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Wildlife Protection Association of Australia Inc. and Minister for the Environment, Heritage and the Arts and Director-General of the Department of Environment and Climate Change (NSW) (Party Joined) [2008] AATA 717 (15 August 2008)

Last Updated: 19 August 2008

Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION [2008] AATA 717

ADMINISTRATIVE APPEALS TRIBUNAL)

) No 2007/0535

GENERAL)
ADMINISTRATIVE
DIVISION

Re **WILDLIFE PROTECTION
ASSOCIATION OF AUSTRALIA
INC.**
Applicant

And **MINISTER FOR THE
ENVIRONMENT, HERITAGE AND
THE ARTS**
Respondent

And **DIRECTOR-GENERAL OF THE
DEPARTMENT OF
ENVIRONMENT AND CLIMATE
CHANGE (NSW)**
Joined Party

DECISION

Tribunal Deputy President P E Hack SC and Dr T J Hawcroft, Member
Date 15 August 2008

Place Brisbane (heard in Sydney)

Decision The Tribunal directs that the parties consult with a view to providing within 14 days an agreed form of decision in accordance with these reasons or, if agreement cannot be reached, lodging further short submissions within 21 days setting out the suggested form of decision and the reasons for adopting that form.

.....Signed.....Deputy President

CATCHWORDS

ENVIRONMENT – wildlife protection – New South Wales Commercial Kangaroo Harvest Management Plan 2007-2011 – framework to commercial harvesting of kangaroos imposed under the Commonwealth’s export powers – the management plan must meet certain requirements under the [Environment Protection and Biodiversity Conservation Act 1999](#) – the Plan satisfies the requirements of ecological sustainability, the conservation of biodiversity, the humane treatment of kangaroos, the assessment of environmental impacts – ethical research and effective state legislation – the Plan is consistent with the precautionary principle – the Plan satisfies the requirements relating to mitigation and monitoring measures but not response measures – Plan to be varied to provide a response to an apparent or demonstrated decline in numbers – the parties to provide further submissions on the form of decision

[Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) – [ss 3, 3A, 303BA, 303FO, 391, 528, Part 13A](#)

[Environment Protection and Biodiversity Conservation Regulations 2000](#) (Cth) – reg 9A.05

[National Parks and Wildlife Act 1974](#) (NSW)

Re Wildlife Protection Association of Australia Inc and Minister for the Environment and Heritage (2003) 73 ALD 446

Re Wildlife Protection Association of Australia Inc and Minister for the Environment and Heritage [2004] AATA 1383

REASONS FOR DECISION

15 August 2008

Deputy President P E Hack SC and Dr T J Hawcroft, Member

INTRODUCTION

1. On 19 December 2006 the then Minister for the Environment and Heritage made a declaration^[1] pursuant to [s 303FO\(2\)](#) of the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) (the EPBC Act) that the “New South Wales Commercial Kangaroo Harvest Management Plan 2007-2011” (the Plan) was an *approved wildlife trade management plan* as that expression is used in Part 13A of the EPBC Act. The Plan deals with four species of kangaroo – the red kangaroo (*Macropus rufus*), the western grey kangaroo (*Macropus fuliginosus*), the eastern grey kangaroo (*Macropus giganteus*) and the wallaroo (*Macropus robustus erubescens* and *Macropus robustus robustus*).
2. The applicant, the Wildlife Protection Association of Australia Inc., seeks a review in this Tribunal of the Minister’s decision. The Director-General of the New South Wales Department of Environment and Climate Change^[2], who propounded the Plan and sought the declaration by the Minister, was a party to the proceedings and generally adopted the arguments put on behalf of the Minister. The Plan replaces the “New South Wales Kangaroo Management Program 2002-2006”, which was the subject of earlier proceedings in the Tribunal^[3].
3. At the outset we should stress that the Minister’s decision, and that of this Tribunal, is not a decision that authorizes the commercial harvesting of kangaroos *per se*. That is a matter for the State. The decision that is before us seeks to impose a framework to commercial harvesting in the context of the Commonwealth’s powers in relation to the export of the products from those animals to overseas markets. Except within that context, it is not within the power of the Commonwealth to impose restrictions on the harvesting of the animals. Absent the Plan, the harvesting of the animals would continue, subject to the controls imposed by the [National Parks and Wildlife Act 1974](#) (NSW) (the NPW Act) and Regulations made under that Act.

THE STATUTORY SETTING

1. Given that the Plan incorporates a number of requirements of the NPW Act it is necessary to first examine certain aspects of that

legislation before examining the EPBC Act.

2. All kangaroo species are “protected fauna” for the purposes of the NPW Act and it is an offence to harm them unless that is done in accordance with a licence or other lawful authority. The NPW Act, and the Regulations made under that Act, make provision for the licensing of a range of activities in connection with the commercial harvesting of kangaroos. Those who seek to kill kangaroos for the purposes of sale must be the holder of a trapper’s licence. An applicant for a trapper’s licence must hold a current firearms licence and must have completed the firearms accreditation programme undertaken by the New South Wales Firearms Safety and Training Council Ltd. Trapper’s licences are subject to a variety of conditions including, relevantly:
 - that kangaroos be shot in accordance with the *Code of Practice for the Humane Shooting of Kangaroos*;
 - that the trapper may not be in possession of a carcass containing a bullet wound to the body;
 - that a numbered and self-locking plastic tag must be immediately affixed to each kangaroo taken;
 - that kangaroos may only be sold to the premises of a registered and licensed fauna dealer;
 - that the trapper provide monthly returns to the Department of Environment and Climate Change.
3. The area where shooting is to take place is regulated by the requirement for an occupier’s licence. An occupier’s licence entitles the holder to kill, or to permit the holder of a trapper’s licence to kill, a specified number of kangaroos on the occupier’s land. The numbered plastic tags issued by the Department of Environment and Climate Change may only be used on the property subject of the particular occupier’s licence and may only be used by the trapper nominated by the occupier’s licence.
4. Kangaroo carcasses may only be sold to, and may only be purchased by, a licensed fauna dealer. A fauna dealer may only purchase carcasses from the holder of a trapper’s licence or from another licensed fauna dealer.
5. The starting point for an examination of the EPBC Act is an examination of its objects and of the principles of ecologically sustainable development. The former are set out in s 3 of the EPBC

Act in these terms:

“(1) The objects of this Act are:

(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and

(c) to promote the conservation of biodiversity; and

(ca) to provide for the protection and conservation of heritage; and

(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and

(e) to assist in the co-operative implementation of Australia’s international environmental responsibilities; and

(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity; and

(g) to promote the use of indigenous peoples’ knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.”

