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AN ASSESSMENT OF THE ADEQUACY OF THREATENED SPECIES & PLANNING LAWS IN ALL JURISDICTIONS OF AUSTRALIA

DECEMBER 2012

This report was commissioned by the Places You Love Alliance of more than 35 environment groups and prepared by the Australian Network of Environmental Defender's Offices Inc (ANEDO)

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Executive Summary

> *"Model threatened species legislation ideally has four features. First, it would establish an independent, science-based process for listing threatened species, populations and ecological communities, and key threatening processes. Correspondingly it would require a concurrent determination of the critical habitat of the species, population or ecological community. Second, legislation would include strategies for the active management of species recovery and threats to biodiversity, supported by action-forcing provisions to ensure effective implementation of the strategies. At least recovery plans and threat abatement plans for identified species and communities at risk should be mandatory. Third, it would impose substantive obligations, enforceable through the civil and criminal law, on both the public and private sectors to avoid jeopardy to threatened species, populations and ecological communities. Experience tells us that enforcement should not be the exclusive right of government, or of persons, if any, materially or directly affected by non-compliance with this obligations. Fourth, the legislation would need to be integrated with environmental planning and development control legislation, ensuring that the latter incorporates biodiversity principles. The effectiveness of such legislation depends critically on the provision of substantial financial and administrative resources. Historically, threatened species programs have been grossly underfunded. None of the legislation in Australia stands up to the model threatened species legislation."*[1]

The *Place You Love* Alliance of over 35 environmental groups commissioned a report assessing the adequacy of threatened species and planning laws in Australian jurisdictions.

Based on feedback from EDO offices in each State and Territory, this report outlines the legal framework for managing threatened species in each jurisdiction and identifies some of the key issues in terms of: strengths and weaknesses of the relevant laws, an assessment of whether the laws are effectively implemented and enforced, and some analysis of the interaction of threatened species laws with planning legislation in each jurisdiction.

The report makes a number of key findings.

Our analysis confirms the finding that no state or territory meets all the core requirements of best practice threatened species legislation.

While the laws in some jurisdiction look good on paper, they are not effectively implemented. There are a number of important legislative tools available for managing and protecting threatened species that are simply not used. For example, interim conservation orders and management plans are not utilised in Victoria, no native plants have been declared prescribed species on private land in South Australia, no critical habitats have been listed and no interim protection orders have been declared in Tasmania, and no essential habitat declarations have been made in the Northern Territory.

Key provisions are often discretionary. Critical tools such as recovery plans and threat abatement plans are not mandatory. Time frames for action and performance indicators are largely absent.

Effective implementation is further hampered by a lack of data and knowledge about the range and status of biodiversity across Australia.

[1] *Laws of Australia*, Updated May 2012, at [14.7.2680], p405-406.

Current threatened species laws do not prevent developments that have unacceptable impacts on threatened species from going ahead. It is clear that no State or Territory planning laws meet best practice standards for environmental assessment. Project refusals on the basis of threatened species are extremely rare, for example, a handful of refusals under the EPBC Act, or are the result of third party litigation. The failings of State and Territory laws to effectively avoid and mitigate impacts on threatened species is most apparent in relation to provisions for the fast-tracking of environmental impact assessment for major projects.

Planning laws, in particular provisions for the assessment of major projects, effectively override threatened species laws in all jurisdictions. Levels of impact assessment required tend to be discretionary, and projects can be approved even where they are found for example, to have a significant impact on critical habitat. The quality of different levels of species impact assessment is highly variable, and rarely audited.

In addition, there is poor integration between threatened species laws and other natural resource management laws in most jurisdictions. Threatened species laws are further subjugated in many jurisdictions by the absence of third party rights that enable communities to enforce the laws to protect threatened species.

Given the common failings of legislation in all jurisdictions, **a clear finding of this report is that threatened species laws in all jurisdictions needed to be reviewed, strengthened, and fully resourced and implemented**. Given the decline in biodiversity in each State and Territory, combined with increasing population pressures, land clearing, invasive species and climate change, now is *not* the time to be streamlining and minimising legal requirements in relation to threatened species assessment.

Part One: The ecological and legal context

1 The state of biodiversity in Australia

Australia is megadiverse and hosts between 7% and 10% of all species on Earth.[2] With a spectacular number of endemic plants and animals,[3] Australia' biodiversity is globally significant in both the terrestrial and marine environment. The state of Australia's biodiversity however, is in decline. With almost 1200 plant species and 343 species of animals considered endangered or vulnerable,[4] the rates of species extinction in Australia are amongst the worst on the planet.

The most recent Commonwealth *State of the Environment Report 2011* showed the highest numbers of threatened species occur in more densely populated areas, particularly, the east coast and the south-west coast of Western Australia. The loss of biodiversity has been seen through all components of biodiversity - genes, species, communities and ecosystems.

The most significant rate of decline has been evident in areas of greater human activity and is most notable in the decline of mammals. Since European settlement, 18 species of endemic mammals have become extinct, representing 7% of the total. About 100 species of vascular plants, 0.8 per cent of the total, have become extinct, the majority having occurred in areas cleared for farming.[5]

The availability of data on long term trends is limited, which can make it challenging to understand the significance and the magnitude of decline in the state of biodiversity.

A summary of the state of biodiversity in each State and Territory is included in **Appendix 1**.

2 Framework for analysis

This report assesses the adequacy of threatened species laws in all Australian jurisdictions. The analysis for each jurisdiction includes:

1. An overview of the main threatened species legislation in the jurisdiction
2. Strengths of the legislative framework
3. Weaknesses of the legislative framework
4. Compliance and enforcement of the laws
5. Interaction of threatened species laws with planning and other relevant legislation

[2] Cork, S., et al. *State of the Environment*. 2011.
[3] International Union for Conservation of Nature (2012). *About Oceania.*
[4] Department of Sustainability Environment Water Population and Communities (2009). *EPBC Act List of Threatened Fauna.*
[5] Australian Bureau of Statistics (2009). *Endangered Species in Australia*. Year Book Australia 1990.

3 The state of Australia's threatened species and planning laws

One of the most effective ways of protecting and conserving threatened species is through the establishment of comprehensive, adequate and representative networks of large, interlinked areas, specifically protected by law. The effective legal protection of whole ecosystems and significant geographic areas has obvious conservation benefits for a number of threatened species and biodiversity more broadly.

However, many of our most threatened biota live outside of protected areas and are subject to key threatening processes in areas marked for future development. A study in 2010 in the international scientific journal *Conservation Biology* shows that Australia's most endangered species are extremely poorly represented in the nation's protected area system. The authors found that one fifth of species considered critically endangered have no formal protection in Australia.[6] It is therefore necessary to assess the effectiveness of threatened species laws outside the reserve system.[7]

Each Australian jurisdiction has legislation relevant to threatened species. In a number of jurisdictions there are several laws and policies that influence management of threatened species. A summary of the various instruments and policies around Australia is provided in **Appendix 2**.

While there is diversity in the extent to which threatened species are specifically addressed in the laws of each State and Territory – ranging from no specific biodiversity Act in Western Australia, to specific and detailed legislation in NSW and the Commonwealth – there are a number of common themes and mechanisms.

Common elements and legislative tools include mechanisms for: listing threatened species (and ecological communities in some jurisdictions), the establishment of scientific committees (with varying degrees of independence), identification of key threatening processes, recovery planning, threat abatement planning, licensing and offence provisions.

The analysis of the laws in each jurisdiction undertaken for this report shows there are certain **strengths** of some current laws. For example, strengths include provision for:

- Objective to conserve biodiversity
- Adoption of IUCN categories of threat
- Recognition of key threatening processes
- Scientific listing processes
- Independent expert scientific committees
- Public participation in listing
- Third party enforcement provisions
- Standing for third parties to seek review of decisions
- Publically available information on listing, monitoring and enforcement

In terms of assessing the **weaknesses** of threatened species laws in each jurisdiction, the analysis shows clear themes and widespread deficiencies in biodiversity law in Australia. While the laws in many states look

[6] Watson, J. E *et al*, "The Capacity of Australia's Protected-Area System to Represent Threatened Species" (2010) *Conservation Biology*, 10.1111/j.1523-1739.2010.01587.

[7] Legal analysis of the legal framework for Australia's national reserve system, the recent National Corridors Plan, Management of public lands in NSW, and management of marine protected areas are available at http://www.edo.org.au/edonsw/site/policy_submissions.php#2.

good on paper they are seriously limited in their application and implementation by a number of crucial factors. Key weaknesses include:

- Inadequate resourcing for recovery and threat abatement planning
- Good provisions are simply not implemented or enforced
- Excessive Ministerial discretion
- Threatened species considerations can be overridden by state planning and development laws
- Poor data and mapping for some species
- No fundamental requirement to prioritise protection over economic and social outcomes
- Single species focus not integrated with an ecosystem approach
- Failure to address climate change impacts and resilience
- Poor integration with other natural resource laws

In addition to threatened species laws, this report assesses relevant **planning legislation** in each jurisdiction in terms of how biodiversity impacts are assessed and incorporated into decision making processes. It is clear that no state or territory planning laws meet best practice standards for environmental assessment. The failings of State and Territory laws to effectively avoid and mitigate impacts on threatened species is most apparent in relation to provisions for the fast-tracking of environmental impact assessment for major projects.

Given the common failings of legislation in all jurisdictions, **a clear finding of this report is that threatened species laws in all jurisdictions needed to be reviewed, strengthened, and fully resourced and implemented**. Given the decline in biodiversity noted in each state and territory, combined with increasing population pressures, land clearing, invasive species and climate change, now is *not* the time to be streamlining and minimising legal requirements in relation to threatened species assessment.

This report does not make comprehensive recommendations for legislative reform in each State and Territory, but based on the assessment identifies the essential core elements of best practice threatened species legislation. **Best practice threatened species laws should include the following core elements**:

- Overarching object to protect and conserve biodiversity
- Object operationalized by all decision-makers under the legislation
- Implementation of an ecosystem approach, in addition to strengthened species recovery tools
- A strong Commonwealth oversight and approval role
- Independent Scientific Committee
- Listing based on scientific considerations only
- Expanded listing categories
- Strengthened mandatory EIA and species impact assessment processes
- Focus on avoiding and mitigating impacts
- Significantly increased resourcing for recovery and threat abatement planning
- Increased enforcement and increased penalties
- Public participation provisions – both in relation to listing, planning and civil enforcement
- Clear integration with planning and natural resource management legislation
- Easily accessible publicly available information on listing, habitat mapping, government research and enforcement.

Part Two: Jurisdictional analysis

This report assesses the adequacy of threatened species laws in all Australian jurisdictions. The analysis for each jurisdiction includes:

1. An overview of the main threatened species legislation in the jurisdiction
2. Strengths of the legislative framework
3. Weaknesses of the legislative framework
4. Compliance and enforcement of the laws
5. Interaction of threatened species laws with other legislation

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4 Victoria

The *Flora and Fauna Guarantee Act 1988 (Vic)* (**FFG Act**) is the key piece of Victorian legislation for the conservation of threatened species and communities and for the management of potentially threatening processes.

It was introduced with the aim of guaranteeing that all Victoria's flora and fauna 'can survive and flourish and retain their potential for evolutionary development in the wild.'[8] Despite its bold and laudable objectives, the Act has been of limited efficacy in halting the decline of biodiversity in Victoria. The latest Victorian State of the Environment Report (2008) found that the number of threatened species increased between 2002 and 2007.[9] Furthermore, Victoria has the highest number of threatened species by sub-region in Australia,[10] with some 157 animal species listed as threatened and 24 already extinct and 778 plant species listed as threatened with 51 extinctions.[11] The great number of listings illustrates the desperate state of many species in Victoria and is a clear indication of the failure of the FFG to meet its stated objectives.

While the FFG Act contains some potentially powerful processes and measures to conserve and protect Victoria's flora and fauna, one of the greatest failings of the Act has been its poor implementation. Reasons for this may be attributed to the discretionary nature of key provisions in the Act, together with a lack of enforcement mechanisms, lack of set timeframes, and lack of political will and resources to implement the Act. The approach to implementation of the Act, together with the passage of time, has resulted in a legislative regime inadequate to the task of providing a framework for the conservation and protection of the State's flora and fauna.

4.1 Overview of threatened species legislation in Victoria

The *Flora and Fauna Guarantee Act 1988* is the principle piece of Victorian legislation governing the conservation of threatened species and ecological communities and the management of processes that threaten Victoria's native flora and fauna. As noted, it aims to guarantee that all taxa of Victoria's flora and fauna, with some limited exceptions, can survive, flourish and retain their potential for evolutionary development in the wild[12], and to ensure that the genetic diversity of flora and fauna is maintained.[13]

In order to achieve these objectives, the FFG Act establishes a process to list threatened species and ecological communities and potentially threatening processes.[14] To be eligible for listing, a species or community must be in a demonstrable state of decline which is likely to result in extinction.[15] A potentially threatening process can be listed when it poses a significant threat to the survival or evolutionary development of a range of flora and fauna if not appropriately managed.[16]

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[8] *Flora and Fauna Guarantee Act 1988 (Vic)* (FFG Act), s4.
[9] Commissioner for Environmental Sustainability, *State of the Environment Victoria 2008*, p.296.
[10] Commissioner for Environmental Sustainability, p.295.
[11] Commissioner for Environmental Sustainability, p.247.
[12] *Flora and Fauna Guarantee Act 1988* (FFG Act), s4(1)(a).
[13] FFG Act, s4(e).
[14] FFG Act, s10.
[15] FFG Act, s 11(1).
[16] FFG Act, s11(3).

For listed items, the Act sets out a range of management processes and conservation and control measures that can be used to protect and conserve species and manage potentially threatening processes. Key management processes in the FFG Act include:

- Action Statements – statements setting out the management actions to protect threatened species and communities and mange threatening processes. [17]
- Flora and fauna management plans – plans for the conservation and management of threatened species and communities and management of threatening processes. [18]
- Critical Habitat Determinations – declarations areas of habitat critical to the survival of a species or community,[19]
- Public authority management agreements –agreements with public authorities to provide for the management of species, communities and threatening processes. [20]

The main conservation and control measures are:

- Interim Conservation Orders (**ICOs**) – orders that prohibit or regulate activities or processes that take place within Critical Habitat, or, if it adversely affects that habitat, any activity that takes place outside that habitat.[21]
- Controls over the handling of protected flora.[22]
- Controls over the handling of listed fish.[23]

Controls in relation to listed fauna are contained in the *Wildlife Act 1975* (**Wildlife Act**). Therefore the operation of the FFG Act needs to be considered together with the Wildlife Act.

The Victorian Department of Sustainability and Environment (**DSE**) is primarily responsible for administering the FFG Act and the Wildlife Act. Much of DSE's responsibilities under these Acts are vested in the Secretary of the Department.

4.2 Key strengths of the FFG Act

The FFG Act contains a number of strong elements. Some of these are outlined briefly below.

4.2.1 Objectives of the Act

A significant feature of the Act is its bold objectives as noted. While it has been suggested that this objective is unrealistic and impossible to achieve, the objective reflects a fundamental starting point for biodiversity protection. The designers of the Act saw the guarantee as a strong concept for the setting of goals because '*while there is no certainty that we can ever fully achieve the Flora and Fauna Guarantee goal, the employment of any lesser concept is to give advance warning of our intention to fail*'.[24]

[17] FFG Act, s19(1).
[18] FFG Act, s21(1).
[19] FFG Act, s20(1).
[20] FFG Act s25(1).
[21] FFG Act, s27.
[22] FFG Act, Division 2.
[23] FFG Act, Division 3.
[24] Sutton, P. (1987). *Designing the Proposed Victorian Flora and Fauna Guarantee Legislation*. Paper presented to the 1987 Conference of the National Environmental Law Association: Melbourne, 7.

Further, the goal of guaranteeing not just survival of species but also that species and communities flourish and evolve in the wild goes beyond solely a species recovery and protection and abatement of threat approach. The objective hints at a broader approach aimed at enhancement and restoration, which is consistent with current ecological thinking.[25]

4.2.2 Some elements of the listing process

Key strengths of the listing process under the FFG Act include:

- The ability for members of the public to nominate any eligible species or community of flora or fauna or threatening process to the Committee for listing or any ineligible species or community of flora or fauna or potentially threatening processes for repeal.[26] This aspect of the Act recognises the public interest in and shared responsibility for biodiversity conservation, and the importance of community participation in decision-making.
- The ability to list ecological communities and critical habitat in addition to species. Protection of communities and critical habitat in addition to species is consistent with a broader, landscape or ecosystems approach to biodiversity conservation promoted nationally and internationally.
- The requirement for the Minister (in making a recommendation) and the Scientific Advisory Committee (in making a recommendation and in preparing the list of criteria for eligibility) to have regard only to nature conservation matters. [27] Listings based purely on scientific reasons maintain the integrity of the Act.

4.3 Key Weakness of the FFG Act and its implementation

It is widely acknowledged that the FFG Act contains several flaws and is inadequate to the task of providing a framework for biodiversity protection in Victoria. As stated, one of the greatest failings of the current legislative regime has been the approach to implementation of the Act. Further, failure to review and update the framework has meant that several elements of the Act are simply out of date and need to be modernized in light of developments since 1988. Key weaknesses are discussed below.

4.3.1 Objectives of the Act need updating

Despite its positives, the objectives of the FFG Act are in need of review to ensure they reflect current ecological thinking and best practice principles for threatened species protection. The current objectives of the Act do not incorporate the well-established principles of ecologically sustainable development,[28] including recognition of the precautionary principle and the irreversibility of biodiversity loss; indigenous involvement in biodiversity management and the importance of transparency and accountability.

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[25] See for example, Dawson, Dr F, 'analysing the goals for Biodiversity Conservation: Scientific, Policy and Legal Perspectives' (2004) 21(1) EPLJ 6, p26.
[26] FFG Act, s12.
[27] FFG Act, s10(7).
[28] The Intergovernmental Agreement on the Environment provides that ESD principles should be taken into account in decision-making.

Recent developments in conservation ecology indicate that in addition to a focus on threatened species and communities, attention and investment should be directed to the protection and rehabilitation and restoration of ecological processes that sustain species.[29] Further, there is a need to adopt a broader, more strategic landscape scale approach which emphasises the interrelated, holistic and dynamic nature of biodiversity.'[30] The objectives of the Act need to be updated to ensure they reflect these developments.

The objectives also need to be modified to ensure they are appropriate to deal with the threats imposed by climate change. Some key principles that have consistently emerged in the scientific literature as a basis for conserving biodiversity under a climate change include the need to promote and strengthen ecosystem resilience and adaptive capacity and adopt flexible management principles including adaptive management.[31]

Despite some laudable objectives in the Act, and statutory interpretation principles which allow these objectives to guide interpretation of the scope of the powers under the Act, the provisions of the Act do not adequately provide for the means and actions in order to achieve the Act's objectives. [32] There is no specific requirement to consider or implement the objectives of the Act in decision-making, except in deciding whether to grant a permit under section 40(2).

The objectives do not currently include recognition of:

- The precautionary principle and the irreversibility of biodiversity loss;
- The need for protection and also restoration and enhancement;
- The need for adaptation and the development of resilience particularly in the face of climate change;
- Community or indigenous involvement in biodiversity management
- The importance of transparency and accountability.
- That decision-making must be scientifically based.

4.3.2 Shortcomings of the listing process

There are a number of deficiencies with the current listing process in Victoria including:

- **Single risk category** - Currently, the Act only provides for a generic "threatened" listing category for listing species and communities. The category is defined in section 11(1) of the Act. This does not provide a useful indication of Victoria's biodiversity as there is a broad spectrum of levels of threat that species who qualify for listing might face. Most other jurisdictions in Australia list according to multiple categories of threat. Categorising entities within a more comprehensive hierarchy of risk[33] would reflect a deeper understanding of the health and conservation status of entities and therefore is more meaningful in terms of suggesting priorities for action, and give a more comprehensive overview of the state of Victoria's biodiversity. It would also bring Victoria in line with national and

[29] *Ecological Processes in Victoria: Priorities for Sustaining Biodiversity*, Discussion Paper prepared for Victoria Naturally Alliance (December 2008), p16.
[30] Dawson, Dr. F, 'Analysing the Goals of Biodiversity Conservation: Scientific, Policy and Legal Perspectives' (2004) 21(1) EPLJ 6, p26.
[31] Heller N and Zavaleta E (2009) _Biodiversity Management in the Face of Climate Change: A review of 22 years of recommendations' *Biological Conservation* 142: 14-32.
[32] Young, Margaret., 'At the Crossroads: Protective Mechanisms for Victoria's Biodiversity', (1998) 15 EPLJ 190, p194.
[33] For example listing categories based on the IUCN system: extinct, extinct in the wild, critically endangered, endangered and vulnerable.

international standards/practice. Uniformity in listing across Australia is useful for gaining a picture of the country's overall biodiversity and also allows for the possible importation of threatened species lists from other jurisdictions, particularly the Commonwealth, which could help minimise use of resources.

- **Nationally listed species found in Victoria** - Nationally listed species under the EPBC Act that are found in Victoria are not automatically added to Victorian lists under the FFG Act, resulting in unnecessary duplication of efforts.
- **Data deficiencies** - The listing process under the FFG Act is compromised by a lack of up-to-date scientific data.[34] In his 2009 performance audit of the Act, the Victorian Auditor-General found that DSE's 'information systems relating to conservation and biodiversity are incomplete and disjointed.'[35] Information available on threatened species is over 20 years old, while information on marine invertebrates is not readily available. As the Auditor-General concludes in his report, 'in the absence of complete, reliable, measurable information, the department does not have a clear picture of what is happening to many threatened species, and cannot be assured its decisions are soundly based.' The effectiveness of the listing process relies on the quantity and quality of information that underpins listing decisions.[36] The Auditor-General notes however that major system development and integration projects are underway to address current shortcomings.[37]
- **Minister's decision to list species** - The Minister's decision whether to list or not to list a species, community of flora or fauna or threatening process is not subject to review.
- **Impacts of climate change** - The current listing process under the FFG Act does not adequately address the impacts of climate change on the threatened species protection. For example:
  - Species are only eligible to be listed under the Act if they are currently threatened, even if they are likely to become threatened in the future under climate change.
  - The Act does not enable protection of 'key functional species' which play a key role in maintaining ecosystem structure and function.

4.3.3 Lack of implementation and review of Action Statements

As noted above, the Act contains some potentially powerful processes and measures to conserve and protect flora and fauna however it lacks enforcement provisions for ensuring that these processes are carried out. Some key areas of concern are discussed below.

While the FFG Act requires the Secretary of DSE to prepare Action Statements and sets out what the Action Statement must include, the Act lacks legislative power to compel DSE and other agencies to complete directives within Action Statements.[38] They do not bind anyone to take any actions, or to refrain from taking any actions and no penalties are imposed for any breach of directives in the Statements. Once prepared, they can remain motherhood statements without any practical effects. There are numerous examples of Actions Statements failing to conserve or manage listed taxon or communities or processes.

[34] Victorian Auditor-General's Office, p2.
[35] Victorian Auditor-General's Office, p2 and 14.
[36] Victorian Auditor-General's Office, p21.
[37] Victorian Auditor-General's Office, p14.
[38] Victorian Auditor-General's Office, p25.

Case study – Action statement for degradation of native riparian vegetation along Victoria's rivers and streams'

'Degradation of native riparian vegetation along Victoria's rivers and streams' has been listed as a potentially threatening process under the FFG Act since 2000. The Action Statement for this process specifically identifies uncontrolled grazing of stock on riparian land as a key cause of the degradation of riparian vegetation in Victoria. However, the Victorian Government currently issues 10,000 licences that permit landholders to use adjoining Crown land. The vast majority of these allow uncontrolled stock grazing in the riparian zone. It is illogical that the Government would give licences to landholders to do the very activity that they have listed under legislation as being one of the main threatening processes to biodiversity.

While it is mandatory under the Act for Action Statements to set out what *has* been done to conserve and manage a species, community or process and what is *intended* to be done, it is discretionary to include information on what *needs* to be done to protect and conserve a species or community or to halt a threatening process.[39]

As the Victorian Auditor General stressed in his Report, listing of threatened species and communities is only of value if the conservation and management actions that are meant to follow from the listing process are implemented and their impacts evaluated.[40] The Act does not contain mandatory provisions requiring implementation of Action Statements or a requirement that decision-making should not be inconsistent with the Statements.

Furthermore, the Act does not require Action Statements to be reviewed or updated to take into account environmental changes or new information available on a listed item.[41] The Act does not require compliance with statements to be monitored, Action Statements to contain performance measures or for progress to be reported on. Therefore DSE is not able to determine whether initiatives included in actions statements are effective. As the Auditor General's report notes Departmental staff that prepare and monitor Action Statements rely on the goodwill of other departmental and agency staff to undertake tasks in Action Statements.[42]

The Act does not include a requirement to monitor and evaluate initiatives included in Action Statements and to update and review the Action Statements within statutory time limits or within time limits fixed in the Statement.

