

**NATIONAL PARKS AND WILDLIFE AMENDMENT (VISITORS AND TOURISTS)  
BILL 2010**

**MEMORANDUM OF ADVICE**

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1. This Bill was introduced into the Parliament on 3 June 2010. I prepared an advice on an earlier draft Bill on 11 May 2010. Mr Walker SC prepared an advice on 1 June 2010 concerning a later version of the Bill.
2. The gravamen of Mr Walker's advice is that the Bill (in its current form) strengthens rather than weakens the protections in the existing Act for National Parks and other conservation reserves. He concludes (para 24) that the Bill "does not alter, in any way that has any significance for conservation values, the present capacity for [food outlets and accommodation premises etc] to be permitted within National Parks". Mr Walker's "etc" is left hanging, so it might be useful to explain what it involves.
3. Much of Mr Walker's advice seeks to justify this conclusion by reference to the leasing powers conferred for the adaptive reuse of existing buildings within National Parks (paras 16-20, 23). These powers include the provision of retail outlets, restaurants, food outlets, and conference, sporting and general tourism facilities. Regrettably, Mr Walker did not point out that these leasing provisions (in s.151B of the Act) only apply, on my instructions, to about 50 hectares, that is, 0.00077% of the National Parks Estate. Mr Walker considers these provisions to be significant and noteworthy. They are irrelevant. They are designed to allow adaptive reuse of buildings which are in the main heritage premises, in accordance with *Burra Charter* principles, to advance the cultural heritage objectives of the Act, or to facilitate existing uses in accordance with the policy expressed by s.39 of the Act.

4. In the version of the Bill which I considered, a lease or licence of land could be granted (in addition to the existing powers):
- for facilities and amenities for tourists not associated with their accommodation;
  - to provide retail outlets “commensurate with the needs of the area in which that outlet is located”;
  - to provide restaurants, cafes, kiosks and other food outlets;
  - to provide cultural institutions, including museums and galleries;
  - to enable the hosting of conferences and the provisions of facilities for that purpose;
  - to enable activities of a sporting, recreational, educational, or cultural nature to be carried out and the provision of facilities for that purpose;
  - to provide residential accommodation to facilitate the provision of services to tourists.
5. These were free-standing powers, unconnected to conservation purposes. The draft Bill imposed constraints on the power of the Minister to grant a lease or licence, it is true, but those constraints were only triggered upon the Minister’s subjective opinion, and were in any event one of the weaker constraints known to the law: they were matters for consideration by the Minister. For example, a lease or licence could only be granted if the Minister was satisfied that the purpose was “suitable”, having regard to the natural and cultural values of the land or land in its vicinity: proposed s.151B(1)(a). “Suitable” does not even mean “compatible” or “consistent” with, let alone “in accordance with” the natural and cultural values of the land<sup>1</sup>. Once the Minister “had regard” to the natural and cultural values, he could proceed to make a decision in defiance of them. Some protection.

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<sup>1</sup> It was later changed to “compatible”, a slight and barely perceptible strengthening.

There are important gradations of meaning here which Mr Walker's advice ignores. The devil was, and remains, in the detail.

6. In *Packham v Minister for the Environment* (1993) 31 NSWLR 65, the Court of Appeal decided that the power to grant licences under s.151 was not at large but was constrained by the nature and scope of the Act and:

*"... is to be understood solely as a power to advance the objects and purposes of the Act. The power can only be exercised to licence acts or conduct things the characters of which are such as to promote, or to be ancillary to, the use and enjoyment of the National Park as a public park or for public recreation".*

It said, speaking of s.151 which was in the same terms in 1993 as it is today<sup>2</sup>, that:

*"... land used for public recreation and enjoyment must be open to the public generally, as of right. This was made plain in Waverley Municipal Council v Attorney-General (1979) 40 LGRA 419 ... the emphasis in principle in this series of cases (and there are others to like effect) is unsurprising. It is that National Parks must be available for public use, and their benefits should be retained for the public generally. Development such as buildings, facilities and roads must thus be such that all members of the public with a relevant interest should equally be able to use them and to enjoy the public benefits in the National Park. Developments should, of their nature, be for the purposes, and designed for the enjoyment of, the general public, not for particular, specified individuals in order to give them some special property rights over and above others. This general principle is, of course, subject to the particular provisions of the Act. Certain subsections of s.151 of the Act, by their nature, contemplate varieties of restricted use. But the general principle remains one to which this Court has rigorously adhered and in my view, for very good reasons, sanctioned by Parliament, it should continue to do so.*