The principles of ecologically sustainable development are set out in s 3A of the EPBC Act in these terms:

“The following principles are *principles of ecologically sustainable development*:

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(c) the principle of inter-generational equity — that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

(e) improved valuation, pricing and incentive mechanisms should be promoted.”

1. It is now necessary to consider the objects of Part 13A headed “International movement of wildlife specimens”, set out in s 303BA of the EPBC Act in these terms:

“(1) The objects of this Part are as follows:

(a) to ensure that Australia complies with its obligations under CITES and the Biodiversity Convention;

(b) to protect wildlife that may be adversely affected by trade;

(c) to promote the conservation of biodiversity in Australia and other countries;

(d) to ensure that any commercial utilisation of Australian native wildlife for the purposes of export is managed in an ecologically sustainable way;

(e) to promote the humane treatment of wildlife;

(f) to ensure ethical conduct during any research associated with the utilisation of wildlife;

(h) to ensure that the precautionary principle is taken into account in making decisions relating to the utilisation of wildlife.

Note: CITES means the Convention on International Trade in Endangered

Species—see section 528.

(2) In order to achieve its objects, this Part includes special provisions to conserve the biodiversity of Australian native wildlife.”

1. The general scheme of the EPBC Act is to prohibit the export of wildlife unless that export is in accordance with, *inter alia*, an approved wildlife trade management plan. By virtue of s 303FO(2) the Minister may declare a specified plan to be an approved wildlife trade management plan for the purposes of s 303FO. Subsections 303FO(3) and (4) are relevant to the task of the Minister (and this Tribunal). They provide:

“(3) The Minister must not declare a plan under subsection (2) unless the Minister is satisfied that:

(a) the plan is consistent with the objects of this Part; and

(b) there has been an assessment of the environmental impact of the activities covered by the plan, including (but not limited to) an assessment of:

(i) the status of the species to which the plan relates in the wild; and

(ii) the extent of the habitat of the species to which the plan relates; and

(iii) the threats to the species to which the plan relates; and

(iv) the impacts of the activities covered by the plan on the habitat or relevant ecosystems; and

(c) the plan includes management controls directed towards ensuring that the impacts of the activities covered by the plan on:

(i) a taxon to which the plan relates; and

(ii) any taxa that may be affected by activities covered by the plan; and

(iii) any relevant ecosystem (for example, impacts on habitat or biodiversity);

are ecologically sustainable; and

(d) the activities covered by the plan will not be detrimental to:

(i) the survival of a taxon to which the plan relates; or

(ii) the conservation status of a taxon to which the plan relates; or

(iii) any relevant ecosystem (for example, detriment to habitat or biodiversity); and

(e) the plan includes measures:

(i) to mitigate and/or minimise the environmental impact of the activities covered by the plan; and

(ii) to monitor the environmental impact of the activities covered by the plan; and

(iii) to respond to changes in the environmental impact of the activities covered by the plan; and

(f) if the plan relates to the taking of live specimens that belong to a taxon specified in the regulations—the conditions that, under the regulations, are applicable to the welfare of the specimens are likely to be complied with; and

(g) such other conditions (if any) as are specified in the regulations have been, or are likely to be, satisfied.

(4) In deciding whether to declare a plan under subsection (2), the Minister must have regard to:

(a) whether legislation relating to the protection, conservation or management of the specimens to which the plan relates is in force in the State or Territory concerned; and

(b) whether the legislation applies throughout the State or Territory concerned; and

(c) whether, in the opinion of the Minister, the legislation is effective.”

1. The object in s 303BA(1)(h) of the EPBC Act refers to “the precautionary principle”. That principle is dealt with in s 391 of the EPBC Act. The section requires the Minister to take account of the precautionary principle, to the extent that can be done consistently with the other provisions of the EPBC Act, in the making of a variety of decisions including decisions made under s 303FO of the EPBC Act. The precautionary principle is:

“that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.”

1. The expression “ecologically sustainable use” or variants of it are used in s 303BA and in s 303FO of the EPBC Act. The expression, in the context of the use of natural resources, is defined in s 528 of the EPBC Act as meaning:

“use of the natural resources within their capacity to sustain natural processes while maintaining the life-support systems of nature and ensuring that the benefit of the use to the present generation does not diminish the potential to meet the needs and aspirations of future generations.”

THE PLAN

1. As the submissions for the Association point out, kangaroos are species native to, and only found naturally in, Australia and form a significant part of the Australian ecosystem. Expressed in its broadest form, the Plan contemplates that in the order of 1,000,000 kangaroos will be culled each year during the five year life of the Plan. We should start by examining the main features of the Plan. We propose only to deal with its main features at this point since we will need to examine particular parts of it in greater detail when we come to deal with the criticisms of the Plan advanced by the Association.

2. The Plan regulates the commercial culling of the four species of kangaroos within a number of designated zones. The Plan has no application to non-commercial culling and it has no application to land managed by the Department of Environment and Climate

Change, for example, national parks and nature reserves. Kangaroos cannot be taken in those areas which total some 6.5 million hectares or approximately 7% of the State.

3. The primary goal of the Plan is:
“to ensure that the commercial harvest of *kangaroos* is ecologically sustainable. This will be achieved through the application of the best available scientific knowledge, best practice management and monitoring of outcomes to ensure the viability of *kangaroo* populations is not compromised by any action undertaken in accordance with this plan.”

