

THE PARLIAMENT OF THE COMMONWEALTH OF
AUSTRALIA

PROTECTION OF THE GREATER DAINTREE

Report from the House of Representatives Standing
Committee on Environment and Conservation

August 1984

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Terms of Reference of the Committee

- (1) That a standing committee be appointed to inquire into and report on -
- (a) environmental aspects of legislative and administrative measures which ought to be taken in order to ensure the wise and effective management of the Australian environment and of Australia's natural resources, and
 - (b) such other matters relating to the environment and conservation and the management of Australia's natural resources as are referred to it by -
 - (i) resolution of the House, or
 - (ii) the Minister responsible for those matters.

Members of the Committee

Chairman	Mr P. Milton, M.P.
Deputy Chairman	Mr D.M. Connolly, M.P.
Members	Mr M.A. Burr, M.P. Mr R.L. Chynoweth, M.P. Mr R.F. Edwards, M.P. Mr G. Gear, M.P. Mr A.A. Morris, M.P. The Hon. I.L. Robinson, M.P.
Secretary to the Committee	Mr J.R. Cummins

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1. INTRODUCTION

1. During 1983 and 1984, the Committee received representations from conservationists concerning the construction of a road by the Douglas Shire Council from Cape Tribulation to Bloomfield in Northern Queensland. Following these representations the Committee was briefed in March 1984 by officers of the Department of Home Affairs and Environment.

2. The Committee inspected the Daintree area in July 1984. This included a visit to the site of the proposed Cape Tribulation - Bloomfield Road, an aerial inspection of most of the Greater Daintree and a trip along the coast between Cape Tribulation and the Bloomfield River by boat.

3. During its visit the Committee talked to a number of local residents and representatives of conservation groups. There were no formal discussions with State government officers nor were there any public meetings. The Committee Chairman also held informal discussions with the Douglas Shire Council. Present were the Shire President, a Councillor, the Shire Secretary and the Shire Engineer.

4. On 23 August 1984, the Committee resolved to report to Parliament on the Greater Daintree. The Committee decided to report without inquiry because of the sensitivity of the issue and its belief that there was a need for a preliminary report. The report makes no recommendations relating to the world heritage status but rather acknowledges that studies are presently being undertaken, identifies areas where some further study is required and suggests appropriate consultative procedures which should be entered into by the Commonwealth Government, the Queensland Government and the Douglas Shire Council.

2. THE GREATER DAINTREE

Introduction

5. For the purpose of this report the region referred to as the Greater Daintree is the area listed on the Register of the National Estate as the Cooktown/Daintree/Windsor tableland area. It was nominated in 1976 and was listed on the Register in 1980 after assessment of the objections to the proposal.

6. The Greater Daintree covers approximately 350 000 hectares extending from Mossman in the south to Cooktown in the north. It has generally been described as the most extensive relatively untouched tropical rainforest left in Australia and includes the largest remaining coastal rainforest.

7. The area north of Cape Tribulation received particular attention during the Committee's investigation. It contains the greatest number of different types of vegetation communities in the region and is the only place south of Cooktown where unprotected natural vegetation, including rainforest, extends from the high water mark over coastal ranges to the Great Dividing Range.

Topography

8. The Greater Daintree includes rugged and spectacular coastal ranges, higher more extensive peaks of the Great Dividing Range, broad valleys, deep gullies, tidal lowlands, high tablelands and scenic coastal headlands. There are several in-shore fringing coral reefs and much of the area is contiguous with the Great Barrier Reef.

9. There are several outstanding geological features including Thornton Peak, Black Mountain, Roaring Meg Creek waterfall and Mt Petier Botte. Natural landscapes have been preserved by the steep topography and mountain streams which have restricted access particularly in the Cooktown/Daintree area.

Flora and Fauna

10. There are 30 major vegetation complexes represented in the area including 15 distinct types of rainforest, eucalypt forest, mangroves, coastal swamps and mountain moorland. Some of the rainforest types contain a very high number of species including some rare plants and there are numerous examples of plant communities and species that occur nowhere else.

11. The large areas of diverse habitats support a rich variety of fauna including animals not found elsewhere, for example Bennetts Tree Kangaroo.

Conservation and Scientific Values

12. The area is of high conservation value because it contains the last remaining examples of several types of vegetation and wildlife habitat retained in a natural state. The diversity, complexity and the number of species present make it one of the important natural areas in Australia.

13. The region also has a high scientific value because it contains many species not found elsewhere in Australia. Its interest to scientists would increase if more biological surveys were carried out because many animal species have not yet been described and as many as 10 per cent of the plant species have not been identified and named.

14. The area contains examples of 8 of the 14 primitive plant species and is therefore considered to have some of the most important botanical sites in Australia. It is suggested that there has been a continuous line of evolution from the earliest flowering plants with the vegetation developing relatively undisturbed by continental and climatic change over the last 150 million years. For this reason the area holds immense interest for botanists.

15. The forest near Cooktown was the first in Australia to be examined thoroughly by botanists and has remained relatively unchanged since the naturalists who accompanied Captain Cook explored the area in 1770. It therefore forms an important benchmark for ecological research.

Land tenure and access

16. There are seven national parks in the Greater Daintree area. Most of these are small and the majority of the area is contained in State Forest and Timber Reserves with some small areas of freehold and leasehold land. Conservation groups have proposed that the Greater Daintree be consolidated as a single national park.

17. The only north-south road through the area is the track which follows the electricity supply line from Daintree to the Bloomfield River. It is suitable only for 4 wheel drive vehicles and is closed to traffic during the wet season. All weather access from Mossman in the South to the Bloomfield River in the North is via the Cooktown Development road which passes inland west of the Greater Daintree. There is also a road that runs north from the Daintree River but this terminates at Cape Tribulation.

