

***The reasons for the decision***

*The conditions of the ACT licence previously issued required that Wildcare Queanbeyan Inc. provide details relating to all animals received and cared for under the licence. Statistics provided by the group indicated that there was a high mortality rate. Of the 32 animals received by Wildcare Queanbeyan Inc. during the licence period, 14 were either euthanased or died. Only 9 were released. Ten animals were still in care at the time the details were provided.*

*As acknowledged by Suzy Nethercott-Watson, Wildcare President, in an email to Bob Neil, Director Environment Protection, dated 15 October 2008, the initial licence was issued on a one year trial basis. The licence was to be reviewed dependent on the statistics provided by the group. Ms Nethercott-Watson provides that the experience of Wildcare is that there is a 40-60% mortality rate of Eastern Grey Kangaroo Joeys.*

*New South Wales Parks and Wildlife Service also issued a licence to Wildcare Queanbeyan Inc. The licence was for a period of twelve months and was to be reviewed at the end of the licence period.*

*The Conservator considered the advice of the ACT Natural Resource Management Advisory Committee, the ACT Flora and Fauna Committee and the Animal Welfare and Advisory committee.*

*The Conservator accepted the advice of the ACT Natural Resource Management Advisory Committee and the ACT Flora and Fauna Committee and gave the most weight to the advice of the Third report to the Minister for the Environment, Land and Planning, ACT Kangaroo Advisory Committee, October 1997 (Living with Eastern Grey Kangaroos in the ACT - Public Land)*

*The Conservator also reviewed the outcomes of the first licence to export EGK granted to Wildcare Queanbeyan Inc. and formed the view that the conservation outcome as evidenced by the results of the rehabilitation and subsequent release of EKG provided by Wildcare Queanbeyan Inc. did not justify a reissue of the licence.*

- 3. On 18 December 2008, the Appellant sought review of the Respondent's decision by the ACT Administrative Appeals Tribunal. The application was transitioned to the ACT Civil and Administrative Tribunal (ACAT) when the Tribunal commenced operation.



4. The matter was heard by Senior Member Hatch on 2 July 2009. He handed down his decision on 10 September 2009, affirming the decision under review (the original decision).<sup>1</sup>
5. The Appellant lodged an application to appeal the decision on 29 September 2009. The application for appeal was said to be brought on the basis that both the Respondent and the Tribunal in its original decision, had incorrectly interpreted and applied the criteria relevant to determining whether a licence should be granted. The application for appeal identified a number of questions of fact and law in the original decision that were said to involve errors. The Appellant asked for permission to provide fresh evidence to support the appeal.
6. Some of the grounds for appeal assert that the original decision was wrong because the Tribunal admitted and considered hearsay evidence contrary to the provisions of the Evidence Act. These assertions cannot be sustained. The rules of evidence do not apply in these matters.<sup>2</sup> The original tribunal's role was to review the decision of the respondent on a merits basis, considering all relevant factors and only the relevant factors so as to arrive at the correct or preferable decision. Hearsay evidence may well be relevant in such an exercise. The decision maker must assess all relevant material to determine the probative value of the material. Hearsay evidence may be persuasive or of little value; but if it has any relevance, it should be considered.
7. The Appeal Tribunal is satisfied however, that the original tribunal's reasons for decision do not demonstrate that all relevant factors were considered.

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<sup>1</sup> Reported as *WILDCARE QUEANBEYAN INCORPORATED v CONSERVATOR OF FLORA AND FAUNA (Administrative Review) [2009] ACAT 31*

<sup>2</sup> See section 8, ACAT Act



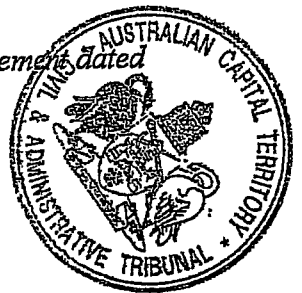
8. The Appeal Tribunal made a number of procedural directions about how it would deal with the appeal on 30 November 2009. Because of the view taken of the grounds of appeal, the Appeal Tribunal decided to deal with the appeal as a review of the whole of the original decision under section 82 (b) of the *ACT Civil and Administrative Tribunal Act 2008* (ACAT Act). The Appeal Tribunal also ordered that the Appellant should be allowed to file further evidence. This is somewhat unusual for an appeal that is conducted as a review. Section 82 of the ACAT Act gives the tribunal broad discretionary powers to deal with an appeal as it considers appropriate. Rule 21 of the *ACT Civil and Administrative Tribunal Procedural Rule 2009 (No 2)* re-inforces the broad discretion. It provides:

**21. Appeals to tribunal—general powers**  
*For an appeal to the tribunal, the tribunal—*

- (a) has all the powers and duties of the tribunal that made the order appealed from; and*
- (b) may draw inferences of fact; and*
- (c) may receive further evidence about questions of fact, either orally in a hearing, by written statement or in another way; and*
- (d) may make an order confirming, amending or setting aside the order of the tribunal appealed from; and*
- (e) may make any other order it considers appropriate.*

9. The procedural directions allowed the Appellant to give the Respondent a request for answers to questions about evidence given by Dr Donald Fletcher at the original hearing. In addition, the appellants were allowed to rely on affidavits filed on 4 November 2009 in support of the application for appeal. Both parties were ordered to provide written submissions. The Appeal Tribunal identified the documents that would be considered in the Appeal as follows:

- 1. *Application for appeal from an ACAT Decision and attached Statement dated 29 September 2009*



2. *Order and Reasons for Decision of original Tribunal in Application AT 111 of 2008 dated 10 September 2009*
  3. *Statement of Reasons of the Conservator of Flora and Fauna dated 18 February 2009 and related documents lodged with the original Tribunal (the "T" documents numbered T1 to T11)*
  4. *Respondent's Statement of Facts and Contentions lodged with the original Tribunal*
  5. *Exhibits A to G*
  6. *Transcript of hearing dated 2 July 2009*
  7. *Affidavits of Kevin Patrick, Patricia Searson, Marilyn Mills, Jutta Brinkmeyer, Sandra Latham, Lesley Machin, Philip Machin and Robert Greenshields*
10. The eight affidavits referred to above were filed on 4 November 2009. Each deponent stated that they were a trained wildlife carer and that each had been involved in the rescue, rehabilitation and release of eastern grey kangaroos for several years. Each deponent stated that none of the eastern grey kangaroos they had hand raised had exhibited aggression towards them, their family or visitors.
11. Both parties subsequently indicated their preference that the appeal be dealt with on the papers.
12. In addition to the documents listed above, the Appeal Tribunal considered the questions put by the Appellant to Dr Fletcher, the answers that were provided and the written submissions filed by the parties.

#### The relevant legislation

13. The licence in this matter is sought under the *Nature Conservation Act 1980* (the NC Act). The NC Act does not have a specific section that sets out its object or purpose but it is clear from a reading of the Act as a whole that it is concerned with the preservation of native animals and the protection of the environment. Sometimes there may be a tension between those objects. The Act is sub-titled "An Act to make provision for the protection and conservation of native animals and native plants, and for the reservation of areas for those purposes." Section 6 of the



NC Act requires that the Act be construed and administered in a way that is consistent with environmental laws of the ACT. An *environmental law* is defined as a law that has as one or more of its objects or purposes, the protection of the environment. The concept of environment is not specifically defined, but is clearly intended to be a broad concept encompassing all aspects of the natural environment as a whole and the individual components that come together to constitute the natural environment. This provides some assistance in the context of this case by emphasising the need for the tribunal to construe and apply the law in a way that is focussed on protection and preservation.

- 14. The relevant provisions of the *Nature Conservation Act 1980* (the NC Act) are found in Part 4 of the Act. That Part is headed the "Protection of Animals and Fish". Again, it emphasises the protective focus of the relevant sections. Part 4 creates statutory offences designed to prohibit a person from doing various things with native animals and fish, unless the person acts in accordance with a licence.
- 15. Section 45 of the NC Act prohibits the taking of a native animal, whether dead or alive, except in accordance with a licence. Section 46 and 47 of the NC Act prohibit the keeping or selling of an animal except in accordance with a licence. Section 48 of the NC Act prohibits the importation or exportation of animals from the ACT, except in accordance with a licence. Section 49 of the NC Act prohibits a person from releasing a native animal from captivity in certain circumstances, except in accordance with a licence.
- 16. Part 11 of the NC Act deals with the process for obtaining a licence. Section 103 provides that an application for a licence must be given to the Respondent.
- 17. Section 104 of the NC Act requires the respondent to either grant or refuse to grant the licence sought. It provides:



*On application under section 103, the conservator shall, in accordance with section 106—*

*(a) grant a licence; or*

*(b) refuse to grant a licence.*

*(2) The conservator may grant a licence, in accordance with section 106—*

*(a) subject to any condition, including a condition referred to in section 105; and*

*(b) for such duration as he or she thinks fit.*

18. Section 105 of the NC Act details the conditions on which a licence may be granted. In so far as is relevant, it provides:

*105 (1) The conditions subject to which a licence may be granted include the following:*