1. The overarching goal of the Plan is said to be the maintenance of viable populations of kangaroos throughout their ranges in accordance with the principles of ecologically sustainable development. The Plan seeks to achieve that goal by setting seven “aims” as follows:

- (1) manage commercial operators via licensing;
- (2) ensure humane treatment of kangaroos;
- (3) monitor industry compliance;
- (4) monitor kangaroo populations;
- (5) facilitate adaptive management and research;
- (6) undertake program reporting and review;
- (7) promote community awareness and participation.

1. It will suffice for present purposes to outline the actions to be taken to achieve the aim of monitoring kangaroo populations. There are four actions proposed:

- the conduct of population surveys, annually across the western plains and three yearly for tableland zones and other areas where helicopter surveying is required;
- the setting of quotas of 15% of the population estimate for eastern grey kangaroos, western grey kangaroos and wallaroos and 17% of the population estimate for the red kangaroo;
- the setting of a special quota of a maximum of 5% of the

population estimate for each species where the commercial quota in a particular zone has been utilised and where one or more of climatic trends and local conditions, exceptional circumstance declaration, or kangaroo population trends require the setting of a special quota. On a state-wide basis the special quota may not exceed 1.5% of the population estimate for each species in any one year^[4];

- continuous monitoring of populations indirectly, for example from industry returns.

We observe, at this juncture, that the Plan does not prescribe any particular consequence of this monitoring of populations beyond the adjustment of quotas that would flow from a variation in population.

1. The extent of commercial culling authorised by the Plan is not evident from the Plan. Recourse must be had to the 2007 Kangaroo Quota Report prepared in November 2006 which shows 2006 population estimates and 2007 quotas as follows:

	Population Estimate 2006	Quota – 2007	Quota – Percent of Population
Red kangaroo	2,182,788	371,074	17.0
Eastern grey kangaroo – (Western Plains)	2,142,137	321,320	15.0
Eastern grey kangaroo – (Tablelands)	378,847	56,827	15.0
Eastern grey kangaroo – (South-eastern NSW)	415,271	62,291	15.0
Western grey kangaroo	653,524	98,028	15.0
Wallaroo – (Tablelands)	208,104	31,216	15.0
TOTAL	5,982,677	942,763	

1. We should also, in this context, refer to the evidence of the actual take in the period to 30 September 2007 extracted from the 2008

Kangaroo Quota Report. As was the case in previous years, the quota was not met.

Species Quota Take % quota % population

Red 371,074 231,483 62% 11%

Eastern grey 440,438 313,350 71% 11%

Western grey 98,029 66,955 68% 10%

Wallaroo 31,216 19,526 63% 9%

1. Despite that take, population estimates in the 2008 Kangaroo Quota Report demonstrate an increase in population for red kangaroos, eastern grey kangaroos and western grey kangaroos. There is, however, a significant decrease in the population estimates for wallaroos although it is likely that that decrease is attributable to inaccuracies in the estimates. The 2007 estimates and 2008 quotas are:

	Population Estimate 2007	Quota – 2008	Quota – Percent of Population
Red kangaroo	2,524,448	429,156	17.0
Eastern grey Kangaroo – (Western Plains)	2,150,523	322,578	15.0
Eastern grey kangaroo – (Tablelands)	470,226	70,534	15.0
Eastern grey kangaroo – (South-eastern NSW)	415,271	62,291	15.0
Western grey kangaroo	726,363	108,954	15.0
Wallaroo – (Tablelands)	114,996	17,245	15.0
TOTAL	6,401,827	1,010,758	

THE ASSOCIATION'S EVIDENCE

1. Before undertaking the task of considering the statutory criteria we should deal with some of the evidence relied upon by the Association – that of Mr O'Brien, Ms Stephenson, Ms Dingle Wall and Mr Pearson. Whilst we do not doubt the sincerity of those witnesses and the sincerity of their convictions we do not find their evidence to be of any assistance except in one limited area. That exception relates to evidence that on occasions “short neck” kangaroos were sighted in chillers. We deal below with the significance of that evidence when considering the issue of the humane treatment of kangaroos. Otherwise it is not entirely clear what was sought to be demonstrated by the evidence which was essentially anecdotal evidence of observations made by the witnesses in the course of various travels throughout parts of New South Wales. If the evidence was tendered to demonstrate a fall in kangaroo numbers, particularly as a consequence of drought conditions, it cannot be preferred to that which is based upon scientific estimates and found within the Quota Reports, *a fortiori* where no challenge was mounted to the estimates of population. If it was tendered to demonstrate that, on occasions, kangaroos of less than minimum size were taken, or that there was a female bias in the commercial take, the random nature of the observations would preclude us from placing any reliance upon the evidence. If, however, the evidence was lead to demonstrate the existence of hygiene concerns in the treatment of kangaroo carcasses, that was not made an issue in the proceedings and accordingly the Director-General has not had any opportunity to meet such a case even assuming that the subject of hygiene is otherwise relevant to the matters that we must decide.
2. The issues we have to decide in this case fall to be determined by reference to the substantial body of expert evidence.

THE ISSUES

1. There is considerable overlap in the statutory criteria. Rather than undertake a *seriatim* consideration of the evidence by reference to those criteria, we propose to adopt and adapt the categorisation used in the Minister's Statement of Facts and Contentions[5]. By reference to that the issues that arise are as follows:

(a) does the Plan satisfy the requirements of ecological sustainability?

(b) does the Plan satisfy the requirements for the conservation of biodiversity?

(c) does the Plan satisfy the requirements of humane treatment of kangaroos?

(d) does the Plan satisfy the requirements relating to mitigation, monitoring and response to environmental impact?

(e) does the Plan satisfy the requirement for assessment of environmental impacts?

(f) is the Plan consistent with the precautionary principle?

(g) does the Plan satisfy the requirements of ethical research?

(h) does the Plan satisfy the requirements of effective State legislation?

1. We propose to deal with each of these issues, making findings on the evidence and dealing with the arguments of the parties as we do so.