*... incidental benefits to a park from a proposed development do not bring within Ministerial power a derogation from the use of a National Park, as such, which is otherwise outside power" (per Kirby P).*

7. The present leasing power extends only to accommodation hotels or houses and the provision within them of facilities and amenities for tourists and

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<sup>2</sup> Except for the addition of subsection (5) which is irrelevant.

visitors: s.151(1)(a), (b). The current licensing power extends to occupy or use lands within the park under s.151(1)(f). The exercise of both powers has been strictly confined by the Courts to purposes which promote or are ancillary to the promotion of the purposes for which National Parks and other conservation reserves have been created. National Parks (with the irrelevant exception of adaptive reuse) cannot be used for wider purposes such as those which the draft Bill sought to authorise. Not only is Mr Walker's criticism misplaced, the Canadian decisions on comparable legislation reinforce my point that, even with express duties on decision-makers to regard the objects of the Act, the Courts will not interfere with discretionary decisions to approve development in National Parks where broad powers to authorise use or occupation are conferred of the kind proposed in the draft and now, to a lesser extent, in the Bill. Where compliance with statutory objects are to be judged by Ministers, intervention by the Courts is unlikely: *Canadian Parks and Wilderness Society v Canada* [2003] 4 FC 672; *Bow Valley Naturalists Society v Canada* [2001] 2 FC 461.

8. The Bill before Parliament significantly alters the draft Bill upon which I earlier advised<sup>3</sup>. In proposed s.151A(1)(b), it states the purposes "related to the sustainable visitor or tourist use and enjoyment" of conservation reserves for which a lease or licence can be granted as follows:

- "(i) the provision of accommodation for visitors and tourists,*
- (ii) the provision of the following facilities if the facilities are ancillary to accommodation facilities for visitors or tourists:*
  - (A) retail outlets,*
  - (B) facilities to enable the hosting of conferences or functions,*
  - (C) facilities to enable activities of a sporting nature to be carried out,*

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<sup>3</sup> A fact acknowledged by Mr Walker at [27] but then ignored in the rest of his advice where I am castigated for my interpretation of provisions which did not then exist!



example, in the *Bow Valley Naturalists Society* case, the Federal Court of Appeal refused to interfere with the approval in Banff National Park of:

*“A six-storey meeting facility with accommodation, food services, a large meeting room, and smaller ‘break-out’ meeting rooms ... adjacent to the current parking wing, sewer, water, waste and electrical infrastructures will be upgraded to service the expansion along with the addition of two proposed staff housing units” at [7].*

The meeting hall accommodated 700 persons. The existing hotel facility (which will now become permissible in our conservation reserves) accommodated 1,126 guests per night [4]. Although it is true, as Mr Walker points out, that the existing leasing power extends to accommodation for visitors and tourists, that power cannot be exercised presently for purposes other than to protect the conservation purposes of the reserve or its enjoyment, a purpose which the Court in the *Blue Mountains Conservation Society* case (referred to in my earlier advice) said required public access as of right. As it is presently drafted, the Bill destroys this delicate balance that the Courts have struck, which gives primacy to the conservation objectives of the Act. In my opinion, that can only be restored by amending this Bill to ensure that, where those objectives are in conflict with land development (basically, any development for the purpose of tourism), priority is accorded to the conservation objectives of the Act.