Cape Tribulation to Bloomfield River Road

18. In November 1983 the Douglas Shire Council commenced construction of a 30 kilometre road from Cape Tribulation to the Bloomfield River through the Cape Tribulation National Park. The purpose of this road is to provide an alternative north-south route. However the Committee doubts that the proposed road will provide all-weather access and expects that it would be closed during the wet season.

19. The road will pass through one of the most significant and scenic parts of the Greater Daintree. Construction will have a severe local impact including sedimentation of the streams and possible siltation of inshore coral reefs. During its inspection the Committee saw that the incomplete work carried out in 1983 had caused considerable erosion. Longterm impacts may include permanent alteration of the rainforest and the introduction of weeds. It is also likely, given the steep terrain and very high rainfall, that erosion would continue to be a long-term problem.

20. The alternatives would be to upgrade the power line track on its existing alignment, to select a new alignment in the Daintree and Bloomfield River valleys or to upgrade the Cooktown Regional Development Road together with the link road to the Bloomfield River. The Committee was told that the present alignment of the power line road is unsuitable for upgrading and that a new alignment between Daintree and the Bloomfield River would be prohibitively expensive.

21. Although the Cooktown Regional Development road is a longer route than the other alternatives it may be possible to upgrade this road to reduce the travel time.

Sub-division in the Cow Bay Area

22. Virgin rainforests with high conservation and scientific values are being sub-divided and cleared for rural housing in the Cow Bay area. Approval for this sub-division was given before the National Park was established and is occurring on privately owned land. The Committee inspected some sub-divisions and associated roads and were concerned that the developments might be causing serious environmental impacts and might not be an appropriate form of zoning for that area. The destruction of this rainforest may not be consistent with the proposals to preserve and protect the vegetation of the Greater Daintree region.

Logging on the Windsor Tableland

23. The Windsor Tableland contains several unusual associations of plant species and is of considerable interest to botanists. Logging has commenced in this area and there are plans to harvest rainforest timbers from 10 000 hectares of forest. This logging is likely to have significant localised impact on the rainforest and is being carried out without a detailed knowledge of the biological resources of the tableland or the long term consequences.

3. ENVIRONMENTAL ASSESSMENTS

24. The Australian Heritage Commission sought expert advice about the proposed listing of the Greater Daintree on the Register of the National Estate and about the objections to the proposals. The advisers reported that the objections to the nomination were not valid and that the area should be included on the Register and that parts of the Greater Daintree could be considered to be of World Heritage. This included the Cape Tribulation to Cooktown coastline.

25. One of the advisers suggested that the commercial forestry activities on the Windsor Tableland threatened conservation values and stressed that there was a need for a rigorous biological assessment to be carried out in the areas proposed for logging.

26. The Douglas Shire Council prepared an environmental assessment before commencing work on the Cape Tribulation to Bloomfield Road in 1983. The conservationists argued that assessment did not include any biological survey or proper identification and consideration of the environmental impacts. It did not prescribe any construction standards to minimise these impacts. They argued that the report prepared by the Shire was not an adequate assessment given the conservation and scientific value of the area.

27. A study commissioned by the Australian Heritage Commission into the conservation value of the wet tropical rainforests from Townsville to Cairns commenced in January 1984. The study was conducted by the Rainforest Conservation Society which reported in June 1984. The consultant's report was forwarded to international referees for assessment. The Australian Heritage Commission has yet to announce the conclusions of this study.

1. Introduction

2. Methodology

3. Results

4. Discussion

5. Conclusion

6. References

7. Appendix

8. Acknowledgements

4. COMMONWEALTH POWERS

Introduction

28. The Commonwealth has power to require environmental factors to be taken into account in the decision-making processes of the Commonwealth and Commonwealth authorities. The Commonwealth does not have any general legislative power directly to control environmental conduct within the States. The Commonwealth does however possess both legislative and fiscal powers which may be utilised to pursue environmental goals within the States.

29. Upon the Commonwealth becoming a party to a treaty or convention which attracts the operation of the external affairs power, then, subject to constitutional prohibitions expressed or implied it acquires legislative power to implement the provisions of the treaty or convention. The external affairs powers of the Commonwealth are presently being discussed by a Sub-committee of the Standing Committee of the Australian Constitutional Convention.

30. Section 96 of the Constitution enables the Commonwealth to grant financial assistance to States on certain terms and conditions. By the use of this power the Commonwealth can, with State cooperation pursue environmental goals in areas which are beyond its legislative competence.

31. The specific pieces of Commonwealth environmental legislation which may be relevant to the Daintree issue are:

- The Great Barrier Reef Marine Park Act 1975
- The Australian Heritage Commission Act 1975
- Environment Protection (Impact of Proposals) Act 1974
- The World Heritage Properties Conservation Act 1983.

These acts are discussed in the following paragraphs.

32. The source of the Committee's information are primarily:

a letter from the Minister for Home Affairs and Environment (Appendix 3);
 articles from the Legal Services Bulletin and Habitat on Commonwealth Powers (Appendix 4 and 5);
 and
 documents from a previous inquiry conducted by the Committee into the Commonwealth's environmental powers.

Great Barrier Reef Marine Park Act

33. The Great Barrier Reef Marine Park Act 1975 makes provision for the establishment, control, care and development of a marine park in the Great Barrier Reef region. The Act also empowers the Governor-General to make regulations to control or prohibit acts within the Marine Park or elsewhere which may pollute water in a manner harmful to animals and plants in the Marine Park. It has been argued that an amendment to the Act in 1978 further empowers the Commonwealth to act on the reef because of its possible damaging effect on the Reef. The Minister for Home Affairs and Environment argues that the 1978 amendment relates purely to cost sharing arrangements between the Commonwealth and the State regarding Queensland's marine parks.

