



# environmental defender's office new south wales

## Submission on the Review of the *Threatened Species Conservation Act 1995*

17<sup>th</sup> November 2010

### The EDO Mission Statement:

*To empower the community to protect the environment through law, recognising:*

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services around NSW*

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## Executive Summary

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the statutory review of the *Threatened Species Conservation Act 1995* (*TSC Act*).<sup>1</sup> The EDO is a community legal centre specialising in public interest environmental law.

The *TSC Act* has been in operation for 15 years 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”.<sup>2</sup>

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.<sup>3</sup> 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 for over 30 years. In addition, a recent 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.<sup>4</sup>

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.

The EDO has been heavily involved in policy and law reform work relating to biodiversity laws in NSW for some time. In 2006 the EDO undertook an audit of biodiversity laws of behalf of the Nature Conservation Council of NSW where we made 35 recommendations to Government in order to better conserve and manage biodiversity in NSW. That report was entitled *The Status of Biodiversity Conservation in NSW* and a copy provided to the NSW Government. We attach a copy to this Report as part of this submission.

In relation to Biobanking, the EDO has been involved in analysing the development of the scheme for a number of years and is a member of the Ministerial Reference Group

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<sup>1</sup> The EDO acknowledges the assistance of members of the EDO Scientific Advisory Service namely Dr Steven Douglas and Martin Fallding.

<sup>2</sup> 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](http://www.environment.nsw.gov.au/soe/soe2009/chapter7/chp_7.2.htm#7.2.13)

<sup>3</sup> *Ibid.*

<sup>4</sup> Watson, J. E *et al*, “The Capacity of Australia's Protected-Area System to Represent Threatened Species” (2010) *Conservation Biology*, no. doi: 10.1111/j.1523-1739.2010.01587.x

on Biobanking. We have provided advice directly to the Department of Environment, Climate Change and Water (DECCW) on the biobanking methodology and made several public submissions on various aspects of the scheme, which are available on our website.<sup>5</sup> Due to the failings of the current threatened species and planning laws, the EDO supports investigating innovative tools to better value biodiversity and we particularly support schemes that provide income for land owners to manage biodiversity for conservation. However, we submit that any such schemes must be underpinned by robust objective scientific principles. Any offsetting must be as a very last resort after all efforts to avoid then minimise impacts have been undertaken, and any offsets must be according to scientific “like for like” criteria.

Similarly, in relation to biocertification, the EDO has a long history of engagement on the issue, and more recently we have provided advice to the DECCW on amendments to the *TSC Act* and the development of a robust and scientifically sound methodology for assessing plans at a landscape level. Our public submissions relating to biocertification are available on our website.<sup>6</sup> There are clear advantages of developing landscape scale approaches to biodiversity conservation. 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 potential participants risks the ecological credibility and overall success of the scheme.

Recently, the EDO prepared a discussion paper entitled *Climate Change and the Legal Framework for Biodiversity Protection in NSW: a legal and scientific analysis*, where we put forward a new approach to biodiversity management in NSW to cope with the challenges posed by climate change. The recommendations in that paper cover all the areas which are the subject of this review. We attach a copy of this report as part of this submission.

The EDO will not address the limited range of questions in the Discussion Paper but will make comment under the broad headings identified in the Act. Our key comments and recommendations are listed below.

### ***Objects of the Act***

*Recommendation # 1:* The current objectives of the Act, which include the aspirational goal of protecting all species and populations in NSW, must remain paramount. However, a new set of goals and objectives need to be developed to provide greater guidance on *how*

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<sup>5</sup> 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.

<sup>6</sup> 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.

the legislative objectives are to be achieved in recognition that under climate change we may not be able to protect all species;

*Recommendation #2:* Where the Act already requires the Minister or Director-General to consider ecologically sustainable development (ESD), separate additional references to social and economic considerations be deleted;

*Recommendation #3:* The TSC Act should be reviewed to ensure that wherever a ministerial discretion is exercised, or where any decision is made under the Act, it is done in accordance with the principles of ESD as the overarching objective; and

*Recommendation #4:* The NSW Government needs to systematically review the ability of local councils in terms of whether staff possess necessary skills; sufficient funding, good quality and quantity of data; and an organisational culture that supports effective implementation of ESD in local decision-making.

