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Tarkine Road, the EPBC Act, an FOI and the cost of transparency

The controversial proposal to build a tourist road through the Tarkine rainforest in north-west Tasmania has been further stalled by the Federal Environment Minister, Peter Garrett's decision to use his emergency powers to bring forward its assessment for registration on the National Heritage List. This decision followed the referral of the matter as a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act 1999)* to the Minister for assessment. The result is that the proposed road is now subject to two Federal government decisions. The listing of the Tarkine in the National Heritage List, Mr Garrett stated "does not in itself prevent the road being built and does not amount to a decision on the road". It does however mean that the Bartlett government must now show that the proposed road will not detrimentally affect the Tarkine natural heritage values. These values include the largest tract of remaining cool temperate rainforest in Australia, tertiary fossil deposits, rare lichens and rare magnesite karst systems. In the meantime, Garrett has assured the Tasmanian government that the assessments will not interfere with forestry operation or possible mining in the Tarkine. The Tasmanian government is confident that the road to be constructed by the Department of Infrastructure, Energy and Resources will be approved by the Minister.

The Tarkine

The Tarkine is a precious relic of the once ancient super-continent Gondwanaland. It stretches across 450,000 hectares from the Arthur River in the north to the Pieman River in the south. It contains the second largest temperate rainforest in the world, and the largest in the southern hemisphere. The rainforest is habitat to Myrtle, Huon Pine and Sassafras some specimens estimated to be around 1,000 years old. The area is not a national park and it has been both logged and mined but it still holds a considerable amount of old growth rainforest.

The Road

Initiated by the former Tasmanian premier, Paul Lennon the proposed \$23 million road would be built by Forestry Tasmania. It would be approximately 134 kilometres long and link the towns of Burnie and Smithton. It would cut through the northern section of the Tarkine with at least six kilometres through old-growth rainforest. Forestry Tasmania are 100% certain that the road will be built as told to Felicity Ogilvie by Ken Jeffreys in an

interview because as he stated 'it makes sense' - economic sense with 1,600 jobs and \$70 million to be created by the construction of the road.¹ The road however is not popular with locals on the north-west coast. Out of the seven councils only one supports the construction of the road. Many tourism operators are also against the road as they say it may detract from the area and conservators say it will open up the area for further logging.

The Scientists

The greatest known threat to endangered species is habitat destruction and the construction of the road would only compound an already existing threat to the extinction of the Tasmanian devils. Further the construction of the proposed road would increase the potential for road kill impacts on the already endangered native species in the area and in particular the Tasmanian devil, listed as endangered under the *EPBC Act*.

Devils are known to use roads to travel in search of food and as scavengers are especially attracted to roadkill. Of the 70 submission a total of 33 were sent by scientists to the Environment Minister stating their concerns.

The native species likely impacted by the construction of the road include the critically endangered orange-bellied parrot and the endangered wedge-tailed eagle and swift parrot and the vulnerable spotted-tailed quoll, eastern-barred bandicoot, Australian grayling (fish) and the giant freshwater grayfish. It is home to 24 species of native land mammals more than two-thirds of Tasmania's entire native mammal species. The plants include the critically endangered windswept spider orchid and the western leek-orchid.

Those close to the devil research program claim that the construction of the road would have a negative impact on the devils and facilitate the spread of the devil cancer, Devil Facial Tumour Disease (DFTD). Tasmanian devils in the north and south-west of Tasmania are currently free of the disease. This is confirmed by the state government's own referral which states "The Tarkine area has a large number of Tasmanian devils that have not been affected by the Devil Facial Tumour Disease so the department will undertake a study into any possible spread of the disease".

The Tasmanian Government's stance

In contrast to the scientists' view the Tasmanian government has declared that the risk to the Tasmanian devil by the proposed Tarkine road is minimal. It has however, acknowledged that the road would threaten at least four native animals listed as vulnerable and six plant species.² Meanwhile, the Greens and the Tasmanian state Liberals oppose the road project in line with the scientists' view.

¹ ABC PM, Felicity Ogilvie, Controversial Tarkine road to be assessed by Federal Government, 20 March, 2009

² Carter, P, 2009, Garrett to assess Tarkine road plan, *Sydney Morning Herald*, 13 November 2009, accessed 14.11.2009, <http://news.smh.com.au/breaking-news-national/garrett-to-assess-tarkine-road-plan-20091113-ie8w.html>

The Referral

The proposed action, to build the Tarkine Road, was referred to the Environment Minister, Peter Garrett to decide if the road is legal under the *EPBC Act 1999*. A total of 70 public submissions have been received, however they are not being made public. The Referral included a survey of flora and fauna conducted by Barker Ecosystem Services for the state government. However, Scott Jordan from the Tarkine National Coalition said that “crucial information regarding the projected numbers of devil roadkill, on the number of dens in the area, the impact on spotted tail quoll, on wedge tailed eagle and on threatened botanical species in the area, are just missing from the report”.