- (a) conditions requiring compliance with a management plan approved by the conservator under subsection (4) for the activities to be undertaken pursuant to the licence;*  
*(b) different conditions in relation to species having special protection status, protected fish, protected invertebrates, protected native animals, protected native plants, exempt animals, controlled organisms and prohibited organisms.*

19. Section 106(1) of the NC Act identifies the criteria that the respondent must follow when granting a licence. It provides:

*106 (1) The conservator shall not grant a licence, or impose or vary a licence condition, except in accordance with the criteria determined under subsection (2).*

*(2) The Minister may, in writing, determine criteria for—*

*(a) the grant or refusal of a licence; and*

*(b) the imposition of conditions; and*

*(c) determining the duration of a licence.*

*(3) For the purposes of subsection (2), the Minister may determine different criteria in relation to—*

*(a) species having special protection status; and*



- (b) *protected native animals and protected native plants; and*
  - (c) *other native animals and native plants; and*
  - (c) *prohibited organisms and controlled organisms; and*
  - (e) *any other animals, plants, fish and invertebrates.*
  - (4) *A determination under subsection (2) is a disallowable instrument.*
20. Section 107 of the NC Act provides that a licence remains in force for the period specified in the licence unless sooner surrendered or cancelled. Sections 108 and 110 of the NC Act provide for the surrender and cancellation of licences respectively.
21. The criteria referred to in section 106(2) are set out in the *Nature Conservation (Licensing Criteria) Determination 2001*. This is Disallowable Instrument number 47 of 2001. It sets out the formal requirements for an application. The sections of the determination that are relevant to this application say:

#### **CONDITIONS OF A LICENCE**

*5.(1) A licence may specify conditions subject to which the licence is granted in relation to the activity and how it is to be carried on, for example:*

- (a) *the manner in which the activity is to be or not to be conducted;*
- ...
  - (b) *handling and care requirements for an animal or plant;*
  - ...
    - (d) *the type of activity and its purpose;*
    - ...
      - (g) *the number of animals, plants or fish involved;*
      - ...
        - (j) *record keeping, and reporting requirements;*

#### **GENERAL CONSIDERATIONS**

*7(1) For the purpose of determining an application for a licence, the Conservator shall have regard to*

- (a) *the objectives set out in the Nature Conservation Strategy made under Part 2 of the Nature Conservation Act 1980; and*



*(b) the effect the activity will have on:*

- (i) a species of native animal or native plant already found in the Territory;*
- (ii) the significant ecosystems of the Territory; and*
- (iii) if the activity is proposed to be undertaken on public land, the effect of the activity on that land.*

*(3) For the purposes of determining an application from a body corporate, the Conservator shall be satisfied, based on reasonable grounds, that the officers or employees of the body corporate possess such qualifications and experience as is necessary to undertake the proposed activity.*

...

*10. When determining an application for a licence relating to animals or live fish, the Conservator shall have regard to:*

*(a) the degree of unintended mortality of animals or fish that is likely to occur;*

...

*(g) in the case of an application for a licence to export an animal ...the degree to which exportation of animals...of the species to which the application relates is likely to threaten the continuance in the Territory of that ... species of animal ...*

*(i) in the case of an application for a licence to import or export an animal ... – the means by which the animal will be transported.*

*12. In the case of an application to release an animal from captivity, the Conservator shall have regard to:*

*(a) the place proposed for release of the animal;*

*(b) the likelihood of the animal being able to survive or breed in the wild following its release;*

*(c) the potential for the animal to have a detrimental impact upon the natural environment, including other animals or plants and their conservation requirements;*

*(d) the source of the animal in relation to its genetic characteristics and freedom from disease;*

*(e) the likelihood of the animal having any other harmful effect whatsoever.*



13.(1) *In the case of an application for a licence to keep an animal for rehabilitation purposes, the Conservator shall have regard to:*

- (a) *the general well-being of the animal in captivity;*
- (b) *the likelihood of the animal being able to survive in the wild following its rehabilitation;*
- (c) *the effect on the natural environment of releasing the animal following its rehabilitation;*  
*and shall be satisfied, based on reasonable grounds, that the Applicant:*
- (d) *possesses qualifications and experience relevant to keeping an animal of the kind proposed; and*
- (e) *has the facilities and is able to apply the handling techniques that are conducive to the animal being successfully reintroduced to the wild.*

(2) *For the purposes of paragraph 13.(1), keeping for rehabilitation includes dependant juvenile or orphaned progeny of an animal.*

**Consideration of the issues**

22. Section 79 ACAT Act provides that the present appeal lies in respect of both issues of fact and law. On this appeal the Tribunal is able to:

- (a) have regard to the relevant statutory provisions; any relevant policies of a statutory origin and other relevant government policies;
- (b) have regard to the evidence before the original tribunal;
- (c) consider the further evidence provided; and
- (d) draw such inferences of fact as appear justified from either the original or new evidence;

in order to come to the necessary findings of fact in relation to the issues to be determined.