### ***Listing processes***

*Recommendation #5:* Key strengths of the listing process under the Act are open nominations, public consultation, independence of the Scientific Committee, requirement to only consider scientific information when making listing decisions and the listing of endangered ecological communities and critical habitat in addition to single species. These elements must be retained in the Act;

*Recommendation #6:* Gaps in the current lists need to be addressed particularly in relation to insects, invertebrates and fungi;

*Recommendation #7:* The listing processes for marine species under the *Fisheries Management Act 1997* should be incorporated into the *TSC Act*. Resource use legislation is not the appropriate place to include threatened species listing and recovery processes;

*Recommendation #8:* If species or ecological communities are listed under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, they should they should automatically be listed under the *TSC Act* if found in NSW;

*Recommendation #9:* A listing of a Key Threatening Process (KTP) under either the *TSC Act* or *EPBC Act* should be automatically paralleled by a listing at the other level as KTPs pose threats to biodiversity throughout Australia (unless referring to a very localised threat);

*Recommendation #10:* Where a species endemic to NSW is nominated under either Act it should be assessed at a the NSW level by the Scientific Committee, and any determination at that level should have the same effect federally without the need for a separate assessment;

*Recommendation #11:* The listing of species that play a key role in ecosystem function ('key functional species') should be enabled under the *TSC Act*;

*Recommendation #12:* The listing of species that are not currently threatened but that are likely to be vulnerable to climate change should be explicitly enabled under the *TSC Act*;

*Recommendation #13:* The definition of ‘indigenous’ under the *TSC Act* should be changed to address the situation of native species moving in response to climate change;

*Recommendation #14:* A review of the identification, definition and listing process for ecological communities and populations under the *TSC Act* should be undertaken with a view to ensuring their efficacy under climate change;

*Recommendation #15:* In conjunction with a robust community nomination process, the *TSC Act* should be amended to allow the NSW Scientific Committee to establish non-exhaustive ‘priority themes’ for the assessment of nominations;

*Recommendation #16:* The *TSC Act 1995* should be amended to allow the NSW Scientific Committee to establish prioritisation criteria that the Committee must consider when prioritising nominations; and

*Recommendation #17:* The listing of critical habitat should be made exclusively by the Scientific Committee based on scientific evidence only.

### ***Critical habitat***

*Recommendation #18:* Where a critically endangered species is listed, its corresponding habitat should be automatically identified as critical habitat under the *TSC Act*;

*Recommendation #19:* Relevant legislation should be amended to ensure that critical habitats are identified as ‘red flag’ areas where development is prohibited. This should be similar in form to the red flag mechanism under the native vegetation methodology. This prohibition must apply to all categories of development, including major projects under Part 3A; and

*Recommendation #20:* The definition of critical habitat under the *TSC Act* should be amended to cover ‘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’, ie, to include buffer zones around the critical habitat.

### ***Recovery Planning***

*Recommendation #21:* A framework for prioritisation between listed species should be developed under the *TSC Act*, taking into account four related criteria: species value, the cost of management, the benefit of management, the likelihood of success. The criteria should take into account the impacts of climate change;

*Recommendation #22:* The framework for prioritisation between listed species should be based on scientific considerations and also involve public ethical debate over what we try to protect and why;

*Recommendation #23:* Conservation budgets for threatened species recovery and threat abatement actions should be increased to address the continued decline in biodiversity and deal with the challenges of climate change;

*Recommendation #24:* Recovery plans under the *TSC Act* should be made shorter, simpler, and be more tightly focused on recovery actions and outcomes;

*Recommendation #25:* A greater focus should be given operationally under the *TSC Act* to the more generic multi-species recovery strategies over recovery plans, as provided for in the Priorities Action Statement, where species can be appropriately grouped based on threat similarity using robust approaches;

*Recommendation #26:* Recovery plans under the *TSC Act* should facilitate adaptive management and be more flexible and responsive to change and uncertainty;

*Recommendation #27:* A greater focus should be given operationally under the *TSC Act* to threat abatement planning over recovery planning;

*Recommendation #28:* Threat abatement efforts under the *TSC Act* should generally be focussed on sets of threats that overlap and interact to affect large numbers of species; and

*Recommendation #29:* Threat abatement plans under the *TSC Act* should be made shorter, simpler, and be more tightly focused on threat abatement actions and outcomes.