4.3.4 Flora and Fauna Guarantee Strategy lacks weight

Despite providing directions for management, the Flora and Fauna Guarantee Strategy does not hold a great deal of weight as a policy document. The lack of legal or binding obligation for the Victorian Government to consider the Strategy weakens its effect.

[39] FFG Act, s19(2).
[40] Victorian Auditor-General's Office, 31.
[41] Victorian Auditor-General's Office, p31.
[42] Victorian Auditor-General's Report, p31.

4.3.5 Lack of explicit timeframes

The FFG Act lacks set time frames or periods for making decisions and taking action under the Act. In many instances, the Act provides that actions are to be completed 'as soon as possible'. This has lead to lengthy delays in implementation of various aspects of the Act. Some examples include:

- **Development of Action Statements** - While the Act imposes a mandatory obligation on the Secretary to prepare Action Statements for listed species, communities and any potentially threatening processes, the Act imposes only that the Secretary must do so 'as soon as possible' after the listing.[43] This has resulted in significant delays between listing and the development and finalisation of Action Statements. Furthermore, insufficient funding and resources have been dedicated to the task. Despite the preparation of these Statements being the primary tools under the Act being used to give practical effect to protecting and conserving species and communities listed as threatened, at March 2012, fewer than half of the 675 species, communities and threatening processes listed under the Act have had the management of their survival set out in Action Statements.[44]
- **Development of Flora and Fauna Guarantee Strategy** - Similarly, the Act requires the Secretary of DSE to prepare a Flora and Fauna Guarantee Strategy (Biodiversity Strategy) 'as soon as possible' after the section comes into operation setting out how the objectives for conservation of flora and fauna under the Act are to be achieved. A draft Biodiversity Strategy was developed and released in September 1992. However this draft lapsed with a change in the State government and it was not until 1997, 5 years after the original draft and 9 years after the Act came into operation, that a Biodiversity Strategy was released which purported to fill the requirements of the Act. This Biodiversity Strategy titled "Victoria's Biodiversity Strategy', is now significantly out of date.
- **Development of Management Plans** - The Act does not provide a timeframe for the preparation of Management Plans.[45]

4.3.6 Lack of utilisation of key powers / Discretionary power

Several of the FFG Act's provisions are discretionary and rely on the exercise of the Minister's or the Secretary's decision-making powers. The discretionary nature of key provisions combined with a lack of political will and resources means that the full range of management processes and conservation and control measures available under the Act have not been utilised. Many legal measures to protect flora and fauna have never been used. The Auditor-General reports that this is 'largely because of their perceived complexity and difficulty of administering these provisions.' DSE has instead relied on provisions in other environmental legislation, strategies, policies and plans to conserve and protect flora and fauna in preference to those available under the Act.[46]

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[43] FFG Act,s19(1).
[44] Environment Defenders Office (Victoria), *Where's the Guarantee? Implementation and Enforcement of the Flora and Fauna Guarantee Act 1988 (Vic)*, p10.
[45] FFG Act, s21.
[46] Auditor-General's Office, p2 and 39.

4.3.7 Listing is discretionary

The decision to list or not to list threatened species, communities of flora and fauna and threatening processes is entirely at the discretion of the Minster.[47]

Case study – Discretionary listing process

As one example, the discretionary nature of the listing process led to the rejection of the Scientific Advisory Committee's advice to list the Grey headed flying fox without sufficient rationale for that rejection having been provided by the Minister in nature conservation terms. The subsequent listing of the species under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, and eventually, through a re-nomination and decision under a different Minister, under the FFG Act highlight the poor reasoning behind the initial rejection.

4.3.8 Critical Habitat Determinations and Interim Conservation Orders rarely used

The decision of the Secretary to declare or decide not to declare a Critical Habitat is also solely at the discretion of the Secretary.[48] The Act does not contain any legislative criteria or guidelines as to when a Critical Habitat Determination (CHD) should be made and therefore nor is there an obligation on the Secretary to make a CHD when set legislative criteria or guidelines are satisfied.

Further, the decision of the Minister to make or determine not to make an Interim Conservation Order (ICO) is at the complete discretion of the Minister.[49] Moreover, before making an ICO, the Minister must consult with any other Minister whose area of responsibility is likely to be affected by the order.[50] Therefore, the Orders can be subject to the discretion of a number of Ministers or government bodies.[51]

As noted above, since the commencement of the Act, only one CHD has been made, and this declaration was revoked almost immediately.[52] Despite the significance of ICOs and the prominence of the provisions in the Act, no orders have ever been made in over two decades of the Act's operation.

Reluctance to use the CHD and ICO provisions of the Act could be due in part to the requirement in the Act to pay compensation to landholders for financial loss suffered as a direct and reasonable consequence of the making of an ICO. While this provision is not a complete explanation for why there has been only one CHD and no ICOs made since the Act came into operation, it undoubtedly has a significant chilling effect which contributes to the general lack of political will to implement the Act.

[47] FFG Act, s10(3).
[48] FFG Act, s20(1).
[49] FFG Act, s26(1).
[50] FFG Act s26(4).
[51] Lawyers for Animals, *Review of the Flora and Fauna Guarantee Act 1988 (Vic)*, p16.
[52] The determination was made on 4 May 1996 over a 9 hectare site in Altona in an effort to protect the environment of the Small Golden Sun Moth orchid, which was threatened by the subdivision of remnant Western Basalt Plains Grasslands.

4.3.9 Management Plans never used

The decision of the Secretary to prepare or decide not to prepare Management Plans for species, communities of flora and fauna and threatening processes is also at the discretion of the Secretary.[53] No management plans have been made to date. The Victorian Auditor-General reports that DSE sees management plans as 'more detailed action statements' which require only minimal additional information and therefore are perceived by DSE as having 'little additional value'. DSE explain that they have placed higher priority on the development of Action Statements than the development of flora and fauna management plans. However, as the discussion above demonstrates, the development of Action Statements has not been given sufficient priority resulting in a situation where many listed matters do not have an Actions Statement or a Management Plan.

4.3.10 Lack of Transparency and Accountability mechanisms

Another reason for the failure of the Act is the lack of transparency and accountability mechanisms for decision-making and implementation of policies and strategies in legislation.

4.3.11 No performance reporting

Currently, there are no reporting requirements or outcome and output performance measures under the FFG Act to provide direct information on Victorian flora and fauna and their conservation status, or to assist in determining whether the objectives of the FFG Act are being achieved and requirements under the Act are being fulfilled.[54]

For example, although DSE has prepared a Flora and Fauna Guarantee Strategy as required under the Act, there are no legislative requirements to report on the Strategy's progress. Further, as the Auditor-General's report notes, the Strategy does not 'detail measurable objectives or provide adequate guidance' on how to achieve its stated goals. This report went on to observe that '[t]his lack of clearly defined actions, timeframes, performance indicators, and assigned responsibilities puts at risk the achievement of the Strategy's broad goals' and render it impossible to measure the efficacy of any action which are taken.[55] In another example, none of the action statements examined by the Auditor-General in his review covered how DSE would monitor compliance with or report on the progress of directives contained within Action Statements, nor did they contain performance measures.

The lack of accountability and reporting requirements undermine the efficacy of the Strategy and Action Statements.

4.3.12 No third party standing

Deficiencies in the current system also result from the lack of third party enforcement provisions in the FFG Act. Unlike threatened species legislation in other jurisdictions, the FFG Act fails to provide for public standing to review and challenge decision-making under the Act and to secure compliance with the Act. At present, DSE is the only body able to take action for offences committed under the Act. This has the

[53] FFG Act, s 21(1).
[54] Victorian Auditor-General's Office, p42.
[55] Victorian Auditor-General's Office, p27.

potential to further compromise the efficacy of the Act, especially given DSE's apparent lack of will or resources to enforce the legislation.

4.3.13 Inadequate public participation

The Act provides little opportunity for public participation. For example:

- The Attorney-General found that the listing process under the Act is compromised by limited stakeholder participation.[56] Currently, the right to make nominations under the Act applies only to the listing of threatened species, communities of flora and fauna and threatening processes. The Act does not allow for a member of the public to nominate an area that could be declared Critical Habitat. Nor does the Act contain a process for the public to request that an ICO be put in place for Critical Habitat. Further, the Act does not contain a process to appeal against the Minister's listing decision.
- As noted above, there is no scope for the public to take enforcement action in relation to breaches of the offence provisions.

Public participation is critical for ensuring the quality of information used in, and the rigour of, the decision-making processes under the Act. It allows for increased community engagement and empowerment in biodiversity conservation and the opportunity to draw upon the considerable knowledge and expertise that resides outside of government departments. Increased public participation in matters such as nominations of species and critical habitats would also assist in lightening the burden on the resource constrained DSE, and provide greater scope for action to be taken and processes to be initiated under the Act.

4.3.14 No requirement to give reasons

The Act lacks sufficient mechanisms to ensure transparency of decision-making. For example, the Secretary is not required to publish reasons for the making of a determination of Critical Habitat, or when revoking or amending determinations.

4.3.15 Narrow Application of the Act

Although the Act requires public authorities to be administered so as to have regard to the flora and fauna conservation objectives set out in section 4(1) of the Act, there is no specific obligation on public decision-makers or bodies to implement or give consideration to the impacts on threatened species and communities or critical habitat in their decision-making (except when granting a permit under section 40(2) of the Act).

While threatened species lists and the processes flowing from listing are valuable for the recovery of species, they are inadequate of themselves to effectively address the problems of the high number of threatened species currently listed or awaiting to be listed. Although we need to continue to target threatened species and ecosystems, and to manage critical habitats for threatened species, evidence of substantial ongoing decline in biodiversity in Victoria signals the need to do something more.

As discussed above, recent developments in conservation ecology indicate that attention and investment should also be directed to the protection, rehabilitation and restoration of ecological processes that sustain

[56] Victorian Auditor-General's Office, p2.

species. There is a need to adopt a broader, more strategic approach which seeks to emphasise the 'interrelated, holistic and dynamic nature of biodiversity'.[57] There is a need to move towards greater enhancement and restoration of biodiversity. This is hinted at in the FFG Act which includes the objects of guarantee not just for survival of species, but for species and communities to flourish and evolve in the wild.

Furthermore, the already significant challenges of biodiversity conservation in Victoria will be exacerbated by the impacts of climate change. It is now recognised that species will change their distribution and abundance, ecosystem structures and functions will be altered, significant extinctions are likely to occur and adaptation options may be limited for some ecosystems.[58] The existence of climate change and the likelihood of rapid change, together with the significant uncertainties about what it will mean for biodiversity will require a legislative framework that is able to manage and respond to a dynamic system.[59] It also heightens the urgency of changes required to Victoria's legislative framework.

4.3.16 Lack of resources and political will

Inadequate funding and resources for implementation appears to be a fundamental problem underlying many of the deficiencies identified in the FFG Act. As the discussion above demonstrates, resource increases are required to address shortcomings relating to gaps in scientific data, capacity for assessing and listing nominated items effectively, development of Action Statements and for compliance and enforcement of the legislation.

4.4 Compliance and enforcement

In March this year EDO Victoria released a report examining the effectiveness of DSE's implementation and enforcement of the FFG Act and the Wildlife Act. The report highlighted DSE's lack of compliance framework and failure to publish comprehensive information on its compliance monitoring and enforcement activity under the two Acts, limiting a proper assessment of DSE's compliance responsibilities.

DSE does not have an official compliance monitoring and enforcement policy. Nor does it report on compliance and enforcement activity separately for each Act; rather the limited data available is combined data for all activity under the eight key Acts[60] and 18 Regulations[61] administered by the Department.

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[57] Dawson, Dr. F, 'Analysing the Goals of Biodiversity Conservation: Scientific, Policy and Legal Perspectives' (2004) 21(1) EPLJ 6, p26.

[58] See generally the Intergovernmental Panel on Climate Change (2007) *Synthesis Report Working Group II 11.4 Summary for Policy Makers* at p65 and also Adger WN, Agrawala S, Mirza MMQ, Conde C, O'Brien K, Pulhin J, Pulwarty R, Smit B and Takahashi K (2007) "Assessment of adaptation practices, options, constraints and capacity" in Parry ML, Canziani OF, Palutikof JP, van der Linden PJ and Hanson CE (eds) *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Cambridge UK, 717-743 at p719.

[59] EDO submission in response to the Victorian Government Department of Sustainability and Environment Green Paper, *Land and Biodiversity at a Time of Climate Change*, July 2008, p11.

[60] *Catchment and land Protection Act 1994; Conservation, Forests and Land Act 1987; Flora and Fauna Guarantee Act 1988; Forest Act 1958; Planning and Environment Act 1987 (*section 52 Victorian Planning Provisions*); Sustainable Forests (Timber) Act 2004; Safety on Public Land Act 2004;* and the *Wildlife Act 1975.*

[61] Catchment and Land Protection Regulations 2002; Catchment and Land Protection (Register of Interest) Regulations 2006; Conservation, Forests and Lands(Contracts) Regulations 2000; Conservation, Forests and Lands (Infringement Notices) Regulations 2002; Flora and Fauna Guarantee Regulations 2001; Forests (Fire Protection) Regulations 2004; Forests (Licences and Permits) Regulations 1999; Forests (Miscellaneous) Regulations 2000; Forests (Murindindi

In October this year the Victorian Auditor-General released a performance audit, examining the effectiveness and efficiency of the Department of Primary Industries' (DPI) and Department of Sustainability and Environment's (DSE) compliance activities, *Effectiveness of Compliance Activities: Department of Primary Industries and Sustainability and Environment.* With respect to DSE's compliance approach, the Auditor-General concluded that the deficiencies are substantial. DSE are 'not adequately measuring, monitoring, reporting or reviewing their compliance performance and lack appropriate performance measures, targets and benchmarks. Their departmental performance management systems do not specifically measure compliance performance, or how this contributes to achieving legislative objectives and corporate outcomes.'[62] As a consequence, the Auditor-General reported that DSE cannot be sure that its compliance activities contribute to protecting the environment as the legislation intended.[63]

4.4.1 Compliance monitoring and enforcement activity

DSE's compliance monitoring activities include audit programs, inspections (planned and reactive), patrols and operations and analysis of complaints and other information.[64] The department's enforcement activities include responding to complaints, conducting investigations, imposing penalties and undertaking prosecutions.[65]

DSE has a dedicated Compliance and Enforcement Services Team which includes region-based compliance officers. Some of DSE's compliance and enforcement functions are undertaken in cooperation with other government agencies, including Victoria Police, Customs, Parks Victoria and the Department of Primary Industries.

As noted, DSE publishes very limited data regarding its compliance monitoring and enforcement activity. The main source of data regarding compliance monitoring and enforcement is the Victorian Competition and Efficiency Commission's (VCEC) annual 'Victorian Regulatory System' reports which compile basic information about all Victorian regulatory activity.

The VCEC reports contain high level information regarding number of complaints, investigations, disciplinary action/proceedings commenced and the number of penalties imposed for each financial year. Broadly, the data shows an increase in the number of investigations since the 2008-09 financial year, and a significant increase in the number of penalties imposed by DSE in the period 2007-08. As noted in our report, however, without a more detailed breakdown of the types of offences in relation to which the penalties were imposed, it is not possible to accurately identify the reason for the increase in penalties imposed.[66]

Scenic Reserve) Regulations 2000; Forests (Steavenson Falls Scenic Reserve) Regulations 2000; Forests (Thomson River Forest Reserve) Regulations 2005 ;Forests (You Yangs Regional Park) Regulations 2000; Timber Harvesting Regulations 2000; Sustainable Forests (Timber Harvesting) Regulations 2006; Wildlife Regulations 2002; Wildlife (State Game Reserves) Regulations 2004; Wildlife (Whales) Regulations 1998; Wildlife (Game) Regulations 2001.

[62] Auditor-General's Office, Effectiveness of Compliance Activities: Department of Primary Industries and Sustainability and Environment, px.

[63] Auditor-General's Office, Effectiveness of Compliance Activities: Department of Primary Industries and Sustainability and Environment, pviii.

[64] Auditor-General's Office, Effectiveness of Compliance Activities: Department of Primary Industries and Sustainability and Environment, p26.

[65] Department of Sustainability and Environment, Compliance and Enforcement webpage, available at: http://www.dse.vic.gov.au/plants-and-animals/native-plants-and-animals/compiance-and-enforcement

[66] Environment Defenders Office (Vic), *Where's the Guarantee? Implementation and Enforcement of the Flora and Fauna Guarantee Act 1988 and the Wildlife Act 1975*, 2012, p28.

4.4.2 Potential Breaches

As noted in the EDO Victoria report, DSE receives more than 300 calls each year from the public regarding potential breaches of environmental legislation including the FFG Act and Wildlife Act. These calls concern a range of issues including wildlife smuggling, keeping or selling native or high risk invasive species without a relevant permit, and the removal of native plants and animals from the wild. Data collected for financial years 2008-09 and 2009-10 show that the majority of calls received from the public relate to wildlife offences.[67] As we observed in our report, however, it is not possible to comment on the value of information received from the public in detecting contraventions, as DSE does not publish whether these calls lead to charges being laid, or investigations or prosecutions being undertaken. Nor does it publish how this information compares to information gathered through proactive compliance monitoring and enforcement activities undertaken directly by the department, such as patrols and licence checks.[68]

4.4.3 Charges

Although DSE reports on its website that in the last year the department laid 601 charges involving wildlife, forestry, marine and hunting offences in Victoria, it does not report which Acts the charges were laid under, the proportion of charges that resulted in successful prosecutions, nor how this data compares to charges initiated in previous years.[69]

4.4.4 Investigations and prosecutions

As noted in our report, DSE does not publish comprehensive data on the number of investigations and prosecutions it undertakes each year and the outcomes of these. It does, however, publish occasional media releases and case studies of investigations and prosecutions undertaken by DSE for offences under various Acts, including the FFG Act and Wildlife Act. The publication of this material is intended to deter and reduce illegal activities.

As both the EDO Victoria report and Auditor-General's recent audit clearly identify DSE does not have an effective compliance framework in place and therefore has been unable to carry out its compliance responsibilities effectively. The Auditor-General makes a number of recommendations for improving the framework, including developing departmental compliance policies, improving oversight of compliance functions and improving performance measures, data and reporting.[70]

4.4.5 Inadequate penalties

The penalties under the Act are inadequate to provide sufficient protection.

4.4.6 Offences are limited

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[67] Environment Defenders Office (Vic), *Where's the Guarantee? Implementation and Enforcement of the Flora and Fauna Guarantee Act 1988 and the Wildlife Act 1975*, 2012, p29.
[68] Environment Defenders Office (Vic), *Where's the Guarantee? Implementation and Enforcement of the Flora and Fauna Guarantee Act 1988 and the Wildlife Act 1975*, 2012, p29.
[69] Environment Defenders Office (Vic), *Where's the Guarantee? Implementation and Enforcement of the Flora and Fauna Guarantee Act 1988 and the Wildlife Act 1975*, 2012, p29.
[70] Auditor-General's Office, Effectiveness of Compliance Activities: Department of Primary Industries and Sustainability and Environment, p9.

Provisions for the protection of flora are very limited in their application on private land, to instances where the land owner's permission to take flora is not secured (such instances are very rare) and the flora has not been taken for the purposes of sale, and to where a critical habitat determination applies (none exist). The Act imposes controls and prohibitions on protected flora and listed fish, yet it does not impose equivalent controls in relation to listed fauna, which are instead contained in the *Wildlife Act 1975*. It is questionable whether this divided provision for protection of flora and fauna is appropriate.

4.5 Interaction with Victorian planning laws

4.5.1 Environmental Effects Act 1978

The main legislation dealing with Environment Impact Assessment (**EIA**) in Victoria is the *Environmental Effects Act 1978* (Vic) (**EE Act**).[71] The EE Act applies to any projects that the Minister for Planning determines are capable of having a significant effect on the environment and typically only applies to large scale projects. It requires the project proponent to prepare an Environment Effects Statement assessing the project's environmental effects. The Minister then makes a recommendation as to whether the project should proceed and on what conditions.

The FFG Act does not require any comprehensive assessment of projects which may impact on listed species or communities or their habitat or before threatening processes are undertaken.

The process prescribes in the EE Act is deficient in several respects:

- It only applies to a project if the Minister says it does.
- The bulk of the process is set out in non-binding guidelines, not legislation.
- The EES process is very slow (generally takes years) regardless of the project's size
- The Minister's final decision and recommendations are not legally binding.
- It is a 'rubber stamp' which almost never stops inappropriate projects.[72]

[71] Note that the EE Act is currently under review by the Victorian Government, and a new legislative scheme is expected in 2013.
[72] See EDO Victoria's report on the EE Act, available here on our website.

4.5.2 Planning and Environment Act 1987

The *Planning and Environment Act 1987* (**P&E Act**) also provides that the environmental effects of certain developments be considered in decision making. As with the EE Act however there is no requirement to consider the listing of species, communities or threatening processes or any other implementation of the FFG Act in making decisions under the P&E Act.

4.5.3 Major projects

Victoria also has a major projects law: the *Major Transport Projects Facilitation Act 2009* (Vic) (**MTPFA**), designed for the fast-tracking of major transport projects. The MTPFA applies to transport projects declared 'major' by the Premier. It puts all the approval decisions required under other laws (like the *Environment Protection Act 1970* or the *Planning and Environment Act 1987*) into the hands of a single decision-maker — the Planning Minister — and largely shields that Minister's decisions from public comment and review in the courts.[73]

4.5.4 Ongoing Reform

Victoria's EE Act is currently undergoing significant reform. The State Government committed in March this year to replacing the EE Act, in accordance with the recommendations of a Parliamentary Committee.[74] They have provided no firm timeframe for this. If reformed in accordance with these recommendations, the EE Act process in Victoria stands to be significantly improved.

[73] See EDO Victoria's summary of the MTPFA and the problems with it, here on our website.
[74] See the report of the Committee, and the Government's response, here on the Parliament website.

5 New South Wales

The *Threatened Species Conservation Act 1995* (TSC Act) has been in operation since 1995 but despite strong objectives, it has failed to arrest the decline of biodiversity in NSW. The stresses on biodiversity remain significant and debilitating in NSW including "pressures that arise from meeting human needs including food production, urban expansion and consumption of natural resources. The loss and degradation of habitat has been compounded by the introduction of pests and weeds, diseases, the impacts of altered fire regimes and pollution that alone, or in combination, affect individual species and ecosystems".[75]

The NSW State of Environment Report 2009 highlights the dire situation for biodiversity. Since European colonisation 19% of mammals (26 of 138 species) in NSW have become extinct. In addition, 35 species of plants, 12 species or subspecies of birds, and one species each of reptiles, fish and invertebrates are also now listed as presumed extinct under threatened species legislation. One additional species, the green sawfish has been listed as presumed extinct in the last 3 years.[76] A further 1017 species, populations and ecological communities are listed as 'vulnerable', 'endangered' or 'critically endangered' under the *TSC Act*. This list is growing despite the existence of legislative objectives to protect biodiversity in NSW planning legislation for over 30 years.

It is clear that the *TSC Act* is not achieving its objective of conserving and protecting biodiversity in NSW, particularly threatened species, endangered ecological communities and critical habitat. This challenge will only get greater as the impacts of climate change become more apparent and require us to re-evaluate our priorities in light of dynamic and far-reaching changes to ecosystems.

5.1 Overview of threatened species legislation in NSW

In NSW, threatened species are protected under the following three Acts which operate in conjunction with each other:

- The *Threatened Species Conservation Act 1995* deals with the listing of species, the declaration of critical habitat, recovery plans, threat abatement plans, licencing, biodiversity certification and biobanking;
- The *National Parks and Wildlife Act 1974* contains additional licencing provisions, and provisions for criminal offences; and
- The *Environmental Planning and Assessment Act 1979* imposes obligations on developers and consent authorities to assess and consider the impacts of proposed development on threatened species during the development assessment process (for example, by requiring a species impact statement in some circumstances).

In addition, threatened fish (both saltwater and freshwater) and their habitat, and threatened marine vegetation, are protected under the *Fisheries Management Act 1994*.

There are many native species of flora and fauna which, although not threatened, still have some degree of legal protection. These are protected under the *National Parks and Wildlife Act 1974*.