23. Government policies can generally be divided into three categories:



- (a) written policies, whether of statutory origin or otherwise, that are the outcome of public consultation; are of general application; are publicly available and are consistently applied;
  - (b) advice from expert committees (statutory or otherwise) that are entirely responsive to a request for advice on an individual issue; and
  - (c) ad hoc policies that derive wholly from intra departmental sources in response to situations that arise from time to time.
24. Within the first two categories, a further distinction can be between policies that are of statutory origin and that a relevant statute require be taken into account, and policies that are wholly executive in origin. In the case of policies of a statutory origin, the statute may provide that the policies are binding in their terms (prescriptive) or that the policy is a relevant consideration to which regard must be had. The formulation 'have regard to' requires only a genuine consideration of the issue without mandating any particular weight to be attached to the issue or the outcome (*Pelka v Secretary FASCIA* 2008 FCAFC 92; *David v MIMIA* 2004 FCA 686)
25. Because the Tribunal is exercising the powers of the Respondent, any prescriptive statutory requirement, or any requirement that the Respondent is required to have regard to, also binds the Tribunal.
26. In relation to government policies within the first two categories that are wholly of executive origin, the Tribunal is required by law to consider such policies but is not bound by them; and is free to consider whether the policies themselves are fairly based on the statute (*Drake -v- Minister for Immigration and Ethnic Affairs (No.2)* (1979) 2 ALD 634; *Re Control Investments P/L and ABC* (1981) 39 ALR 281;



*BHP Direct Reduced Iron P/L -v- Chief Officer, Australian Customs Service*  
(1998) 1346 FCA).

27. It would be an error of law on the part of the Respondent and the Tribunal to simply and inflexibly apply a policy without giving a "proper, genuine and realistic consideration" of the merits of the individual case (*Mendoza -v- Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 405; *Croft -v- Minister for Health* (1983) 45 ALR 449; *Hindi -v- Minister for Immigration* (1988) 91 ALR 586; *Robobatini -v- Minister for Immigration and Multicultural Affairs* (1999) FCA 1238). In the present context, this requires the Tribunal to go beyond a mechanical recitation of the general policy to seriously examine whether the policies in question produce a result consistent with the intention of the statute.
28. In the current context the first category of policies include:
- (a) the *Nature Conservation (Licensing Criteria) Determination 2001*;
  - (b) the *Nature Conservation Strategy* from Part 3 NC A (Disallowable Instrument 263 of 1997); and
  - (c) *The Code of Practice for the Humane Destruction of Kangaroos in the ACT*.

Of these, (a) and (b) are of statutory origin and (c) is wholly of executive origin.

29. In the current context, the second category of policies include the reports considered by the Respondent and the advices sought by the Respondent on receipt of the licence application as described in the Reasons for Decision set out at paragraph 2 above, namely;
- (a) the ACT Kangaroo Advisory Committee Report 1997;
  - (b) the advice from the ACT Natural Resources Management Advisory Committee;



- (c) the advice from the ACT Flora and Fauna Committee; and
- (d) the advice from the ACT Animal Welfare Committee.

All these are of executive origin.

30. In the current context, the third category of policies includes the policy considerations deriving from the Respondent's concern not to expose the government to criticisms of inconsistency.
31. The Tribunal is bound to consider and apply the two policies of statutory origin and is inclined to place greater weight on the first category of policies with progressively lesser weight on the second and third categories.
32. Where statutory policies of the first kind exist, the government is bound by the terms of the policy. Where policies of the first and second kind exist that are of executive origin and are published, the government creates a reasonable expectation in the community that the government will itself apply its published policies, and will not engage in ad hoc departure from such policies save in unforeseen or exceptional circumstances without first giving affected parties a right to be heard on the intended change of policy (*Darling Casino Ltd v New South Wales Casino Control Authority* [1997] HCA 11).
33. Similarly, the Tribunal accepts that consistency in government administration is a desirable and relevant consideration, but is not bound to give effect to the perpetuation of a government practice that appears to be misconceived or unfair (*Pickering v DCT* (1997) 37 ATR 41; *Re Deacon and SDFHCS & IA* [2009] AATA 88).

**Consideration of the evidence in the light of the statutory scheme**



34. A perusal of the *Nature Conservation Strategy* (NCS) discloses little of immediate relevance to a consideration of the granting of a licence to export kangaroo joeys from the ACT. It is concerned predominantly with protecting biodiversity, managing conservation assets and the management of animals and weeds that are regarded as pests within the ACT. To the extent to which the granting of a licence to export native animals may be seen as contributing to the management of a species that is abundant within the ACT (though not regarded as a 'pest' under the NCS) while protecting biodiversity, the granting of a licence can be seen as consistent with rather than contrary to, the objectives of the NCS.