### ***Interaction with planning legislation***

*Recommendation #30:* The *TSC Act* and the *EPA Act* must be amended to state that the 7 part test is compulsory for all development applications. In addition, there should be an explicit requirement for 7 part tests to be made public as this will increase the transparency and accountability of the process;

*Recommendation #31:* The 7 part test should be amended to require consideration of whether a site is likely to be important for biodiversity under climate change such as whether it is a potential habitat corridor or buffer areas;

*Recommendation #32:* The DECCW should be granted a review/audit role of environmental impact assessments prepared under the *EPA Act* including broad powers to reject an unsatisfactory EIA. There should be an additional allocation of funding to DECCW for this purpose.

*Recommendation #33:* The *TSC Act* should include mechanisms to provide Councils with funds to commission environmental assessments from independent experts;

*Recommendation #34:* The *TSC Act* should be amended to require all environmental consultants conducting assessments under the Act to be accredited;

*Recommendation #35:* The *EPA Act* and the *TSC Act* should be amended to require 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. This requirement must also apply to Part 3A;

*Recommendation #36:* The *EPA Act* should be amended to introduce a compulsory legal test that requires a decision-maker to be satisfied that a Local Environmental Plan (LEP) as a whole will adequately protect biodiversity, or it cannot be approved; and

*Recommendation #37:* The *EPA Act* should be amended to prohibit the Minister for Planning from overriding the provisions of LEPs that prohibit development or impose strong biodiversity protections in approving Part 3A projects.

### ***Biocertification and Biobanking***

*Recommendation #38:* The biobanking and biocertification schemes must be underpinned by robust objective assessment methodologies that are based on scientific principles, such as offsets being “like for like”. This is essential to maintain the integrity of the “maintain or improve biodiversity values” test in the Act.

### ***NSW Biodiversity Strategy***

*Recommendation #39:* The NSW Biodiversity Strategy should clearly identify conservation objectives, how the objectives are proposed to be achieved, measurable performance targets, timeframes for achieving objectives and mechanisms to measure whether performance targets are being met; and

*Recommendation #40:* The *NSW Biodiversity Strategy* should be used as an appropriate framework to facilitate a debate on the appropriateness of our current approach to biodiversity conservation in light of climate change.

### ***Advisory Bodies***

*Recommendation #41:* The Natural Resources Commission should be retained as the primary independent advisory body to government on environmental issues, including biodiversity, in NSW.

We provide comment under the following headings:

1. Objects of the Act
2. Listing processes
3. Critical habitat
4. Recovery Planning
5. Interaction with *EPA Act*
6. Biocertification
7. Biobanking
8. NSW Biodiversity Strategy
9. Advisory Bodies

**Attachment A:** *Climate Change and the Legal Framework for Biodiversity Protection in NSW: a legal and scientific analysis*

**Attachment B:** *The Status of Biodiversity Conservation in NSW*

## **1. Objects of the Act**

### *1.1. Objectives under climate change*

The EDO supports the current objects of the *TSC Act* and submits that these must be retained and augmented as they reflect accepted ecological priorities. For example, it is widely acknowledged that permanent habitat protection and habitat restoration are the most efficient methods of achieving protection and recovery of threatened species, communities and populations. Moreover, aspiring to conserve all biodiversity in NSW is an essential starting point, as each species, community and population plays an important role within its ecosystem.

However, in our recent report, *Climate Change and the Legal Framework for Biodiversity Protection in NSW: a legal and scientific analysis*, which is attached, we highlight that some scientists are of the view that our current overarching goal of attempting to preserve all species may be impossible to achieve under climate change. Under climate change, we will not be able to protect all species from extinction or prevent change to biodiversity. Indeed, trying to protect all species from extinction may mean that we will focus our conservation efforts in the wrong areas, which is likely to deplete limited resources and may result in greater extinctions.