ECOLOGICAL SUSTAINABILITY

1. What is meant by the expression “ecologically sustainable use” has already been noticed^[6]. The goal of ecological sustainability is imposed in a variety of ways. First, s 303FO(3)(a) of the EPBC Act obliges us to be satisfied that the Plan is consistent with the objects of Part 13A of the EPBC Act. One of those objects is:

“to ensure that any commercial utilisation of Australian native wildlife for the purposes of export is managed in an ecologically sustainable way.”

1. Additionally, s 303FO(3)(c) of the EPBC Act requires us to be satisfied that the Plan includes management controls directed towards ensuring that the impacts of the activities covered by the Plan are ecologically sustainable. Similarly, s 303FO(3)(d)(i) of the EPBC Act require us to be satisfied that the activities contemplated by the Plan will not be detrimental to the survival of the kangaroos subject of the Plan.

2. Mr Baird of counsel, who lead Mr Singleton for the Association,

submitted, on this aspect of the case, that the evidence supported conclusions that the operation of the Plan:

“(a) will result in Australia contravening its obligations under the Biodiversity Convention, namely, the conservation of biological diversity and the sustainable use of its components;

...

(c) will not ensure that the commercial harvesting of kangaroos for the purpose of export is managed in an ecologically sustainable way;

...”

We are unable to agree.

1. The argument for the parties concerning sustainability focussed, in part, upon the risk of over-harvesting and whether the Plan contained adequate safeguards against that risk. In coming to the view that there is a minimal risk of overharvesting and that the Plan manages harvesting in an ecologically sustainable way we were particularly impressed by the evidence of Dr Anthony Pople, a population ecologist with over 25 years experience in the harvest management of kangaroos. Dr Pople described the concepts of ecological sustainability and conservation of biodiversity in this way^[7]:

“6. Sustainability of a harvest refers to maintaining a harvest regime that does not jeopardise future harvests ... To be ecologically sustainable, this harvest should not adversely affect ecosystem function. In other words, we should be concerned about the broader impacts of harvesting and not just ensuring conservation of the harvested population. The term ‘function’ is used to indicate that it is not necessarily a biological state (e.g. species composition and density) that needs to be conserved ..., but the interactions and processes that allow states to change and species to evolve and adapt in response to changing environments.

1. Biodiversity generally refers to variation amongst species, genetic diversity within a species, and even diversity of ecosystems ... To conserve biodiversity is to go somewhat towards ecological sustainability. If biodiversity can be measured, such as by species richness (i.e. the number of species in an area) or composition, then

this offers a possible way of monitoring the ecological sustainability of an activity such as wildlife harvesting. However, it may not capture changes in landscape or ecosystem function and so other measures such as soil characteristics may also need to be monitored.”

2. Dr Pople makes the point that kangaroo harvesting has been conducted in this country for over a century and that populations have been sustained. He cites research, including some undertaken by him, which demonstrates that harvest rates of 10% - 20% are sustainable in the long term. Dr David Croft, an ecologist with similarly impressive qualifications whose opinions were relied upon by the Association, is critical of this view of historical sustainability on the basis that it is based on studies of the red kangaroo-chenopod shrubland system and that it assumes, but does not establish, relevance to other ecosystems and species.
3. That criticism is answered, we think, by research undertaken by Dr Pople and others in 2006 which indicated that all four species in issue here showed population dynamics that are sufficiently similar to be harvested under a common strategy. Dr Pople relied upon demonstrated sustainability over years and modelling studies to conclude that there was a low risk of overharvesting. He said:
“14 In kangaroo management, the factors outlined above, in my opinion, result in a low risk of overharvesting. Other factors that further support this view include:
 - a. Population estimates are conservative (i.e. underestimates of true population size) as I have explained in a number of articles ... and more recently in some work assessing the accuracy of helicopter surveys of kangaroo populations ...
 - b. The male bias in the harvest ... effectively reduces the harvest rate by removing individuals (i.e. males) that are surplus to the population’s requirement to reproduce because kangaroos have a promiscuous mating system. In other words, the maximum sustained yield (i.e. the harvest rate at which long-term yield is maximised) is greater and is taken at a higher rate when the harvest is male biased compared with a non-selective harvest. This effect has been modelled for kangaroos ...
- i. The annual surveys referred to earlier track populations that, outside of drought, fluctuate only moderately from year-to-year.

- a. A large proportion of the mortality during population declines, when the risk of overharvest is greatest, is likely to be ‘compensatory’ rather than ‘additive’ ... In other words, many of the animals that are harvested during steep population declines would have died anyway.
 - b. Spatial refuges where kangaroos cannot be harvested will further reduce the risk of overharvesting ... To be effective, these unharvested areas provide immigrants to supplement harvested areas. The Management Plan identifies a large area of conservation reserve where kangaroo harvesting is not permitted. There are also inaccessible areas on properties and areas that are too far from chiller boxes (i.e. where carcasses are taken in the morning following shooting and stored) for shooters to operate, where kangaroos are not harvested.”
1. We accept the opinion of Dr Pople that the risk of over-harvesting is low and, in our view, is an acceptable risk. In our discussion below regarding the Plan’s capacity for mitigation, monitoring and response to environmental impact we propose amendments to the Plan to overcome deficits that we identify in the Plan. With these amendments we consider that the Plan will satisfy the requirements of ecological sustainability.
 2. We do not accept the submission advanced on behalf of the Association[8] that “ecological sustainability requires some benefit of the use”. The EPBC Act proceeds upon the premise that, in certain circumstances and subject to controls, animals will be “taken”, i.e. harvested, caught, captured, trapped or killed[9]. With the exception of the extreme case, where the taking of one species was for the better sustainability of others, it is difficult to envisage how taking wildlife could create an ecological benefit and none was suggested in the evidence or the argument for the Association.
 3. It follows that we are satisfied that the Plan, as amended in accordance with the views expressed in paragraphs [63] to [68] below, satisfies the requirements of ecological sustainability.