[75] NSW Government, State of Environment Report 2009, Chapter 7, Found at: http://www.environment.nsw.gov.au/soe/soe2009/chapter7/chp_7.2.htm#7.2.13
[76] *Ibid.*

Habitat loss through land clearing and development is one of the key threatening processes leading to loss of biodiversity in NSW. Land clearing in general is regulated under the *Native Vegetation Act 2003.*
As set out in Appendix 1, the extract from the National Biodiversity Strategy identifies at least 14 pieces of legislation in NSW that are relevant to threatened species and at least 9 government policies.

The TSC Act and the *Threatened Species Conservation Regulation 2002* contain a comprehensive framework for listing threatened species. In NSW species may be listed under the TSC Act once they reach a particular level of endangerment (for example, vulnerable, endangered, critically endangered).

Individual species may be listed as:

- Presumed extinct (not recorded in its known or expected habitat within its lifecycle)
- Critically endangered (facing an extremely high risk of extinction in NSW in the immediate future) [6]
- Endangered (facing a very high risk of extinction in the near future)
- Vulnerable (facing a high risk of extinction in the medium-term future)

Individual populations, or pockets, of species may be listed as an "**endangered population**".

Ecological communities may be listed as:

- Critically endangered ecological community
- Endangered ecological community
- Vulnerable ecological community

The nomination must follow the process set out in the Act. The Scientific Committee may also list a species, population or ecological community on its own initiative.

5.1.1 Scientific Committee

The Scientific Committee, established under the TSC Act, is responsible for determining whether a particular species, population or ecological community is to be included on or omitted from the list of threatened species. The process is as follows:

- After the Committee has considered a proposal, it must make a preliminary determination as to whether or not the proposal should be supported,
- In a case involving a nomination, the Committee must then make a final determination within 6 months of calling for submissions on its preliminary determination,
- Before making a final determination, the Scientific Committee must refer the proposed nomination to the Environment Minister. The Environment Minister may only refer the proposed determination back to the Committee for further consideration on scientific grounds.

Final determinations are published in the NSW Government Gazette. The validity of a final determination may only be challenged in the Land and Environment Court within 6 months of the determination appearing in the Gazette.

5.1.2 Emergency listings

The Scientific Committee may list a species on an emergency basis by giving it a provisional listing.

A species may be provisionally listed as endangered or critically endangered if, although not previously known to have existed in New South Wales, it is believed on current knowledge to be indigenous to New South Wales, or if it was presumed extinct but has been rediscovered. Anyone may nominate a species to be listed provisionally.

Once a species, population or ecological community has been listed, it may trigger the following actions:

- the Director-General may prepare a recovery plan for it;
- the NPWS must identify critical habitat if the species, population or ecological community is endangered or critically endangered, which may then be declared as such by the Environment Minister;
- A person who harms (animals) or picks (plants) the threatened species will commit an offence unless they have a licence or other form or authorisation;
- Developments which are likely to significantly affect the threatened species or its habitat will require a species impact statement.

5.1.3 Critical habitat

Once a species, population or ecological community is listed as endangered or critically endangered, the NPWS must take steps to identify the habitat that is critical to its survival. The Environment Minister is responsible for declaring critical habitat, on advice from the Director-General. A declaration of critical habitat and a map showing its location must be published in the NSW Government Gazette and copies given to all affected landholders, public authorities and mortgagees. The Director-General must keep a public register of all critical habitat.

If an area of land is declared as critical habitat, it means that:

- The Environment Minister may not confer biodiversity certification over those areas of land in a Local Environment Plan (LEP) or State Environmental planning Policy (SEPP);
- Planning authorities (such as local councils) must have regard to the register of critical habitat when deciding whether to grant development consent;
- Public authorities must consider the habitat when using land that it owns or controls;
- An application for a licence to carry out an activity on the land must be accompanied by a species impact statement; and
- A development application relating to that land must be accompanied by a species impact statement.

5.1.4 Interim protection orders

The Environment Minister may make an interim protection order over land containing threatened species, populations or ecological communities, or critical habitat, but only after receiving a recommendation to do so from the Director-General. An interim protection order may contain terms relating to the preservation, protection and maintenance of the land, its fauna, plants, threatened species, populations, ecological communities and critical habitat as well as any Aboriginal object or places subject to the order.

The Minister does not need to give anyone notice before making an interim protection order. An interim protection order has effect for such period as is specified in the order, being not longer than 2 years, unless revoked beforehand. The Director-General must keep a public register of all interim protection orders. An owner or occupier of land subject to an interim protection order may appeal against the order to the Land and Environment Court within 60 days of receiving the order. It is an offence not to comply with an interim protection order. The maximum penalty for a corporation is $1.1 million, or for an individual, $110,000.

Furthermore, the NSW Land and Environment Court may grant an injunction to stop an activity that is causing harm to a threatened species or its habitat. It may also make an order to remedy or restrain a breach of the TSC Act or a declaration that a provision has been breached. Any person may bring proceedings to remedy or restrain a breach of the TSC Act.

5.1.5 Recovery plans

Once a species is listed as threatened, the Director-General may prepare a recovery plan for it, although this is not mandatory. Recovery plans may be prepared for all categories of threatened species, populations and ecological communities, other than those presumed extinct. A recovery plan must identify critical habitat for the threatened species, identify the processes which are threatening the species (for example, land clearing, predation by foxes), and state what can be done to ensure the recovery of the species. Ministers and public authorities (local councils) must take any action available to them to implement a recovery plan and must not make decisions that are inconsistent with a recovery plan. Public authorities who intend to depart from a recovery plan must notify the Director-General. There are over 80 recovery plans for species listed as "endangered", and around 16 for species listed as "vulnerable".

5.1.6 Key threatening processes

Key threatening processes may be listed by the Scientific Committee. A process can be listed if it could adversely affect, or cause a species, population or ecological community which is not presently threatened to become threatened.[77] Any person may nominate a threatening process for inclusion on the list. Once a key threatening process is listed, it triggers the need for a threat abatement plan.

[77] There are over 30 key threatening process listed. These include processes such as: long wall mining, alteration to the natural flows of rivers and wetlands, climate change, bush rock removal, clearing native vegetation, loss of hollow-bearing trees, and removal of dead wood and dead trees.

5.1.7 Threat abatement plans

The listing of a key threatening process triggers the need for the Director-General to prepare a threat abatement plan (although this is not mandatory). The plan should set out how the Director-General proposes to reduce or eliminate the threat, identify the people or public authorities responsible for implementing the plan, and give a proposed timetable. There are presently 3 threat abatement plans in NSW. Ministers and public authorities must take any action available to them to implement the plan. Consent authorities must have regard to threat abatement plans when considering a development application (under Part 4 of the EP&A Act), or when a determining authority is considering an approval (under Part 5 of the EP&A Act).

5.1.8 NSW Threatened Species Priority Action Statement

The Director-General is required to prepare and adopt a Threatened Species Priorities Action Statement (PAS). In accordance with this obligation, a Priorities Action Statement has been developed which outlines strategies to promote the recovery of each threatened species, population and ecological community and manage key threatening processes. The PAS identifies which recovery and threat abatement plans the Office of Environment and Heritage (OEH) will prepare. The PAS must be reviewed every three years.

5.2 Strengths of NSW laws

5.2.1 Listing

There are considerable benefits and strengths of the current listing process under the *TSC Act*.

First, a key strength of the Act is the ability of any member of the community to make a nomination to the Scientific Committee for listing, acknowledging the valuable role the community has in identifying and promoting the stewardship of biodiversity. Moreover, once the Committee has made a preliminary determination, the public is consulted generally to determine whether the species or population should be finally listed in the Act.

A second strength is the independence of the Scientific Committee in making listing decisions under the Act, and the requirement that the Committee take into account only scientific considerations when deciding on listings. Furthermore, there is no ministerial veto right available in relation to listings. There are ample opportunities for social and economic considerations to be taken into account in decisions subsequent to listing but in order to maintain integrity of the Act, listing decisions must be purely scientific. Removal of these elements would undermine the scientific credibility of listings, and could be misused be the Minister to delay or refuse a listing for economic or political purposes.

Finally, another strong element of the Act's listing processes is that it allows for the listing of endangered ecological communities (EECs) and critical habitat in addition to single species and populations. This is consistent with the ecosystems approach endorsed internationally and nationally as there are a number of problems associated with focusing on threatened species alone as the basis for biodiversity protection.[78]

[78] Possingham, H. P., Andelman, S. J., Burgman, M. A., Medellin, R. A., Master, L. L., Keith, D. (2002) Limits to the use of threatened species lists *TRENDS in Ecology & Evolution* 17(11), 503-507, Rohlf D (1991) 'Six Biological Reasons Why the Endangered Species Act Doesn't Work – And What to Do About It' *Conservation Biology* 5 273-282.

Protecting communities and critical habitat has considerable benefit for a number of species, whether threatened or not.

Case study – listing populations

As noted, in NSW a population is eligible to be listed if it is facing a very high risk of extinction in New South Wales in the near future. The population cannot be listed if the species is already listed as endangered, critically endangered or presumed extinct. This is a strength in comparison with other jurisdictions – for example, individual populations cannot be listed under the EPBC Act. Examples of endangered populations in NSW include:

- the Emu population in the NSW North Coast bioregion and the Port Stephens area,
- the Gang-gang Cockatoo population in the Hornsby and Ku-ring-gai areas,
- the Little Penguin in the Manly Point Area,
- the Long-nosed Bandicoot at North Head,
- Koalas at Hawks Nest and Tea Gardens, and
- Koalas at Pittwater Local Government Area.

5.2.2 Key threatening processes and threat abatement planning

KTPs are processes that may adversely affect threatened species, populations or ecological communities, or could cause species, populations, or ecological communities that are not threatened to become threatened.[79] A threat abatement plan (TAP) is a plan to abate, ameliorate or eliminate the adverse effects of KTPs[80] and must include actions necessary to reduce the impact of a KTP on threatened species, etc.[81] Like recovery plans, priorities for TAPs are now determined in accordance with the PAS.[82] The PAS identifies that TAPs will continue to be prepared for each KTP where it poses a significant impact on biodiversity or is the main threat to many species, where its impact varies depending on location, or where management requires coordination of several public authorities and stakeholders.[83]

Threat abatement planning will remain a key mechanism to protect biodiversity under climate change. A key impact of climate change will be the exacerbation of existing threats, and hence reducing existing threats through threat abatement is one of the most widely advocated strategies to combat the impacts of climate change and build resilience.[84] However, in the context of a limited conservation budget, TAPs must be made shorter, simpler and focus more readily threat abatement actions and outcomes.

More resources need to be focused on threat abatement planning. This is because threat abatement planning addresses the drivers of biodiversity decline, is likely to benefit multiple species in a cost-effective

[79] (NSW) *Threatened Species Conservation Act 1995 s 13.*
[80] (NSW) *Threatened Species Conservation Act 1995 s 74.*
[81] (NSW) *Threatened Species Conservation Act 1995 s 77.*
[82] (NSW) *Threatened Species Conservation Act 1995 s 76.*
[83] DECC (2008) 'Statement of Intent 1: Infection of native plants by *Phytophthora cinnamomi*', Sydney; www.threatenedspecies.environment.nsw.gov.au/tsprofile/pas_abatement_strategies.aspx
[84] Heller N and Zavaleta E (2009) 'Biodiversity management in the face of climate change: A review of 22 years of recommendations *Biological Conservation* 142 14-32; Reaser JK, Pomerance R and Thomas PO (2000) "Coral Bleaching and Global Climate Change: Scientific Findings and Policy Recommendations" *Conservation Biology* 14(5) at pp 1500-1511.

way.[85] TAPs are likely to work particularly well in cases where one threat is causing the primary impact on many species and the control of that threat is feasible at a large-scale. Finally, as many of the key threats to biodiversity operate at a landscape scale, a focus on TAPs is a strength as TAPs provide a good mechanism to co-ordinate threat abatement actions across regions and targeted to priority areas.[86] Therefore, it is likely to be most cost effective to identify and focus threat abatement efforts on sets of threats that overlap and interact to affect large numbers of species to allow the NSW government to identify and target priority areas or regions.

5.3 Weaknesses of NSW laws

5.3.1 Listing process deficient

Despite the positive elements of the listing process, there are three key deficiencies of the NSW listing process.

First, the current lists are not truly representative of the flora and fauna that is vulnerable or endangered in NSW. The TSC Act listing process generally shows considerable bias towards mammals, birds, and other iconic species. Consequently, there are substantial gaps in representation on lists under the Act, particularly in relation to insects, invertebrates and fungi.[87] Due to this bias, as well as time lags and lack of knowledge, many species at risk of extinction may not be currently listed.[88]

Related to this issue is the problem of data and skills deficiencies. In many cases, the data required to make a proper assessment of whether a species or population should be listed does not exist, in large part due to consistent under-funding of relevant State agencies. Severe under-resourcing means that even when limited data indicates that further research is required which would likely support the listing or upgrading of threatened biota, the required work rarely takes place. In addition, there are too few people with the technical skills required within government to support the listing of species by the Scientific Committee.

Second, there is currently a separate process for the listing of marine species under the *Fisheries Management Act 1997* (FM Act). Marine threatened fish, invertebrates and plants are protected under a separate Act and by a separate agency, namely NSW Department of Primary Industries. There is no logical reason for maintaining threatened species lists for marine species in a separate Act. The FM Act 1997 is not an appropriate place for biodiversity protection mechanisms as it is essentially resource-use legislation that facilitates commercial use of fish species, including those that are threatened. There is a clear conflict of interest with the Minister and department responsible for exploitation of the marine environment also responsible for conservation of these species. This is demonstrated by the fact that no commercially harvested species were listed as threatened until 10 years after the legislation was enacted. Similarly, no

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[85] Caughley G and Gunn A (1996) *Conservation Biology in Theory and Practice* Blackweel Science, Cambridge, Massachusetts; McIntyre S, Barrett G, Kitching R and Recher H. (1992) 'Species triage – seeing beyond wounded rhinos' *Conservation Biology* 6(4): 604-606;

[86] Downey P, Williams M, Whiffen L, Turner P, Burley A, and Hamilton M (2009) 'Weeds and biodiversity conservation: A review of managing weeds under the New South Wales Threatened Species Conservation Act 1995' *Ecological Management and Restoration* 10 S53-58.

[87] Possingham HP, Andelman SJ, Burgman MA, Medellin RA, Master LL and Keith DA (2002) "Limits to the use of threatened species lists" *Trends in Ecology and Evolution* 17(11) at pp 503–7.

[88] See Department of Environment and Climate Change *NSW State of the Environment Report 2006* at: http://www.environment.nsw.gov.au/soe/soe2006/chapter6/chp_6.3.htm#6.3.22

species that require changes to commercial fishing practices to ensure recovery has had a recovery plan finalised. Moreover, there is no compelling reason why there should be a separate scientific committee for considering listings of fish, since the members of the Scientific Committee are not required to be experts in the species or even phyla in question, simply to assess the available information scientifically. Other jurisdictions, like the Australian federal jurisdiction have a single list for terrestrial and marine biodiversity.[89]

Third, the TSC Act could better coordinate with the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) as there is significant scope for improving parity between the lists under the two Acts. Species or ecological communities listed under the EPBC Act are not automatically listed under the TSC Act if found in NSW. Similarly, where there is a decision to list a species endemic to NSW under the TSC Act that species is not automatically listed under the EPBC Act.

5.3.2 Failure to adequately address impacts of climate change on threatened species

The current listing process under the TSC Act is not designed to address future climate change impacts effectively. Relevant problems with the current listing process include:[90]

- There is a mismatch between current threatened species lists and what needs to be done to protect biodiversity under climate change. For example, areas important for connectivity may not be considered in decision-making without a link to threatened species;
- Strategies to protect biodiversity under climate change are not adequately resourced;[91]
- The current listing process under the Act does not protect 'key functional groups', which are groups of species that play an important role in maintaining ecosystem functions;[92]
- Decisions to list species are made on the basis on current conservation status. Species are not eligible to be listed if they are not currently threatened, even if they are likely to become threatened in the future under climate change;
- The current identification, definition and listing process for ecological communities and populations may become problematic as these may expand and contract in response to climate change;
- For a species to be eligible for listing under the TSC Act, it must be 'indigenous' to NSW, which may become problematic under climate change as species from other states might move in. For example, a species from Queensland may move into NSW in response to climate change and establish small populations but would not be eligible for listing under the TSC Act; and
- Climate change is likely to increase the extinction risk of many species, which will further exacerbate the problem of limited conservation budgets making prioritisation of listing processes a necessity.

5.3.3 Listing of critical habitat rarely used

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[89] *Environment Protection & Biodiversity Conservation Act 1999.*

[90] For further assessment of the climate readiness of NSW and Commonwealth laws, see: *Climate change and the legal framework for biodiversity protection in Australia: a legal and scientific analysis,* June 2009, EDO NSW and *Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis*, June 2009, EDO NSW.

[91] Possingham HP, Andelman SJ, Burgman MA, Medellin RA, Master LL and Keith DA (2002) "Limits to the use of threatened species lists" *Trends in Ecology and Evolution* 17(11) at pp 503–7.

[92] Some scientists argue that conservation efforts should be targeted towards maintaining the diversity amongst functional groups. By better ensuring that ecological functions are maintained, this approach will maximise the number of species protected, including the many we have not yet identified.

Critical habitat is a rarely used conservation tool in NSW. There are currently only four areas declared as critical habitat under the TSC Act: the Wollemi Pine, the Gould's Petrel, Little Penguin population in Sydney Harbour, and the Mitchell's Rainforest Snail.[93] The area declared as critical habitat ranges from tens of ha (Little Penguin and Gould's Petrel) to 5,000 ha (the Wollemi Pine). In all cases except for the Little Penguin, areas of critical habitat have been declared entirely within existing protected areas.[94]

The reason that there are very few critical habitats listed relates to the method of listing critical habitat under the Act which differs from the listing process for threatened species, and which allows economic considerations to be taken into account. The Director-General is responsible for identifying critical habitat, and must consult with the NSW Scientific Committee and have regard to any advice received.[95] However, the decision to list critical habitat is made by the Minister, who must have regard to the likely social and economic consequences of a declaration and the likely consequences for landholders.[96] As a result, economic considerations have served to thwart the listing of critical habitat even in situations in which the declaration is scientifically sound.

Furthermore, under the Act, the definition of critical habitat implies that for habitat to be declared critical, it must be *current* habitat for a threatened species. This may mean that critical habitat cannot be declared on land that is not current habitat for a threatened species, but that is likely to be required by a threatened species in the future under climate change (for example, as a habitat corridors, climate refuge, or suitable habitat types within the likely future distribution of a species). We noted that the Queensland *Nature Conservation Act 1992* provides greater certainty about this by defining critical habitat as including 'an area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife'.[97]

5.3.4 Problems with Recovery Planning and Priority Action Statement

Under the *TSC Act*, the Director-General now has discretion as to whether to prepare a recovery plan for threatened species, populations, and ecological communities.[98] Priorities for recovery plans in NSW are determined in accordance with the PAS.[99] The PAS identifies that recovery plans will continue to be prepared for threatened species that are iconic, or have complex conservation issues involving a suite of management actions, or require the input of multiple stakeholders. The PAS provides for either single species plans, multi-species plans, or region-wide plans.

Despite no longer being mandatory, recovery planning must remain a key mechanism to ensure the long-term survival of species, especially in the context of climate change. However, due to the realities of a limited conservation budget, recovery plans must be made shorter, simpler and focus more readily on recovery actions and outcomes. Moreover, in light of the significant uncertainty around climate change, the plans must implement adaptive management principles, including the flexibility to adapt and amend actions that are not working. Currently recovery plans are time consuming and resource intensive to produce, and are not easily modified. While multi-species recovery plans may be a cost-effective way of recovering more

[93] See Department of Environment and Climate Change at: http://www.environment.nsw.gov.au/criticalhabitat/CriticalHabitatProtectionByDoctype.htm

[94] For example, nature reserves declared under the *NPW Act 1974*. Part of the Little Penguin critical habitat occurs within Sydney Harbour National Park, and the remaining areas also appear to be public land.

[95] (NSW) *Threatened Species Conservation Act 1995* ss 38, 39.

[96] (NSW) *Threatened Species Conservation Act 1995* s 44.

[97] (Qld) *Nature Conservation Act 1992* s13(2).

[98] (NSW) *Threatened Species Conservation Act 1995* s 56.

[99] (NSW) *Threatened Species Conservation Act 1995* s 58.

than one species, as they are a relatively new tool, there needs to be detailed monitoring in place to determine whether they are effectively recovering target species. For example, the effectiveness of the Cumberland Plain Woodland Recovery Plan seems to be undermined by the application of planning and development laws (discussed below).

There is a clear need to establish a transparent, repeatable, and defensible prioritisation process for the protection of threatened species under climate change. However, the current iteration of the PAS does not achieve these things. Problems include:[100]

- The PAS does not prioritise strategies and priority actions *between* species. It does not introduce a transparent method for allocating limited resources between species – it merely lists what actions apply to each species;
- The basis for the prioritisation of strategies and priority actions is unclear, including what criteria were used to determine relative priorities;[101]
- The PAS does not clearly identify responsibilities for the implementation of strategies and priority actions or provide an assessment of the capacity of government agencies and others to implement the strategies and actions; and
- The PAS does not identify the locations for the implementation of strategies and priority actions. This makes it difficult to identify priority areas or regions where actions would have the greatest impact.

In addition to dramatically increasing the departmental budget to address the continued decline of biodiversity in NSW, a new framework is needed for the PAS (that prioritises actions *between* listed species), be developed under the TSC Act, taking into account not only the value of the species, but the cost of management, the benefits of management and the likelihood of success.[102]

5.4 Compliance and enforcement in NSW

A relatively broad range of criminal offences relating to threatened species, endangered populations and endangered ecological communities are set out in the *National Parks and Wildlife Act,* not the *Threatened Species Conservation Act*. Although these offences may be enforced through either civil proceedings, or criminal proceedings, most breaches are prosecuted as criminal matters. OEH and the NSW EPA are responsible for bringing criminal prosecutions.

It is an offence to *harm* any animal that is a threatened species, or which is part of an endangered population or an endangered ecological community. This includes harm which is caused by any substance (for example, poison), animal (for example, dog), firearm, net, trap or hunting device. The maximum penalty for harm to an *endangered* species, population or ecological community is $220,000 and/or two years imprisonment. For harm to a *vulnerable* species, it is $55,000 and/or one year imprisonment.

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[100] See EDO submission on Threatened Species Priority Action Statement at: http://www.edo.org.au/edonsw/site/policy.php; See also Joseph L, Watson J, Possingham H (2009) 'The New South Wales Priorities Action Statement and opportunities for maximizing return on investment for conservation' *Ecological Management and Restoration* 10 S143-144.

[101] Department of Environment and Climate Change (2006) 'Introducing the Threatened Species Priorities Action Statement (PAS), DECC, Sydney.

[102] Joseph L, Maloney R and Possingham H (in press) 'Optimal allocation of resources: a project prioritisation protocol' *Conservation Biology*.

In many cases, however, it is the habitat rather than the individual animal itself which is harmed or damaged. It is therefore also an offence to damage the *habitat* of a threatened species, endangered population or endangered ecological community if the person knows that the land concerned is habitat of that kind. The maximum penalty is $110,000, and/or one year imprisonment.

It is also an offence to damage *critical habitat*. The maximum penalty is $220,000 or two years imprisonment, or both. If a map showing where the critical habitat is has been published in the Gazette, then the prosecution does not need to prove that the person knew it was declared critical habitat (they are assumed to have known).

It is an offence to buy, sell or have in one's possession (for example, in a vehicle, house, apartment or field) any animal or plant that is listed as a threatened species or which is part of an endangered population. The maximum penalty for an *endangered* species is $220,000 and/or two years imprisonment. For a *vulnerable* species, it is $55,000 and/or one year imprisonment.[103]

It is an offence to *pick* any plant that is listed as a threatened species, or that is part of an endangered population or endangered ecological community. The maximum penalty for an *endangered* species, population or ecological community is $220,000 and/or two years imprisonment. For *vulnerable* species, it is $55,000 and/or one year imprisonment. "Pick" includes gathering, cutting, poisoning, digging up or injuring the plant or any part of the plant. For example, slashing a paddock which contains threatened plants would constitute "picking".

5.4.1 Defences

Protection of threatened species under NSW legislation is not absolute. There are a broad range of defences that a person can call on if they are charged with an offence regarding threatened species. In short, if the offending activity was in some way authorised (for example, by a licence or development consent), then an offence will not have been committed. Some of the more typical defences include:

- *Licences to harm, kill, etc* - It is a defence to a prosecution for an offence if the person had a licence to harm or pick the threatened species and they were complying with that licence. OEH does not issue licences concerning threatened fish species and marine vegetation. These are issued by Department of primary Industries.

[103] This provision does not apply to a landowner or lessee if the plant is naturally occurring on their land.