35. The *Code of Practice for the Humane Destruction of Kangaroos in the ACT* for present purposes goes no further than to define the method of killing of orphaned joeys. This is no dispute concerning this issue between the parties.

36. The *Nature Conservation (Licensing Criteria) Determination 2001* is the most relevant document in the first category of policy. The relevant criteria relating to the grant of a licence (as opposed to various conditions that may be imposed on a licence) are criteria 7(1), 10(1)(a), (g) and (i), 12 and 13 which are set out above.

37. Criterion 7(1)(a) calls into play the *Nature Conservation Strategy* which has been addressed above and has no apparent present relevance.

38. Criterion 7(1)(b) deals with the effect the licensed activity will have on:

- (i) a species of native animal or native plant already found in the Territory;
- (ii) the significant ecosystems of the Territory; and
- (iii) if the activity is proposed to be undertaken on public land, the effect of the activity on that land.

39. In so far as the licensed activities propose to remove the orphaned joeys from the Territory into NSW, it is the Appellant's argument that this activity cannot raise



any concerns under 7(1)(b)(i) or (ii). The Respondent argued that it is possible that the joeys released in NSW may find their way back to the ACT at some time and therefore may have some potential relevance for criteria 7(1)(b)(i) and (ii) (the 'range' issue).

40. Criterion 7(1)(c) requires consideration only of the impact on public land, and then presumably only in the ACT. The joeys are to be released on private land in NSW.
41. The Appellant's contentions that criterion 7 has no present relevance appear self evident to the Tribunal. Thus, other than the 'range issue' there does not appear to be any impediment to the issue of the licence arising out of criterion 7.
42. Criterion 10(1)(a) deals with the degree of unintended mortality of the joeys that is likely to occur. The Respondent conceded before the original Tribunal that given the Respondent's own policy would produce 100% intended mortality, this criterion does not form the basis of any substantial objection to the grant of the licence.
43. Criterion 10(1)(g) deals with the degree to which the exportation of the joeys is likely to threaten the continuance of eastern grey kangaroos in the ACT. The request for exportation arises from the culling of kangaroos because of an over abundance. There is no suggestion that the exportation will threaten the continuance of the species here.
44. Criterion 10(1)(i) raises the issue of the experience and expertise of the Appellant in transporting joeys. The Respondent conceded this expertise before the original Tribunal and there is no evidence before the present Tribunal that suggests that the concession was other than appropriately made.
45. Criterion 12 requires that the Tribunal 'have regard to':



- (a) the place proposed for release of the animal;
- (b) the likelihood of the animal being able to survive or breed in the wild following its release;
- (c) the potential for the animal to have a detrimental impact upon the natural environment, including other animals or plants and their conservation requirements;
- (d) the source of the animal in relation to its genetic characteristics and freedom from disease;
- (e) the likelihood of the animal having any other harmful effect whatsoever.

46. It was agreed that the joeys were to be released in NSW and that the permission of the NSW authorities was required for this. Evidence was given that there would be no release into the wild in NSW unless and until the consent of the NSW authorities was obtained. The Appellant argued that, putting to one side the 'range issue', 12(a), (c), (d) and (e) are matters for the NSW authorities and not for this Tribunal. This is self evident.

47. Criterion 12(b) requires that regard be had to the likelihood that the joeys may not survive in the wild when released. To the extent that this criterion is focused literally on the likelihood of survival (as opposed to suffering) the Appellant argues that any rate of survival of joeys exported under a licence is better than the assured 100% rate of death under the Respondent's policies. So much is obvious to the Tribunal.

48. Thus, putting aside the suffering issue, there appears to the Tribunal to be no basis for rejection of the application for a licence under criterion 12.

49. Criterion 13 requires that 'regard be had to':

- (a) the general well-being of the animal in captivity;
- (b) the likelihood of the animal being able to survive in the wild following its rehabilitation;



- (c) the effect on the natural environment of releasing the animal following its rehabilitation;

and shall be satisfied, based on reasonable grounds, that the applicant:

- (d) possesses qualifications and experience relevant to keeping an animal of the kind proposed; and
- (e) has the facilities and is able to apply the handling techniques that are conducive to the animal being successfully reintroduced to the wild.

50. As indicated above, the Respondent did not challenge the experience and expertise of the Appellant that is called into question in criteria 13(d) and (e). The only evidence before the Tribunal concerning these issues was in the Appellant's favour.