CONSERVATION OF BIODIVERSITY

1. The Association submitted that we ought conclude that the Plan “will not promote the conservation of biodiversity in Australia” which is one of the objects of Part 13A of the EPBC Act. We are required to be satisfied that

the Plan is consistent with, *inter alia*, this object. The object of ensuring compliance with Australia's international obligations under the Biodiversity Convention[10] imposes a similar obligation as does the obligation in s 303FO(3)(d)(iii) of the EPBC Act for us to be satisfied that the proposed activities are not detrimental to any relevant ecosystem.

1. The Association submitted that it was not enough to meet this object for the Plan to be sustainable; the Plan, it was argued, "must actually promote the conservation of biodiversity in a positive sense". The purpose of the Plan, it was said, "must be for some conservation biodiversity benefit".
2. We are unable to accept the proposition that the object in issue can only be promoted where it can be demonstrated that there is a "positive" result. As we have said, it seems difficult to see how, except in an extreme case, culling could be regarded as producing a conservation biodiversity benefit, but the EPBC Act is premised upon the taking of wildlife in certain circumstances. We consider that the object of promoting the conservation of biodiversity will be achieved where it can be demonstrated that there will not be a negative effect to the conservation of biodiversity from the activities proposed.
3. We are not able, on the evidence, to conclude that the culling of kangaroos proposed by the Plan will, of itself, contribute to the conservation of biodiversity however we do not consider that the EPBC Act requires us to go that far. We are satisfied by the evidence of Dr Pople that the Plan "is certainly not inconsistent with" biodiversity conservation and, in that way, promotes it.
4. We are accordingly satisfied that the Plan does satisfy the requirement to promote the conservation of biodiversity.

HUMANE TREATMENT OF KANGAROOS

1. The requirement of humane treatment is imposed in two ways. First, one of the objects of Part 13A is "to promote the humane treatment of wildlife". But, in addition, we are required by s 303FO(3)(f) of the EPBC Act to be satisfied that regulatory conditions for the taking of wildlife "are likely to be complied with".
2. The regulatory conditions are imposed by reg 9A.05 of the [Environment Protection and Biodiversity Conservation Regulations](#)

2000 (Cth). For the purposes of s 303FO(3)(f) it imposes the following conditions:

“(a) the animal is taken, transported and held in a way that is known to result in minimal stress and risk of injury to the animal;

(b) if the animal is killed, it is done in a way that is generally accepted to minimise pain and suffering.

Note 1 Code of Practice for the Humane Shooting of Kangaroos, second edition, 1990, published by Environment Australia, applies to the shooting of an animal of a species in the Macropodidae family.

Note 2 Code of Practice for Capture, Handling, Transport and Slaughter of Brush Possums (Trichosurus vulpecula), 1997, published by the Animal Welfare Advisory Committee, Tasmania, applies to live trappings of brush possums in Tasmania.”

1. The Code referred to in Note 1 to the regulation is the *Code of Practice for the Humane Shooting of Kangaroos* published in 1985 under the auspices of the Council of Nature Conservation Ministers (CONCOM). The Code was prepared by the CONCOM Special Working Group on Cruelty Aspects of the Taking and Holding of Native Fauna. The Code was revised in 1990 and it is in the process of being revised by a working group that includes the RSPCA, other bodies concerned with animal welfare, and state and territory kangaroo management agencies. Despite the terms of Note 1 to reg 9A.05(4) it is not clear to us how it is said that that the Code applies, that is, has statutory force, to the shooting of macropods except by the process of importing the Code into approved trade management plans.
2. The upshot of this is that we are required to be satisfied:
 - (a) that the Plan promotes the humane treatment of wildlife; and
 - (b) that it is likely that kangaroos are killed in a way that is generally accepted as minimizing pain and suffering.

For the reasons we deal with below we do not accept the Association’s argument that reg 9A.05(4)(a) has any relevance.

1. We will first consider whether we are satisfied that the Plan promotes the humane treatment of wildlife. Aim 2 of the Plan is expressed in this way:

“Promote improved animal welfare outcomes and ensure that the commercial harvest of *kangaroos* under this plan is carried out in accordance with the *Code of Practice for the Humane Shooting of Kangaroos*.”

The Plan requires trappers to comply with the Code and proposes the adoption of any subsequent replacement for it. Three “actions” are proposed to ensure that Aim 2 is delivered. First, trappers are required to demonstrate competency by completing a firearms accreditation programme undertaken by the New South Wales Firearms Safety and Training Council Ltd and involving both a written test and a shooting test. Completion of that course, and renewal of accreditation every five years, is a condition precedent to obtaining a trapper’s licence. Next, it is said that Departmental officers will undertake regular and opportunistic inspections of kangaroos taken by trappers and of premises of fauna dealers. Finally, it is proposed that the Department will facilitate research into improving animal welfare outcomes associated with commercial harvesting of kangaroos.

1. The Association’s first submission is that the Plan proceeds on the assumption that the shooting of kangaroos in accordance with the Code constitutes humane treatment. The Minister and the Director-General have the onus, it is said, of showing that that assumption is correct.
2. The Code has the “primary objective” of achieving “instantaneous loss of consciousness and rapid death without regaining consciousness”. This is sought to be achieved by requiring the trapper to shoot only from a stationary position, to ensure that the target is clearly visible, stationary and within range, and to target the brain of the kangaroo. It is accepted by the Association that shooting in the brain with a centrefire rifle “is probably the most humane method of killing ... in that it will cause the least pain, suffering and stress”, a concession amply supported by the evidence of Professor Clive Phillips. On that basis we conclude that in circumstances where that is achieved, that is, where the shooting causes

instantaneous death, the treatment of kangaroos is humane and, in that respect, the Plan satisfies the object in s 303BA(1)(e) of the EPBC Act of promoting the humane treatment of wildlife.