Under the *EPBC Act* the precautionary principle commits the Minister to consider his decisions in relation to the objective of ecologically sustainable development. However, the *EPBC Act* and its guiding precautionary principle has failed to protect endangered species in Tasmania in the past due to the irregular practices of Forestry Tasmania and the Tasmanian government.

The attitude displayed by the Tasmanian government and the forestry industry in respect to the *EPBC Act* was clearly demonstrated in the case of *Brown-v-Forestry Tasmania*. Senator Bob Brown took both the Tasmanian and Federal governments to court alleging that clear-fell logging in the Wielangta was illegal. In judgement, Justice Shane Marshall in the Federal Court of Australia on 19 December 2006, found in favour of the applicant who ‘submits that the interpretation of the *EPBC Act* and the *Regional Forest Agreement (RFA)* are informed by the precautionary principle’.³ The finding also states that ‘[t]he view I have taken about the construction of the *EPBC Act* is informed by the following matters:

The *EPBC Act* was enacted to implement the provisions of the *Convention on Biological Diversity 1992*, and other international environmental agreement into Australian law.⁴

In his summary Justice Marshall clarified the definition of protection with the following statement:

[p]rotection is not delivered if one merely assists a species to survive. Protection is only effective if it not only helps a species to survive, but aids in the recovery to a level at which it may no longer be considered to be threatened.⁵

However, notwithstanding Justice Marshall’s findings the law was changed to meet the needs of the forestry industry. The Tasmanian government simply amended the *RFA* so that forestry practices were made legal.⁶ Exemptions such as this are considered by theorist to be a final stage of regulatory capture - corruption. Those who are in charge of protecting the environment from the excesses of industry work counter to this objective by enabling the evasion of the law. Non-observance of this law is further evident when in

³ *Brown-v-Forestry Tasmania* (no. 4) (2006) FCA 1729

⁴ Ibid

⁵ Ibid

⁶ Flanagan, R, 2007, ‘Gunns Out of Control’ in *The Monthly*, May 2007, pp 20-31

2002/2003 approximately 97,000 native animals were poisoned with 1080, a practice used by DPIWE to control native protected and endangered species.⁷ The precautionary principle also calls for timely action by decision makers but delaying tactics are evident in the protection of the Tasmanian devil under the *EPBC Act*. Biodiversity protection under the *EPBC Act* is activated through the identification of threatened species and ecological communities for which Recovery Plans are developed and implemented. Recovery Plans are a Federal government legislative requirement. The Tasmanian devil was previously listed under the threatened species legislation in Tasmania. As such it was the responsibility of the Biodiversity Conservation Branch of the DPIWE which implemented a strategy to save the Tasmanian devils. As the devils are now listed as endangered under the *EPBC Act* it is a requirement that a Recovery Plan be implemented - to date this has not happened.

The Tasmanian government does not have a good record in the protection of threatened species in general or the Tasmanian devil in particular. Hence the proposed new road through The Tarkine wilderness would constitute unacceptable and irreversible environmental degradation threatening the survival of endangered species and the Tasmanian devil. In 1998 the then Prime Minister, John Howard stated in defence of the Tasmanian RFA:

[h]ow any body in the name of reason can regard that as a sell out of the environment or a sell out of conservation values or a defiant indifference to the environment of this State or the environment of Australia is beyond ordinary human comprehension. I would also remind those critics that the reserve system protects more than 70 percent of the Tarkine wilderness area...⁸

Security for the Tarkine was again secured in the 2005 *Community Forest Agreement* when a 73,512 hectare reserve was set aside. As stated by the Federal Liberal Environment spokesman Greg Hunt in an interview with Matthew Denholm '[w]e didn't protect it from logging only to have it destroyed by bulldozers building a road'.⁹

Freedom of Information

The *Freedom of Information Act 1982* was introduced to provide greater transparency in government policy decisions and access to personal records held on Australian citizens. Its brief description is given as 'An Act to give to members of the public rights of access to official documents of the Government of the Commonwealth and of its agencies'.¹⁰ In 2009 the Rudd government announced it would keep its 2007 election promise of reforming the *FOI Act 1982* in order to build a 'stronger foundation for more openness in government'.¹¹ Part of this reform enabling greater access to information is amendments to FOI fees and charges.