51. Criterion 13(c) relates to the effect on the environment at the place of release in NSW. Putting aside the 'range issue', this is a matter for the NSW authorities rather than this Tribunal.

52. Criteria 13(b) requires consideration to be given to the likelihood of the joeys surviving when released. The Appellant argues that this consideration favours the issuing of a licence which will allow at least some animals to survive in the wild. If a licence is not issued, none would survive. We accept this submission.

53. The only issue that seriously arises out of criterion 13 is that detailed at 13(a). This raises for consideration the issue of the suffering of joeys under the Appellant's proposal. The Respondent has argued that it is more humane to kill joeys than it is to allow them to be taken and exported by the Appellant and its carers. The Respondent's argument is not intended to be critical of the intention or capacity of the Appellant's carers. The Respondent's argument is that suffering is inherent in the orphaned joey's circumstances. The evidence was that some orphaned joeys do not respond to human caring and progressively deteriorate until death; while others prosper and can be successfully released into the wild.



54. Again, this criterion involves difficult competing considerations. Is it better for 35 joeys per year to die quickly, than for about half to survive and prosper and half to experience non-specific suffering and deterioration leading to death?
55. In relation to the second category of policies we note that the ACT Flora and Fauna Committee made no recommendation to the Respondent because they felt that animal welfare issues were outside the scope of their expertise and statutory role.
56. Significantly, the Animal Welfare Advisory Committee supported the application. This committee's remit is the most closely related to animal welfare issues.
57. Only the ACT Natural Resources Management Advisory Committee recommended against the application. Its recommendations were based on a 1997 report of the ACT Kangaroo Advisory Committee. In this sense, the views of the Natural Resources Management Advisory Committee were not independent from those of the ACT Kangaroo Advisory Committee. Neither the original tribunal nor the Appeal tribunal had a copy of the 1997 report.
58. The only related document in evidence was the Public Consultation Draft of the *ACT Kangaroo Management Plan* (the Draft Plan) of March 2009 which asserts that it draws upon the 1997 Report.
59. The Draft Plan deals with the following issues relating to kangaroos in the ACT:
- (a) the effect on grass lands and the environment generally and the need to control the population;
  - (b) the incidence of motor vehicle collisions with kangaroos;
  - (c) the risk of kangaroo violence towards humans; and
  - (d) the welfare of kangaroos and their humane destruction where necessary.



60. The Draft Plan recommends against hand rearing and release within the ACT and against translocation generally. The objection to translocation is based on the following considerations:
- (a) lack of known conservation benefits;
  - (b) ineffectiveness as a means of controlling the population of kangaroos and
  - (c) expense.
61. The Draft Plan recognises that different people have different attitudes to animal welfare and that some people support a right to live for animals in the same manner as for humans (p9). The Draft Plan does not adopt this approach and favours the humane killing of orphaned young (p76) referring to (a)-(c) above as the rationale for the preference.
62. The issue of translocation is more fully dealt with at page 86 and following where the rationale for opposing translocation is stated as:
- (a) the certainty that some kangaroos would die in the process;
  - (b) the lack of cost-benefit in saving a few kangaroos which are not an endangered species; and
  - (c) the difficulty in finding suitable sites for release.
63. The Draft Plan points to the cost of any large scale translocation sufficient to have any impact on population control.
64. In terms of the welfare of an individual joey, the Draft Plan points to the potential stress involved in the capture, transport, acclimatisation and release of the joey and then deals only with the financial cost of these measures (p 88).
65. The following concerns set out in the Draft Plan need to be considered:



- (a) the effect on grass lands and the environment generally and the need to control the population;
- (b) the incidence of motor vehicle collisions with kangaroos;
- (c) the risk of kangaroo violence towards humans; and
- (d) the welfare of kangaroos and their humane destruction where necessary.

66. Given that the Appellant's proposal is to locate the joeys in NSW, and putting to one side 'the range issue', concerns (a)-(c) are not relevant.

67. This leaves only the concerns about the welfare of the joeys and their humane destruction. The only specific ground of animal welfare identified in the draft report was that some joeys would die in the translocation process. The Appellant argues that this risk should be balanced by considering the certainty that all would die under the Respondent's policy.

68. The Respondent invites an inference that during the translocation the joeys would suffer before dying and that there may also be suffering of the joeys that survive. There is no evidence in support of this inference. It is not a self evident proposition that the Tribunal can accept in the absence of evidence. We note that it is an inference that appears to be contra-indicated by the support of the ACT Animal Welfare Advisory Committee for the Appellant's proposal.

69. In so far as the Draft Plan requires consideration of the cost of translocation we note that the Appellant is not seeking public funding.