- *Lawful development* - It is a defence if the work which harmed the threatened species was essential for the carrying out of development under a development consent issued under the *Environmental Planning and Assessment Act*. To have the benefit of this defence, the work must have been carried out in accordance with the relevant approval and its conditions. For example, if a person clears land in excess of that which is permitted under a development consent, then they cannot point to the development consent as a defence if they have cleared the habitat of a threatened species.
- *Routine agricultural and farming activities*[104] - It is a defence if the person can prove that they were carrying out work which was reasonably necessary for: clearing native vegetation for a routine agricultural activity; a routine farming activity (which does not include clearing native vegetation); or an activity which is permitted under the *Native Vegetation Act 2003*, such as clearing non-protected regrowth, continuing an existing farming activity or engaging in sustainable grazing.
- *Property vegetation plans* - It is a defence if the act complained of was authorised by a property vegetation plan approved under the *Native Vegetation Act 2003* (but only if that plan had biodiversity certification).
- *Property management plans* - The Director-General may approve a property management plan which has been prepared by a landholder. A property management plan may authorise the landowner, or others, to take certain actions (for example, to authorise Aboriginal persons to harm animals or pick plants). It is a defence to a threatened species offence if the person was carrying out the activity concerned in accordance with an approved property management plan.
- *Conservation agreements* - Conservation agreements also provide an important defence to threatened species offences. It is a defence to a threatened species offence if the activity was carried out under a conservation agreement.

Case studies – NSW penalties

NSW engages in a range of regulatory activities and the NSW EPA provides a good model for environmental enforcement, however generally low fines are imposed with some exceptions in recent years.

In *Director-General of the Department of Land and Water Conservation v Leverton Pastoral Company Pty Ltd* [2002] NSWLEC 212 the defendant cleared land in contravention of s 21(2) of the (now repealed) *Native Vegetation Conservation Act 1997* (NSW). The clearing of vegetation affected the habitat of a threatened species, the Grey-Crowned Babbler. Due to the defendant's genuine mistaken belief as to his entitlement to clear, the penalty imposed was at the lower limit of the spectrum at $5,000.

In *Carmody v Brancourts Nominees Pty Ltd and Another* [2003] NSWLEC 84 both defendants were charged with knowingly clearing vegetation from land at Hawks Nest that was the habitat of an endangered population of koalas, contrary to s 118D(1) of the NPWA. The defendants pleaded guilty, and were fined $5,000, while agreeing to undertake remediation works under s 118E of the NPWA.

In *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234 the defendant slashed, cleared and excavated land that contained thousands of plants of the vulnerable species *Tetratheca juncea*. The plant is listed as a vulnerable species under the TSCA. The defendant was convicted of picking threatened species contrary to s 118A(2) of the NPWA, and given a fine of $40,000.

[104] Routine agricultural activities include things such as: constructing dams, fences, stockyards and farm roads; removing noxious weeds; controlling noxious animals; collecting firewood (but not for commercial purposes); lopping native vegetation for stock fodder; and traditional Aboriginal cultural activities (but not commercial activities). See Native Vegetation Act 2003 (NSW).

In *Garrett v Williams* (2006) 160 LGERA 115 Mr Williams owned land in the Southern Highlands on which the listed Shale Woodland grew. The Southern Highlands Shale Woodland was listed as an endangered ecological community under the *Threatened Species Conservation Act 1995*. It is an offence to pick plants that are part of an endangered ecological community. Picking plants a part of an endangered ecological community was in contravention of s 118A(2) of the NPWA. Over two separate periods, he arranged for trees of the woodland to be cleared or cut down. The offences occurred while Mr Williams' application for development consent to subdivide the land was being considered by the local council. Mr Williams pleaded guilty to the charges. The Land and Environment Court found that the clearing was premeditated and deliberate, and that it was done to remove an impediment to the subdivision being approved. A fine in the upper limit of the range was imposed. The Court fined Mr Williams a total of $180,000 and also ordered him to pay the prosecutor's costs.

In *Director-General of the Department of Environment and Climate Change v Taylor* [2007] NSWLEC 530 the defendant was charged under s 21 of the (now repealed) *Native Vegetation Conservation Act 1997* (NSW) after clearing vegetation in a manner that was not consistent with a development consent. The clearing resulted in the loss of habitat over 40 hectares for 5 forest dependent threatened fauna species (Koala, Squirrel Glider, Square-tailed Kite, Grey-headed Flying Fox, Little Bent-wing Bat). The defendant pleaded guilty, and was fined $20,000.

In *Director-General, Department of Environment and Climate Change v Rae* [2009] NSWLEC 137 the defendant cleared native vegetation in contravention of s 12(1) of the NVA, in the process damaging the habitat of 12 threatened flora and fauna species. The defendant pleaded guilty and was fined $160,000.

In *Garrett v Freeman (No 5)* (2009) 164 LGERA 287 the Port Macquarie Hasting Council, headed by the defendant, constructed a road that caused damage to the habitat of a threatened species. The act of damaging the habitat of a threatened species contravenes s 118D(1) of the NPWA. Fines across all parties amounted to $137,500.

Plath[105] *v Knox* [2007] NSWLEC 670
The defendant engaged in spraying of vegetation on reserved land, harming three species of flora and fauna that are either endangered or vulnerable. Following the plea of guilty, and other mitigating factors, a $13,200 fine was imposed.

Plath v Chaffey [2009] NSWLEC 196
The defendant was charged with four counts of collecting eggs of a threatened species, and one count of harm to protected fauna. The defendant had intentionally collected the eggs of the threatened species on Lord Howe Island. The defendant pleaded guilty to collecting 94 eggs of four species (Masked Booby, Red-Tailed Tropicbird, Sooty Tern, White Tern) in contravention of s 118A(1) of the NPWA and also s 98(2)(a). The defendant had limited capacity to pay a fine, and as such was sentenced to 80 hours of community service.

Plath of Department of Environment and Climate Change v Fish [2010] NSWLEC 144
The defendants cleared the habitat of threatened koalas contrary to s 118D(1) of the NSWPA, after receiving incorrect advice as to whether planning approval was needed. The defendants were found guilty, and cumulatively paid fines of $15,000, as well as being obligated to carry out remediation work.

Plath v Hunter Valley Property Management Pty Ltd [2010] NSWLEC 264
The defendant cleared vegetation, including of the endangered species *Acacia pendula* in the Hunter Valley,

[105] Note: Gordon Plath is from the then Department of Environment and Climate Change.

contrary to s 118A(2) of the NPWA. The defendant pleaded guilty. Due to mitigating factors, the defendant was fined $37,500.

Plath v Lithgow City Council [2011] NSWLEC 8
The defendant pleaded guilty to two charges under s 118A(2) of the NPWA of picking plants of threatened species, listed as 'endangered' under the TSCA, in the course of roadworks. The defendant was ordered to pay $105,000 in fines, and direct $105,000 to rehabilitation of the area that was cleared.

Similar to some of the penalties imposed for breaches regarding terrestrial threatened species, low fines have also been imposed in relation to marine species. For example, a recreational fisher from Lake Munmorah who killed an endangered grey nurse shark was in fined $2000 for the offence. The man pleaded guilty in Forster Local Court for taking the 1.7m long female shark off Hastings Point in June 2006. Grey nurse sharks were listed as an endangered species in 2001 under the *Fisheries Management Act 1994*, after first being declared threatened in 1984. The fine was disappointingly low. As the proceedings were dealt with in the Local Court , the maximum fine available was $10,000. If proceedings had been commenced in the Supreme Court or the Land and Environment Court, a much larger penalty would have been possible (that is, $220,000 or two years imprisonment).

5.5 Interaction of threatened species and planning laws in NSW

NSW threatened species laws do not protect threatened species absolutely. Rather, the laws set up administrative procedures (such as requiring species impact statements) to guide decision-making where threatened species are concerned. For example, under the *Environmental Planning and Assessment Act 1979* (EP&A Act) (the main legislation controlling development in NSW), a consent authority may grant development consent which will adversely affect threatened species.

Case study – Weakness of critical habitat listings

One of the most significant failings of the current system is that even where a critical habitat declaration is made, it only introduces procedural protections and does not guarantee the protection of that habitat. For example, where development is proposed under the EP&A Act in critical habitat, then there is the automatic need for a Species Impact Statement (SIS) which must fully examine the impacts on the species by the development, and the concurrence of the Minister for environment is required.[106] However, once the SIS is taken into account, the development can be approved, even if it is likely to have a significant impact on critical habitat. Furthermore, for a time in NSW the procedural requirement for an SIS did not apply to the assessment of the largest developments in NSW, which were assessed under the now repealed major projects fast-track provisions - Part 3A of the EP&A Act.

[106] Except for projects assessed under Part 3A.

Case study – Local Council decisions contrary to listing status

Penrith City Council decided to approve the clearing of 300 hectares of vegetation from the Australian defence Industries site (ADI site) near St Mary's in Western Sydney. Only one month before the Council granted the approval, the NSW Scientific Committee made a preliminary decision upgrading Cumberland Plain Woodland's status from endangered to critically endangered.

There are three ways in which impacts of development on threatened species happen in NSW:

- The development takes place under an environmental planning instrument (for example, a local environment plan) which has biodiversity certification;
- The developer carries out a species impact statement which accompanies the development application; or
- The developer participates in the BioBanking Scheme.

Each of these options is exclusive of the other. For example, if a development it is proceeding under the BioBanking Scheme, a species impact statement will not be needed.

5.5.1 Main EIA Law

The main EIA law in NSW is the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).
The majority of activities that have the potential to impact on threatened species are regulated and assessed through the EP&A Act.

The protections provided by the listing of threatened species, communities and critical habitat comes into play during the development assessment processes under the EP&A Act. Local councils and other government bodies must assess whether a proposed development is likely to have a significant impact on threatened species, populations or ecological communities, or their habitats. This is undertaken through the assessment of significance – known as the 7 part test. If the assessment finds there is likely to be a significant impact, then an SIS is required.

There are several ways that a project might undergo EIA under the EP&A Act:

- Part 4 (for any development which requires a development application); and
- Part 4.1 – State significant development (for major projects of state or regional significance);
- Part 5 (for development that doesn't require a development application, including many public infrastructure developments)
- Part 5.1 – State significant infrastructure (for major infrastructure projects).

Both Part 4 and Part 5 have two tiers of environmental assessment — a 'low-level' tier (a Statement of Environmental Effects, and Review of Environmental Factors,[107] respectively), and a 'high-level' tier for cases likely to have significant impacts (a full Environmental Impact Statement). That assessment must be taken into account before the development is allowed to proceed.

[107] An REF has no statutory basis, but is required as part of the standard practice of the Planning Department and other public authorities which are bound by Part 5 of the EP&A Act, to determine if an EIS is required.

When it commenced in 1979, the NSW model of EIA was heralded as ground-breaking – for its relatively robust assessment processes and statutory decision-making criteria; and its emphasis on community participation, significant merits appeal rights,[108] and 'open standing' to enforce breaches in the specialised NSW Land and Environment Court.[109]

However, the EP&A Act has been subject to many major amendments in the subsequent three decades. These changes made the system highly complex, concentrated power and discretion in the Planning Minister and Department, and caused significant community dissatisfaction and disconnection. The former major projects fast-tracking provisions -'Part 3A' major projects regime was symbolic of this disconnection.

5.5.2 'Assessment of significance'

There are significant problems with the current assessment of biodiversity in NSW, particularly the assessment of whether a development will have a significant impact – the '7 part test'. Indeed, the test is often not undertaken where required, and are applied inconsistently across Local Government Areas in NSW. [110] The consequence of this is that developments are often proceeding without a proper assessment of threatened species and in the absence of an SIS where one should have been required.

A key issue is the failure of consent authorities to undertake the 7 part test, often based on an arbitrary decision that the test is not required. This is to some extent due to the fact that the Act does not state that the test is mandatory, nor who should prepare it.[111] Moreover, often when the test is undertaken, it is done incorrectly, leading to a finding that no significant impact will ensue when this is not in fact the case.

Further issues relate to the lack of an auditing or oversight framework of 7 part tests and SISs, the lack of appropriate resources and skills within local government to conduct assessments and issues relating to the integrity and accountability of ecological consultants who are commissioned to undertake threatened species assessments.

5.5.3 Accuracy of environmental impact statements

There are problems associated with the accuracy of environmental assessments of threatened species conducted. Examples include where a 7 part test has failed to identify all species or endangered ecological communities present on a site or has erred in failing to identify a likely significant impact. Further issues include inaccurate findings in environmental impact statements.

These issues are symptomatic of three key problems. First, there is an absence of any processes in either the TSC Act or the EP&A Act to assess the accuracy of environmental impact assessment after the event. Without independent technical review, the outcome of the environmental impact assessment process will always remain fraught with suspicion. Second, many local councils do not have the skilled personnel, nor the internal processes in place that allow them to properly conduct biodiversity assessments. Moreover, these assessments take time and getting an independent expert to conduct an assessment can be very expensive. In addition, there is pressure from the Department of Planning for local councils to undertake development

[108] For projects categorised 'designated development' under Part 4.
[109] Although there remains a significant imbalance in merits appeal rights in favour of development proponents.
[110] Douglas, S, "Local Government and the Threatened Species Conservation Act – The Greatest Potential; the Weakest Link' (1999) 6(2) *The Australasian Journal of Natural Resources Law and Policy,* 135-149.
[111] *Ibid* at p137.

assessment in a timely manner which creates a culture in which dealing with ecological issues is seen as an administrative burden. Third, there are serious issues around the accountability and integrity of private ecological consultants paid by proponents to conduct biodiversity assessments. There is a clear conflict of interest for consultants who are paid by the proponent to conduct ecological assessments.

5.5.4 Consideration of environmental impact assessments

A key failing of the assessment of threatened species under the EP&A Act is that even where an EIS or SIS demonstrates that a development will have potentially devastating impacts on threatened species or their habitats, this does not operate as a stop on development under the EP&A Act. This is because consent authorities are only required to take an ecological assessment into account and are free to give more weight to social and/or economic factors. Thus, the listing of threatened species under the TSC Act ensures very little real protection as the final outcome is dependent on the discretion of development consent authorities. There is no requirement for consent authorities to *refuse consent* to development proposals where an environmental assessment has shown that there will be an unacceptable impact on threatened species, endangered ecological communities or their habitats.

5.5.5 Coordination with environmental planning instruments

The listing of threatened species under the TSC Act does not activate a requirement to consider such listings (particularly of Endangered Ecological Communities) when making or reviewing Local Environmental Plans (LEPs) in LEPs. As has been noted, "the implications of the TSC Act have not reflected in the LEPs through the application of appropriately restrictive zoning of land".[112]

A key issue with land-use planning in NSW is that local councils are not required to prepare a LEP that has the overall effect of adequately protecting biodiversity (i.e. a LEP is not required to meet any objective standard for biodiversity protection). A LEP is not required, for example, to prohibit development in high conservation value areas. Furthermore, the Standard Instrument, which is a template that all LEPs must eventually adhere to, currently provides little in the way of mandatory provisions relating to biodiversity. While the Standard Instrument sets out standard environmental protection zones and prescribes the objectives and land uses of these zones, again there is no mandatory requirement for Councils to adopt an environmental protection zoning in high conservation value areas.

5.5.6 Major Projects Fast-Tracking

Provisions to fast-track assessment of major projects in Part 3A of the EP&A Act were repealed in 2011 under a new State Government, and a revised major projects system was enacted for 'state significant development' (SSD) and 'state significant infrastructure' (SSI).[113] The Minister (or delegate) is still the consent authority for these projects,[114] which are assessed by the Planning Department.

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[112] Douglas, S, "Local Government and the Threatened Species Conservation Act – The Greatest Potential; the Weakest Link' (1999) 6(2) *The Australasian Journal of Natural Resources Law and Policy,* 135-149 at p143.

[113] For more detail on the amendments to Part 3A and the new SSD and SSI regime, see EDO NSW factsheets at http://www.edo.org.au/edonsw/site/factsh/fs02_3_1b.php. As at June 2012 there were still over 230 Part 3A projects in the system which are subject to transitional arrangements.

[114] Although the current Planning Minister has delegated these powers to an independent Planning Assessment Commission (PAC) and the Planning Department.

The EIA process for SSD is set out in Director General's Requirements (DGRs) for the specific project, and requirements in the regulations.[115] The EP&A Act also sets out certain exhibition and submission requirements.[116] A slightly different process applies for SSI.[117] The SSD system narrows the scope of projects that were eligible for fast-tracking under Part 3A.[118] It also reinstates the statutory assessment considerations that apply to decisions on Part 4 development.[119] Merits appeals against SSD projects are available in some circumstances.[120] A significant shortcoming retained in the SSD system is that major projects remain *exempt* from a significant list of 'concurrence' approvals normally required from various agencies. A range of other authorisations *cannot be refused*, and must be consistent with an SSD project approval.[121] The SSI system for fast-tracking infrastructure retains many features of the former Part 3A regime. It includes exemptions from merits appeal rights, exemptions from certain administrative orders for enforcement, and requires ministerial consent to bring proceedings to remedy or restrain breaches.[122]

5.5.7 New Tools to integrate threatened species and planning laws

Case study - Biocertification

The TSC Act in NSW contains provisions for landscape scale assessment to allow areas to be biodiversity certified – if the overall outcomes is that biodiversity values in the certified area are maintained or improved. The scheme requires use of a regulatory assessment methodology.[123]

There are clear advantages of developing landscape scale approaches to biodiversity conservation, in addition to strengthening species based approaches. Assessment at a broad scale can better take into account cumulative impacts of a number of single developments, and better plan for strategic biodiversity corridors and links and enhance connectivity. However, as with biobanking, it is absolutely essential that the biocertification scheme is underpinned by a robust and objective scientific methodology that adheres to scientific offset principles. Weakening assessment requirements to make the scheme more attractive for

[115] See for example, Environmental Planning and Assessment Regulation 2000, Schedule 2. See also EP&A Act, s 78A(8A).
[116] EP&A Act, s 89F.
[117] See EDO NSW factsheet, *State Significant Development and State Significant Infrastructure* (February 2012), at http://www.edo.org.au/edonsw/site/factsh/fs02_3_1b.php.
[118] For example, the *State Environmental Planning Policy (State and Regionally Significant Development) 2011*, which sets out categories of SSD, removes a range of commercial, residential and tourism development types that came under Part 3A. Other projects can be declared SSD by order of the Planning Minister after advice from the PAC. See EP&A Act, s 89C.
[119] Under s 79C (in Part 4) of the EP&A Act.
[120] Merits appeal rights are removed if the SSD would not otherwise be 'designated development'; or where the PAC holds a public hearing on the development.
[121] EP&A Act, ss 89J (Approvals etc legislation that does not apply) – including certain authorisations relating to coastal protection, fisheries, Aboriginal heritage, native vegetation, bush fire and water management; and 89K (Approvals etc legislation that must be applied consistently) – including aquaculture, mining leases and pollution licences.
[122] See for example, EP&A Act, ss 115ZJ, 115ZG and 115ZK.
[123] EDO biocertification submissions can be found at: http://www.edo.org.au/edonsw/site/policy.php#2 and include: Submission on the Draft Biodiversity Certification Methodology 30 July 2010**;** Submission on the proposed Sydney Growth Centres Strategic Assessment 25 June 2010; Submission on the DECC Guidelines for Biodiversity certification of environmental planning instruments 21 December 2007; Submission on the proposed biocertification of the Draft Growth Centres Conservation Plan 18 April 2007; and Biodiversity Certification and Banking in Coastal and Growth Areas, 13 September 2005.

potential participants risks the ecological credibility and overall success of the scheme.

Key concerns with the current methodology relate to the integrity of the "maintain or improve biodiversity values" test.[124] The current proposed methodology relaxes the offsetting rules to such an extent that the legislative test becomes meaningless. The clauses in the draft methodology allowing offsetting of one species with an entirely different species and allowing for a financial contribution in lieu of an offset, represent a radical departure from the "like for like" principle of offsetting. The rationale that offset rules for biocertification must be relaxed due to the landscape scale and to make the scheme more attractive to voluntary participants do not justify such a significant departure from ecological principles.

Other key concerns with the draft methodology include: the ability to vary red flag areas, security of tenure and long-term (funded) management of conserved areas, and interim management of biodiversity values prior to land being dedicated for conservation management. Furthermore, as biocertification is a relatively new and untested tool, to live up to the claim of 'maintaining or improving' biodiversity values, there needs to be a monitoring and review mechanism built in to the biocertification framework to ensure that the values informing the future improvements in biodiversity values are based on demonstrated outcomes.

It is essential that these flaws are addressed if the scheme is to have any credibility. This is particularly important if plans using the scheme are to be proposed for federal accreditation under the *EPBC Act*. For example, the EDO NSW has highlighted a number of problems with the proposed federal strategic assessment of the Sydney Growth Centres which was based on the biocertification process.[125]

Biobanking

The NSW TSC Act also facilitates a biodiversity offset scheme whereby developers can buy biodiversity credits to offset the impacts of their developers.[126] Owners/managers of biobank site can generate an income by selling credits and managing their land for conservation. Like biocertification, this scheme is underpinned by an assessment methodology which is provided for by regulation.[127]

The biobanking scheme in NSW is currently under statutory review.

5.5.8 Ongoing Reform

The NSW planning system is currently under comprehensive review, with a planning Green Paper released for consultation in June and White Paper and Exposure Bill due for release in December 2012.[128] The Green Paper indicates that there will be a greater focus on strategic planning – which if done properly, may have benefits for biodiversity in terms of up-front identification of areas for conservation and regional corridors.

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[124] For further detail on our concerns with the methodology, please see: EDO submission on the *Draft Biodiversity Certification Assessment Methodology* available at: www.edo.org.au/edonsw/site/pdf/subs10/100730draft_biodiversity_certification_methodology.pdf.

[125] See: www.edo.org.au/edonsw/site/pdf/subs10/100625growth_centres_strategic_assessment%20_EPBC.pdf

[126] See: http://www.environment.nsw.gov.au/biobanking/

[127] EDO biobanking submissions can be found at: http://www.edo.org.au/edonsw/site/policy.php#2 and include: Submission on the Proposed Biodiversity Banking Scheme, 7 February 2008; Biobanking consultation - Key concern: variation of red flags - 21 November 2007; Submission to the Joint Select Committee on the Threatened Species Conservation Amendment (Biodiversity Banking) Act 2006 9 May 2007; Submission on "BioBanking - A Biodiversity Offsets and Banking Scheme" Working Paper, 5 March 2006; and Biodiversity Certification and Banking in Coastal and Growth Areas, 13 September 2005.

[128] See: www.planning.nsw.gov.au.

However, there are concerns that community participation at the individual project assessment stage could be under threat and this may have implications for the ability of local communities to protect local threatened species.[129]

[129] M. Moore, '"Bold and daring" or undemocratic? Controversial planning law change', Sydney Morning Herald, 27 June 2012, available at http://smh.domain.com.au/real-estate-news/bold-and-daring-or-undemocratic-controversial-planning-law-change-20120627-211uw.html.

6 South Australia

6.1 Overview of threatened species legislation in South Australia

The *National Parks and Wildlife Act 1972* (NPW Act) is one of the key pieces of nature conservation legislation in South Australia. It provides for the protection and management of certain native animals and plants. Other South Australian legislation relevant to threatened species includes: *Native Vegetation Act 1991*, *Wilderness Protection Act 1992* and the *Natural Resources Management Act 2004.*

The major focus of the *National Parks and Wildlife Act* is on protected areas, and the process for listing endangered species is comparatively informal. The *National Parks and Wildlife Act* also protects native animals by classifying them as protected animals, and then placing prohibitions on the taking and killing of protected species without a permit. If the survival of a species is under a particular threat, it may be further classified as endangered, vulnerable or rare. The *National Parks and Wildlife Act* ostensibly protects native plants in a similar way, however such protection only covers plants found in protected areas, not on private land.

6.2 Strengths of the South Australian legislative framework

6.2.1 Minister advised by NPW Council and committees

The administration of the *National Parks and Wildlife Act* is largely within the power of the Minister who is advised by the National Parks and Wildlife Council[130] and any advisory and consultative committees[131] the Minister establishes. Each member of the Council must be a person who, in the opinion of the Minister is committed to the conservation of animals, plants and other natural resources.[132] Further, it is mandatory for some members to have conservation and ecosystem qualifications;[133] whilst this may include biodiversity experience, it must be implied from the legislation as it is not explicit. The purpose of the Council is to advise the Minister as specified in the Act.[134] Once again, there is no specific mention of biodiversity matters and so any protection must be inferred from other terms used such as “the conservation of wildlife”.