⁷ Environmental Defenders Office (Tas) Inc., 2004, '1080 Ban in State Forests' *EDO Bulletin*, Edition 19

⁸ Prime Minister John Howard, 'What the Leaders Said', *CRA Forest News*, No. 6, January 1998

⁹ Denholm, M, 2009, Tarkine road looms as new green battle, *The Australian*, 03 April 2009,

¹⁰ Australian Government, Australian Research Council, accessed 31 January 2010, http://www.arc.gov.au/about_arc/foi_act.htm

¹¹ Australian Government, Department of Prime Minister and Cabinet, Freedom of Information (FOI) Reform, accessed 31 January 2010, http://www.dpmc.gov.au/consultation/foi_reform/index.cfm

In 2009 Senator John Faulkner, Special Minister of State and Cabinet Secretary in a speech at the Australia's Right to Know conference stated that '[t]here is a growing acceptance of the right of the people to know...the information that underlies debate and informs decision-making, is fundamental to democracy'.¹² He states further that '[b]oth in practice and as a symbol, 'freedom of information' represents the pinnacle of citizens' right to know: a legal requirement for government to release information'. In reference to FOI reforms Senator Faulkner stated the proposed new objects of the Act state, "increasing public participation in Government processes, leading to better informed decision making; increasing scrutiny, discussion, comment and review of the Government's activities" and increasing "recognition that information held by the Government is to be managed for public purposes, and is a national resource". Unless these statements represent purely rhetorical devices to deceive the public then it would appear to be the sentiment of this government that documents requested through an FOI should be released in the name of transparency and greater public participation in democracy.

The public submissions in relation to the Tarkine Road were sent to the Department of Environment, Water, Heritage and the Arts (DEWHA) in November 2009. They were not made available on the department's website. As a University of Wollongong PhD research student investigating the struggle to save the Tasmanian devil from a devastating cancer and the author of a public submission I sought through the Environmental Defenders Office (EDO) access to copies of the public submissions. The EDO contacted the office of Cassy O'Connor, Tasmanian Greens parliamentary member and she agreed to submit an FOI on my behalf. A letter was sent to the Department on 26 November 2009 by Cassy O'Connor in her capacity as Greens Spokesperson for the Environment, Parks and Tourism in Tasmania.

The *FOI Act* states under Part III Section 24 (Requests may be refused in certain cases) (2) ...the agency or Minister is to have regard to the resources that would have to be used: (c) in making a copy, or an edited copy, of the documents. In this instance the FOI request was granted therefore the Minister considered that resources were available to photocopy the documents. Meanwhile, under Section 29 (Charges) (1)(f)(ii) the Act allows for an applicant to contend that the charge has been wrongly assessed or should be reduced or not imposed...'. It is under this section that I contend that the cost of \$4285.19 does appear to be excessive. It would seem incomprehensible that it would cost \$4,087.27 in decision-making time to decide whether or not to photocopy 70 submissions. However, Cassy O'Connor did offer to receive the documents via a pdf document and print them in her office.

Whilst under section 30A (Remission of application fees) (a)(i) payment would cause financial hardship or (iii) is in the general public interests or in the interests of a substantial section of the public. It is presumably under this section that the Department has requested details of my personal financial situation expressly suggesting that if I hold a Healthcare Card or similar government benefit the fee would be waived. I do not wish to disclose my personal financial information as I can see that it is of no consequence in asking for the information. Whilst the information is in the interests of a substantial section of the public at this point in my research that is not my main consideration. I would like to

¹² Faulkner, John, Senator, 2009, Open and Transparent Government - the Way Forward, Australia's Right to Know Freedom of Speech Conference, Sydney, 24 March 2009

read and analyse the documents to augment my already considerable knowledge in relation to the investigation of the scientific research into the Tasmanian devil disease.

Suppression of Information

The failure to provide the documents in pdf format to Cassy O'Connor appears to constitute suppression of information. The documents were provided by the public, including myself, either in agreement with the proposed Tarkine road construction or against its construction. The documents are neither the advice or opinions of Australian Public Service employees nor documents commissioned and financed by the Australian Government they are documents provided by individual citizens at their own financial and personal expense.

It is ironic that the situation I find myself in is reminiscent of the FOI request by Peter Garrett himself, when he was opposition environment spokesman. At the time he was seeking information from the Great Barrier Reef Marine Park Authority. When the Authority refused to provide him with the documents he responded saying that it was 'a complete corruption and a complete betrayal of the Freedom of Information legislation'.¹³ It was true then and it is true now.

¹³ ABC News, Reef Authority rejects FOI suppression claims, 25 October 2007, accessed 31 January 2010, <http://www.abc.net.au/news/stories/2007/10/25/2070686.htm>