The EDO is of the opinion that while the aspirational goal of protecting all species and populations remains relevant, a new set of goals and objectives need to be developed for biodiversity conservation in NSW. That is, the *TSC Act* should provide greater guidance on *how* the legislative objectives are to be achieved by outlining, for example, a hierarchy of actions. Determining what these priorities are involves ethical questions such as what to protect and why. There is a clear need for national and State-wide debates on the appropriateness of our current approach to biodiversity conservation. The debate should discuss the realities of the impacts of climate change on biodiversity and should focus on the fundamental question of how we should go about trying to achieve our aspirational legislative objectives under climate change. We discuss this further in the context of the NSW Biodiversity Strategy below.

***For an detailed discussion please refer to the attached biodiversity and climate change report, section 5.1, pages 23-27.***

### *1.2. Ecologically Sustainable Development*

The EDO supports the fact that a key objective of the Act is to promote ecologically sustainable development (ESD). EDO is of the view that the principles of ESD, which include the precautionary principle, inter-generational equity and the conservation of biodiversity, are fundamental to the effective functioning of the *TSC Act* if it is to achieve the best environmental, social and economic outcomes.

We support the retention of the ESD objective as it is stronger than other legislation which only requires the consideration of ESD or lists ESD as one of the number of unprioritised objectives.<sup>7</sup> However, despite this objective, the *TSC Act* currently

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<sup>7</sup> Such as in the *Environmental Planning and Assessment Act 1979*.

misapplies ESD. For instance, in various sections of the Act, the Director-General or the Minister is required to consider the likely social and economic consequences of his/her determination and/or ways of minimising such consequences, *in addition* to the duty to consider ESD.<sup>8</sup> Such provisions seem to be based on the view that ESD is an exclusively environmental concept which needs to be “balanced” by a requirement to consider economic and social impacts separately. However, ESD has always been premised on the *integration* of environmental and economic factors into decision-making. Therefore, consistent with administrative law principles, ESD would thus allow economic factors to be given equal consideration as environmental factors without the need for additional specific requirements. By requiring a separate consideration of economic and social matters, the Act is essentially allowing for these matters to be “doubly” weighted. The EDO submits that where the Act requires the Minister or Director-General to consider ESD, that separate references to social and economic factors be removed.

However, this in and of itself will not ensure the substantive implementation of ESD under the Act as it still remains as just another consideration to be balanced, something that decision-makers must “have regard to”. This essentially means that once the procedural requirement to consider or take into account ESD principles is followed, then the decision-maker is entitled to disregard significant environmental impacts, including the destruction of habitat for threatened species, and favour other considerations under the Act, such as economic considerations. This is despite the fact that ESD is supposed to lead to decisions that integrate all three elements instead of favouring just one. That is, ESD is meant to frame the *outcomes* of decision-making instead of just having procedural implications.<sup>9</sup> In light of the above, the EDO submits that the Act should be amended to require all decisions under it to be made *in accordance with* ESD, as the primary and overarching object. The *TSC Act* should be reviewed to ensure that wherever a ministerial discretion is present, or where any decision is made under the Act that ESD is given *overriding weight* to ensure that sustainable decisions are made.

A further issue is that regulatory authorities, such as local councils, who have to apply ESD on the ground, often do not have the ecological knowledge to implement the concept. This is due to a lack of technical ability, limited resources and minimal training in ESD and its concepts. To address this deficiency in order to achieve ESD outcomes, the EDO submits that the government needs to systematically review the ability of local councils who have to make decisions relating to ESD in terms of whether staff possess necessary skills, sufficient funding, good quality and quantity of data, and an organisational culture that supports effective implementation of ESD.

## **2. Listing processes**

The EDO supports the listing process under the Act and it is one of the Act’s strengths. We discuss the positive aspects of the listing processes and propose recommendations for improvement below.

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<sup>8</sup> See for example sections 57 and section 75 of the Act.

<sup>9</sup> Marie-Claire Segger & Ashfaq Khalfan, ‘Sustainable development law: principles and practices’ (2004) at 368.