3. There are two areas where the Association points to inhumane treatment of kangaroos – the occasions when a shooter does not achieve a brain shot and thus an instantaneous kill, and the treatment of joeys.
4. It is in the former of these instances that the evidence of the Association’s witnesses, and the evidence of seeing “short neck” kangaroos, becomes relevant. We are prepared to infer from the evidence of those observations that on occasions trappers may not achieve a head shot and may instead strike the kangaroo in the neck. The conditions of shooting being what they are it is impossible for all trappers to always achieve a brain shot. The Code notes that “[n]o matter how carefully the shooter aims, some kangaroos will not be killed outright”. It requires that wounded animals “must be dispatched as quickly as possible”. The evidence of a study undertaken by the RSPCA and published in 2002 shows that in a very high percentage of cases, in excess of 97%, there was compliance with the Code.
5. As it seems to us, no system, short of absolute prohibition, could prevent instances where instantaneous death was not achieved. The question is whether the Plan, by accepting that these instances will occur, promotes the humane treatment of kangaroos. We think that it does. The Plan requires trappers to achieve a very high level of accuracy before becoming licensed. It incorporates measures to deter non-compliance. The Plan requires a very high standard of accuracy that, if achieved, achieves humane death. In the small percentage of cases where that cannot be achieved the Plan requires measures to quickly and humanely despatch wounded kangaroos.
6. Dr Paul Hopwood, a veterinarian with considerable experience in both kangaroos and firearms, reviewed the trappers’ accreditation course undertaken by the New South Wales Firearms Safety and Training Council Ltd in 2003 and expressed the opinion that it adequately determines the ability of a trapper to comply with the Code. His vast experience leads him to the conclusion that there is no significant evidence of incompetence amongst commercial harvesters. To the contrary his experience “indicates exceptional

shooting skills amongst kangaroo trappers”.

7. It may be accepted that there will, nonetheless, be instances where instantaneous death by brain shot is not achieved. It may, as well, be accepted that in these instances there is a period of suffering by the wounded animal and that in an even smaller number of cases animals will be wounded but mobile and unable to be dispatched by the trapper and may suffer a lingering death. But those instances, whilst unfortunate, do not detract from our conclusion that the Plan does all that can be done to promote the humane treatment of wildlife. Any management plan that involves the commercial killing of free-ranging animals will involve a risk that perfection will not always be achieved. What is required is that the Plan achieve as near to perfection as human frailty will permit. We are satisfied that the system of accreditation, licensing, and compliance management achieves that object.
8. The same is true of the other aspect of the matter that the Association relied on, the treatment of orphan joeys. The Code requires the trapper to inspect females to ascertain whether there are in-pouch young. Any found must be dispatched as quickly as possible by a blow to the head or decapitation. In the case of larger young a shot to the head will result in humane death. The concern of the Association is directed particularly to those young at foot that are not able to be killed by the trapper following the killing of the mother. There was no unanimity in the evidence regarding the fate of those joeys. Dr Croft suggested that all young at foot joeys starve to death or are taken by predators. Professor Phillips was of the view that the survival rate was dependant upon forage quantity and quality. We need not resolve that issue. Again, it may be accepted that there will be a very small number of instances where young at foot die in this way, but we do not regard that fact, even in combination with the instances where an instantaneous killing of the adult is not possible, as leading to the conclusion that the Plan does not satisfy the object of promoting the humane treatment of wildlife. We are satisfied that it does meet that object.
9. The second argument of the Association concerns Reg 9A.05(4). The Association says that paragraph (a) has application. We do not accept that that is so. Paragraph (a) uses the expression “taken, transported and held” whereas paragraph (b) refers to what is required when an

animal is “killed”. There is no definition in the regulations of the expression “take”, however it is defined in s 303BC of the EPBC Act and for the purposes of Part 13A as including, “unless the contrary intention appears”, “harvest, catch, capture, trap and kill”. If the Regulations incorporate that definition, the presence of a separate use of “kill” expresses a contrary intention, that is, “take” in paragraph (a) does not include “kill”. If the definition is not incorporated the same result is achieved by the *expressio unius* rule of statutory construction. In either case we regard only paragraph (b) as having any application.

10. That being so, the question we must decide is whether we are satisfied that it is likely that kangaroos are killed in a way that is generally accepted as minimizing pain and suffering. The Code was the product of cooperation between State and Territory authorities responsible for national parks and wildlife matters, in consultation with interested groups such as the RSPCA and shooters’ organisations. Each of the management plans for the harvesting of kangaroos in Queensland, South Australia and Western Australia require compliance with the Code.
 11. The Code was considered by the Tribunal, differently constituted, in *Re Wildlife Protection Association of Australia Inc and Minister for the Environment and Heritage*[\[11\]](#). The Minister relied upon the conclusions of the Tribunal in that case as demonstrating “general acceptance” of the Plan as minimizing pain and suffering. The Association objected to the tender of the Reasons for Decision of the Tribunal and we reserved our decision on its admissibility. Having considered the matter we are of the view that the earlier Reasons, given after a contested hearing, are admissible to demonstrate a level of general acceptance of the Code as minimising pain and suffering. We overrule the Association’s objection. On that basis we have regard to the earlier conclusion of the Tribunal that the Code:
“adequately and humanely addresses the welfare issues in relation to kangaroos being killed for sale, and that it dictates the manner in which in-pouch joeys are to be dispatched in a manner, which, in the circumstances, is as humane as can be expected.”[\[12\]](#)
1. These matters satisfy us that under the Plan kangaroos will be killed in a way that is generally accepted as minimising pain and suffering.

MITIGATION, MONITORING AND RESPONSE TO ENVIRONMENTAL IMPACT

1. We are required to be satisfied that the Plan includes the measures set out in s 303FO(3)(e) of the EPBC Act which, for simplicity, we shall describe as mitigation measures, monitoring measures and response measures. The argument for the Association on this aspect of the case focussed upon the “failure to include specific and relevant management controls”[\[13\]](#). Without these controls, it was said, it was not possible to mitigate known impacts or to monitor potential impacts. That seems to us to be an argument directed to response measures and we propose to deal with it under that heading. No particular argument was directed to mitigation measures and monitoring measures however we need to be satisfied of those matters even in the absence of argument.