34. The Minister advises that it is his understanding that no regulation could be made under the Act unless it was established clearly and by expert evidence that the building of the road may damage the Reef. The Committee has been advised that two criteria need to be satisfied before the Act could be invoked. First it would need to be shown that the pollution was from the road. Secondly it would need to be shown that the polluted water may be harmful to animals and plants in the marine park. The second point may take some years of extensive study to establish.

Australian Heritage Commission Act

35. The Australian Heritage Commission Act 1975 requires that Ministers do not take any action which adversely affects the National Estate unless they are satisfied that there is no feasible and prudent alternative. A function of the Australian Heritage Commission is to forward advice to the Minister on its own motion or at his request on matters relating to the National Estate. It further allows for an inquiry to be held under the Environment Protection (Impact of Proposals) Act on matters relating to the National Estate.

36. It is unlikely that the Heritage Act can be used to prevent construction of the road. No Commonwealth action is involved and the inquiry and reporting provisions while providing information would have no direct impact on the continuing construction.

Environment Protection (Impact of Proposals) Act

37. The Environment Protection (Impact of Proposals) Act 1974 requires that matters affecting the environment to a significant extent and involving Commonwealth decisions be fully examined. If Commonwealth funding was allocated to the road the

provisions of this Act would apply. However the road has been funded solely by the State Government and the Shire and accordingly the Act does not apply.

World Heritage Properties Conservation Act

38. It is argued in Appendix 4 and 5 that the World Heritage Properties Conservation Act 1983 could be invoked to prevent further action on the road. The Act is not limited to protecting sites already on the World Heritage list. An area can be declared by the regulations to be subject to the Act if it fulfills the definition of cultural or natural heritage in the Convention for the Protection of the World Cultural and Natural Heritage.

39. The Minister for Home Affairs and Environment argues, in Appendix 3, that this simplistic view gives no indication of what is needed for an area to fall within the definition of cultural or natural heritage. Before the Government can make regulations under the Act it must be satisfied that a particular area is of outstanding universal value. He believes that consistent application of the criteria is essential otherwise the World Heritage List would lose its significance and creditability.

5. CONCLUSIONS

40. The Committee notes that approaches have been made by the Commonwealth Government to the Queensland Government concerning the road. It is apparent that these discussions have been unsuccessful as construction of the road continues. The Committee does not have detailed information on the nature of the discussions nor is it clear whether the Commonwealth Government offered incentives to the State to cease construction.

41. In many of its previous reports the Committee has recognised the role of State Governments in conservation matters and has advocated a consultative-cooperative approach by the two levels of Government. In the case of the present Daintree controversy it does not appear that the Commonwealth Government has fully exhausted all consultative mechanisms nor does it appear that the State Government or the Shire have been offered incentives to adopt alternatives to their present action.

42. The Committee notes the statement made by the Queensland Premier at the Second World Wilderness Congress concerning the outstanding value of the area. Given statements such as these, the Committee presumes that neither the Queensland Government nor the Douglas Shire Council would continue to undertake action which would damage the area if it proved to be of world heritage value and if feasible alternatives were available to them.

43. The Committee considers it essential that if the area warrants World Heritage nomination, the Queensland Government and the Douglas Shire Council should be offered Commonwealth assistance to develop an environmentally acceptable all-weather

road in a different location or to upgrade existing roads. It further considers that the Commonwealth should recognise its responsibilities in the preservation of World Heritage areas and the costs which may be incurred by State and local governments. It would be appropriate for the Commonwealth Government to offer assistance in the preparation of a regional plan of management for the region and on-going financial assistance for its day to day management.

44. The Committee notes the statements by the Minister for Home Affairs and Environment relating to the establishment of a rainforest working group, consisting of Commonwealth and State Government representatives and other interested parties. The Committee considers that it may be appropriate for this body to be involved in future planning and development of proposals for the region.

45. To enable informed discussion it is important that the World Heritage investigations be completed as quickly as possible. Accordingly the Committee recommends that:

- . the Commonwealth Government complete its assessment of World Heritage status as a matter of urgency; and
- . if the assessment concludes that the area is of World Heritage value the Commonwealth Government after consultation with the Queensland Government proceed with World Heritage nomination as soon as possible.

46. The Committee recommends that:

- . the Minister for Home Affairs and Environment consult with relevant Queensland State Ministers to seek agreement for the cessation of the construction of the Cape Tribulation to Bloomfield road until such time as the World Heritage value of the area has been established.

47. The Committee notes the finding contained in the assessment conducted by the Australian Heritage Commission prior to the listing of the region on the Register of the National Estate. While the area may not prove to be unique in terms of the World's rainforests it certainly has special values in terms of Australia's rainforests. Accordingly the Committee recommends regardless of the conclusions relating to world heritage status that:

the Minister for Home Affairs and Environment -

consult with relevant Queensland State Ministers to discuss the assistance which could be offered by the Commonwealth Government for the preparation of a regional plan of management; and

discuss the types of assistance which could be offered by the Commonwealth Government to ensure sound on-going management of the region.

48. There are conflicting views on the possible impact of the road and its effects on the national and world heritage values of the region. The Committee believes that a scientific study should be undertaken to determine these impacts. The Australian Heritage Commission Act allows for reports to be prepared on matters relating to places listed on the Register of the National Estate. Accordingly the Committee recommends that:

the Commonwealth Government commission a scientific study to determine the impact of the road on the region's heritage values.

49. If the road study indicates that there are significant environmental impacts the Committee further recommends that:

the Commonwealth Government offer funding assistance to the Queensland Government to construct an environmentally acceptable alternative all-weather road or to upgrade existing roads.