## 2.1. Strengths of the listing process

The EDO notes that 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. The EDO strongly supports the retention of this process.

Second, the EDO strongly supports 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. We support the absence of a ministerial veto right available in relation to listings. The EDO submits that these essential elements of the listing process must be retained. 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 by 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.<sup>10</sup> Protecting communities and critical habitat has considerable benefit for a number of species, whether threatened or not. The ability to list EECs and critical habitat must therefore be retained.

## 2.2. Deficiencies in current listing processes

Despite the positive elements of the listing process, the EDO has identified three key areas for reform to improve the listing process under the Act to make it more robust and comprehensive.

First, the EDO is of the view that 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.<sup>11</sup> Due to this bias, as well as

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<sup>10</sup> Possingham, H. P., Ankelman, 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.

<sup>11</sup> Possingham HP, Ankelman 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.

time lags and lack of knowledge, many species at risk of extinction may not be currently listed.<sup>12</sup>

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. For example, members of the EDO Scientific Advisory Service have pointed out that DECCW has lost many staff with relevant expertise, and recruitment of new staff with relevant expertise is largely non-existent.<sup>13</sup>

Second, the EDO does not support the 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 Industry and Investment NSW. The EDO submits that 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 resources. This is demonstrated by the fact that no species that are commercially harvested species were listed as threatened until 10 years after the legislation was enacted. Similarly, no 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.<sup>14</sup> Transferring the fisheries conservation and listing provisions from the *FM Act* to the *TSC Act* would address the current conflict. This is discussed further in our recent submission of the statutory review of the *FM Act*.<sup>15</sup>

Third, although the EDO acknowledges that assessments for listing at a Commonwealth and federal level are done at different scales, we submit that the *TSC Act* should 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. In our view, if species or ecological communities are listed under the *EPBC Act*, they should automatically be listed under the *TSC Act* if found in NSW, given that if they are nationally threatened, they will also usually be threatened within all states where they exist. This will allow a coordinated approach to be taken between the Commonwealth and NSW for the same species. In addition, we submit that Key Threatening Processes (KTPs) should be consolidated. A listing of a KTP under either level should be

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<sup>12</sup> 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](http://www.environment.nsw.gov.au/soe/soe2006/chapter6/chp_6.3.htm#6.3.22)

<sup>13</sup> Dr Steven Douglas, *pers. comm.*

<sup>14</sup> *Environment Protection & Biodiversity Conservation Act 1999*.

<sup>15</sup> See EDO submission on the Statutory Review of the *FM Act*, 12<sup>th</sup> November 2010, available at: [http://www.edo.org.au/edonsw/site/pdf/subs10/101112fmact\\_review.pdf](http://www.edo.org.au/edonsw/site/pdf/subs10/101112fmact_review.pdf).

automatically paralleled by a listing at the other level (unless the KTP is listing is for an extremely localised threat in one state). Moreover, where a species endemic to NSW is nominated under either Act it should be assessed at the NSW level by the Scientific Committee, and any determination at that level should have the same effect federally. That is if there is a decision to list a species endemic to NSW under the *TSC Act* then the species should be automatically listed under the *EPBC Act* without the need for a separate assessment.

### 2.3. Effect of climate change on listing processes

In our NSW biodiversity and climate change report, we found that the listing process under the Act will need to be amended in order to be effective in addressing climate change impacts on biodiversity. We identified several problems with the current listing process including:

- 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;
- A focus on individual threatened species may direct attention away from resourcing other strategies to protect biodiversity under climate change;<sup>16</sup>
- 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;<sup>17</sup>
- 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 into NSW. 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 which will make prioritisation of listing processes a necessity.

In response to these issues, we made 6 key recommendations:

- The listing of species that play a key role in ecosystem function (‘key functional species’) should be enabled under the *TSC Act*;
- The listing of species that are not currently threatened but that are likely to be vulnerable to climate change should be explicitly enabled under the *TSC Act*;

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<sup>16</sup> 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.

<sup>17</sup> 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.

