FOREST PRACTICES TRIBUNAL

PRIVATE TIMBER RESERVE - PRIVATE TIMBER RESERVE APPLICATION 943

BETWEEN

GR and RA Linger — Appellants

AND

Forest Practices Board — Respondent

This was the hearing of an appeal against a decision by the Forest Practices Board refusing to grant an application for a Private Timber Reserve.

The appeal was heard at Launceston on the 18th October 1999.

R Hart appeared for Private Forests Tasmania.

R Stagg appeared for the Forest Protection Society.

K Kiernan and S Munks appeared for the Forest Practices Board.

The appellants appeared in person.

DECISION

Application No. 943, was made for a Private Timber Reserve for an area of 41.03 hectares on UPI 0973.

The Forest Practices Board by letter dated the 16th August 1999 notified the refusal, relevantly stating:

> "The reason for refusal was primarily on the grounds under Section 8 (2)(e) of the *Forest Practices Act*, in that it would not be in the public interest to declare the land as a private timber reserve because of the presence of karst values that may be damaged by forestry activities. The Board also noted that there are grounds for refusal under S.8(2)(b) in that parts of the area are unsuitable for declaration as a PTR because of steep and rocky ground, and under S.8(2)(d) because of the presence of threatened species, which are protected under the Threatened Species Act."

The appellants appealed to the Tribunal.

The relevant provisions of the Forest Practices Act 1985 are as follows:

"8. . . .

(2) Application for a declaration of land as a private timber reserve shall be refused if the Board is satisfied that -

(a) The application has not been made in good faith and honestly;

(b) The land is not suitable for declaration as a private timber reserve;

(c) A person who has a legal or equitable interest in the land, or in timber on the land, would be disadvantaged if the application was granted;

(d) By virtue of the operation of any Act, the owner of the land is prohibited from establishing forests, or growing or harvesting timber, on the land; or

(e) It would not be in the public interest to grant the application; or

. . ."

"S.37(12) The Tribunal shall, in making a determination under this Act, have regard to the financial effect of its determination on the parties to the appeal."

Section 8(2) of the Forest Practices Act 1985 sets out a number of circumstances in which the application for a Private Timber Reserve shall be refused. It is appropriate to consider each of those contended to be relevant, in turn.

Section 8(2)(e) provides for refusal if satisfied that the granting of the application would not be in the public interest. It was common ground between all parties that the public interest included preservation of important examples of karst systems, and fauna dependent upon those systems. In the present case it was common ground that the land the subject of the application was situated upon a very significant karst system, which the Senior Geomorphologist for the Forest Practices Board, Mr Kevin Kiernan, summarised as follows:

> "2. Cave Conservation
>
> The area covered by the application encompasses important cave systems including the longest cave in the Mole Creek karst area (Herberts Pot), and it forms part of an extensive and complex karstic hydrological system. The caves and system are of great significance, and have figured in, (a) the International Scientific Literature; and (b) the International literature on recreational caving.
>
> Proposals that the area including the current PTR proposal should be reserved as part of a Mole Creek Cave national park were first put forward in the early 1970s. A recent strategic plan for karst conservation prepared by an inter departmental committee of karst specialists, an involving a comparative assessment of over 300 karst areas throughout Tasmania, identified this cave system as a priority 1 conservation target."

There was no evidence to the contrary of Mr Kiernan's above evidence, and the Tribunal finds accordingly.

Mr Kiernan further gave evidence that there was evidence of soil loss from the surface soil down into the karst system, associated with previous farming and timber harvesting use of the land. In his opinion to allow timber harvesting on parts of the subject land would be likely to result in a disturbance of the soil retention mechanisms, with consequent further loss of soil into the karst system, and deposition of sediment and undesirable changes to the system. Again there was no evidence to the contrary and the Tribunal finds accordingly.

Ms S Munks, Senior Zoologist for the Forest Practices Board, gave evidence that the cave fauna found in the cave system below the area covered by the proposed PTR had high conservation significance for a number of reasons including their rarity, endemicity, the large number of relict species and their importance to the understanding of evolutionary trends. Two species had special significance, including a listed "rare" species under the Tasmanian Threatened Species Protection Act 1995: *Hickmanoxyomma gibbergunyar*, and one similarly listed as "vulnerable": *Tasmanotrechus cockerilli*. Ms Munks confirmed that these species were particularly vulnerable to even small disturbances, arising from surface disturbance such as timber harvesting. Potential impacts included decreased leaf litter input, increased water yield, increased sediment yields and/or chemical run-off into the cave system. Again there was no evidence to the contrary and the Tribunal finds accordingly.

The evidence provided no basis for the Tribunal to distinguish between forestry on different parts of the proposed reserve, in terms of its potential effect upon the karst system or the cave fauna. Further, even if the Tribunal were able to discriminate between different parts of the proposed reserve, the Tribunal's powers under the relevant legislation do not include a power to impose conditions precluding harvesting on part of the land, or granting reserve status only to part of it.