50. The Committee recognises that the process of evaluation for world heritage listing and other studies poses a significant and immediate constraint on both the Queensland Government and the Douglas Shire in terms of their current planning. The Committee considers that this places an obligation on the Commonwealth to accept some responsibility for providing funding regardless of the outcome of these assessments. The Committee therefore recommends that:

the Commonwealth Government indicate its preparedness to assist the Queensland Government and Douglas Shire in the costs incurred in deferring proposed developments.

51. It is difficult to believe that the Queensland Government and Douglas Shire Council would reject an approach involving proper consultation and offers of financial and other assistance.

52. In the previous chapter the Commonwealth's powers to intervene were discussed. It appears that the Commonwealth may have powers under the Great Barrier Reef Marine Park Act 1975 and the World Heritage Properties Conservation Act 1983 to directly intervene.

53. However, the Committee believes that the Marine Park Act is meant for and is achieving sound management of the Marine Park. It would not be appropriate to use the Act to prevent further construction of the road to save a small area of the reef as it could irreparably damage the delicate arrangement which exists between the Commonwealth and the Queensland Governments concerning the sound management of what effectively represents 80 percent of the eastern Queensland coast.

54. With regard to the application of the World Heritage Act the Committee notes the Minister for Home Affairs and Environment's comments relating to the dangers involved in unilateral action by Australia before a proper assessment has been made or before a proposal has been submitted to the World Heritage Committee. This could lead to the 'debasement' of the World Heritage List. A precedent could be established which may lead to pressure for the Act to be used whenever conservationists are in disagreement with State Governments. The Act should not be used for general conservation purposes and should only be invoked when a listed place or places under consideration for listing are under threat.

55. Therefore the Committee recommends that:

- . the Commonwealth Government consider applying the provisions of the World Heritage Properties Conservation Act 1983 but only if -

- (i) the studies commissioned by the Australian Heritage Commission find that the Greater Daintree region is worthy of World Heritage nomination;

- (ii) the Commonwealth Government has consulted with the Queensland Government and offered financial assistance for an alternative road and assistance for regional management;
- (iii) the consultation and offers of assistance have been unsuccessful; and
- (iv) the scientific study has been undertaken and shows that the road seriously debases the region's national and world heritage values.

56. The Committee's recommendation in the previous paragraph is consistent with the view held by the Committee in previous Parliaments on the right of the Commonwealth to intervene in environmental matters of national concern.

(PETER MILTON)

Chairman

23 August 1984

APPENDIX 1

DISSENT BY MR BURR, MR CONNOLLY AND MR ROBINSON

Pursuant to Standing Order 343 we add this dissent to the Committee's Report.

While not disagreeing with some of the Report recommendations we have serious reservations about reporting on a matter as important as this and involving varying interests without first conducting a thorough investigation. We are particularly concerned that neither the Queensland Government nor the Douglas Shire Council were asked to put their views to the Committee in a formal manner. Some of the conclusions were based on very limited scientific data.

We also consider it premature to report at this time when the Australian Heritage Commission has a study in progress on the status of rainforests in Northern Queensland. The results of this study will be released in the near future. The Committee would have made a far more worthwhile contribution to the debate if it had waited until it had examined the Australian Heritage Commission report.

We now turn to specific aspects of the Report. We strongly disagree with those sections which suggest that the Commonwealth pursue action which will result in World Heritage nomination irrespective of the views and agreement of the Queensland Government. The approach adopted by the Committee is confrontationalist and would involve the Commonwealth in areas

which are the primary responsibility of the State. This approach is short-sighted and has serious implications for the management of areas in all parts of Australia which are of significant national and international value.

We recognise that the Commonwealth should play an active role in assisting states in the management of areas considered of major national conservation significance such as the Daintree Rainforest. This should be on the basis of cooperation and consultation.

We believe that the recommendation contained in Paragraph 55 which threatens the application of the World Heritage Properties Conservation Act against Queensland is unnecessary and inconsistent with the main thrust of the Report which is to encourage further negotiation between the Commonwealth and Queensland. We completely oppose the use of the World Heritage Properties Act without the support of the Queensland Government.

Notwithstanding our comments relating to the preparation and contents of the Report, we do not oppose nomination of the Daintree for the World Heritage List if it is determined to be of such significance. However nomination should only proceed with the full support of the Queensland Government.

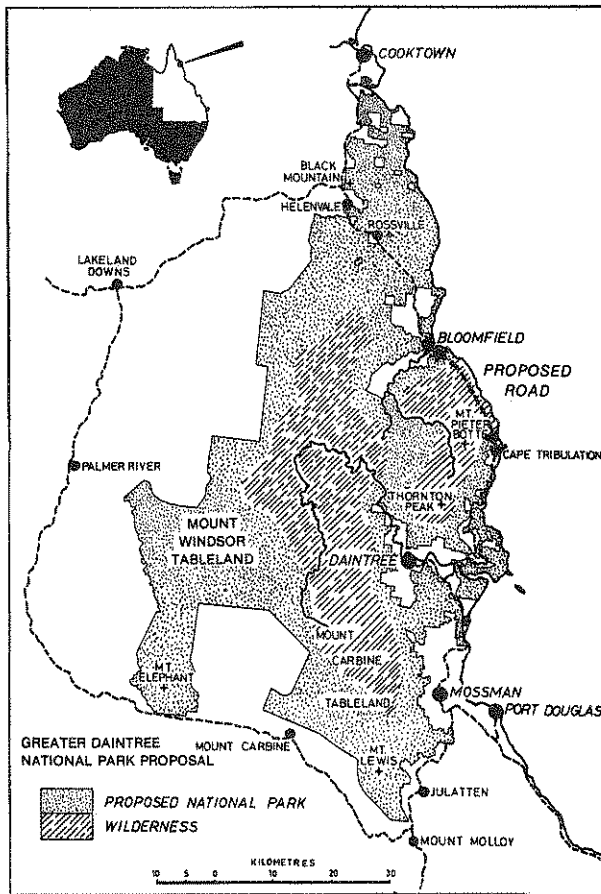
It is regrettable that the Minister for Home Affairs and Environment had not offered assistance prior to the road's commencement in November 1983. The lack of a positive cooperative approach by the Minister and the Government has contributed to the present unsatisfactory situation and needless confrontation.