- The definition of ‘indigenous’ under the *TSC Act* should be changed to address the situation of native species moving in response to climate change’;
- A review of how ecological communities and populations are identified, defined and listed under the *TSC Act* should be undertaken with a view to ensuring their efficacy under climate change;
- In conjunction with a robust community nomination process, the *TSC Act* should be amended to allow the NSW Scientific Committee to establish non-exhaustive ‘priority themes’ for the assessment of nominations; and
- The *TSC Act* should be amended to allow the NSW Scientific Committee to establish prioritisation criteria that the Committee must consider when prioritising nominations.

*For an extensive discussion please refer to the attached biodiversity and climate change report, section 5.3, pages 37-42.*

### **3. Critical habitat**

#### *3.1. Listing of critical habitat*

Critical habitat it 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.<sup>18</sup> 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.<sup>19</sup>

The EDO submits that 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.<sup>20</sup> 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.<sup>21</sup> As a result, economic considerations have served to thwart the listing of critical habitat even in situations in which the declaration is scientifically sound. The EDO submits that the listing of critical habitat should be made exclusively by the Scientific Committee based on scientific evidence only. It is imperative that habitats critical to the survival of species and communities be listed and subject to the greatest protection measures available under the *TSC Act*. We further submit that for critically endangered species or communities, their habitat should be automatically listed as critical habitat under the Act.

In our NSW biodiversity and climate change report, we further highlighted the problems of listing critical habitat in the context of the impacts of climate change. Under the Act, the definition of critical habitat implies that for habitat to be declared critical, it must be

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<sup>18</sup> See Department of Environment and Climate Change at:

<http://www.environment.nsw.gov.au/criticalhabitat/CriticalHabitatProtectionByDoctype.htm>

<sup>19</sup> 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.

<sup>20</sup> (NSW) *Threatened Species Conservation Act 1995* ss 38, 39.

<sup>21</sup> (NSW) *Threatened Species Conservation Act 1995* s 44.

*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’.<sup>22</sup> As a result, the EDO submits that the definition of critical habitat under the *TSC Act* should be amended to cover ‘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’.

### *3.2. Weakness of critical habitat listing*

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 *EPA 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.<sup>23</sup> 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, the procedural requirement for an SIS does not apply to the assessment of the largest developments in NSW, which are assessed under Part 3A of the *EPA Act*. For Part 3A projects, the extent to which the impacts of a major project on critical habitat are assessed depends on the discretion of the Director-General.

It is clear that for areas earmarked as critical habitat for endangered species and populations, that these areas must logically be protected from further development. We submit that the *TSC Act* should be amended to ensure that critical habitats are identified as ‘red flag’ areas where development is prohibited. This should be similar in form to the red flag mechanism under the native vegetation methodology. This prohibition must apply to all categories of development, including major projects under Part 3A.

## **4. Recovery Planning**

***For an extensive discussion of issues relating to recovery planning, including the Priority Action Statement, Recovery Plans, Key Threatening Processes and Threat Abatement Planning please refer to the attached report on biodiversity and climate change, Section 5.5, pages 45-57.***

We provide a summary of our recommendations in that report below.

### *4.1. Priorities Action Statement*

Under the *TSC Act*, the Priority Action Statement (PAS) must set out recovery and threat abatement strategies to promote the recovery of each threatened species, and to manage each key threatening process. It must also establish relative priorities for the

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<sup>22</sup> (Qld) *Nature Conservation Act 1992* s13(2).

<sup>23</sup> Except for projects assessed under Part 3A.

implementation of recovery and threat abatement strategies, establish performance indicators to enable reporting on achievements, and set out timetables for implementation and achievement.<sup>24</sup>

The EDO supports the intent of the PAS as it transparently implements a prioritisation approach which was occurring implicitly as a response to limited conservation budgets. As we commented in our NSW biodiversity and climate change report, 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 EDO submits that the current iteration of the PAS does not achieve these things. Problems which we have previously identified include:<sup>25</sup>

- 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;<sup>26</sup>
- 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 DECCW budget to address the continued decline of biodiversity in NSW, we submit that a new framework 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.<sup>27</sup> This will maximise conservation outcomes within the budget.