70. For these reasons, the Tribunal finds that there is nothing in the Draft Plan that militates against the granting of the licence to the Appellant.

71. As to the third category of policies, the policy that seems to have most influenced the Respondent's decision is the desire for consistency with decisions to issue





licences to cull kangaroos. Consistency in decision making can be a relevant consideration as we have said, but it is not the most significant and does not, of itself, justify the making of a decision to refuse the licence application.

72. The Appellant submits that its application is predicated on animal welfare concerns rather than environmental protection concerns. The Appellant's case is that the translocation to NSW of 35 orphaned joeys presents no environmental threat to the ACT and is consistent with animal welfare and protection considerations. The Appellant submits that the killing of the joeys, humanely or otherwise, is neither necessary nor justified given that the Appellant is prepared to expend its own resources to care for and relocate the joeys.
73. Whether the Tribunal agrees with the Appellant's philosophy is irrelevant. The question is whether there is anything in the policies discussed above which is inconsistent with the grant of a licence, given:
- (a) the obvious premise that the survival of some joeys is a better outcome than the assured death of them all; and
  - (b) the absence of any evidence that joeys suffer during the translocation process;
74. The only consideration that the Respondent has raised that falls within these policy criteria is the 'range issue'. If it is the case that joeys released in NSW are likely to find their way back to the ACT, then the concerns about overgrazing, car accidents, assaults on humans and growing kangaroo populations, become relevant.
75. There is very little evidence on the 'range issue'. Such evidence as there is goes no further than saying that male kangaroos may move between 10-20 km over a period of years. The evidence says nothing about the direction in which kangaroos move if or when they migrate. If the joeys are released in NSW with the consent of the



NSW authorities, there is no evidence to suggest that they will migrate back to the ACT.

76. On considering the relevant criteria for the granting of a licence, the Tribunal cannot identify any issue that supports a conclusion that the correct or preferable decision is that the Appellant's application for a licence should be refused. On the other hand, there are animal welfare considerations which favour the granting of the licence sought. The present Tribunal can therefore see no basis, in any statutory provision or policy, for denying the application.
77. The decision of 10 September 2009 is set aside and in substitute the Tribunal orders that the Respondent issue the Appellant with a licence to export 35 orphaned eastern grey kangaroo joeys on an annual basis subject to the conditions set out in the order.

  
Ms L. Crebbin, General President  
for the members of the Tribunal  




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Licensing & Compliance  
GPO Box 158  
CANBERRA CITY ACT 2601  
Licence Enquiries:  
Phone: (02) 6207 6376  
Fax: (02) 6207 5956  
Email: tams.lc@act.gov.au

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**COPY** 1/2

**Licence Number: K7624**

**Commencement Date: 01/07/2012**

**Expiry Date: 30/06/2013**

## Licence to Keep

**Licence Holder:**

**R.S.P.C.A. (ACT)**

**12 KIRKPATRICK STREET  
WESTON CREEK ACT 2611**

**Activity:** THIS LICENCE AUTHORISES THE AFORENAMED LICENCE HOLDER TO KEEP THE FOLLOWING ANIMALS ( INCLUDING THEIR OFFSPRING ) BUT EXCLUDING PROTECTED NATIVE AND SPECIAL PROTECTION STATUS ANIMALS, IN ACCORDANCE WITH THE CONDITIONS SPECIFIED.

**Location:** Residences of current members of R.S.P.C.A Wildlife as advised to Licensing and Compliance

Common Name	Scientific Name	Male	Female	Unknown	Total
Animals for rehabilitation	as indicated.	0	0	0	0

**This Licence is issued in accordance with the following conditions:**

- 1 This licence is not transferable.
- 2 Housing of animals is to be in a structure/s approved by the Conservator of Flora and Fauna & must ensure good husbandry & security for the animal/s.
- 3 The animal(s) shall not be sold, traded or otherwise disposed of (including giving and donating) without the consent in writing of the Conservator of Flora and Fauna.
- 4 The animals may not be used for public display without prior written consent of the Conservator of Flora and Fauna.
- 5 Animals must be adequately fed, watered, sheltered and managed to ensure their good health. Fresh clean water must be supplied at all times and animals must be fed with regard to the dietary requirements of each species.
- 6 Sick, diseased, or injured animals must receive appropriate treatment. Where necessary a qualified veterinary surgeon is to attend to the animal.
- 7 The Conservator of Flora and Fauna SHALL BE NOTIFIED WITHIN 48 hours of the ESCAPE of any animals or any DISEASE OUTBREAK.

See next page for more conditions...

Fee: \$0.00

(Delegate of the Conservator)

Date: 12 June 12.