D.M. Connolly

M.A. Burr

I.L. Robinson

THE GREATER DAINTREE REGION





Extract from *Habitat*, Volume 12, No. 4
August 1984

from the Hon. Barry Cohen
Minister for Home Affairs and
Environment
Parliament House
Canberra, A.C.T. 2600

I refer to the article "The Commonwealth has legal responsibilities for 'Cape Tribulation'" by Elizabeth Ward published in Volume 12 No. 2 of your magazine — April 1984.

In coming to a decision on a particular environmental issue, the Commonwealth Government needs to take into account not only its responsibilities under specific legislation, but also its overall policy position with respect to the issue.

The matters raised by Ms Ward in her article need therefore to be considered from two standpoints. Firstly, what action the Commonwealth may be able to take under various Acts to prevent or delay construction of the proposed Cape Tribulation to Bloomfield road. Secondly, whether the Commonwealth considers it desirable to act, bearing in mind its relationships with the States on a wide range of co-operative ventures for protecting and conserving the Australian environment.

On the first point, it is my understanding that the Commonwealth's ability to intervene effectively in the development of the road using its powers under four environment Acts is not as clear cut as Ms Ward's article suggests. I will consider in turn each of the Acts mentioned by Ms Ward.

The *Great Barrier Reef Marine Park Act 1975* established the Great Barrier Reef Marine Park Authority which has the responsibility for the care and control of the Marine Park established by the Act. However, there is no duty on the Authority to monitor activities outside the Park to ensure the Reef is not threatened by virtue of sub-section 7 (1A) of that Act, as she alleges.

Sub-section 7 (1A) of the Act was added in 1983 to ensure that the Authority could, in accordance with cost-sharing arrangements, provide money to Queensland, for the Commonwealth's share of recurrent and capital costs associated with the management of areas outside the Marine Park (e.g. Queensland national and marine parks within, or outside, the outer boundaries of the Marine Park). Without this provision the Authority could not provide Queensland with the Commonwealth's contribution towards

the cost of managing Queensland national or marine parks within, or near the Great Barrier Reef Marine Park. Sub-section 7 (1A) was inserted for the purposes of paragraphs 7 (1)(ca) and (1)(cb) only and cannot be used for interpreting other provisions in the Act as Ms Ward has attempted to do.

Ms Ward states that "if there was evidence that land-based activities were affecting reef life within the Park then the Commonwealth Government should pass regulations to control the land-based activities". The Act provides that regulations may be made "regulating or prohibiting acts (whether in the Marine Park or elsewhere) that may pollute water in a manner harmful to animals and plants in the Marine Park".

It is my understanding that no regulation could be made under this Section of the Act unless it were established clearly and by expert evidence that the building of the road may pollute water in the manner described. A number of opinions have been advanced regarding the effect the road construction may have on the water and the fringing reefs adjacent to the shoreline. However, much as I and others may deplore the effects of constructing the road, these opinions do not as yet constitute expert evidence. I am nevertheless seeking further advice on this matter.

Again, Ms Ward's analysis of the *World Heritage Properties Conservation Act 1983* presents a rather one dimensional approach to a complex issue. She states that "once the Cape Tribulation area was prescribed as identified property by the regulations, the Act could be used to protect it". This misleads your readers as it gives no indication of what is needed for an area to come within the definition of cultural or natural heritage as defined in the Convention for the Protection of the World Cultural and Natural Heritage (the Convention). Under the Convention and the Act only areas of "outstanding universal value" are to be considered as "natural heritage" or "cultural heritage".

Before the Government can make regulations under the Act it must be satisfied that a particular area is of "outstanding universal value". What determines that an area is of "outstanding universal value" must be answered by looking at the Convention itself.

Article 11.5 of the Convention provides that the World Heritage

Committee shall define the criteria for including a property in the World Heritage List. For areas to come within the Convention's definition of "natural heritage" they must:

- (i) be outstanding examples representing the major stages of the earth's evolutionary history;
- (ii) be outstanding examples representing significant ongoing geological processes, biological evolution and man's interaction with his natural environment; as distinct from the periods of the earth's development, this focuses upon ongoing processes in the development of communities of plants and animals, landforms and marine and fresh water bodies; or
- (iii) contain superlative natural phenomena, formations or features or areas of exceptional natural beauty, such as superlative examples of the most important ecosystems, natural features, spectacles presented by great concentrations of animals, sweeping vistas covered by natural and cultural elements; or
- (iv) contain the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value from the point of view of science or conservation still survive.

Many areas which are nominated for the World Heritage List are rejected by the World Heritage Committee as not meeting these criteria. Consistent application of the criteria is essential, otherwise the List would lose its significance and credibility. It must be restricted to areas which really are of outstanding universal value. At present there are 165 properties on the List and 5 of these are in Australia. This indicates just how special an area must be to justify listing.

The making of valid regulations, therefore, is not quite as straightforward as the author suggests. A lot more work would need to be done on the "universal" significance of the area. At this stage there does not appear to be adequate evidence to put the matter beyond doubt.

There is a significant flaw in Ms Ward's suggestion concerning proclamations made under paragraphs 6 (2)(e) and section 8 of the *World Heritage Properties Conservation Act 1983*. She should be aware that the High Court in the Tasmania Dam Case, a case to which she refers, declared

Section 8 to be invalid. A majority of the Court also considered paragraph 6 (2)(e) to be invalid.