Mitigation measures

1. There will, of necessity, be an environmental impact by virtue of the extent of culling of kangaroos. We have already concluded that the Plan, as amended in the manner we suggest below, satisfies the requirements of ecological sustainability. In addition, we note that the Plan incorporates a system of regulation that involves licensing only shooters who can satisfy stringent testing requirements and a system of regulation to enforce compliance with the Plan.
2. We are satisfied that the Plan includes appropriate mitigation measures.

Monitoring measures

1. Aims 3 and 4 of the Plan involve the monitoring of industry compliance and kangaroo populations. The monitoring of both is required to monitor the environmental impact of the Plan. Monitoring of industry compliance will be undertaken by inspectors who will ensure compliance at all levels in the industry with the requirements of the Plan and prosecution of those who fail to comply. In addition it is contemplated that there will be scrutiny of returns to ensure that returns are accurately completed.
2. The Association criticizes the monitoring proposed on the basis that no monitoring is undertaken of the actual activities of shooting “in the field” which is invariably undertaken at night. The evidence of

Mr Arthur Snook is that he and his two colleagues who cover the area encompassed by the Plan do not undertake night-time inspections. It was said that there was considerable incentive under the Plan for trappers to abandon, i.e. not tag and leave to die or to rot, kangaroos not despatched with a single brain shot, or to sell such kangaroos illegally. It somewhat overstates the position, we think, to say that the Plan provides considerable incentive to act unlawfully, but it is certainly true that the Plan cannot, of itself, prevent trappers from acting outside the law. But no management plan can ever seek to do so; all that a management plan can achieve is to ensure that a high standard is set for those who seek to participate in the activities envisaged by it and to ensure that adequate sanctions are available to punish those who do not meet its requirements. We consider that Actions 6, 7 and 8 of the Plan are adequate to monitor industry compliance to the end of monitoring the environmental impact of the Plan.

3. It is proposed to monitor kangaroo populations by annual survey in the western areas of the State and at least once every three years in other areas where fixed wing surveying is not practical. It was not suggested that the methodology of surveying was inadequate. It is, of course, an estimate only but the methodology seems universally accepted as being the most realistic mechanism for monitoring populations.
4. We are satisfied that the Plan includes proper and adequate monitoring measures.

Response measures

1. It is this aspect of the Plan where we have some concerns. The Plan does not encompass any particular response to an unusual decline in numbers. Whilst it may be correct to say that trappers will not hunt in areas where the returns are below economic yields it is not adequate to rely upon economic forces to respond to a sudden and significant decline in numbers. We accept, as well, that a sudden decline in numbers can be detected between surveys from an analysis of surveys and from anecdotal information gathered by the staff of the Department.
2. It seems to us that the Plan ought provide some concrete response to an apparent or demonstrated decline in numbers such that culling

will be suspended for a period of time. The first task is to determine a trigger point.

3. There was considerable debate in the course of the hearing about the notion of “quasi-extinction”. Dr Croft seemed to suggest that a figure of 2 kangaroos per square kilometre was a measure of sustainability but we are unable to accept that that is so. Rather, the figure is one used in modelling studies in order to compare different management systems. Whilst the notion of a density at which point harvesting will cease will be practical in certain situations, for example where there is a limited and confined area, it is not practical where there are diverse environments.
4. The better way to respond, in our view, is by reference to population estimates and to do so by establishing a point where harvesting ought be suspended. The Plan envisages a quota of 17% for the red kangaroo and 15% for the other species. Harvest rates of 10% to 20% are demonstrated to be sustainable in the long term. On this basis it seems to us that a trigger point ought be adopted where there is a demonstrated decline of twice the quota. Thus, for example, where the population of grey kangaroos in a Zone has declined between surveys by 30% or more we think the harvesting ought cease in that Zone until the population has recovered. The adoption of the figure of 30% is somewhat arbitrary. It is based on an intuitive sense that a drop of more than twice the quota without any natural increase is sufficiently concerning to warrant suspension by way of response.
5. Moreover, we think that it is undesirable to wait until a survey if it is apparent from returns and other information that there is a concerning population decline. It would be desirable if the Plan required the Department to suspend the Plan if Departmental officers had reason to believe that the population within a Zone had declined by 30% (or 34% in the case of red kangaroos) or more from the last survey. Expressing the matter in this way would require suspension where that was the decline demonstrated by a survey and would permit suspension if information from the field suggested that that had occurred. The period of suspension would last until the Departmental officers were satisfied that populations were no longer declining at an excessive rate.
6. We do not consider that our concern in relation to this aspect of the

matter warrants a decision setting aside the decision under review. Our concern can be adequately dealt with by varying the decision by requiring an amendment of the Plan. With this amendment we are satisfied that the Plan includes adequate response measures and that overall the requirements of s 303FO(3)(e) of the EPBC Act are satisfied.

AN ASSESSMENT OF ENVIRONMENTAL IMPACTS

1. We are required to be satisfied that there has been an assessment of the environmental impact of the activities covered by the Plan. There must be an assessment which includes, but is not limited to, the matters in s 303FO(3)(b)(i) to (iv) of the EPBC Act. The Association does not dispute that there has been an assessment, “to some degree”, of the environmental impacts of the Plan. But, it is said:
“compliance with this provision requires that the environmental assessment be adequate and address all the relevant matters that are likely to be impacted by the activities”[\[14\]](#).
1. There is, as the Association submits, a primary environmental impact caused by the potential to kill in excess of 1 million kangaroos per year for a period of 5 years but we do not accept the underlying premise that there has not been an adequate assessment of that impact. Part 3 of the Plan contains a detailed assessment of the impacts of the activities proposed by the Plan. The Plan is criticised because it contains no reference to the potential environmental impact of the “do nothing” approach. So much may be accepted. However we are not aware of any evidence, and none was pointed to, that suggested that the absence of a consideration of not proceeding with the activities proposed by the Plan made the Plan’s assessment of the impacts of those activities inadequate. On the contrary, it seems logically absurd to require an assessment of the “do nothing” approach where it is no longer suggested, as it used to be, that the control of pasture damage was a basis for justifying harvesting.
2. Two other particular criticisms were made of the Plan’s assessment of environmental impacts – the incidental impact of what was said to be “the death, through starvation and killing, of the hundreds of thousands of in-pouch and young-at-foot joeys” and the “potential impacts of the burial of off-cuts”.