The Tribunal must either grant or refuse the application in respect of the totality of the land concerned. In those circumstances the finding that a significant portion of the land is likely to produce adverse effects upon the karst system and fauna, requires the Tribunal, it considers, to refuse approval of the reserve.

Accordingly the Tribunal refuses approval under Section 8(2)(e) of the Forest Practices Act 1985.

Section 8(2)(d) requires refusal if satisfied that by virtue of the operation of any act, the owner of the land is prohibited from establishing forests or growing or harvesting timber on the land. It was contended for the Forest Practices Board that because the cave fauna were threatened species within the meaning of the Threatened Species Protection Act 1995, and because Section 51 of that Act prohibited damage to or destruction of threatened species, that Act prohibited the owner of the land from carrying out the operations of establishing forests or growing or harvesting timber.

Section 51 of the Threatened Species Protection Act 1995 relevantly provides:

> "51. A person must not knowingly, without a permit -
>
> (a) take, trade in, keep or process any listed flora or fauna; or
>
> . . ."

"Take" is defined in Section 3 of the Threatened Species Protection Act 1995 as:

> "Kill, injure, catch, damage, destroy and collect;"

It was contended for the Board that the conduct of forestry would be likely to damage, injure or kill the relevant fauna, by disturbing the surface of the land, which in turn would probably lead to a damaging of the habitat in the ways described in Ms Munks's evidence.

The Tribunal considers that Section 51, because it refers to "knowingly, without a permit" is related to a taking which is different to the kinds of damage contended for in this case. The words "without a permit" indicate that a taking with a permit would not be an offence. It was not contended, and nothing made it appear to the Tribunal, that a permit under the Threatened Species Protection Act 1995 could be granted for forestry. Similarly the chain of events involved in any of the modes of surface activity affecting the karst system habitat and the fauna, were on the evidence likely to be so indirect as to be inappropriately described as "knowingly". For those reasons the Tribunal considers that the Threatened Species Protection Act 1995 does not prohibit establishing forests or the growing or harvesting of timber on the land, and does not therefore give rise to a prohibition of the granting of a permit under Section 8(2)(d) of the Forest Practices Act 1985.

Section 8(2)(b) requires refusal if satisfied that the land is not suitable for declaration as a Private Timber Reserve. It was contended for the Board that the land was not suitable for declaration as a reserve, because disturbance of the soil would be likely to lead to soil and water loss from the surface to the sub surface, issues which were described by Mr Kiernan as "soil and water stewardship".

Mr Kiernan gave evidence that disturbance of the surface for forestry would be likely to cause the loss of soil, by vertical hydraulic gradient mechanisms, into the karst system; and gave as the basis of this, the exposure of various limestone formations showing that such losses had occurred within the last several decades, which he attributed to practices on the surface of the land including probably both agriculture and forestry, during that period. His opinion was that further such activities would be likely to result in further such soil and water losses. The Tribunal finds that in respect of some areas of the proposed reserve, the mechanisms described by Mr Kiernan are likely to operate if forestry is allowed. The extent of those areas, and their location, is not a matter which the Tribunal can determine upon the evidence given in the appeal. The opinion of Mr Kiernan was that approximately half of the proposed reserve was vulnerable in this respect, whereas the evidence on behalf of the applicants and Private Forests Tasmania was that approximately 75% of the land was suitable for forestry, if not more. In view of the imprecision in the evidence in this respect, the Tribunal is unable to determine whether so much of the land is unsuitable in the way described by Mr Kiernan, that a Private Timber Reserve should not be allowed. It is not possible on the evidence to equate the seriousness of localised soil losses, on the one hand, with potential damaging effects upon the karst system and fauna, on the other. For those reasons the Tribunal considers that it is inappropriate to find that for soil and water stewardship reasons the land is not suitable for declaration as a Private Timber Reserve.

The Forest Practices Board in its determination, referred to the area being unsuitable for declaration as a PTR because parts of it were 'steep and rocky'. The evidence does not enable the Tribunal to find that for these reasons such significant parts of the proposed reserve were unsuitable for forestry, that the reserve should be classified as unsuitable under Section 8(2)(d) of the Forest Practices Act 1985.

With respect to the financial considerations referred to in Section 37(12), the Tribunal notes that a refusal of approval for a reserve and dismissal of the appeal against that decision based upon Section 8(2)(d), are components of a potential right of the appellants to claim compensation for the refusal under Section 16 of the Forest Practices Act 1985

For the above reasons the Tribunal finds that the sole basis for refusal of the Private Timber Reserve proposed, should be that it is against the public interest to grant the application, under Section 8(2)(e) of the Forest Practices Act 1985.

The decision of the Forest Practices Board is in that respect upheld, and Application 943 is refused by the Tribunal. The appeal is accordingly dismissed.

Dated this.....day of 1997

I Chalk	**KAM Pitt QC**	**P Davies**
(Member)	**Chairman**	**(Member)**