Receipt:

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**READ CONDITIONS CAREFULLY**

- 8 This licence also authorises the transfer of deceased animals from the RSPCA to educational institutions for educational or scientific purposes.
- 9 This licence is valid for multiple consignments.
- 10 When fit for release the animal shall be released near the site where found, in an appropriate habitat, at an appropriate time and/or season.
- 11 The advice of a Senior Wildlife Ecologist, Conservation Planning and Research, shall be sought when appropriate or when an animals recovery or release to the wild is in doubt. Contact the Licensing Officer (02 6207 6376) to make these arrangements.
- 12 Only current members of RSPCA Wildlife, who are recorded on the RSPCA Wildlife membership list held by Licensing and Compliance, are covered by this licence.
- 13 Animals shall be kept for rehabilitation and release to the wild only by members who have participated in approved training courses.
- 14 This licence does not authorise the keeping for any purpose, of protected native animals or special protection status species. When species determined as Special Protection Status or Protected Native Animals under the Nature Conservation Act 1980 are received, the Licensing Officer (ph 02 6207 6376) must be notified within 24 hours. A separate licence may be issued and these species can only be cared for by members who have undergone appropriate training or who are under the direct care of a suitably qualified trainer/carer/veterinarian.
- 15 RSPCA Wildlife shall maintain and submit to the Conservator of Flora and Fauna : 1) A current list of names and addresses of members of the group and 2) Records of all animals received by the group by June 30 each year. These records shall contain: 1. Date and where animal found 2. Name and address of person delivering animal 3. Species and sex of animal/s 4. Date animal received 5. Treatment provided and 6. Date of animal's release, or name and address of person animal delivered to and date delivered.
- 16 Individual members of RSPCA Wildlife will maintain detailed records of all animals received in a form specified by the Conservator of Flora and Fauna.
- 17 If an animal is deemed to be unsuitable for release or unable to be rehabilitated, the animal must be euthanased using suitable humane methods by a registered veterinarian. The Licensing Unit (6207 6376, 6205 4876) MUST BE NOTIFIED within 48hours of this occurrence.
- 18 This licence does not authorise the keeping for any purpose, of native animals which do not occur naturally in the ACT (eg Aviary escapees). These animals must be reported to the Licensing Officer (6207 6376), as soon as possible and shall not be released from captivity.
- 19 This licence and any records required to be kept must be available for inspection by the Conservator of Flora and Fauna or any Conservation Officer.
- 20 This licence is issued in line with the keeping wildlife for rehabilitation in the ACT Policy for ACT Parks Conservation & Lands.
- 21 All animals shall be kept, as far as practical, in a setting resembling the animal's natural habitat.
- 22 Appropriate living food will be provided to the animals according to the dietary requirements of the species.
- 23 For the purpose of this licence, the definition of animal shall be taken to include live animals, carcasses or eggs.

See next page for more conditions...

- 24 NOTE: Licence holders are reminded of their obligations under the Animal Welfare Act 1992, and any applicable Codes of Practice under that Act regarding the treatment and housing of any animals covered by this licence. 131
- 25 A Conservation Officer may, at such times, and at such intervals, as are reasonable, enter land or premises on which any animal or plant is kept in accordance with this licence and inspect the animal, plant, cage or enclosure and inspect the accounts, books, documents and other records relating to the animal or plant required under this licence.
- 26 This licence does not authorise the keeping of Eastern Grey Kangaroos or their joeys for a period longer than 48 hours. If they are so seriously injured or diseased that they are unable to be released to the wild they are to be humanely euthanased by a registered Veterinarian as soon as possible.
- 27 This licence does not authorise the transportation of sick and/or injured native animals into or out of the Australian Capital Territory without the prior consent of the Conservator of Flora and Fauna.

NOTE: Failure to comply with these conditions may result in cancellation of your licence and / or jeopardise any future applications made under the Nature Conservation Act 1980.

*ms 12 June 12.*  
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**READ CONDITIONS CAREFULLY**

**AUSTRALIAN CAPITAL TERRITORY**

**ANIMAL WELFARE ACT 1992**

**NO. 149 OF 1994**

**CODE OF PRACTICE - APPROVAL**

Under section 22 of the Animal Welfare Act 1992, I approve the document entitled the **Code of Practice for the Humane Destruction of Kangaroos in the A.C.T.** as a Code of Practice.

Date: 31.10.94



**BILL WOOD**  
Minister for the Environment, Land and Planning

**AUSTRALIAN CAPITAL TERRITORY  
ANIMAL WELFARE ACT 1992**

**CODE OF PRACTICE FOR THE HUMANE  
DESTRUCTION OF KANGAROOS IN THE ACT**