

University of Wollongong

by

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December 2003

Thesis Declaration

I, James Prest, being a candidate for degree of Doctor of Philosophy, declare that this thesis, submitted in fulfilment of the requirements for 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 work has not been submitted for qualifications at any other university or academic institution.

……..
James Prest

……..
Date

ABSTRACT

This thesis examines the regulation of private native forestry in two Australian jurisdictions: NSW and Tasmania. Private forests have long been the forgotten forests - a neglected aspect of forest policy in Australia. Appropriate supervision of private native forestry (PNF) is important because private forests are home to much threatened biodiversity, and as they make up a significant proportion of the total area of native forests in NSW. PNF also makes a substantial contribution to total timber production in NSW.

Research was conducted into the administration of environmental laws applying to PNF in NSW between 1997-2002 in order to assess the regulatory framework and to discern patterns of administrative behaviour. The thesis asked "Were NSW environmental laws applying to PNF effectively implemented and enforced?" The hypothesis that much PNF in NSW is "under-regulated" in practice was explored.

To examine these questions, a thorough review of all relevant legislative provisions and case law was conducted. The *Native Vegetation Conservation Act 1997* and the *Threatened Species Conservation Act 1995* and their implementation in relation to PNF were examined in particular. Defects in the legislative framework applying during the study period were revealed. The applicable law was found to be complex, and highly fragmented, with responsibility spread across many agencies. Over 100 interviews with agency staff at head office and regional offices were undertaken. Other information was obtained from internal documents and through requests under the *Freedom of Information Act*. The broader context was addressed by reviewing theoretical literature in environmental law, with an emphasis on the regulatory theory literature.

Some regulatory failures stemmed from inadequate implementation of the legislation. It was found that PNF was infrequently regulated under the *Native Vegetation Conservation Act*, primarily due to a problematic exemption for specified types of PNF. In the North Coast and Hunter regions the exemption was claimed by 100% of PNF operations (on land tenures where it was available). PNF was found to be infrequently regulated by local government under Local Environment Plans (64.5% of 107 local governments did not regulate PNF in the main rural zone). The safety net mechanism of licensing under the *Threatened Species Conservation Act* was infrequently applied with only five licences granted for PNF. Regarding law enforcement, a low level of prosecution activity was found to have taken place.

The findings support the proposition that in practice NSW law was inadequate to ensure ecologically sustainable forest management, due to the poorly designed and integrated statutory framework. They also provide some evidence to support the proposition that the applicable laws were generally implemented with a light touch, generally expressing a *laissez faire* approach to PNF in most regions (with some exceptions). These findings suggest there is a pressing need for reform of the regulatory framework in NSW, if standards of ESFM are to be achieved. Thus any future exemptions must be of narrow application. Further, a more pro-active approach to ensuring compliance with legislative requirements is necessary.

While the results suggest regulatory failure, they do not constitute grounds for wholesale replacement of regulation with other mechanisms such as self-regulation and incentives payments. Issues of compliance and enforcement as well as adequacy of funding are crucial to choices of policy instrument for biodiversity conservation on private land.

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ABBREVIATIONS

AHC	Australian Heritage Commission
ANZECC	Australian and New Zealand Environment and Conservation Council
CAR	Comprehensive Adequate and Representative (Reserve System)
CBD	United Nations Convention on Biological Diversity
CDM	Clean Development Mechanism under the Kyoto Protocol to the UNFCCC
CITES	United Nations Convention on International Trade in Endangered Species
COP	Code of Practice for clearance of Native Vegetation under *NVCA* (NSW)
CRA	Comprehensive Regional Assessment
CSD	United Nations Commission on Sustainable Development
DA	Development application
DFA	Deferred Forest Areas
D-G	Director-General
DLWC	Department of Land and Water Conservation (NSW)
DPP	Director of Public Prosecutions
DUAP	Department of Urban Affairs and Planning (NSW)
EFIPA	*Endangered Fauna (Interim Protection) Act 1991* (NSW)
EMPCA	*Environmental Management and Pollution Control Act 1994 (Tas)*
EPA	Environment Protection Authority (NSW)
EPAA	*Environmental Planning and Assessment Act 1979 (NSW)*
EPBCA	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)
EPI	Environmental Planning Instrument (NSW)
ESD	Ecologically Sustainable Development
ESFM	Ecologically Sustainable Forest Management
FIS	Fauna Impact Statement (made under former EPIPA)
FNPA	*Forestry and National Park Estate Act 1998* (NSW)
FOI	Freedom of Information
FPA	*Forest Practices Act 1985 (Tas)*
FPB	Forest Practices Board (Tas)
FPO	Forest Practices Officer (Tas)
FPP	Forest Practices Plan (Tasmania)
FPT	Forest Practices Tribunal (Tas)
FRRA	*Forestry Rights Registration Act 1990* (Tas)
HCP	Habitat Conservation Plan made under *Endangered Species Act 1973* (US)
HCV	High conservation value forest
IBRA	Interim Biogeographic Regionalisation of Australia
IFOA	Integrated Forestry Operations Approval under the FNE Act 1998 (NSW)
IGAE	Intergovernmental Agreement on the Environment (1992)
JANIS	Joint ANZECC/Ministerial Council on Forestry Fisheries & Aquaculture NFPS Implementation Subcommittee
LEP	Local Environment Plan (NSW)
LGA	Local Government Area
LNE	Lower North East CRA Region (NSW)
LUPA	*Land Use Planning and Approvals Act 1993* (Tas)
MCFFA	Ministerial Council on Forestry, Fisheries & Aquaculture
NFPS	National Forest Policy Statement (1992)
NGO	Non-government organisation
NHT	Natural Heritage Trust of Australia (Cth)
NPWA	*National Parks and Wildlife Act 1974* (NSW)

NPW	National Parks and Wildlife Service NSW
NRM	natural resources management
NVC	*Native Vegetation Conservation Act 1997* (NSW)
PNF	Private Native Forestry
POEA	*Protection of the Environment Operations Act 1997* (NSW)
PRA	*Plantations and Reafforestation Act 1999 (NSW)*
PTR	Private Timber Reserve (Tasmania)
REP	Regional Environment Plan (NSW)
RFA	Regional Forest Agreement
RMPAT	Resource Management and Planning Appeals Tribunal (Tas)
RMPS	Resource Management and Planning System (Tas)
RVMC	Regional Vegetation Management Committee
RVMP	Regional Vegetation Management Plan (NSW)
SEPP	State Environmental Planning Policy (NSW)
SIS	Species Impact Statement (under *TSCA* (NSW))
SOE	State of the Environment Report
SPPA	*State Policies and Projects Act 1993* (Tas)
THP	Timber Harvesting Plan
TIIPA	*Timber Industry (Interim Protection) Act 1992* (NSW)
TPHG	*Timber Plantations (Harvest Guarantee) Act 1995* (NSW)
TPO	Tree Preservation Order (NSW)
TSCA	*Threatened Species Conservation Act 1995* (NSW)
TSPA	*Threatened Species Protection Act 1995* (Tas)
UNE	Upper North East NSW CRA Region
UNESCO	United Nations Educational Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
VMO	Vegetation Management Officer (DLWC NSW)

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