3. As to the former it is not clear to us where the “hundreds of thousands” figure comes from. It seems to assume that a significant number of females shot have in-pouch or young-at-foot joeys. We are not aware of any evidence to that effect; on the contrary, the evidence suggested that there was a male bias in the harvest. But even if it be assumed that a considerable number of joeys will be killed it is not correct to say that the Plan makes no assessment of that. The Plan is premised upon a quota based on a percentage of the population. That population is determined by a survey which necessarily takes into account the death of joeys in determining an ecologically sustainable harvest quota. We do not accept the first of the Association’s criticisms.

4. The Association’s argument regarding the burial of off-cuts is that the Plan fails to address the impact of such burials. The Plan deals with that impact in this way^[15]:

“The most notable issue identified in the assessment of impacts ... is the utilisation of *kangaroo* harvest offcuts by introduced predators, particularly foxes (*Vulpes vulpes*). Some authors ... have suggested that *kangaroo* harvest offcuts may sustain predator populations during periods of low prey availability. Maintenance of artificially high predator populations may in turn threaten prey populations, including endangered taxa ... However, given that many *trappers* presently bury harvest offcuts and that harvest offcuts are widely and randomly dispersed across the landscape, it is unlikely that the commercial *kangaroo* harvest will have a significant positive effect on populations of introduced predators.”

1. The Association submitted that no source or evidence was cited for the proposition regarding the habits of trappers. That is true, however that contention appears not to have been raised in the Association’s Statement of Facts and Contentions and it was not taken up with either of Mr Snook or Ms Nicole Payne, witnesses who might be expected to know something of the behaviour of trappers. In these circumstances it seems to us that the Plan contains an assessment of the potential impact and that in the absence of some evidence to the contrary that assessment is perfectly adequate.

2. It follows that we reject the Association’s criticisms of the Plan’s assessment of environmental impacts and are satisfied that the Plan does contain an adequate assessment of the environmental impact of

the activities proposed by the Plan.

THE PRECAUTIONARY PRINCIPLE

1. The Minister (and the Tribunal) is required, by the combination of s 303FO(3)(a) and s 303BA(1)(h) of the EPBC Act, to ensure that the precautionary principle is taken into account; however that must be where it has application. In our view a consideration of the principle leads to the conclusion that it has no application in the present case.
2. That is so because the principle operates “where there are threats of serious or irreversible environmental damage”. We are not satisfied that such threats exist in implementing the activities proposed by the Plan. We need not repeat our reasoning for concluding that the Plan is consistent with the requirements of ecological sustainability and biodiversity conservation.
3. Thus taking the precautionary principle into account yields no different conclusion.

ETHICAL RESEARCH

1. The Plan contains some limited proposals regarding research. Where it is to be undertaken Action 15 details steps required before approval may be given, including reference to the Kangaroo Management Advisory Panel, a body representing the various stakeholders, including animal welfare groups.
2. There is no reason to suppose that research would be conducted other than ethically.

EFFECTIVE STATE LEGISLATION

1. The principal provisions of the NPW Act and its Regulations have already been noticed. That Act sets up a comprehensive regime for the protection, conservation and management of wildlife including the kangaroos subject of the Plan. The Association did not suggest that the matters in s 303FO(4) were not made out and we are satisfied that they are, that is, we are satisfied that there is effective legislation for the protection, conservation and management of kangaroos that applies throughout New South Wales.

CONCLUSION

1. Subject to the amendment to the Plan that we propose we are

satisfied of the matters that s 303FO(3) of the EPBC Act requires us to be satisfied of and, in doing so, we have taken into account the matters in s 303FO(4) of that Act.

2. We consider that the Plan ought be amended to incorporate a trigger that would require the suspension of the harvest in any Zone where Departmental officers had reason to believe that the population within that Zone had declined by 30% (or 34% in the case of red kangaroos) or more from the last survey. We propose to provide these reasons to the parties and invite them to consult on an appropriate form of words that can be added to the Plan and a mechanism for achieving that amendment. It appears to us that that could be achieved either by varying the decision under review to incorporate the proposed amendment or by varying the decision to impose a condition requiring the amendment.
3. At this juncture we will simply direct that the parties consult with a view to providing an agreed form of decision in accordance with these reasons or, if agreement cannot be reached, lodging further short submissions setting out that party's suggested form of decision and the reasons for adopting that form.

I certify that the 84 preceding paragraphs are a true copy of the reasons for the decision herein of Deputy President P E Hack SC, Dr T J Hawcroft, Member

Signed:Signed.....

Jacqueline Woods, Associate

Dates of Hearing 31 March 2008 - 4 April 2008

Date of Decision 15 August 2008

Counsel for the Applicant Mr M Baird and Mr P Singleton

Solicitors for the Applicant DLA Phillips Fox

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Solicitors for the Respondent Australian Government Solicitor

Counsel for the Joined Party Ms R Pepper

Solicitor for the Joined Party Departmental solicitor

[1] Published in the Commonwealth of Australia *Gazette*, No S 238, 22 December 2006.

[2] At the time of the preparation of the Plan the Department was known as the Department of Environment and Conservation.

[3] See *Re Wildlife Protection Association of Australia and Minister for the Environment and Heritage* (2003) 73 ALD 446. [4] Ministerial declaration, 19 December 2006.

[5] Exhibit 17, paragraph 10. [6] Paragraph [12] above.

[7] Exhibit 20, annexure D. Citations have been omitted. [8] Exhibit 25, paragraph 93. [9] See s 303BC EPBC Act.

[10] Being the Convention on Biological Diversity done at Rio de Janeiro on 5 June 1992, as amended and in force for Australia from time to time. [11] [2004] AATA 1383. [12] [2004] AATA 1383 at [56]. [13] Exhibit 25, paragraph 142 ff. [14] Exhibit 25, paragraph 69. [15] Paragraph 3.4.2.