11. With the exception of ski resorts, which are a special case, tourist facilities in the parks have largely been confined to camping sites, tracks, viewing platforms and so on. This is not tourism, as it is commonly understood. As everyone knows, tourist facilities usually involve permanent development, not readily reversible like camping areas and narrow tracks. It is difficult to envisage how a tourist development as is commonly understood could coalesce with an objective to promote or conserve biodiversity, especially over time (how can a tourist development whose impacts are only perceived after approval be reversed?). A tourist resort requires power, water and sewage facilities, increasing the footprint of development in remote areas for many kilometres. (I note that the Minister’s Department is being prosecuted

presently in the Land and Environment Court for allegedly mismanaging the sewerage plant in Kosciuszko National Park). Mr Walker appears to think that ESD principles would protect the park system from the adverse impacts of development. ESD principles are applied on a daily basis by planning decision-makers, who approve large scale land clearing. They were required to be applied by the Canadian Parks Authority yet, as the Courts pointed out in the cases to which I referred, they imply development and oblige the decision-maker to take into account economic factors as well as the conservation of biodiversity. As the Federal Court of Appeal said in the *Canadian Parks and Wilderness Society* case:

*“Having concluded that it was open to the Minister to consider the road proposal by having regard to the social and economic needs of the communities living in the park, it is not the role of a reviewing Court to consider whether, given the Minister’s statutory duty to afford the first priority to ecological integrity, she assigned too much weight to the social and economic factors and too little to the ecological. Reviewing the exercise of discretion for unreasonableness ... does not entitle the Court to reweigh the factors considered by the decision-maker” [99].*

12. I have been asked to consider what safeguards could be inserted in the Bill. In my view, the principal safeguard is to adopt a variant of s.11A of the *National Parks and Access to the Countryside Act 1949* (UK). Every nation’s National Park system is different, and in the UK there are existing communities within National Parks. Section 11A deals with the potential conflict between looking after the needs of those communities and tourism and conserving and enhancing the natural values of the park. It resolves that conflict by this provision:

*“(2) In exercising or performing any functions in relation to, or so as to affect, land in a National Park, any relevant authority shall have regard to the purposes specified in [the objects clause] and, if it appears that there is a conflict between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park”.*

Such a provision would overcome the problem which arose in the Canadian cases, where the Courts permitted the Minister to preference development over conservation.

13. The second change which is necessary is to remove the discretion of the Minister to determine whether the leasing purposes are within the authority of the Act. This would reinstate the current position that enables the Courts to assess whether a lease is granted for an authorised purpose. This can be achieved by omitting the first three lines of s.151B(1) and inserting the following words:

*“A lease or licence of land (including any buildings or structures on the land) must not be granted under s.151 unless:”.*

14. For reasons which are not obvious, the leasing power is not connected with the management plans which otherwise govern operations within conservation reserves. Although s.81A provides that the management plan provisions have effect in respect of a part of a conservation reserve that is the subject of a lease or licence, that is “a dog chasing its tail” provision. It only has effect once the lease or licence is granted. If the lease or licence is inconsistent with the Management Plan, it does not give priority to the Management Plan. On the contrary, the Management Plan must be read down in the case of a conflict. As there are two potentially disparate powers, one general and the other specific, the usual approach to construction is to resolve the conflict by giving effect to the specific power, especially where as in the case of a lease, it involves the creation or adjustment of a property right. Of course, a Management Plan can be simply amended to accommodate the lease, and I would expect in almost every case that the Minister would ensure that there would be no opportunity for any conflict to arise or for any work to be done by s.81A. In the unlikely event of conflict, however, it is by no means clear that s.81A resolves it in favour of the Management Plan, when it is predicated upon an existing lease or licence.
15. There is another reason why s.81A is a weak constraint. Management plans only constrain operations by the Parks Service and not the use to which

parks may be put by others: ss.72AA(2), (4), 81(1). It appears that Mr Walker has misunderstood those provisions: [11]-[13], [31], [41].

16. Although some of Mr Walker's analysis is correct (especially when he deals with the improvements made to the Bill as a consequence of my earlier advice) there remain numerous issues, only some of which I have identified in this advice, where the conservation purpose which the Minister advances as the justification for this legislation can be strengthened without, it seems to me, derogating from the enhanced flexibility which the Minister desires in order to better manage the parks system.

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**T F ROBERTSON SC**

Frederick Jordan Chambers

Phone: 9229 7337

Fax: 9221 5747

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