While it is a strength to have conservation-focussed advisory committees to provide advice, it is noted that the giving of any ‘advice’ to the Minister on the above topics is only discretionary and as the section indicates, the role of the Council is advisory and so there is no guarantee of direct positive impact on biodiversity matters. This is especially the case when section 19C of the Act is read together with section 18, which states that the Council is under the control and direction of the Minister. This indicates that the Council is not an independent advisor.

[130] Ss.15-19D.
[131] Ss.19E-19O.
[132] S. 15 (5).
[133] S. 15 (4) (a), (b) (which allows for the appointment of a person nominated by Conservation SA. And (d).
[134] S. 19 (c).

6.2.2 Wildlife Conservation Fund

One benefit of the South Australian system is that it includes a mechanism to direct certain funds to wildlife conservation. The Wildlife Conservation Fund comprises money set aside by the government, as well as money from the sale of an animal or carcass of an animal surrendered to the Minister and fees paid for permits (to take etc.).[135] The fund is for "the conservation of wildlife, and land constituting the natural environment or habitat of wildlife, in such manner as the Minister may, upon the recommendation of the South Australian National Parks and Wildlife Council, determine."[136]

6.2.3 Declaration of sanctuaries

In South Australia, sanctuaries can be declared over both freehold and leasehold land.[137] They serve as a useful method for landowners interested in conservation but are not created in perpetuity (that is it is not attached to the title to the land). The undertaking of any management activity and reporting is voluntary.

6.2.4 Public consultation when granting permits to take or sell native plants

Before granting commercial permits to take or sell native plants the Minister must prepare draft recommendations, which must consider the impact on the species and the ecosystem and which allow for public consultation.[138] This allows for some biodiversity protection to be incorporated in these provisions.

6.3 Weaknesses of the South Australian threatened species laws

6.3.1 No objects clause

The *National Parks and Wildlife Act* is deficient as it does not include an objects clause setting out the purpose and intention of the Act. The long title broadly states: "An Act to provide for the establishment and management of reserves for public benefit and enjoyment; to provide for the conservation of wildlife in a natural environment; and for other purposes."

6.3.2 Does not refer to 'biodiversity'

The *National Parks and Wildlife Act* was enacted almost 40 years ago in 1972 and its terminology does not include the language of the Biodiversity Convention (which was adopted to a large extent by the legislators of the EPBC Act*)*. As a result the *National Parks and Wildlife Act* does not include modern terminology such as 'biodiversity'. Nor does it include a definition of biodiversity.

[135] S.11 (2).
[136] S. 11 (3).
[137] S. 44.
[138] S. 49A.

6.3.3 Lack of formal process for listing

As noted, the South Australian legislation lacks any formal process for listing species. For example, there are no requirements for a nomination process, public involvement and review. Because there is no legal requirement for listing, processes are informal and lack timeframes. The Environment Minister simply makes a decision on listing upon receiving advice from the Department of Environment, Water and Natural Resources.

Lists of protected species are in Schedules to the *National Parks and Wildlife Act*. The Governor may, by regulation, amend Schedule 7, 8, 9 or 10 by deleting species of animals or plants from, or including species of animals or plants in, the Schedule.[139]

The Act does not provide for the listing of ecological communities, populations, critical habit or key threatening processes.

In addition, the *National Parks and Wildlife Act* lacks transparency and accountability as it confers a significant amount of decision making power on the Minister for the Environment without detailing the processes and criteria to be used in making critical decisions such as the listing of threatened species.[140]

Currently threatened fish, aquatic invertebrates and non-vascular plants are not specifically listed under the Schedules. Fish are dealt with under separate legislation.

Finally, listing does not create any obligations. For example, there is no requirement to undertake recovery programs or other actions. The only legal implications apart from the 'take' provisions of the Schedules are that listed species are taken into consideration when a clearance application is before the Native Vegetation Council.

6.3.4 Lack of recovery and threat abatement

Important tools such as recovery and threat abatement planning are also absent from the South Australian legislation.

6.3.5 Precautionary principle and climate change

There is no reference to the precautionary principle in the *National Parks and Wildlife Act*. There is also no requirement to consider the impacts of climate change (when listing, for example).

6.3.6 No protection of plants on private land

The South Australian legislation provides no protection for native plants on private land unless the species is prescribed.[141] No species have to date been prescribed under the *National Parks and Wildlife Act.* However, the *Native Vegetation Act 1991* affords protection to native plant species on private land subject to various

[139] S. 80.
[140] S. 80 (2a)
[141] S. 47 (2).

exclusions. This is in contrast to the offence of taking of protected animals and eggs which is an offence with respect to both protected areas and private land.[142]

6.3.7 'Open season' can be declared

The Minister may also declare 'open season'[143] on protected animals. This excludes endangered species, or species within a reserve (other than a game reserve), wilderness zone or wilderness protection area.[144]

6.3.8 Lack of standing provisions

The South Australian legislation is also deficient in terms of procedural safeguards. In particular, there are no standing provisions, and no appeal rights (with respect to granting of permits to take etc).

It should be noted also that the reserves part of the *National Parks and Wildlife Act* is being amended to provide more details on the objectives of reserve planning. Some reserves are in danger of receiving less protection as a result of this process.

6.4 Compliance and enforcement

There are a number of provisions in the *National Parks and Wildlife Act* which provide for criminal penalties. For example, in the case of rare plants penalties range from $10,000 or 2 years jail on a sliding scale down to $2,500 or six months jail, depending on the rarity of the plant involved. The penalties are relatively minimal and therefore unlikely to provide a deterrent. This is particularly inappropriate when it is remembered that these are the provisions which provide the most protection to biodiversity in the *National Parks and Wildlife Act*.

As noted, the *National Parks and Wildlife Act* does not provide for civil penalties.

In terms of enforcement under the Act, the vast majority of matters seem to be dealt with through the range of compliance tools such as public awareness, formal cautions and education, warning letters and expiation notices. The expiation notices amount is just a few hundred for this year and covers a range of breaches of the Act and its regulations. Breaches are managed in conjunction with the Police Expiations Notice Unit. There have been a couple of court cases in relation to marine mammals (section 68 of the Act), for example, persons approaching whales with one offender receiving a $17,000 fine.

[142] S. 51 (1).
[143] Allowing for the taking of protected animals of a specified species.
[144] S. 52.

6.5 Interaction of threatened species with other legislation in South Australia

6.5.1 Interaction with *Native Vegetation Act 1991*

Clearance of native plants on private land is regulated, with various exemptions, through the *Native Vegetation Act 1991.* The *Native Vegetation Act* provides that the Native Vegetation Council must have regard to and make a decision that is not seriously at variance with the principles of clearance.[145] These principles are listed in Schedule 1 of the Act. Schedule 1 states that native vegetation should not be cleared, if, in the opinion of Council:

- It comprises a high level of diversity of plant species; or
- It has significance as a habitat for wildlife; or
- It includes plants or a rare, vulnerable or endangered species; or
- The vegetation comprises the whole, or a part, of a plant community that is rare, vulnerable or endangered; or
- It is significant as a remnant of vegetation in an area which has been extensively cleared; or
- It is growing in, or in association with, a wetland environment.

6.5.2 Interaction with the *Development Act 1993*

EIA in South Australia is conducted under Division 2 of Part 4 of the *Development Act 1993* (SA). There is no specific interaction between the *National Parks and Wildlife Act* and the *Development Act.* The *Development Act* does not include Species Impact Statement (SIS) provisions.

Under the *Development Act*, the South Australian Planning Minister may declare a project 'major development', due to its 'major environmental, social or economic importance'. This takes it out of the normal planning process, and places key decisions in the hands of the Governor (i.e. the Cabinet). It must undergo one of three levels of EIA (and Environmental Impact Statement, a Public Environmental Report, or a Development Report), before the Minister prepares an 'Assessment Report', and the Government makes a decision.[146]

Case study - Kangaroo Island Helicopter Joy Flights

This matter highlights the inadequate connection between listing of threatened species under the National Parks and Wildlife Act and planning matters, in particular the lack of a requirement to prepare species impact statements for certain development proposals. In March 2010 Kangaroo Island Council approved a development to install a helicopter landing pad and associated buildings on land at the south-western end of Kangaroo Island for the purpose of enabling helicopters to tour the coastal region. EDO South Australia's client Eco Action was concerned at the impact on several threatened species including the white bellied sea eagle and the Australian sea-lion, which are listed under both state and federal laws. The white-bellied sea eagle is listed as endangered and the Australian sea lion as vulnerable under the National Parks and Wildlife Act. The Kangaroo Island Council approval included four conditions which only related to the construction of

[145] S. 29.
[146] For more, see the entry in the South Australian Law Handbook, available here.

infrastructure on the ground and not the impacts of the helicopter flights on threatened species (which received very little mention in either the developer's proposal or the Council's planner's report). The conditions did not cover flight pathways, the number of flights per day, the time of the flights, the level of noise allowed to be emitted from the helicopter and the impact on the human and natural environment. The Council merely made a note in its approval drawing the attention of the developer to the airspace protocols of the National Parks and Wildlife Act and the penalties under that Act for damage to fauna or environments that may result from contravention of these protocols. The decision was appealed to the South Australian Environment, Resources and Development Court but was later withdrawn.

Case study - Little Blue Penguins

Lipson Cove on Lipson Island in the Spencer Gulf is one of the few breeding sites for Little Penguins known to be stable, while others elsewhere have experienced dramatic declines. The Island is known as a "biodiversity hotspot" and besides Little Penguins is a breeding ground for a number of conservation significant species including the hooded plover, red-necked stint, grey plover, sanderling, white bellied sea eagle, eastern osprey and fairy tern. Just 1 km away from Lipson Island a desalination plant and deep water port (principally for the export of iron ore) has been proposed. The Port site, Port Spencer, is located approximately 210 km north west of Adelaide. The developer Centrex claims that the project will facilitate the growth of Eyre Peninsula as a mining hub. The proposal has been declared a major project under the SA Development Act and is undergoing environmental impact assessment by way of a public environmental report, which is not as detailed as a full Environmental Impact Statement (EIS) assessment. The proposal has also been referred to the Federal Environment Minister for assessment and approval under the EPBC Act, and is being assessed on preliminary documents. State and Federal decisions are pending.

EIAs are therefore not mandatory under the *Development Act*. Rather, the Development Assessment Commission determines the level of environmental impact assessment to be undertaken for any proposed development or project of major environmental, social or economic importance (major development).[147] Crown development and electricity infrastructure development are not required to undergo environmental assessment unless directed by the Minister.[148] Where the Minister makes such a direction, the development cannot go ahead without the Governor's approval.[149] Decisions regarding major development are protected from judicial and merits review.[150] Further, the Minister's decision regarding Crown development or electricity infrastructure development cannot be appealed.

The South Australia EIA process is deficient in several respects:

- There is no opportunity to review any aspect of this process in the courts.
- The Minister has a high degree of discretion to declare a 'major development'.
- The Governor's decision is also relatively unconstrained by legal criteria.
- There are limited rights to public input into the decision-making process.

[147] S. 46 (7), (8).
[148] S. 49, 49A.
[149] Ss. 49 (16a), 49A (20). The Governor may issue their approval under s. 48.
[150] S. 48E.

Other relevant South Australian legislation includes:

- The *Fisheries Management Act 2007* which has provisions protecting certain aquatic species (Part 7)
- *Environment Protection Act 1993* (primarily in its objects)
- *Mining Act 1971*- before granting of exploration licences/leases Minister must consider endangered flora and fauna (similarly with licences under the Petroleum and Geothermal Energy Act 2000)

There is generally poor connection between the primary pieces of legislation protecting biodiversity in South Australia.

7 Western Australia

7.1 Overview of threatened species legislation in Western Australia

There is no specific recent legislation dedicated to protecting biodiversity in Western Australia (WA).

The outdated ***Wildlife Conservation Act 1950*** (WA) (WC Act) provides a very basic level of protection to plants and animals in WA. Currently all native species of plants and animals are listed as "protected" under the WC Act, and there are controls on the direct killing or taking of "protected" flora and fauna. However, the Act does not regulate the most common types of activities which are likely to have a significant impact on plants and animals, such as development resulting in the clearing or alteration of habitat, land use change, the pollution of waterways or reduction of groundwater availability. Nor does it not distinguish in a meaningful way between threatened and non-threatened species. Therefore, the WC Act does not constitute a coherent scheme for the protection of biodiversity.

Under the WC Act, a licence is required to take native flora on Crown land, while native flora on private land may be taken with the permission of the landowner.[151] It is a defence to any of these provisions if the person taking the action is acting pursuant to an authorisation under another Act.[152] Therefore, anyone who obtains development consent, a clearing permit or other authorisation which entails destruction of flora is exempt from these provisions.

The killing of any native species of animal is an offence under the Act, unless a permit is obtained, or the species is declared exempt.[153]

The Act provides for the listing of rare flora and fauna. In relation to flora, the consequence of listing is that permission from the Minister for Environment is required to take declared rare flora regardless of whether it is on private or public land.[154] In relation to fauna, the only consequence of listing is that there are higher penalties for taking.[155]

This Act is administered by the Department of Environment and Conservation (DEC).

7.2 Key strengths of the legislative framework in Western Australia

Some key strengths of the legislative framework in Western Australia include:

- All native animals and plants are covered by the WC Act;
- Significant proposals are considered by an independent Environmental Protection Authority;
- Biodiversity impacts are considered in the process of granting permits to clear native vegetation; and
- Appeal rights exist in relation to EPA reports on significant proposals, and decisions by DEC to grant clearing permits.

[151] WC Act s 23B and s 23D.
[152] WC Act s 23B(2) and s 23D(1a).
[153] WC Act s 16.
[154] WC Act s 23F.
[155] WC Act s 14(4).

7.3 Key weaknesses of the legislative framework in Western Australia

7.3.1 No integrated scheme or mandate to ensure biodiversity protection

The most serious weakness of the WA system is the lack of a single coherent scheme for biodiversity protection. Biodiversity values may be protected indirectly under the WC Act, or parts of the *Environment Protection Act* 1986 (EP Act), but each of these schemes operates in isolation from and with no reference to the other, with no overarching objectives for biodiversity conservation.

While DEC does, in practice, carry out threatened species listing and recovery planning in WA, it lacks any statutory mandate to do so and therefore has practically no powers to take action as a consequence of listing and recovery planning. The principal application of DEC threatened species recovery planning is in management of DEC reserves and unallocated crown land, and planning for the acquisition of new reserves. These plans are not a mandatory relevant consideration, and have little, if any, impact on decision-making in relation to the grant of WC permits, private development, general land use planning or clearing on private land. Therefore, DEC is forced to manage biodiversity based on an outdated and expensive model of locking up land in reserves, rather than through a combination of reservation and controls on private land-use development as occurs in other jurisdictions.

Since recovery planning is discretionary, it cannot be compelled. The WA Auditor-General reported in 2009 that 'one in five threatened fauna and less than half of threatened flora have a recovery plan, while full implementation of the plans that are in place often does not occur'.[156] As at 2009 there were 601 listed species listed as threatened with extinction in the WA, the number was reported to be steadily increasing, demonstrating a failure to effectively prevent the decline of threatened species.[157]

7.3.2 No recognition of threatened species habitat or endangered ecological communities

The current statutory scheme does not make any provision for the systematic protection of threatened species habitat or the listing or protection of endangered ecological communities.

7.3.3 Non-binding listing process

The listing process under the WC Act does not require species to be nominated or reviewed by a committee which advises the Minister. In practice, Minister currently does seek advice from the Threatened Species Scientific Committee before publishing threatened species lists, but he could elect not to do so.

A hierarchy of threatened species categories is recognised internally in the Western Australian Department of Environment and Conservation (DEC) but is not recognised in the statutory framework.

No emergency listing provisions apply to species in Western Australia. This means that no action is available to government to safeguard species which may be unforeseeably subject to mass extinction. Situations where this may apply include mass mining projects or natural disasters.

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[156] http://www.audit.wa.gov.au/reports/pdfreports/report2009_05.pdf
[157] http://www.audit.wa.gov.au/reports/pdfreports/report2009_05.pdf

7.3.4 Insufficient accountability mechanisms

The WC Act and EP Act do not provide third party standing to review and challenge administrative decision-making and to uphold the provisions of the Act that can be enforced. At present, DEC is the only body able to take action for offences committed under the WC Act.[158]

Currently, there are no reporting requirements or performance measures under the WC Act to provide information on the conservation status of species and communities.

7.4 Compliance and enforcement in Western Australia

In 2011-12, there were 9 prosecutions under the *Wildlife Conservation Act* (WC Act) with 24 matters pending.[159] A further 552 infringement notices and 435 cautions were also issued in this period.[160] The Environmental Enforcement Unit initiated 21 prosecutions, 6 of which are subject to final determinations and 15 remain before the courts.[161]

The DEC received 544 applications to clear native vegetation and made 492 decisions in 2011-12. Overall over 18 413 hectares were approved to be cleared, with 39 hectares refused.

In *Simpson v Department of Environment and Conservation (WA)*,[162] a man was fined $2000 for taking various reptiles contrary to s 16A(1) of the WC Act. These reptiles included protected species such as the Pygmy Python, Blue Tongue Lizard, Death Adder and Stimson Pythons. A subsequent appeal to the WA Supreme Court was rejected for no reasonable prospect of succeeding under s 9(2) of the *Criminal Appeals Act 2004* (WA).

In terms of examining the enforceability of provisions set out in the WC Act, the number of infringement notices compared to subsequent litigation suggests that a majority of infringements are simply paid out by offenders. Currently the WA DEC is statutorily bound when issuing modified penalty notices (for first time offenders) of a penalty no greater than 10% of the maximum possible penalty.[163]

We also note that all environmental offences in WA are dealt with in the local courts which do not publish their judgements, therefore reasons for decisions only appear online when there is an appeal to a higher court (as in the Simpson case).

7.5 Interaction of threatened species and planning laws in WA

7.5.1 Main EIA Law

[158] WC Act s 26.
[159] Department of Environment and Conservation, *2011-12 Annual Report* (Government of Western Australia, 2012) 20.
[160] Ibid.
[161] Ibid, 4. Please note that the EEU enforced provisions from a range of Acts, not just the WC Act.
[162] See *Simpson v Department of Environment and Conservation (WA)*[2011] WASC 206.
[163] Note only one modified notice was issued in 2011-12 to the Geraldton Port Authority for exceeding concentrations for lead emissions. The subsequent fine was $12,500. See *Environmental Protection Act 1986* (WA), s 99B.

Under Part IV of the *Environmental Protection Act 1986* proposals and changes to planning instruments which are likely to have a significant impact on the environment may undergo environmental assessment.[164] Typically only large, high-impact proposals and planning instruments in very sensitive areas are assessed under this scheme. This process is administered by the Environmental Protection Authority (the EPA), with input from DEC. The final approval authority is the Minister for Environment.[165]

There is no legislative requirement for threatened species impacts or threatened species recovery plans to be taken into consideration in relation to the assessment of significant proposals or amendments to planning schemes. Nor is there a legal requirement for proposals affecting threatened species to be assessed to a particular standard. In practice, DEC usually is consulted about the likely impacts of the proposal on rare or threatened species of flora and fauna. However with no legislative framework to guide threatened species, this process is entirely discretionary and ad-hoc, and there is nothing to prevent the government from ignoring threatened species impacts in the face of developments of economic importance.

Under Part V of the EP Act, a permit from the Director-General of DEC is required for the clearing of native vegetation, unless subject to an exemption.[166] One of the factors which DEC must consider when deciding whether or not to grant a permit is whether the clearing is proposed for area of high biodiversity, and its value as habitat for fauna, or declared rare flora.[167]

The EIA process in WA has some strengths including:

- The independent EPA plays a significant role and focusses on just environmental issues.
- Any person may appeal a number of the EPA's decisions to the Minister.
- Third parties may apply for judicial review of the Minister's decision.

Its weaknesses are:

- The EIA law only applies to major projects with big environmental impacts (unlike for example, NSW, where most developments receive some sort of EIA).
- Merits review is not available for any of the Minister's decisions.
- The EIA system struggles to integrate with other environmental laws and policies, like threatened species recovery plans (partly because WA has no threatened species law).

There is currently no major projects legislation in WA and no plans to reform EIA laws in WA. (The Labor Government has indicated it would introduce new biodiversity legislation if re-elected, and a Greens Bill to reform the NCA has not been supported in parliament to date).

[164] EP Act s 38.
[165] EP Act s 45.
[166] EP Act s 51C.
[167] EP Act s 51O and Sch 5.

8 Queensland

8.1 Overview of threatened species legislation in Queensland

The *Nature Conservation Act 1992 (Qld)* **(NC Act)** establishes a framework for creation and management of protected areas, for example national parks, and protection and management of native flora and fauna. Under the Act there are 13 classes of protected area.[168]

National Parks offer the highest level of protection with a prohibition on mining or greenhouse gas storage activates in the National Park. Before the protected area status can be revoked, the decision must go through State Parliament. Administration of the Act is now split between 3 departments: the Department of National Parks, Recreation, Sport and Racing (**NPRSR**), the Department of Environment and Heritage Protection (**EHP**) and the Department of Agriculture, Fisheries and Forestry (**DAFF**). NPRSR now deals with all protected areas (except nature refuges) and EHP deals with nature refuges and protected wildlife.

As a general rule, all native fauna is "protected wildlife" and cannot be killed or harmed unless requirements of section 88 of the Act are met. There are three categories of wildlife, namely protected, international and prohibited wildlife. The category of protected wildlife is further divided into 5 classes. Native plants have a more complicated system.

As of August 2011, 1372 species were listed as 'near threatened', 'vulnerable', 'endangered' or 'extinct in the wild' in Queensland under the Nature Conservation (Wildlife) Regulation 2006 (i.e. threatened species). In 2007, 1449 species were listed as 'rare', 'vulnerable', 'endangered' and 'extinct in the wild'. The discontinuation of the 'rare' category since the 2007 reporting period and the introduction of the 'near threatened' category make comparison between the reporting periods challenging.[169]

Under the NC Act, a threatening process is one that is capable of threatening the survival of any protected area or protected wildlife or affecting the capacity of the area of wildlife to sustain natural processes.

The Minister is able to prepare an Interim Conservation Order which can prohibit or control a specified threatening process, if the Minister is of the opinion that threatened, rare or near threatened wildlife, declared critical habitat, declared areas of major interest or protected areas are subject to a threatening process.

The NC Act allows for Conservation Plans to be developed for any native wildlife, class of wildlife, native wildlife habitat or area of interest. Currently there are Conservation Plans for koalas, Dugong, crocodiles, macropods, whales and dolphins and protected plants.

[168] Under the Act there are 13 classes of protected area: national parks (scientific); national parks; national parks (Aboriginal land); national parks (Torres Strait Islander land); national parks (Cape York Peninsula Aboriginal land); national parks (recovery); conservation parks; resources reserves; nature refuges; coordinated conservation areas; wilderness areas; World Heritage management areas; international agreement areas. These classes are set out in the NC Act from areas of highest protection to areas of lowest protection.

[169] Queensland *State of the Environment Report* 2011.

8.2 Strengths of Queensland laws

Some strengths of the Queensland framework include:

- There have been some recent changes to better align species lists with IUCN criteria.
- The Queensland 'Back on Track' process was designed in part to short-circuit the bureaucratic inertia and get regional prioritisation of species.[170]
- In 2011 the Queensland State ALP government introduced a Biodiversity Strategy that was intended to be comprehensive and is still on the State government website.[171]
- The NC Act contains community enforcement rights.

8.3 Weaknesses of Queensland laws

Some weaknesses of the Queensland framework include:

- Listing processes are not as transparent as some other jurisdictions.
- Committee members are not independent.
- The Nature Conservation Regulations were changed in 2012 so as to allow damage mitigation permits to be issued for shooting of flying fox.[172]
- The existing range of protected areas may be condensed to just three which will place pressure on existing parks to accommodate a wider range of uses.[173] Some potential uses are not consistent with protecting natural values.
- The staffing cuts by the Queensland State government affected the number of public servants working on biodiversity protection.
- There are very few conservation plans compared to the number of threatened species listed in the Queensland State of the Environment Report 2011.
- Queensland has a low percentage of land in national parks (4.77%) and total protected areas (6.8%) compared to other States.[174]

[170] See: http://www.ehp.qld.gov.au/wildlife/prioritisation-framework/biodiversity_action_plans.html
[171] See: http://www.ehp.qld.gov.au/ecosystems/biodiversity/biodiversity-strategy.html
[172] Bosworth, the respondent in the Booth v Bosworth case says he is seeking a permit to shoot flying fox. http://www.townsvillebulletin.com.au/article/2012/11/24/370663_news.html
[173] Paul Donatiu of Queensland National Parks Association in Spinifex December 2012 p8.
[174] See page 3 Annual Report 2011/12 NPAQ

8.4 Compliance and enforcement in Queensland

All protected areas are protected by the NC Act from unlawful interference with their natural or cultural values. Native species are protected by this NC Act from unlawful "taking" (which includes killing, injury or harm, but not by habitat loss), "keeping" or "using". The NC Act contains community enforcement rights. These enable any member of the public to go to the Planning and Environment Court to seek a remedy against breaches of that Act. The general rule is that each side pays his or her own costs regardless of the outcome, unless the Court considers the case is vexatious.