Ms Ward's last point concerns the direction of an inquiry under the Commonwealth's *Environment Protection (Impact of Proposals) Act 1974*. As Ms Ward correctly points out, the Cape Tribulation region is already listed on the Register of the National Estate kept in pursuance of the *Australian Heritage Commission Act 1975*. I know of no proposal to reconsider the listing. In such circumstances, I do not see any need for the conducting of an inquiry under the *Environment Protection (Impact of Proposals) Act*.

Even if, from this analysis, it could be concluded that the Commonwealth might have power in certain circumstances to act with respect to the road, there remains the issue of whether it wishes to do so.

The Commonwealth cannot prevent all actions by State or local governments which result in damage to

the environment. The situation in respect of South West Tasmania was special and unique. It was a clear case of a property, on the World Heritage List, being threatened by the deliberate and continuing action of a State Government. That action, if continued, would have led to Australia being in breach of its international obligations. Further, the Government had a mandate from the 1983 election to act to prevent the Gordon-below-Franklin dam being built.

The situation with respect to the Cape Tribulation road is different. While many people are saying the area is of World Heritage quality, the fact is that it is not on the World Heritage List, and it has not been considered for entry on the list by the Commonwealth Government, which is the appropriate body to nominate it. The Commonwealth Government receives advice on world heritage matters by a special program committee of officials representing relevant areas of Government administration, including the Australian

Heritage Commission. I am informed that a number of places, including the Cape Tribulation area, that might be nominated in the future by Australia for the World heritage List are being considered by the group.

When the Government receives the advice of the special program committee it will consider the matter. Before making any decision on the nomination of any properties to the World Heritage Committee the Government will consult fully with the State or Territory Governments concerned.

I will conclude by re-affirming the Government's commitment to developing policies which will provide a balance between economic, ecological and recreational needs in relation to Australia's forest resources. To this end, and particularly when faced with sensitive issues such as Cape Tribulation, we will strive to achieve consensus with *all* interested parties, rather than pursue the interventionist approach so readily advocated by Ms Ward.

Extract from Legal Services Bulletin,
Volume 9, No. 2, April 1984

Canberra's responsibility Cape Tribulation

Elizabeth Ward

On 8 December 1983 the Minister for Home Affairs and Environment, Barry Cohen, announced that the Commonwealth would not offer the Douglas Shire Council (Qld) a sum of money as an inducement to abandon the construction of the road from Cape Tribulation to Bloomfield. He went on to say, 'The responsibility for the Cape Tribulation rain forest area lies with the Douglas Shire Council and the Queensland Government'. The Federal Government's attitude must lead environmentalists to ask why the environmental issues at Cape Tribulation are so different from those in South West Tasmania. Is the case for Commonwealth intervention any weaker in relation to the Cape Tribulation road than it was for the Franklin Dam?

An examination of relevant Commonwealth legislation shows that the Federal Government has not only the power to act in North Queensland, but has legal obligations to intervene to protect the Cape Tribulation region.

THE GREAT BARRIER REEF MARINE PARK ACT 1975 (Cth)

The previous Labor Government expressed its commitment to protecting the Great Barrier Reef by passing the *Great Barrier Reef Marine Park Act 1975*. This Act established the Great Barrier Reef Marine Park Authority to hold responsibility for the care and control of the marine park which was established by the Act, to make recommendations to the Minister in relation to the care and development of the Marine Park and to carry out research and investigations relevant to the Marine Park (ss.7(1)(a) and (b) of the Act).

Furthermore, the Parliament amended the Act in November 1983, increasing the powers of the Authority by providing that matters relate to the Marine Park if they are concerned with the use or management of an area outside the Park which would or might affect the Marine Park (new s.7(1A)). The Authority therefore has the duty to monitor activities outside the Park and to ensure that the reef is not threatened.

If there was evidence that land-based activities were affecting reef life within the Park then the Commonwealth Government could act to control the land-based activities. Regulations could be enacted pursuant to s.66(2)(e) of the Act.¹ These regulations would be similar to current provisions which prohibit drilling for

minerals outside the Park, in order to protect the environment within the Park.²

Barry Cohen referred to the possibility of damage to fringing reefs in his 8 December 1983 press release. The very suggestion that the Marine Park would be affected, immediately makes the matter one of Commonwealth concern, one on which the Minister can do more than 'hope' that the Queensland Government and the Douglas Shire Council will change their course.

WORLD HERITAGE PROPERTIES CONSERVATION ACT 1983

The Commonwealth has legislation already in force to protect sites of outstanding natural and cultural significance. The *World Heritage Properties Conservation Act 1983* is not limited to protecting sites already on the World Heritage List. Any area can be declared by the regulations to be subject to the Act if it fulfils the definition of cultural or natural heritage in the *Convention for the Protection of the World Cultural and Natural Heritage*.³ Once the Cape Tribulation area was prescribed as identified property by the regulations, the Act could be used to protect it, by making proclamations under s.6 and -s.8. The constitutional support for the proclamations would derive from ss.6(2)(b), (c), (d) and (e).⁴

It would be argued, relying on s.6(2)(b), that the Commonwealth is obligated to protect the Cape Tribulation area under Articles 4 and 5⁵ of the Convention, together with Article 12.⁶ Together, these articles require signatory countries to identify and protect properties which fall within the Convention definition of cultural or natural heritage. It should be noted that the majority of judges in the High Court *Dams Case* (1983) found that Articles 4 and 5 imposed substantial obligations on signatories to the Convention.⁷ Evidence of the outstanding universal value of the area could be

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obtained from earlier studies done of it and from certain clear acknowledgements of world significance such as:

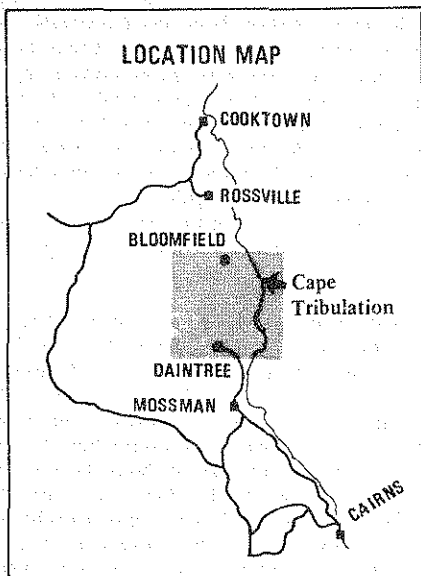
- preparatory work on the area by the Australian Heritage Commission to include the area in a list of Australian sites of world heritage standing;
- the International Union for Conservation of Nature and Natural Resources (which advises and implements the decisions of the World Heritage Committee) has identified Cape York Peninsula and Queensland rainforest regions in its inventory of natural sites of world heritage quality;⁸
- in 1980 the second World Wilderness Congress, meeting in Cairns, acknowledged the Queensland rainforests as an area of top priority for conservation action. The Congress sought the creation of a large national park from Cooktown to the Daintree River area and inland, and urged both State and Federal Governments to devise a scheme to preserve all remaining areas of Australian rainforest as World Wilderness Heritage.

The area could be proclaimed under s.6(2)(c) on the basis that its protection is necessary to fulfil Australia's obligation under the World Heritage Convention to protect the Great Barrier Reef, which is a world heritage site listed pursuant to the Convention. Again, this would be on the basis that regulation of land-based activities is necessary in order to protect the nearby reef environment.

The area could be proclaimed as identified property on the basis that it is a matter of international concern under s.6(2)(d). It is arguable that failure to protect the area would reflect badly on Australia in the international community, especially after the international publicity generated by the Tasmanian dam debate.

The area could be proclaimed as identified property on the basis of s.6(2)(e). This action would rely on the site being part of Australia's heritage, given its presence on the list of the national estate. The provision relies on the national implied power and might not withstand High Court challenge. Although it was not necessary to decide the matter in the *Dams Case*, Deane J, and the three minority judges, expressed the view that the power did not extend this far.

However, the paragraph can also be supported to



some extent by the Commonwealth's power to make laws with respect to Aborigines. On this ground, s.6(2)(e) could support a proclamation of the area given its social and historic significance to the local Aboriginal people (the Kuku Yalanji) who live primarily in the Bloomfield area and at Mossman and Daintree, and still use the area for gathering traditional foods and for fishing.⁹

Section 8 of the Act is squarely based on the Aborigines' power and operates to protect areas of significance to Aboriginal people and a proclamation could be made under s.8 to protect any acknowledged Aboriginal sites¹⁰ in the area.

AUSTRALIAN HERITAGE COMMISSION ACT 1975 & ENVIRONMENT PROTECTION (IMPACT OF PROPOSALS) ACT 1974

The Cape Tribulation region is listed on the national estate administered by the Australian Heritage Commission under its Act. Section 44 of that Act provides that any matter relevant to the national estate can be the subject of an inquiry held pursuant to s.11 of the *Environment Protection (Impact of Proposals) Act 1974*. The Minister should use his power under the *Environment Protection (Impact of Proposals) Act* to direct that an inquiry be held into this part of the national estate.

CONCLUSION

It is difficult to reconcile the above legal analysis with the Minister's statement that responsibility for Cape Tribulation lies with the Douglas Shire Council and the Queensland Government. Barry Cohen reiterated his view of limited Commonwealth powers when he opened the Cairns Rainforest Conference on 2 February 1984. His references to the Federal division of powers ignore the concept of the Constitution as a changing and evolving document, 'an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.'¹¹ The Federal Government's stand shows that it has not grasped the outcome of the *Dams* decision. South West Tasmania was not an isolated case. The Commonwealth has substantial powers to act in environmental matters. Speaking in terms of paying the States not to take environmentally harmful action is just a variation on the 'States' rights' excuse of the former Fraser Government. The Commonwealth Government must stop thinking that it was lucky (or unlucky) to win the Franklin Dam case. The Government will be rightly accused of political opportunism for opposing environmental destruction in South West Tasmania, unless it is prepared to take decisive action in other cases where a unique environment is threatened.

REFERENCES

1. Section 66(2)(e) of the Act provides for the making of regulations 'regulating or prohibiting acts (whether in the Marine Park or elsewhere) that may pollute water in a manner harmful to animals and plants in the Marine Park'.
2. *Great Barrier Reef Marine Park (Prohibition of Drilling for Petroleum) Regulations 1983*.
3. Cultural and Natural Heritage are defined in the Convention by Articles 1 and 2 as follows:

Article 1

For the purposes of this Convention, the following shall be considered as 'cultural heritage':

- monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

- groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
- sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Article 2

For the purpose of this Convention, the following shall be considered as 'natural heritage':

- natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
- geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the aesthetic or scientific point of view;
- natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

4. These paragraphs are as follows:

- 6(2) (b) the protection or conservation of the property by Australia is a matter of international obligation, whether by reason of the Convention or otherwise;
- (c) the protection or conservation of the property by Australia is necessary or desirable for the purpose of giving effect to a treaty (including the Convention) or for the purpose of obtaining for Australia any advantage or benefit under a treaty (including the Convention);
- (d) the protection or conservation of the property by Australia is a matter of international concern (whether or not it is also a matter of domestic concern), whether by reason that a failure by Australia to take proper measures for the protection or conservation of the property would, or would be likely to, prejudice Australia's relations with other countries or for any other reason;
- (e) the property is part of the heritage distinctive of the Australian nation –
- (i) by reason of its aesthetic, historic, scientific or social significance; or
 - (ii) by reason of its international or national renown, and, by reason of the lack or inadequacy of any other available means for its protection or conservation, it is peculiarly appropriate that measures for the protection or conservation of the property be taken by the Parliament and Government of the Commonwealth as the national parliament and government of Australia.