Dr Carol Booth was the first person to use those community enforcement rights. After the Queensland EPA (now the Department of Environment and Heritage Protection) failed to prosecute lychee farmers, Dr Booth obtained orders in two Planning and Environment Court cases that lychee farmers dismantle electric grids used to kill or harm flying foxes. The Court held that the lychee farmers were in breach of s88 of the Act "Taking Protected Animal etc" and the farmers could not prove the defence under that section. A defence to unlawful taking is that it happened in the course of an otherwise lawful activity which was not directed towards the taking and which taking could not have been "reasonably avoided".

Unfortunately the Queensland government has changed the costs rules in the Parliament that make it harder for community groups or individuals like Dr Carol Booth to use the courts to enforce the law to protect biodiversity if government fails to act.[175]

8.5 Interaction of threatened species and planning laws in Queensland

The current South East Queensland (SEQ) Regional Plan[176] made under the Sustainable Planning Act 2009 does not provide strong protection for biodiversity. It does not strongly protect off reserve areas of biodiversity, and for example, there are no maps with wildlife corridors that must not be developed or strong provisions protecting areas of off reserve biodiversity. The main tool meant to protect biodiversity and to stop urban sprawl is by designating an urban footprint and restricting areas outside that foot print from urban development. However the State regulatory provisions restricting urban development outside the urban footprint have been repealed for FNQ Regional Plan and are under reconsideration for the SEQ Regional Plan.

Case study – Koala protection under state planning laws

South East Queensland has had various State Planning Policies to protect koalas and criteria by which development in koala habitat is assessed, yet koala habitat has continued to be cleared for residential development. In late 2007 the State of the Environment Report announced that koala numbers had fallen below their ecologically viable population levels for the region of 5000 animals. Conservation Plans – such as the *Nature Conservation (Koala) Conservation Plan and Management Program 2006-2016* – can overrule planning schemes but this incurs compensation payments to landholders. The current decision-making criteria therefore tends to allow the majority of development to proceed.

In 2008, surveys of the Koala Coast in South East Queensland found the koala population had declined by 50 per cent since the 2005–06 surveys (from an estimated 4600 animals to an estimated 2300 animals). In 2010,

[175] *Sustainable Planning and Other Legislation Amendment Bill 2012 (Qld).*
[176] See: http://www.dsdip.qld.gov.au/resources/plan/seq/regional-plan-2009/seq-regional-plan-2009.pdf - natural environment p47.

population estimates indicated a decline of 13 per cent since the 2008 surveys (to an estimated 2000 koalas). The decline between these two years was not statistically significant, however it should be noted that the long-term downward trend since the 1996–1999 survey is still statistically significant, demonstrating a 68 per cent decline between 1996–1999 and the latest (2010) survey. Further surveys will be required to determine whether the overall trend continues downward or whether there is a levelling off in the decline.

Outside of South East Qld, koala habitat is not protected. Developers are obliged to use spotters and catchers to remove koalas before clearing trees for approved development. Within South East Qld, koalas are vulnerable to extinction. Two key state laws give qualified protection to the best-of-the-best urban koala habitat: the *2/10 Koala Conservation State Planning Policy* (**SPP**) and the *SEQ Koala Conservation State Planning Regulatory Provisions* (**SPRP**), supported by policies on offsets and government-supported infrastructure.

The SPP requires that when certain Council planning schemes are amended, plus when new structure plans and new community infrastructure designations are made, that they deliver a net gain in mature koala habitat by 2020. However this is mostly by requiring offsets for clearing (and koala-friendly design), rather than stopping clearing of important urban koala habitat. The SPP only applies in seven Council areas: Sunshine Coast, Moreton Bay, Brisbane, Ipswich, Logan, Redland and the Gold Coast. The SPRP are applied in certain mapped areas by those seven Councils when assessing development applications, which must comply with the SPRP. The SPRP protects a small proportion of mapped areas from certain clearing, but otherwise only requires koala-friendly design and offsets to be imposed. Many exemptions apply.

The Koala Offsets Policy requires mature koala trees removed are replanted with suitable juvenile species at a 5:1 ratio in the same Council area, in areas mapped as appropriate for rehabilitation. It is feared that it will be too late for SEQ koalas by the time koala habitat offsets mature.

It is noted that previous laws and policies did not effectively stop decline in koala numbers, and the new government has put some funds towards purchasing habitat.[177] Furthermore, the koala was listed under the EPBC Act, effective 2 May 2012.

8.5.1 Main EIA Law

There are three laws in Queensland under which EIA can be required: the *Sustainable Planning Act 2009* (Qld) (**SPA**), the *Environmental Protection Act 1994* (Qld) (**EP Act**), and the *State Development and Public Works Organisation Act 1971* (Qld) (**SDPWO Act**). Each is approved under the current Qld EPBC assessment bilateral.

A development may fall under:

- the SDPWO Act, if the Coordinator-General declares it a 'significant project';
- the EP Act, if it is a mining activity or an other 'environmentally relevant activity';
- the SPA, in any other case where development approval is required under that Act.

[177] See: http://www.ehp.qld.gov.au/wildlife/koalas/strategy/koala-habitat-programs.html.

The majority of EIA conducted in Queensland falls under the SDPWO Act. The SDPWO Act is the major projects legislation for Queensland. Most EISs are prepared under this and it is overall a problematic system and not one that results in good environmental outcomes. The Coordinator-General (CG) is responsible for encouraging development, and for making environmental assessment decisions under the Act, creating a problematic conflict of interest. The breadth of the CG's discretion and the removal of statutory judicial review rights also makes it hard to challenge his or her decisions in court. The SDPWO Act means that certain other approvals, such as environmental authorities issued by DERM, must not be inconsistent with the Coordinator General's conditions.

The next most used EIA process is under the EP Act. The Department of Environment and Resource Management coordinates EIA under this regime, and the approval decision is made by the Chief Executive. Objectors to mining activities and certain submitters to petroleum and gas activities may object or appeal on the merits to the Land Court.

The EIA laws in Queensland are problematic because:

- most projects receive EIA under the major projects legislation, the SDPWO Act;
- that regime gives the Coordinator-General significant discretion, despite conflicting roles;
- even projects with serious adverse environmental impacts are routinely approved;
- the developer pays the consultants who prepare the EIA which can bias the consultant to minimise reporting of the environmental impacts of the development .

8.5.2 Ongoing Reform

There is currently no reform process for EIA laws in Queensland.[178] However it is noted that there are changes State Planning Policies and to Regional Plans that will make development easier and thus adversely impact biodiversity. For example, the concept of Department of State Development becoming a single state referral agency and the concept of a single state planning policy means that EHP loses its concurrence powers on coastal issues.[179] A temporary State Planning Policy Planning for Prosperity 2/12[180] was introduced that gives priority to economic development over other elements of ESD.

[178] Note the *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Bill 2011* was introduced in the last Parliament, and lapsed when it dissolved, but could be re-introduced by the current Government.
[179] See: http://www.parliament.qld.gov.au/documents/committees/SDIIC/2012/05-Sustainable-Planning/submissions/033-EnvironmentalDefendersOfficeQLD-SupplementarySubmission.pdf
[180] See: http://www.dsdip.qld.gov.au/resources/policy/state-planning/temporary-state-planning-policy-2-12.pdf

9 Tasmania

9.1 Overview of threatened species legislation in Tasmania

9.1.1 Threatened flora and fauna

The principal piece of legislation relating to the management of threatened species in Tasmania is the *Threatened Species Protection Act 1995* (the ***TSPA***). Under the TSPA, species may be declared in the following categories, according to the nature of the threat to their survival:

- **Endangered:** extinct or in danger of extinction (Schedule 3)
- **Vulnerable:** likely to become endangered (Schedule 4)
- **Rare:** small population that is not immediately vulnerable but is still at risk (Schedule 5)

Guidelines have been published outlining criteria for each of these classifications.[181]

The TSPA is implemented on a day to day basis by the Policy and Conservation Assessment Branch of the Department of Primary Industries, Parks, Water and Environment (**DPIPWE**). A number of key decisions remain the responsibility of either the Secretary or the Minister.

Under the TSPA, the government is required to develop and implement the *Tasmanian Threatened Species Strategy*[182], to identify critical habitats and to prepare listing statements, recovery plans and threat abatement plans for listed species.[183]

DPIPWE also has powers to negotiate land management plans and agreements with landowners (including public authorities), and is required to do so in relation to any critical habitat.[184] Landowners and others who are financially affected by decisions restricting the use of land may apply to the Minister for compensation. The Minister may make an interim protection order to conserve habitat or protect a listed species on private or Crown land.[185] The interim protection order will expire after a short period (30 days for private land, 65 days for Crown land), however until its expiry the order will prevail over other permits and planning scheme provisions.

It is generally an offence to knowingly:

- take, keep, trade in or process any listed species; or
- disturb any listed species found on land subject to an interim protection order; or
- disturb any listed species contrary to a land management agreement; or
- disturb any listed species subject to a conservation covenant[186]; or
- abandon or release any listed species into the wild.[187]

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[181] DPIPWE. 2008. *Guidelines for Eligibility for Listing Under the Threatened Species Protection Act 1995*. www.dpipwe.tas.gov.au/inter.nsf/Attachments/LBUN-59X7G2/$FILE/Threatspeciesguidelines.pdf
[182] Section 10, *Threatened Species Protection Act 1995*
[183] Sections 22-27, *Threatened Species Protection Act 1995*
[184] Sections 29-31, *Threatened Species Protection Act 1995*
[185] Part 4, *Threatened Species Protection Act 1995*
[186] Conservation covenants may be entered into under Part 5 of the *Nature Conservation Act 2002*.

However, such activities will not be an offence if they are authorised by a permit issued under the TSPA, a certified forest practices plan or a dam works permit.

Offences are punishable by a fine of up to 100 penalty points (currently $13,000). If convicted, an offender may also be required to forfeit species, equipment and any permits issued under the TSPA. An offender may also be required to carry out restoration work where the offence involved damage to a threatened species or critical habitat.[188]

9.1.2 Threatened native vegetation communities

Threatened native vegetation communities are listed in Schedule 3A of the *Nature Conservation Act 2002*. The list is not categorised by threatened status, however the listing guidelines (discussed below) advise that vegetation communities must meet one of the following criteria:

- **Endangered:** 90% of original area cleared
- **Vulnerable:** 70% of original area cleared
- **Rare:** total range of less than 1,000 hectares

Threatened native vegetation communities are managed principally through the *Forest Practices Act 1985,* administered by the Forest Practices Authority. A forest practices plan is generally required for any clearing and conversion of a threatened native vegetation community.[189] However, a range of exemptions apply and clearing associated with a planning permit is assessed by the local planning authority only (discussed below). Conversion is defined to include leaving land unvegetated or replacing the threatened native vegetation community with another other vegetation, agricultural works or residential, commercial or industrial uses.
The Forest Practices Authority is not to certify a forest practices plan for the clearance and conversion of a threatened native vegetation community unless:

- the clearance and conversion is justified by exceptional circumstances;
- the activities authorised by the forest practices plan are likely to have an overall environmental benefit; or
- the clearance and conversion is unlikely to detract substantially from
  - the conservation of the threatened native vegetation community; or
  - conservation values in the vicinity of the threatened native vegetation community.[190]

If an application for a forest practices plan is refused, or amended, on the basis of the need to protect a threatened species or native vegetation community, compensation may be available to the affected owner.[191]

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[187] Section 51(1), *Threatened Species Protection Act 1995*. Activities conducted in breach of an interim protection order are also punishable under s.36.
[188] Section 54, *Threatened Species Protection Act 1995*
[189] Section 17(4), *Forest Practices Act 1985*
[190] Section 19(1AA), *Forest Practices Act 1985*
[191] Part 5, Division 4, *Nature Conservation Act 2002*. An affected owner may be required to enter into a conservation covenant in return for the compensation.

It is an offence to clear and convert a threatened native vegetation community without a forest practices plan, or in contravention of the conditions of a forest practices plan. Offences are punishable by a fine of up to $130,000.

9.1.3 Listing processes

Any threatened flora or fauna species may be recommended for listing, delisting or change of status by the Scientific Advisory Committee (***SAC***). The SAC may of its own motion, or from regular review, make a recommendation to the Minister that a species be included in, or removed from, the threatened species list. In addition to the SAC, any person may nominate flora or fauna which they consider should be added to or removed from the threatened species list, or have its threatened status altered. The SAC is required to invite public comments on the nomination and consider all comments received in making a recommendation to the Minister.

The Minister is to have regard to the SAC recommendation before making an order including the species, removing the species or amending the listing for the species.[192]

Where the amendment to the threatened species list has been initiated by the SAC, any person can appeal to the Resource Management and Planning Appeal Tribunal to challenge the Minister's decision in relation to the species.[193] There is no right of appeal against a decision in relation to a public nomination[194], but an "aggrieved person" may seek judicial review of the decision.

For threatened native vegetation communities, the Minister is able to amend the list in Schedule 3 by an order.[195] There is no legislated process for considering listing / delisting proposals, however DPIPWE has published guidelines[196] that require proposals to be considered by:

- a scientific review group (comprised of three government scientists and one independent scientist);
- a community reference group (comprised of an economist, a member of the scientific review group and representatives of stakeholder groups such as the Tasmanian Farmers and Graziers Association, Local Government Association and the Forest Industries Association)
- an affected Agency group (comprised of relevant government agencies, if required)

Advice from these groups will be considered by the Minister in making his/her decision regarding listing / delisting. There is no right of appeal against a decision, however the decision can be subject to judicial review.

9.2 Strengths of the Tasmanian regime

The level of public consultation in relation to listing decisions for both threatened species and threatened vegetation communities in Tasmania is commendable. Ideally, rights of appeal would also be extended to decisions made in relation to public nominations, rather than being limited to listing / delisting decisions initiated by the Scientific Advisory Committee.

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[192] Sections 13 and 21, *Threatened Species Protection Act 1995*
[193] Sections 13(5) and 14, Threatened Species Protection Act 1995
[194] Llewellyn v Resource Management and Planning Appeal Tribunal [2007] TASSC 21
[195] Section 76A, Nature Conservation Act 2002
[196] DPIPWE. 2012. Process for Listing Threatened Native Vegetation Communities. Available at www.dpipwe.tas.gov.au

Following criticism from the Auditor-General in 2009 regarding the lack of information publically available, DPIPWE has made significant advances in the preparation of listing statements and habitat mapping. The Threatened Species Link website[197] was launched in September 2012, providing an easy-to-use portal for information relating to threatened species, likely habitat and assessment requirements.

While penalty provisions under the TSPA are lower than those imposed under the *Forest Practices Act 1985*, both Acts provide options to require rehabilitation of damaged habitat areas.

9.3 Weaknesses of the Tasmanian regime

The principal weakness relating to threatened species management in Tasmania remains lack of information, monitoring and enforcement. The *Tasmanian Threatened Species Strategy 2000* is outdated, however funding has yet to be allocated to facilitate a review.

In 2009, the Auditor-General released a report[198] critiquing DPIPWE's implementation of the TSPA. Significantly, the report found that:

- No comprehensive listing of the important habitats of threatened species had been prepared;
- Only 18% of the 674 listed species had a complete listing statement;
- Recovery plans were prepared for only 20% of listed species, and the effectiveness of existing recovery plans was rarely assessed.
- Monitoring was ad hoc, with only 16% of threatened wildlife species regularly monitored, no clear guidelines for any monitoring programmes and no systematic monitoring of habitat loss.
- The organisational structure within DPIPWE "did not encourage a strategic approach to management of threatened species."

Since that report, efforts have been made to prioritise listing statements, with a further 187 statements finalised. However a significant number of listed species are still not covered by a comprehensive listing statement or a recovery plan. Scheduled reviews of significant recovery plans (such as the plan for threatened eagle species or the endangered 40-spotted pardalote) also remain outstanding.

No critical habitats have been listed in Tasmania, and no land management agreements have been entered into in respect of private land. While there is a requirement to develop a land management plan for critical habitat, there is no requirement to enter into a land management agreement which would allow enforcement of the plan against current or future landowners.

Land use planning and resource management decisions are currently made without consistent consideration of impacts on threatened species. As discussed below, assessments in relation to land use and development that is likely to impact on threatened species are often the responsibility of planning authorities. DPIPWE is currently developing planning and decision-making tools to incorporate threatened species information more effectively throughout Tasmania, but there are currently no statewide planning scheme provisions to guide these assessments. Most of Tasmania's 30 planning authorities lack the resources and expertise to undertake rigorous assessments. Planning authorities may, but are not required to, consult the Policy and Conservation Assessment Branch within DPIPWE. However, even where they are consulted, PCAB will

[197] http://www.threatenedspecieslink.tas.gov.au/

[198] Auditor-General. 2009. Special Report 78: Management of Threatened Species. Available at www.audit.tas.gov.au/publications/reports/specialreport/pdfs/specialreport78.pdf

generally make recommendations based on desktop assessments rather than inspecting the development site.

The offence provisions in the TSPA are very narrow. Unless land is subject to a conservation covenant, land management agreement or interim protection order, disturbance of habitat is not an offence. Instead, it is necessary to prove that a threatened species was actually "taken" as a result of an activity. Furthermore, all offences require the taking or disturbance to have been done "knowingly".

Penalties under the TSPA remain very low (maximum fine of $13,000), and do not provide sufficient deterrent against damage to threatened species or habitat. Section 47D of the *Forest Practices Act 1985* allows the Forest Practices Authority to authorise the salvage of illegally cleared threatened native vegetation communities, again failing to provide an adequate disincentive against unlawful clearing.

The lack of active involvement by DPIPWE in the assessment and monitoring of forest practices or dam works in relation to threatened species impacts make it difficult for DPIPWE to monitor statewide habitat loss, the effectiveness of management prescriptions of achievement of recovery plan objectives. The limited appeal rights in relation to decisions regarding forestry or dam works further limit the level of oversight by the community.

9.4 Compliance and enforcement

To date, there have been no prosecutions under the TSPA and no interim protection order declarations.

Case study – Departmental staff and resourcing

The PCAB unit responsible for threatened species monitoring in Tasmania comprises only two staff, while the Wildlife Management Branch employs four staff, two of whom are dedicated to the Save the Devil project. This level of staffing makes it incredibly difficult to undertake compliance monitoring or enforcement activities.

Prosecutions and other enforcement activities do occur under the *Forest Practices Act 1985,* but enforcement is rare and penalties remain low. For example, in 2010-2011, a landowner was fined only $3,000 for unlawfully clearing 3 hectares of forest including a threatened native vegetation community and diverting a stream that provided habitat for a threatened crayfish species.[199]

9.5 Interaction with other resource management and planning laws

Activities that are authorised under a forest practices plan under the *Forest Practices Act 1985* or a dam permit under the *Water Management Act 1999* do not require a permit under the TSPA. In theory, this is because threatened species issues have been addressed in the assessment process in relation to each of those activities.

Any land that is "inhabited by threatened species" is vulnerable land for the purposes of the *Forest Practices Act 1985* and a forest practices plan will generally be required for any volume of clearing (subject to

[199] Forest Practices Authority, Annual Report 2010-2011. Available at www.fpa.tas.gov.au

standard exemptions in relation to emergency clearing, clearing for infrastructure etc). Pursuant to agreed procedures between the Forest Practices Authority and DPIPWE[200], forest practices officers will impose standard management prescriptions on forest practices plans where threatened species are likely to be present (for example, standard buffer distances around active eagle nests) and will consult with FPA specialists "as required". The planning tools on which these prescriptions are based are in need of review.[201]

Since 2009, forest practices plans have *not* been required for clearing associated with building and development approved by a planning authority. As outlined above, many planning authorities lack sufficient authority under their planning scheme, resources and expertise to conduct rigour assessments of threatened species impacts associated with vegetation clearing. Many planning schemes do not include a power to request further information regarding threatened species impacts or a power to refuse a development or impose conditions on the basis of such impacts. However, unlike decisions in relation to forest practices plans, decisions in relation to planning permits may be subject to merits review in the Tasmanian Resource Management and Planning Appeal Tribunal.

Applications for dam permits are assessed by the Assessment Committee for Dam Construction (**ACDC**).[202] The ACDC must consider protection and conservation of natural values, and have regard to any public comments received, when assessing an application. An "interested person" may appeal against a decision by the ACDC only on grounds that the assessment process was flawed or unfair, and cannot appeal on the grounds that a scientific finding (for example, regarding the extent of affected threatened species habitat) was incorrect.[203]

All mining activities remain subject to the *Threatened Species Protection Act 1995* and would require a permit authorising any taking of listed species.

9.5.1 Main EIA Law

There are five ways that a project can undergo EIA in Tasmania:

- For a 'level 1' project, under the *Land Use Planning and Approvals Act 1993* (Tas), under a planning process similar to those in other jurisdictions.
- For a project declared to be a 'project of regional significance' under the *Land Use Planning and Approvals Act 1993* (Tas), and EIA is conducted by the Environment Protection Authority (**EPA**).
- For a 'level 2' project, listed under the *Environmental Management and Pollution Control Act 1994* (Tas) (**EMPC Act**) or 'called in' by the EPA.
- For a 'level 3' project, under the *State Policies and Projects Act 1993* (Tas) (**SPP Act**) which applies to projects that the Minister declares to be 'projects of state significance'.
- Large infrastructure developments that cross a number of council areas can be declared as Major Infrastructure Projects under the *Major Infrastructure Development Approvals Act 1999*. These projects are assessed by a Combined Planning Authority or the Tasmanian Planning Commission, but are otherwise subject to the normal planning process (including EIA)

[200] FPA and DPIPWE. 2010. *Procedures for the Management of Threatened Species under the Forest Practices System*. Available at www.dpipwe.tas.gov.au
[201] Please note, a review of the biodiversity provisions of the Forest Practices Code has been ongoing for a number of years.
[202] Part 8, *Water Management Act 1999*
[203] Section 276, *Water Management Act 1999*

The assessment of Level 2 and 3 projects, and projects of regional significance, are accredited under the Tasmanian EPBC assessment bilateral agreement,[204] but most EIA occurs under the EMPC Act. This is therefore the main EIA law in Tasmania.

The EPA oversees the preparation of an EIA for projects under the EMPC Act and projects of regional significance, and makes a binding recommendation to council or the Development Assessment Panel as to whether the proposal should be approved and on what conditions. Any person who was involved in the assessment process for a Level 2 or called-in project may apply for merits review of that decision.

The EIA process under the EMPC Act is relatively sound, because:

- the EIA and decision is conducted by the independent EPA, and is usually thorough;
- there are wide rights for people to apply for merits and judicial review of the EPA decision;
- most projects are assessed under the EMPC Act, not the major projects regime.

9.5.2 Major Projects Fast-Tracking

The SPP Act allows projects of 'state significance' to be fast-tracked. But it is rarely used (and rarely makes the process faster).[205]

Under the SPP Act, the Tasmanian Planning Commission oversees the proponent's preparation of an EIS, and prepares its own Integrated Assessment Report (setting out whether or not the project should proceed and on what conditions) for the Minister to decide[206]. That approval replaces other approvals required under for example, planning and threatened species laws. If the Minister decides against the TPC's recommendation, Parliament must approve the decision. There is no merits or judicial review of this.

Recent amendments have also created the new category of projects of 'regional significance'. These projects, declared by the Minister, are assessed by a Development Assessment Panel under project specific guidelines and an EIA is undertaken by the EPA. There is no merits review of decisions in relation to these projects. No projects of regional significance have been declared to date.

The planning system is currently being reformed to provide greater consistency between planning schemes, including in relation to information requirements and EIA processes for Level 1 projects.[207] A draft bill to tighten the timelines on the EPA EIA process and allow the EPA to seek more information has been circulated, but no major reform has been proposed.

[204] See the Agreement between the Commonwealth of Australia and the State of Tasmania.
[205] Approximately 10 projects have gone through this process since the Act was introduced in 1994.
[206] The ultimate decision is made by the Governor, on the recommendation of the Minister.
[207] See the Tasmanian Planning Commission website.

10 Northern Territory

10.1 Overview of threatened species legislation in NT

The ***Territory Parks and Wildlife Conservation Act*** **(TPWCA)** (*TPWCA)* is the principle piece of legislation governing the conservation of threatened species in the Northern Territory.

10.2 Strengths and Weaknesses of NT legislation

10.2.1 Classification of wildlife

The Minister must identify the conservation status of each of the species of wildlife in the Territory and apply a classification prescribed (under section 28) to each species accordingly.[208]

Classification classes under the TPWCA are taken from the IUCN Red List.[209] In summary, these categories are : 'Extinct in the wild', 'Critically Endangered', 'Endangered', 'Vulnerable', 'Near Threatened' and 'Data deficient'.[210]

The Minister is required to make the reasons for classification available to the public and seek and consider public comments on the classification of wildlife. The Administrator makes the classification in writing (after being satisfied that the public process has been followed).[211] The classification is available to the public at the office of the Commission. This process also applies to varying a classification of wildlife.

Where wildlife is classified as 'threatened', the Minister is also required to provide notice of the classification in the Gazette.[212]

There is no mechanism for emergency listing of threatened wildlife under the TPWCA.

10.2.2 Principles of Management

The TPWCA sets out principles of management.[213] The principles of management are:

31 Principles of management

1. The management of wildlife under this Act is to be carried out in a manner that promotes:
    a. the survival of wildlife in its natural habitat;
    b. the conservation of biological diversity within the Territory;
    c. the management of identified areas of habitat, vegetation, ecosystem or landscape to ensure the survival of populations of wildlife within those areas;

[208] *Territory Parks and Wildlife Conservation Act* (NT), S29.
[209] *Territory Parks and Wildlife Conservation Regulations* (NT), R2.
[210] IUCN Red List, *The IUCN Red List of Threatened Species* accessed on 13 December 2012 at: http://www.iucnredlist.org/about.
[211] *Territory Parks and Wildlife Conservation Act* (NT), S29.
[212] *Territory Parks and Wildlife Conservation Act* (NT), S30. The classification of wildlife in the NT is available at: http://www.lrm.nt.gov.au/biodiversity-conservation/animals/native/classification.
[213] *Territory Parks and Wildlife Conservation Act* (NT), S31.

d. the control or prohibition of:
    i. the introduction or release of prohibited entrants into the Territory; and
    ii. any other act, omission or thing that adversely affects, or will or is likely to adversely affect, the capacity of wildlife to sustain its natural processes; and
e. the sustainable use of wildlife and its habitat.

2. Species of wildlife are to be managed in a manner that:
    a. accords with their classification under section 29; and
    b. in the case of threatened wildlife – maintains or increases their population and the extent of their distribution within the Territory at or to a sustainable level (which may include breeding in captivity).

The TPWCA does not refer to the principles of ecologically sustainable development.

10.2.3 Management of wildlife

Processes for achieving these management objectives include 'wildlife management programs',[214] 'co-operative schemes' in accordance with management plans'[215] or by declaring an area of 'essential habitat'.[216] The TPWCA allows for cooperation with the Commonwealth or a State or another Territory of the Commonwealth to formulate and implement these objectives.[217]

Currently, approximately, 13 species management programs exist.[218]

The Administrator declares areas of essential habitat.[219]This requires consultation with the landowner and interested persons and a recommendation by the Minister.[220] The Minister must provide public notice of the intention to make the declaration and consider submissions before making a recommendation to the Administrator.[221]

However, the Minister may declare an area of essential habitat if there is an area of land containing a species of wildlife that is likely to become extinct if not immediately protected. The Minister does this by Gazette.[222] The Minister must provide public notice of the declaration and consider submissions in order to vary or revoke the declaration and Gazettal.[223]

To date, no essential habitat has been identified under the TPWCA.[224]

Ecological communities are not currently contemplated by the Act to address the principles of biodiversity conservation.[225]

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[214] *Territory Parks and Wildlife Conservation Act* (NT) s32
[215] *Territory Parks and Wildlife Conservation Act* (NT) s35
[216] *Territory Parks and Wildlife Conservation Act* (NT) s37
[217] *Territory Parks and Wildlife Conservation Act* (NT) s32
[218] http://www.lrm.nt.gov.au/biodiversity-conservation/programs/approved
[219] *Territory Parks and Wildlife Conservation Act* (NT) S37(1)
[220] *Territory Parks and Wildlife Conservation Act* (NT) S37(2)
[221] *Territory Parks and Wildlife Conservation Act* (NT) S38
[222] *Territory Parks and Wildlife Conservation Act* (NT) S37(3)
[223] *Territory Parks and Wildlife Conservation Act* (NT) S38
[224] Source within Northern Territory Department of Land Resource Management.
[225] Natural Resource Management Ministerial Council, 'Australia's Biodiversity Conservation Strategy 2010-2030' (Department of Sustainability, Environment, Water, Population and Communities (SEWPaC), SEWPaC library, 2010) .

10.2.4 Compliance

The TPWCA manages 'protected wildlife'. All species of 'threatened wildlife' are 'protected wildlife'.[226]

Permits can be granted by the Director to take or interfere with wildlife.[227] The taking of threatened wildlife also requires the written permission from the Minister.[228] The TPWCA sets out relevant considerations for the Director to take into account before making the decision to grant or refuse the permit application. A person must not contravene a permit.[229]
It is an offence to possess, take or interfere with protected wildlife unless the person is authorised to do so under the Act.[230]

Penalties for taking threatened wildlife in contravention of the TPWCA have an upper limit of a $141,000 fine or 10 years imprisonment for individuals or $ 705,000 for a body corporate.[231]

A person must not damage or destroy an area or part of an area of essential habitat, unless authorised to do so under the TPWCA. Additionally, a person cannot take, interfere or remove wildlife from an area of essential habitat or take a prohibited thing/animal into the area of essential habitat unless authorised to do so under the TPWCA.[232] The maximum penalty for damaging essential habitat is $70,500 or 5 years imprisonment in the case of individuals and $352,500 in the case of a body corporate.[233]

10.2.5 Interaction with other Northern Territory laws

Native vegetation in the Northern Territory is protected from removal and destruction (called clearing) by two main laws. These are the Northern Territory *Planning Act* (and *Planning Regulations*) which applies to native vegetation on certain zoned land and on un-zoned non-pastoral land, when more than 1 hectare of native vegetation is proposed to be cleared; and the Northern Territory *Pastoral Lands Act* (and *Pastoral Lands Regulations*), which applies to native vegetation which is proposed to be cleared on pastoral land. Pastoral land is crown land on which a lease has been granted for pastoral purposes.

Several other laws may also apply to protecting native vegetation from clearing:[234]

- The Northern Territory *Environmental Assessment Act* applies to development applications to clear more than 200 hectares of native vegetation.
- The *Mining Management Act* applies to environmental protection on mining sites. There is not a specific law relating to clearing native vegetation on mining sites.

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[226] *Territory Parks and Wildlife Conservation Regulations*, R3.
[227] *Territory Parks and Wildlife Conservation Act* (NT) S55
[228] *Territory Parks and Wildlife Conservation Act* (NT) S56(2)(b)
[229] *Territory Parks and Wildlife Conservation Act* 2011 (NT) s 67D
[230] *Territory Parks and Wildlife Conservation Act* 2011 (NT) s 66
[231] *Territory Parks and Wildlife Conservation Act* 2011 (NT) ss66,67
[232] *Territory Parks and Wildlife Conservation Act* 2011 (NT) s 67C
[233] *Territory Parks and Wildlife Conservation Act (NT), s67C*
[234] The new CLP government has made departmental changes in relation to relevant controlling agency for the legislation at:
http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d7583963f055c335482561cf00181d19?OpenView&Start=1&Count=300&Expand=10#10 .

- The Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999* may apply if clearing is likely to have environmental impact on a matter of national environmental significance such as listed threatened species, migratory species or listed ecological communities
- The Northern Territory *Heritage Act 2011* .
- The *Northern Territory Aboriginal Sacred Sites Act* may apply if the native vegetation is proposed to be cleared on or near to an Aboriginal sacred site

The NT Government is introducing a new Northern Territory *Environmental Protection Authority Act* which will increase the responsibilities of the NT Environment Protection Authority (NT EPA). The proposal is for the NT EPA to now be responsible for administering the environmental assessment process. The NT EPA sits with the new Department of Lands, Planning and Environment.

The Northern Territory government has recently restructured the government departments. The Northern Territory Department of Land Resources Management is responsible for the management of biodiversity and management plans. Parks and wildlife is managed by the Parks and Wildlife Commission of the Northern Territory. The role of the Commission is to facilitate the work of the Department of Land Resources Management and to control weeds, feral animals and fire as they impact on biodiversity.

11 Australian Capital Territory

11.1 Overview of threatened species legislation in ACT

The *Nature Conservation Act* 1980 (**NC Act**) is the central piece of legislation providing for the protection of threatened species in the Australian Capital Territory. The Act provides for listing of threatened species and establishes the role of a Conservator of Flora and Fauna, and a Flora & Fauna Committee.

There are two listing paths in the NC Act. The first involves a declaration by the Conservator, the second a recommendation by the Flora and Fauna Committee that the Minister make a declaration listing a species as vulnerable or endangered.[235]

The Conservator of Flora and Fauna may make declarations to list species. The first is a declaration of 'special conservation status'. The Conservator must declare a native animal or plant species to have special conservation status if they believe on reasonable grounds that the species is threatened with extinction or the Minister makes a declaration under s. 38 that the species is endangered.[236] The Conservator *may* declare members of a migratory species to have special protection status if the species is protected under a treaty to which Australia is signatory or under Federal legislation.[237] The second declaration pertains to 'protected' species. The Conservator *may* declare fish or invertebrates, native animals, native plants to be protected. While the Conservator must consider certain criteria when considering whether to declare a species as protected, the criteria needs to be rewritten to be more specific.[238] Both special conservation status declarations and protected species declarations are disallowable legislative instruments.[239]

Action Plans are provided for in the NC Act.[240] They are to be prepared by the Conservator for the purposes of identifying and protecting the species or ecological community the subject of a declaration under s. 38 so as to ensure (as far as practicable) their survival etc.[241]

A licence is necessary to kill or take or interfere with the nest of a native animal,[242] or to keep, sell, import, export native animals.[243] A licence is necessary to take a plant that has special protection status; or is a protected native plant; or is a native plant growing on unleased land.[244]

[235] Both are provided for in Part 3 of the Act.
[236] Section 33 (2).
[237] Section 33 (1).
[238] Section 34.
[239] Sections 33 (3), 34 (3).
[240] Part 3, Division 3.4.
[241] Section 40 (2).
[242] Part 4.
[243] Part 4.
[244] Part 5.

11.2 Strengths of legislative framework

11.2.1 Flora and Fauna Committee – requisite expertise

The Minister may only appoint a person as a member of the Committee if they have appropriate expertise in biodiversity or ecology.[245] Of the 7 members, at least two must not be public servants.[246] The chairperson and the deputy chairperson may not be public servants.[247]

11.2.2 Listing process

The Conservator has considerable power to declare species to have either special conservation status or to be protected. That is, the Conservator's functions are not subject to the concurrence of the Minister. However, there is no statutory requirement that the Minister appoint a Conservator with specific expertise in respect of biodiversity or ecology.

The NC Act provides for the Committee to make recommendations regarding the listing of vulnerable or endangered ecological communities and threatening processes. Furthermore, a member of the public may make an application to the Committee requesting the Committee to recommend the making of a declaration under s. 38 (declaration of species, community or process).[248] If the Committee refuse to make the recommendation, they must provide the individual with a written statement of reasons.[249]

11.2.3 Draft action plans

The Act does provide for draft action plans to be exhibited for a minimum of 21 days.[250] Comments received during this period are to be considered by the Conservator when preparing an action plan.[251]

11.2.4 Costs—public interest

In deciding the amount of costs to be awarded against a party to a proceeding under section 93 or section 94, the Supreme Court must take into account the public interest in protecting the environment.[252] (Note that pursuant to s. 96, the Supreme Court may make an applicant provide security for costs). This can increase accessibility to the courts for public interest litigants under the NC Act.

[245] Section 17 (2).
[246] Section 17 (1).
[247] Section 18 (2).
[248] Section 39 (1).
[249] Section 39 (4).
[250] Section 41.
[251] Section 42 (2).
[252] Section 95.

11.3 Weaknesses of the ACT legislative framework

11.3.1 Lacks objectives

The Nature Conservation Act is the ACT's key legislation for protecting biodiversity. While this is implicit, this is not actually specified or clearly defined in the legislation.

11.3.2 Does not include an ecosystem approach

The NC Act provides for declarations of species and ecological communities. In addition to these tools the Act does not currently provide for an ecosystem approach, implementing connectivity at landscape scale, and resilience to climate change.

11.3.3 Listing process ineffective

It is unclear why there are two declaration streams in the ACT, and it is arguable that in marrying the Conservator's independence with the Committee's expertise one would create a more effective system.

Limitations to the ACT listing process include that the Conservator may not make a declaration with respect to ecological communities.[253] The Conservator may also exempt certain animals.[254] Neither this section nor the definitions provide any information regarding the consequences of declaring an animal to be exempt. Given the definition of animal, it is assumed that it extends to native animals.

The Conservator is a public servant appointed by the Director-General.[255] There is no statutory requirement that the person appointed have any qualifications or expertise with respect to biodiversity or ecology. The appointment is not subject to Assembly scrutiny or disallowance. The Conservator's role is mostly advisory and is not independent from Government.

Another shortcoming of the listing process under the NC Act is that there is no statutory requirement to list critical habitat, and the Act does not provide for listing of critically endangered species (IUCN category).

11.3.4 Flora and Fauna Committee recommendations not binding

The Committee is only empowered to recommend to the Minister that a species or ecological community be declared as vulnerable or endangered.[256] Similarly, the Committee is only empowered to recommend to the Minister that a process be declared a threatening process.[257] The Minister is not bound to take into consideration, act consistently with or follow this advice.

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[253] Declarations under ss. 33 and 34 are made in respect of species, animals, plans, fish and invertebrates. The definition given for each of these entities does not include ecological communities (which are defined separately in the dictionary).
[254] Section 34 (1) (b).
[255] Section 7.
[256] Section 38.
[257] Section 38 (3).

The functions of the Committee include providing the Minister with advice concerning nature conservation.[258] However again, the Minister is not bound to take into consideration, act consistently with or follow this advice.

11.3.5 Subsidiary documents not strictly binding

A key structural feature of the current NC Act is a reliance on a range of subsidiary documents such as the Nature Conservation Strategy and action plans for declared threatened species, ecological communities or threatening processes as well as management plans for reserved areas under the *Planning and Development Act 2007*. These various documents are not binding on decision-makers, which detracts from biodiversity outcomes. In addition while these documents are required under the NC Act, there are no substantive legal requirements for regular review, implementation or reporting of outcomes.

11.3.6 Problems with the Nature Conservation Strategy

There are a number of flaws with the ACT Nature Conservation Strategy including:

- Consultation period is for a minimum of 21 days.[259] This is arguably not long enough given the breadth of the document.
- It was drafted in 1997, thus is clearly out-dated.[260] This highlights the need for a mandatory review period to be included in the Act.
- Failure to act in accordance with the Strategy is not a reviewable decision (at ACAT) for the purposes of Schedule 1 – *Reviewable Decisions* of the Act. The Act only provides very general direction regarding the contents of the Strategy. Specifically, 'A draft nature conservation strategy prepared pursuant to subsection (1) shall include proposals in relation to the protection, management and conservation of flora and fauna indigenous to the Territory.'[261] This is arguably too vague to give rise to a corresponding review right. Schedule 1 of the Act confirms this assessment. Ideally the criteria regarding the contents of the Strategy would be much more detailed and subject to administrative and/or judicial review under Schedule 1.
- While it includes objectives which are correlated to actions and performance indicators/targets, there is no explicit obligation to ensure that these targets are met. Furthermore, several of the targets are to produce 'guidelines' (which are non-binding)[262] and the Act does not contain any requirements regarding the reporting of outcomes.
- There is no statutory requirement that the Strategy be prepared in consultation with the Flora and Fauna Committee.
- The Nature Conservation Strategy does not adequately reflect current best practice as recommended in decisions of the Convention on Biological Diversity.

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[258] Section 14 (a).
[259] Section 27 (2).
[260] For a copy of the Strategy see:
http://www.tams.act.gov.au/__data/assets/pdf_file/0020/13493/natureconservationstrategyword.pdf
[261] Section 26 (2).
[262] See for example 2.2. Conservation through Reservation, Objective 1 (to manage the nature conservation estate…), action (a) Identify sensitive or significant areas, determine conservation requirements & formulate management **guidelines** (our emphasis).

11.3.7 Action Plans limited in application

Action plans only relate to vulnerable or endangered species.[263] Thus 'protected species' are not managed in accordance with a specific plan. While they must be exhibited, the public is only entitled to a minimum of 21 days to comment.[264] This may be insufficient depending on the complexity of the Plan in question. As noted above, their provisions are not binding on decision-makers, and nor does the NC Act require an action plan to be prepared within a particular time frame. There is no right of review regarding Action Plans in Schedule 1 of the NC Act.

11.3.8 Room to improve licensing provisions

The Act only provides for conditions which 'may' be imposed on a licence,[265] and the Minister 'may' determine criteria regarding the granting of a licence.[266] These may be 'different' for a species with special protection status (i.e. protected, vulnerable or endangered). These criteria, if created, are contained in a disallowable legislative instrument.[267] There is no legislative requirement to consider whether the granting of a licence will have (for example) a significant impact on a listed species.

There is no statutory review period for licences. Thus they remain in force for the period specified in the licence.[268] Cancellation of a licence following a breach of the Act or failure to comply with a condition is not mandatory. Rather, it is at the discretion of the Conservator.[269] There are no third party appeal rights with respect to the granting of a licence (see Schedule 1) .

11.3.9 Lack of legal requirement for monitoring and evaluation, and regular reporting and review

There are currently no legal requirements for regular review of the NC Act or subsidiary documents such as action plans and the Nature Conservation Strategy or reporting of biodiversity outcomes. Provisions should be included in the NC Act for regular reporting and review as well as outcome reporting against clear indicators. Ideally such reporting should be incorporated into existing agency reporting requirements such as via agency Annual Reports and Budget Papers, as well as the proposed new accountability and reporting framework. This would require increased resourcing and the broadening and deepening of partnerships with stakeholders.

11.3.10 The Act does not address key threats

It appears that planning decisions relating to urban development and climate change impacts are the key threats to biodiversity in the ACT that to date have been substantially unaddressed. Changes to the NC Act are needed to establish legislative measures and processes to ensure that the impacts of urban planning decisions are based on adequate biodiversity data and consider ecosystem impacts very early in the urban

[263] Section 38.
[264] Section 41 (2).
[265] Sections 105; 106.
[266] Section 106 (2), (3).
[267] Section 106 (4).
[268] Section 107.
[269] Section 110.

planning process. Likewise appropriate monitoring and research needs to be undertaken to assess climate change impacts on biodiversity, such that consideration can be given to mitigation activities prior to significant biodiversity losses.

11.3.11 Absence of biodiversity overlay and appropriate mapping

There is currently no biodiversity overlay in the Territory Plan to apply to active use of the existing Strategic Environmental Assessment (SEA) provisions of the *Planning and Development Act 2007* to ensure biodiversity mapping is undertaken well in advance of land release and structural planning activities.

11.3.12 Security for costs can be ordered

As mentioned, while the Supreme Court must take into account the public interest when deciding whether or not to order costs in a NC Act case, the Supreme Court may also order an applicant under s. 93 to provide security for costs or an undertaking regarding payment of any amount that may be awarded against the applicant under s. 97.[270] This limits access to justice for public interest litigants under the NC Act.

11.3.13 Third party appeal rights lacking

As noted, Schedule 1 of the NC Act outlines which decisions made under the Act are reviewable decisions and by whom. This is circumscribed to a small list of decisions. For example, only an 'entity that has interests affected by licence' may seek review.[271] Therefore common law standing would have to be established to seek review of a decision not covered by Schedule 1. This is difficult as an applicant has to demonstrate a sufficient interest in the matter.[272] Part 9 provides for *Injunctive Orders* in the Supreme Court regarding a contravention or likely contravention of the Act or where an order is necessary for the protection or conservation of an animal, plant or area, however barriers to injunctive relief are found in the security for costs and compensation provisions.[273]

The Act does not provide for third party merits appeal or the appointment of mediators or facilitators to assist with consensus building amongst stakeholders and the avoidance of disputes and litigation.

11.3.14 Buffer zone protections are inadequate

The legislation does not regulate the planting of potentially invasive species and domestic pets in areas adjacent to Canberra Nature Park. It would be better to have integrated nature conservation, invasive species, and planning and development legislation so that land uses on Territory land is regulated for ecologically sustainable development, including in relation to Canberra Nature Park.

11.3.15 Volunteer contribution should be recognised

[270] Section 96.
[271] Schedule 1, item 7.
[272] See *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 (Gibbs J).
[273] Sections 96; 97

The legislation does not currently recognise and outline the role and responsibilities of government agencies and community groups in relation to volunteer contributions such as ParkCare and similar activities.

11.4 Compliance and enforcement

The powers of search, entry and seizure are quite comprehensive and may be exercised by conservation officers where there are 'reasonable grounds' to believe that someone has acted in contravention of the NC Act.[274] These powers extend to seizing the bird, animal, plant or thing related to a breach of the NC Act.[275] However, the current penalties are insufficient to deter offenders in the ACT.

Furthermore, according to a discussion paper released by the ACT Government, there has been very little enforcement of the Act. Specifically:

> *Since 2000, over 1500 potential offences under the NC Act have been reported. Of these, 354 were investigated resulting in 10 infringement notices and two prosecutions. The lack of prosecutions and fines may indicate general community compliance with the NC Act, and prosecution arguably has been regarded as a last resort. However, it is possible the enforcement provisions are viewed as inadequate and the low level of prosecutions is undermining the ability of the NC Act's objects to be satisfactorily fulfilled.*[276]

There is lack of mandatory compliance monitoring activities. For example, the Act does not require that Conservator's directions have a transparent compliance monitoring plan and regular review of the effectiveness of the Directions.

11.5 Interaction of threatened species and planning laws in the ACT

The main EIA law in the ACT is under the *Planning and Development Act 2007* (**PD Act**). Environmental Impact Statements can also be prepared under the *Environment Protection Act 1997* and *Public Health Act 1997*, but this rarely occurs.

In the development approval process under the PD Act, an EIS is required for projects (a) listed in Scheduled 4 of the PD Act, and (b) for which the Minister requires an EIS to be prepared. However, in some limited cases, this requirement can be avoided by submitting an Environment Significance Opinion (**ESO**), approved by the relevant agency. The ACT Planning and Land Authority (**ACTPLA**) oversees the preparation of an EIS, including public comment. The ACTPLA will make a final approval decision, unless the Minister 'calls in' the decision to make it him or herself. Third parties may apply for merits review of the decision of ACTPLA in the ACT Civil and Administrative Tribunal (**ACAT**) if they have suffered 'material detriment'.

This is a relatively good EIA regime, but it could be improved. Its weaknesses are the option to avoid the process by submitting an ESO, the difficulties facing community members in appealing decisions compared to developers, and the fact that the Minister can step in and exercise discretion in the process if he or she wishes. Its strengths are the role played by the independent ACTPLA, and the scope for some merits review.

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[274] Section 130.
[275] Sections 132, 133.
[276] ACT Department of Environment, Climate Change, Energy and Water, *Review of the Nature Conservation Act 1980, Discussion Paper 2010*, p. 23.

There is no major projects fast-tracking legislation currently in the ACT, and there are currently no plans to reform EIA laws in the ACT.

Overall, the Nature Conservation Act needs to be better integrated with other key environment and planning legislation with biodiversity implications such as the *Tree Protection Act 2005*, *Pest Plants and Animals Act 2005* and the *Planning and Development Act 2007.* There is also scope to better integrate the committees concerned with nature conservation in the ACT such as the Natural Resource Management Advisory Committee (NRMAC), the Flora and Fauna Committee and the ACT NRM Council.

12 Commonwealth

12.1 Overview of Commonwealth threatened species legislation

The purpose of the *Environment Protection and Biodiversity Conservation Act* (**EPBC Act**) is to provide for the protection of the environment on a national scale.[277] Under the Act, the Commonwealth is responsible for regulating matters of national significance (**MNES**) which include:[278]

- World Heritage sites;[279]
- National Heritage places;
- National protected wetlands (recognised by the Ramsar Convention);[280]
- Nationally listed threatened species and ecological communities;
- Listed migratory species;
- Nuclear actions
- Commonwealth marine areas;
- Land owned by the Commonwealth
- Activities by Commonwealth agencies and
- Great Barrier Reef Marine Park

Categories of listed species are: extinct, extinct in the wild, critically endangered, vulnerable or conservation dependent such as vulnerable to loss at cessation of conservation program, fish or species is a focus of a plan of management.[281]

The Act is a substantial document that deals with a range of issues and implements various international environmental obligations. For example, it deals with trade in endangered species as required under the CITES Convention. It also, for example, make provisions for assessment of fisheries. For the purpose of this report we focus on the assessment of impacts on threatened species that are matters of national environmental significance under the Act.