5. Article 4 reads as follows:

4. Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future

generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Article 5 reads as follows:

5. To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

- (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
- (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
- (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
- (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

6. Article 12

The fact that a property belonging to the cultural or natural heritage has not been included in either of the two lists mentioned in paragraphs 2 and 4 of Article 11 shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.

7. *Commonwealth v Tasmania* 1982-3 46 ALR 625 Mason J at p. 698, Murphy J at p. 735, Brennan J at p. 777, Deane J at p. 807.

8. *The World's Greatest Natural Areas*, International Union for Conservation of Nature and Natural Resources.

9. Anderson, C., 'The Bloomfield community, North Queensland', in E.A. Young and E.K. Fisk (eds), *Small Rural Communities*, Development Studies Centre, ANU Canberra 1982.

10. Anderson, C., Dept of Anthropology and Sociology, University of Qld, 'Kuku Yalanyji Aborigines and the Coastal Region from Bloomfield River to Daintree', August 1982.

11. Dixon, J., *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29, at p. 81 (quoted by Mason J in the *Dams* case at p. 693).

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The Commonwealth Does Have Responsibilities

from Ms Elizabeth Ward
Canberra, A.C.T.

I would like to make the attached comments on Mr Cohen's reply to my article "The Commonwealth has legal responsibilities for Cape Tribulation". I should say at the outset that several of the points made by Mr Cohen would have been adequately answered if my original footnote material had been included. I therefore seek your indulgence in publishing the following comments in full.

Great Barrier Reef Marine Park Act 1975

As a matter of statutory interpretation, new sub-section 7(1A) is expressed to apply to the whole of section 7 and therefore affects other provisions within the section which give the Authority functions in relation to the Marine Park. Again, as a matter of statutory interpretation, paragraph (1)(ca) itself requires the Authority "to furnish information and advice to the Minister in respect of matters relating to the Marine Park, including . . ." Sub-section (1A) then deems that matters outside the Park relate to the Park if their use or management would or might affect the Marine Park. The specific matters which paragraph (1)(ca) goes on to elaborate do not limit the general words giving the Authority the function of advising the Minister in relation to the Marine Park.

World Heritage Properties Conservation Act 1983

This Act was drafted to enable the Commonwealth to protect two types of properties:

- 1) properties on the World Heritage List,
- 2) properties considered to be of world heritage standing but not on the list.

This second category comes under the protection of the Act once regulations have been made declaring the relevant property as "natural heritage". Before the Commonwealth can make regulations declaring an area to be natural heritage, it must come within the definition provided in the Convention:

Article 2

For the purposes of this Convention, the following shall be considered as "natural heritage":
natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

This definition is the only test for the

purpose of passing regulations. Whether the area would also survive the further criteria refined by the World Heritage Committee and thus find its way onto the World Heritage List, begs the question. If the Commonwealth is concerned about a nonlisted area which is considered to come within the general words of Article 2, then it has the power to regulate it under the Act. Using the Act to protect areas under consideration for nomination by Australia would be a valid use of the legislation. In this way the region could be protected while it was being examined for nomination suitability. It is suggested that this is a very good reason for the original inclusion of the provision in the Act.

If the Commonwealth feels that it cannot take action under this Act until a place is formally on the World Heritage List, then it should give some thought to passing new laws which will enable it to do so. Otherwise it may find itself in breach of the obligations expressed in Articles 4 and 5 of the World Heritage Convention. I mentioned in my article that the majority Judges in the Dams case considered that Articles 4 and 5 imposed substantial obligations and references which, as stated, were available from the author make these obligations quite clear. Articles 4, 5 and 12 of the Convention are as follows:

Article 4

Each State Party to this Convention

recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Article 5

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

- (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
- (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
- (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
- (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

Article 12

The fact that a property belonging to the cultural or natural heritage has not been included in either of the two lists mentioned in paragraphs 2 and 4 of Article 11 shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists."

The majority Judges of the High Court in the *Tasmanian Dams Case* found that section 8 of the *World Heritage Properties Conservation Act 1983* comprised a special law for the Aboriginal people and was therefore validly based on the Commonwealth's power to make laws for the people of any race (s.51(xxvi) of the Constitution). The reason the provision fell was because one of the majority Judges (Deane, J.) considered that use of the section amounted to an acquisition of

land and he was not satisfied that the compensation provisions in the Act were adequate. Under the Constitution, the Commonwealth is required to pay compensation in cases of acquisition of land. Once the compensation provisions of the Act were altered, section 8 could again be relied on. In the meantime, section 8 is inoperative, but this still leaves suitable bases for invoking the Act in the paragraphs of subsection 6(2).

As stated in my article, paragraph 6(2)(e) might not withstand High Court challenge. I pointed out that a majority of the Court expressed the view that the national implied power did not extend as far as its purported use in the Act. However, the official finding of the Court was that it was not necessary

to decide the validity of subsection 6(2)(e) at that stage.

Australian Heritage Commission Act 1975

Section 44 of this Act is a general provision enabling the conduct of an inquiry into matters relating to the national estate. It is not on its terms restricted to inquiries for the purpose of listing or delisting a property on the Register of the National Estate. Even if such a narrow interpretation could be argued, it should not be preferred to one which would give the Act the operation envisaged by the totality of its provisions. One of the purposes of listing areas on the Register is to protect them (sections 28-31), and this purpose should be carried out.

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