The EPBC Act stipulates that any party wishing to conduct an action which is likely to have an impact of national environmental significance or upon these MNES (i.e. a 'controlled action')[282] would require approval from the administering minister.[283]

Under s 523 of the EPBC Act, an 'action' is defined to include projects, developments, an undertaking, an activity or series of events or any alteration to these actions.[284] The term 'significant impact' is not defined

[277] *Environment Protection and Biodiversity Conservation Act 1999*, s 1(a).
[278] See Ibid, Chapter 2 Part 3.
[279] See *Convention for the Protection of the World Cultural and Natural Heritage (Heritage Convention),* opened for signature 23 November 1972, ATS 47, entered into force 17 December 1975.
[280] *Convention on Wetlands of International Importance especially as to Waterfowl Habitat (Ramsar Convention)*, opened for signature 2 February 1971, ATS 48, entered into force 21 December 1975.
[281] *Environment Protection and Biodiversity Conservation Act 1999*, s 179.
[282] See *Environment Protection and Biodiversity Conservation Act 1999*, s 67 for definition.
[283] Actions conducted without ministerial approval may be liable for civil and criminal liability, see Ibid, ss 12(1), 15A (World Heritage), 15B, 15C (National heritage), 16, 17B (Ramsar wetlands), 18, 18A (threatened species), 20, 20A (migratory species), 21 22A (Nuclear actions), 23, 24A (marine environment) and 24C (Great Barrier Reef).
[284] Ibid, s 523. Actions do not include Commonwealth, state or territory decisions or authorizations granted under some Acts such as *Customs Act 1901* (Cth).

under the EPBC Act, however the Federal Court has interpreted the provision to mean 'impacts that is important, notable or of consequence having regard to its context or intensity'.[285] There are also Significant Impact Guidelines designed to clarify when a project may have a significant impact on a matter of national environmental significance.[286]

There are exemptions from the need for approval, which include authorizations accepted prior to the commencement of the Act,[287] bilateral agreements (agreements which allow state approval processes to determine EPBC Act approval),[288] actions declared by the minister as compliant[289] or actions conducted under a regional forestry agreement.[290] A matter may be referred to the Minister by the person taking the action,[291] by state or local council,[292] by the Environment Minister (Cth),[293] or by a Commonwealth agency.[294] During referral no actions can be conducted until the application has been approved.[295]

Upon receipt of an application, the Environment Minister determines whether a proposed activity can be approved (within 20 days).[296] The Environment Minister must apply ecologically sustainable development principles,[297] economic and social matters, environmental assessment and reports, public and ministerial comments and impacts on each MNES in determining whether or not an action can go ahead.[298] Approval can be given subject to satisfying certain conditions[299] which are legally enforceable.[300]

The Environment Minister also determines the type of environmental impact assessment method which may include an accredited assessment process, assessment based on the referred information only, assessment based on preliminary documentation, a public environment report (PER), an environmental impact statement (EIS) or through inquiry.[301] Only actions which impact MNES or are of national environmental significance can be assessed.[302] The ministerial discretion as to assessment is not afforded for actions covered by a bilateral agreement[303] or ministerial declaration in force.[304]

Since the EPBC Act was brought in, almost 4000 actions have been referred for federal consideration.[305] Of the 3744 referrals where a decision was made, only 7 have been refused on the grounds of having a clearly

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[285] See *Booth v Bosworth* [2001] FCA 1453, [99].
[286] *Matters of national Environmental Significance. Significant Impact Guidelines* 1.1, DEWHA, 2009.
[287] *Environment Protection and Biodiversity Conservation Act 1999*, s 43A.
[288] See Ibid, Chapter 2, Part 4.
[289] Ibid, ss 32-37.
[290] Ibid, ss 38-42.
[291] Ibid, s 68.
[292] Ibid, s 69.
[293] Ibid, s 70.
[294] Ibid, s 71.
[295] Ibis, s 74AA.
[296] Ibid, s 75(5).
[297] See Ibid, s 3A for ESD definition and s 391 for requirement for Minister to apply precautionary principle.
[298] Ibid, s 136.
[299] Ibid, s 134.
[300] Ibid, s 142. Enforcement can occur by injunction (ss 475-480), remediation order (s 480) or by civil (ss 12(1), 15B(1), 16(1), 18(1)) or criminal penalties (ss 15A(3), 15C(13), 17B(3). 18A(3), 20A(3), 22A(7)24A(7)).
[301] Ibid, s 87.
[302] Ibid, ss 82, 87.
[303] Ibid, s 83.
[304] Ibid, s 84.
[305] A total of 3982 project referrals have been received by the Commonwealth government since the Act was passed in 2000. Department of Sustainability, Environment, Water, Populations and Communities, *Annual Report 2010-2011,* p143.

unacceptable impact on a matter of national environmental significance. The most recent annual report indicates clear trends. Queensland, NSW and Western Australia produce the greatest number of referred actions, with mining being the most frequent project type being referred.[306] In the vast majority of actions a federal assessment has been triggered by potential impacts on listed threatened species or ecological communities.[307]

[306] Ibid, pp144 – 145.
[307] 130 out of 240 controlled actions in 2010-11 related to listed threatened species or ecological communities. Ibid, p148.

12.2 Strengths of Commonwealth laws

The EPBC Act is the legislative vehicle for delivering Australia's international obligations for protecting and conserving our unique biodiversity. Overall it has many strengths compared to the legislative regimes for the protection of threatened species in the States and Territories of Australia. Some of these strengths are as follows:[308]

- The current list of objects in the EPBC Act are comprehensive and appropriate to the Commonwealth's role in environment protection and provides a good framework to guide the EPBC Act in dealing with matters of national environmental significance.
- The EPBC Act contains procedural requirements to for decision-makers to consider ESD.
- The EPBC Act allows the Commonwealth to play a gatekeeper role with regard to MNES, and veto developments that are likely to threaten these matters.
- The EPBC Act contains enforcement provisions for non-compliance and breach of the Act, which are utilised by the Commonwealth (as discussed below).
- Generally speaking, (and compared to the State schemes), the EPBC Act provides for reasonably good public participation provisions in relation to the assessment and approval process. These are fundamental elements of good governance and enhance the accountability, and thus acceptability, of environmental decisions.
- Further, the EPBC Act allows for the public to play a 'watchdog' role in enforcing breaches of the Act and challenging decisions under the Act. This is something absent from many State schemes.
- Strategic assessment mechanisms are included in the EPBC Act, which if used correctly and robustly (and not as a replacement for project assessment) could allow for the Act to consider cumulative impacts.
- Under the EPBC Act, the Minister must consider indirect impacts in addition to direct impacts of an action. This again sets the EPBC Act process ahead of comparable State processes.
- Provisions in the EPBC Act outlining the responsibilities of proponents to refer proposed actions are clear.
- The EPBC Act contains an appropriate range of environmental assessment tools for projects varying in size and impacts.
- Under the EPBC Act, the Minister is required to provide reasons for certain decisions. This is of key importance for transparency in threatened species protection.
- The EPBC Act contains a number of valuable tools such as a critical habitat mechanism, provisions for threat abatement plans, recovery plans, wildlife conservation plans and the listing of key threatening processes.
- The EPBC Act allows for an expert Scientific Committee to provide advice and recommendations to the Minister.
- Consideration of the precautionary principle is enshrined in the EPBC Act.

[308] Note this list is intended to be illustrative and is not a comprehensive list of strengths.

12.3 Weaknesses of Commonwealth laws

While a superior legislative scheme for threatened species legislation compared to most of the States, the EPBC Act is limited in its scope and application in a number of ways:[309]

- The EPBC Act is limited to matters of national environmental significance that do not include some of the key threats to biodiversity, such as water extraction and climate change. These are issues of grave concern to Australia's environment.
- The EPBC Act only applies where a significance threshold is triggered. Such a threshold is rarely triggered in relation to individual projects, and the project referral process as currently drafted, is not able to adequately address cumulative impacts of a number of developments.
- The Minister's decision is discretionary and has rarely been used to prevent inappropriate development. This is because the Act has only been successful in introducing procedural requirements that must be followed instead of concentrating on the outcomes desired. Decisions under the Act should be based on objective criteria, not subject to the broad discretion of a decision-maker.
- The EPBC Act does not apply to high value forestry areas covered by Regional Forest Agreements. This exemption should be removed from the Act, as the Act must apply to all forestry operations in order to effectively protect threatened species.
- While the EPBC Act contains procedural requirements to consider ESD, a more robust and substantive approach is desirable that consolidates the principles of ESD into the decision-making process to achieve positive environmental outcomes.
- While the provision for Strategic Impact Assessment in the EPBC Act is positive, the process at present seems implicitly focused on streamlining and reducing the regulatory burden rather than on achieving the best environmental outcomes.
- The EPBC Act could be improved to implement robust Indigenous engagement provisions.
- The EPBC Act provides for the accreditation of state approval processes through approval bilateral agreements. ANEDO is of the view that States and Territories are fundamentally not in the position to protect MNES and does not support this provision being contained in the EPBC Act.[310]
- The EPBC Act could be improved to allow any member of the community to refer an action to the Minister if they believe that the action is likely to have a significant impact on MNES and has not been referred.
- Mechanisms of the Act that focus on broader protection methods, such as threat abatement plans, Wildlife Conservation Plans, the listing of key threatening processes, and the critical habitat mechanism could be more readily used. Also, provisions for an emergency listing process could be included in the EPBC Act.
- Limited resourcing has hindered full implementation of the legislation (although this is not a problem with the EPBC Act, per se). Funding for implementation of the Act should be a priority for the Commonwealth Government in order to improve the implementation of Australia's international environmental obligations and to broaden the scope of the Act to address the major environmental challenges facing Australia;

It is noted that many of these key weaknesses could be addressed by fully implementing the package of amendments as recommended by the Hawke Review of the EPBC Act.

[309] Note this list is intended to be illustrative and is not comprehensive.
[310] See *Defending Environmental Laws*, available at: http://www.edo.org.au/policy/policy.html.

12.4 Compliance and enforcement by the Commonwealth

The EPBC Act has provided for successful enforcement actions for breaches where state enforcement failed – for example in relation to clearing of a Ramsar wetland in *Greentree*. Furthermore, it has provided an avenue for third parties to bring actions to protect threatened species – for example, flying foxes in *Booth v Bosworth*. In addition, the Commonwealth has been able to seek significant penalties which is a critical part of deterrence in any enforcement and compliance regime. Some case studies of Commonwealth enforcement are summarised below.

Case studies

Commonwealth enforcement – potential for significant fines

An example of a case brought by the Minister is: ***Minister for Environment Heritage and the Arts v Rocky Lamattina & Sons Pty Ltd*** (2009) 167 LGERA 219. In this case the respondent was found to have cleared native vegetation that was likely to have a significant impact on the Red-Tailed Black Cockatoo, a listed threatened species. Both parties sought a penalty of $110,000, with the respondent admitting to clearing the land. The court held that the clearing was in contravention of s 18(3) of the EPBC Act, however the proposed penalty was not within the permissible range. Given the deliberate nature of the conduct, and indifference to potential consequences, a fine of $220,000 was imposed.

A range of penalties have been ordered for breaches of the *EPBC Act*. In ***Minister for the Environment and Heritage v Greentree*** *(No 3)* (2004) 136 LGERA 89 the two respondents were ordered to pay $150,000 and $300,000 respectively, after clearing, ploughing and cropping within Gwydir Ramsar Wetlands in NSW. In contrast, in ***Minister for the Environment and Heritage v Wilson*** [2004] FCA 6 the respondent fished in the Great Australian Bight Marine Park, and was fined an amount of $12,500. The low fine was due to the unintentional nature of the breach, and the lack of prior offences. In ***Minister for the Environment and Heritage v Warne*** [2007] FCA 599 the respondent engaged in commercial trawling in the Mermaid Reef National Marine Nature Reserve (near WA coast), and was ordered to pay a fine of $25,000.

Third party proceedings – variable success

An example of an action by a third party is: ***Forestry Tasmania v Brown*** [2007] FCAFC 186. Proceedings were commenced by Senator Bob Brown against Forestry Tasmania regarding Forestry Tasmania's non-compliance with the Tasmanian Regional Forestry Agreement 1997 (RFA), given the potential threat to three species (broad-toothed stag beetle, wedge-tailed eagle and swift parrot) by logging operations.
At first instance, Marshall J held that the Court had the power to investigate Forestry Tasmania's compliance with the RFA, and if they were found not to be compliant, then the s 38 exemption would not apply. Overturning *Brown v Forestry Tasmania (No 4)* [2006] FCA 1729, the Court held that the exemption for forestry operations under s 38 of the EPBC Act does apply, and that the Courts may not properly enquire as to whether Regional Forest Agreements are operating in accordance with the rest of the Act.
That is, if a Regional Forest Agreement is in place, the s 38 exception is activated, regardless of the efficacy of the implementation of the RFA.

In ***Krajniw v Brisbane City Council*** *(No 2)* [2011] FCA 563, the applicant sought an injunction under s 475 of the EPBC Act to prevent the construction of a bike path within the Minnippi Parklands in Queensland, on the grounds that the development would damage the habitat of two threatened species. The court held that the application should be dismissed, firstly due to procedural inadequacies, but also because the area the subject of the development did not include habitat of the two threatened species which the applicant relied

upon. That is, there was insufficient evidence that any harm would be caused by the development.

Booth v Bosworth (2001) 117 LGERA 168 contemplated whether or not a 20% loss in the population of the Spectacled Flying Fox constituted a 'significant impact' on the world heritage values of the Wet Tropics World Heritage Area. The Court found that the impact did constitute a 'significant impact'.

Humane Society International v Kyodo Senpaku Kaisha Ltd [2006] FCAFC 116. The applicant sought an injunction under s 475 of the EPBC Act to prevent whaling activities undertaken by the respondent in contravention of ss 229 and 230. An injunction was granted, despite acknowledgment of its potential futility, given jurisdictional issues.

Appendix 1 – The state of biodiversity in Australian States and Territories

Queensland	Queensland has adopted a new framework for conservation management and recovery. *Back on Track* species prioritisation framework is designed to prioritise all species, regardless of their current classification under the Queensland Nature Conservation Act 1992 (NCA) or the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (EPBC)[3] . There are 428 plant and animal species listed as threatened. Around 70% of Australia's native mammals (210 species) and 80 % of bird species (594) live in the state; 38 mammals and 35 bird species are listed as threatened [2]. While the general trend is not positive, there are more than 50 previously unknown plant species are being described in Queensland every year[2]. Concerns have been raised regarding the loss of habitat for threatened bird species and the consequence on population numbers. For mammals, the greatest percentage of threatened species occurs in the Cape York Peninsula, while for frogs it occurs in the Wet Tropics and Southeast Queensland bioregions. Percentages of reptile species threatened are mostly highest in the more easterly bioregions of the state, while for birds it is greatest in Southeast Queensland and the Brigalow Belt. There have been gaps in monitoring, including forest and island birds, both of which are suspected or predicted to be suffering declines, however continual monitoring will ensure better understanding of population numbers and a more accurate rate of decline (if any).
New South Wales (including ACT).	There are a number of growing threats to both plants and animals in New South Wales including loss of habitat, weeds, feral animals, pollution, disease and climate change. There are currently more than 850 plants and animals at risk of extinction in New South Wales alone, including the Koala, Humpback whale and Wollemi pine[1]. New South Wales has shown a general pattern of decline in biodiversity. This is evident in the increased number of plants and animal species listed as threatened or vulnerable. Mammals have experienced the most significant declines with 26 of 138 species (19%) now extinct. In addition, 35 species of plants, 12 species or subspecies of birds, and one species each of reptiles, fish and invertebrates are also now listed as presumed extinct under threatened species legislation[2]. Historical data has shown that birds have been relatively resilient to declines compared with other vertebrate groups; however, over the past decade, resilience has worn and of the 452 known bird species [2], 25 % are listed as threatened or vulnerable. Freshwater fish have also shown decline in numbers with almost 22% of the 55 known species are listed as threatened[2]. Australian Capital Territory has presented similar patterns of decline in biodiversity as New South Wales particularly in woodlands and grassland areas. There have been substantial fluctuations in in different species partly due to habitat changes after 2003 bushfires and prolonged drought, and possible declines in some woodland species [2]. And similar threats remain for the survival of threatened fish species. While there are some positive examples of population recovery, the nature of the data prevents reliable assessment of rate of decline for threatened species.

Victoria	Victoria has shown of 3140 known species of vascular plants, 1826 (58%) are included on the Advisory List of Rare and Threatened Plants, of which 49 are considered extinct, while only 288 are listed under the Victoria's *Flora and Fauna Guarantee Act 1988* [2]. There has been a significant decline in mammal species since European settlement, with 18 species listed as extinct[2]. There are concerns about declines in forest and woodland birds where these habitats have been disturbed. Of 447 total recorded species, 126 are included on the Advisory List of Threatened Vertebrate Fauna (versus 78 listed under the Flora and Fauna Guarantee Act 1988) Inconsistencies between the Advisory List of Threatened Vertebrate Fauna and those listed under Victoria's Flora and Fauna Guarantee Act 1988 have presented issues regarding reliable information and data.
South Australia	South Australia has demonstrated an increase in the number of threatened plant species. In the 2007 Statement of the Environment report, 187 plant species were listed as presumed extinct, endangered and critically endangered, and 196 were listed as vulnerable, representing 7% of known plant species in the state. Significant changes have been recorded in mammal numbers. At least 28 species have become extinct since European settlement and there are currently, 47 species are listed an endangered and 20 as vulnerable, representing 38% of the total known species[2]. Changes in habitat and changes in migratory patterns have seen 42 species of birds are listed as endangered and 32 as vulnerable in South Australia; and 7 species are reported to have become extinct.
Tasmania	With minimal historical data, the trend is difficult to predict. There are 270 forest-associated vascular plant species considered to be at risk from isolation and loss of genetic diversity. Despite the lack of data, most recent studies suggest a decline in vascular plant species. In 1995, 465 plants were listed as threatened; a more recent study in 2007 showed 489 species listed. Tasmania hosts the most ecologically diverse group of large marsupial carnivores in Australia. However threats to the natural habitat have seen populations declining. There have been significant changes in 5 forest-dwelling bird species which have been assessed as being at risk from loss of genetic diversity. Freshwater fish are the most threatened group in inland waters. Several species are listed as threatened in the last state of the environment reporting period bringing the total listed to 11 of the 25 Tasmanian native species[2]. Despite areas of decline, Tasmania has seen numerous areas of population growth, although few general conclusions are drawn due to the limited long term data sets regarding the change in population numbers for threatened species.

Western Australia	There is limited data available that measures trends of changes in species numbers in Western Australia. Of the data available, the number of threatened and priority taxa increased by 14% between 1998 and 2007 (from 2309 to 2625 taxa)[2]. Similar to other states, the most significant decline has been seen in mammals. Medium-sized mammals in the north-west have reported to be in decline with an estimated total of 220 mammal species, 11 are presumed extinct and 42 are listed as threatened [2]. While there are gaps in the available data for terrestrial taxa, the most considerable is the lack of Marine and aquatic species data. Further studies will need to be conducted to fairly measure the population changes in marine and aquatic species.
Northern Territory	Historically, the most significant decline in endemic species has been seen in the southern states, however recent reports have indicated major changes in both animal and plant species. The most significant changes have been shown in reports of major declines in numbers of small mammals with 14 species are listed as extinct, and 23 listed as threatened. The status of threatened bird species has been highly variable between different states with efforts focused in the South, and Northern territories. In the NT, 19 species are listed as threatened bird species and 1 has been listed as extinct. In many cases, it is impossible to draw conclusions regarding the status and trends of many of the plant and animal species due to the lack of data available sometimes it is not even possible to draw confident conclusions about the state of the taxon itself[2].

1. The Office of Environment and Heritage. *NSW Threatened Species*. Nature Conservation 2012 [cited 2012 27 November]; Available from: http://www.environment.nsw.gov.au/threatenedspecies/.
2. The Department of Environment Climate Change and Water, *NSW State of the Environment* 2009, Department of Environment, Climate Change and Water: Sydney.
3. State of Queensland. *Back on Track species prioritisation framework*. Wildlife and Ecosystems 2012 2 November 2012 [cited 2012 November 27]; Available from: http://www.ehp.qld.gov.au/wildlife/prioritisation-framework/index.html.

Appendix 2 – Summary of relevant legislation in each State and Territory

Table A4.2 State and territory frameworks, policies, legislation and reports

Jurisdiction	Framework/policy	Legislation
Australian Capital Territory	ACT Nature Conservation Strategy (1997)	*Nature Conservation Act 1980* *Environmental Protection Act 1997*
New South Wales	NSW Biodiversity Strategy (1999) Policy and Guidelines for Aquatic Habitat Management and Fish Conservation (1999) Eden Regional Forest Agreement (1999) North East Regional Forest Agreement (2000) Southern Regional Forest Agreement (2001) NSW Ramsar Plan 2006-2009 2007–2008 NSW Biodiversity and Climate Change Adaptation Framework NSW National Parks Establishment Plan 2008 NSW Invasive Species Plan 2008-2015	*Western Lands Act 1902* *Forestry Act 1916* *National Parks and Wildlife Act 1974* *Coastal Protection Act 1979* *Environmental Planning and Assessment Act 1979* *Crown Lands Act 1989* *Noxious Weeds Act 1993* *Fisheries Management Act 1994* *Threatened Species Conservation Act 1995* *Wilderness Act 1997* *Marine Parks Act 1997* *Forestry and National Parks Estate Act 1998* *Water Management Act 2000* *Native Vegetation Act 2003*
Northern Territory	Northern Territory Parks and Conservation Masterplan (draft)	*Territory Parks and Wildlife Conservation Act 1977* *Territory Parks and Wildlife Conservation Amendment Act 2009* *Fisheries Act 2009*
Queensland	Strategy for the Conservation and Management of Queensland's Wetlands 1999 South-East Queensland Regional Forests Agreement (1999) Queensland Weed Strategy 2002–2006 Queensland Pest Animal Strategy 2002–2006 Queensland Biodiversity Policy Framework (2003)	*Nature Conservation Act 1992* *Wet Tropics World Heritage Protection and Management Act 1993* *Environmental Protection Act 1994* *Fisheries Act 1994* *Land Act 1994* *Coastal Protection and Management Act 1995* *Environmental Protection (Water) Policy 2009* *Vegetation Management Act 1999* *Water Act 2000* *Land Protection (Pest and Stock Route Management) Act 2002* *Marine Parks Act 2004* *Wild Rivers Act 2005* *Cape York Peninsula Heritage Act 2007* *Vegetation Management (Regrowth Clearing Moratorium) Act 2009*

Jurisdiction	Framework/policy	Legislation
South Australia	No Species Loss—A Nature Conservation Strategy for South Australia 2007–2017	*National Parks and Wildlife Act 1972* *Native Vegetation Act 1991* *Wilderness Protection Act 1992* *Natural Resources Management Act 2004*
Tasmania	Tasmanian Regional Forest Agreement (1997) Threatened Species Strategy for Tasmania (2000) Tasmania's Nature Conservation Strategy (2002–2006) Tasmanian Community Forest Agreement (2005)	*Forest Practices Act 1985* *Threatened Species Protection Act 1995* *Living Marine Resources Management Act 1995* *Environmental Management and Pollution Control Act 1994* *Weed Management Act 1999* *Nature Conservation Act 2002* *Natural Resource Management Act 2002* *National Parks and Reserves Management Act 2002*
Victoria	Victoria's Biodiversity Strategy (1997) East Gippsland Regional Forest Agreement (1997) Central Highlands Regional Forest Agreement (1998) North East Regional Forest Agreement (1999) West Victoria Regional Forest Agreement (2000) Gippsland Regional Forest Agreement (2000) Our Forests, Our Future policy statement (2002) Victoria's Native Vegetation Management —a Framework for Action (2002)	*Environment Protection Act 1970* *Wildlife Act 1975* *Environment Effects Act 1978* *Planning and Environment Act 1987* *Flora and Fauna Guarantee Act 1988*
Western Australia	South West WA Regional Forest Agreement (1999) A 100-year Biodiversity Conservation Strategy for Western Australia: Blueprint to the Bicentenary in 2029 (draft)	*Wildlife Conservation Act 1950* *Conservation and Land Management Act 1984* *Environmental Protection Act 1986* *Fish Resources Management Act 1994*