***Please see pages 45-48 of the biodiversity and climate change report for further detail.***

#### *4.2. Recovery plans*

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.<sup>28</sup> Priorities for recovery plans in NSW are determined in accordance with the PAS.<sup>29</sup> 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

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<sup>24</sup> (NSW) *Threatened Species Conservation Act 1995* s 90A.

<sup>25</sup> 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.

<sup>26</sup> Department of Environment and Climate Change (2006) 'Introducing the Threatened Species Priorities Action Statement (PAS)', DECC, Sydney.

<sup>27</sup> Joseph L, Maloney R and Possingham H (in press) 'Optimal allocation of resources: a project prioritisation protocol' *Conservation Biology*.

<sup>28</sup> (NSW) *Threatened Species Conservation Act 1995* s 56.

<sup>29</sup> (NSW) *Threatened Species Conservation Act 1995* s 58.

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, the EDO submits that 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. Finally, to maximise benefits of recovery plans, a greater focus should be given to multi-species recovery plans where possible as these have the potential to improve cost-effectiveness and increase species coverage.

*Please see pages 48-53 of the biodiversity and climate change report for further detail.*

#### *4.3. 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.<sup>30</sup> A threat abatement plan (TAP) is a plan to abate, ameliorate or eliminate the adverse effects of KTPs<sup>31</sup> and must include actions necessary to reduce the impact of a KTP on threatened species, etc.<sup>32</sup> Like recovery plans, priorities for TAPs are now determined in accordance with the PAS.<sup>33</sup> 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.<sup>34</sup>

The EDO submits that 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.<sup>35</sup> However, in the context of a limited conservation budget, we submit that TAPs must be made shorter, simpler and focus more readily threat abatement actions and outcomes.

The EDO is also of the opinion that more resources should be focused on threat abatement planning than on recovery planning. This is because threat abatement planning addresses the drivers of biodiversity decline, is likely to benefit multiple species,

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<sup>30</sup> (NSW) *Threatened Species Conservation Act 1995* s 13.

<sup>31</sup> (NSW) *Threatened Species Conservation Act 1995* s 74.

<sup>32</sup> (NSW) *Threatened Species Conservation Act 1995* s 77.

<sup>33</sup> (NSW) *Threatened Species Conservation Act 1995* s 76.

<sup>34</sup> 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](http://www.threatenedspecies.environment.nsw.gov.au/tsprofile/pas_abatement_strategies.aspx)

<sup>35</sup> 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.

and may be more cost-effective.<sup>36</sup> 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 ideal as TAPs provide a good mechanism to co-ordinate threat abatement actions across regions and targeted to priority areas.<sup>37</sup> 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.

*Please see pages 53-57 of the biodiversity and climate change report for further detail.*

## **5. Interaction with the *Environmental Planning and Assessment Act 1979***

### *5.1. Assessment of biodiversity*

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 *EPA 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 7 part test. If the assessment finds there is likely to be a significant impact, then an SIS is required.

#### *5.1.1 Seven part test*

The EDO has serious concerns with the current assessment of biodiversity in NSW, particularly the 7 part test. This is consistent with other critics.<sup>38</sup> Indeed, the test is often not undertaken where required, and in our observation it is applied inconsistently across Local Government Areas in NSW. 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.<sup>39</sup> 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

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<sup>36</sup> Caughley G and Gunn A (1996) *Conservation Biology in Theory and Practice* Blackwell 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;

<sup>37</sup> 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.

<sup>38</sup> 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.

<sup>39</sup> *Ibid* at p137.

assessments and issues relating to the integrity and accountability of ecological consultants who are commissioned to undertake threatened species assessments.

The EDO submits that to address these issues, the *TSC Act* and the *EPA Act* must be amended to state that the 7 part test is compulsory for all development applications. Where the application is within a highly disturbed urban area, then it will be relatively simple and quick to complete the test so this will not impose an administrative burden on councils or applicants. In addition, there should be an explicit requirement for 7 part test results to be made public as this will increase the transparency and accountability of the process.

In our climate change and biodiversity report we identified further limitations of the 7 part test, and environmental assessment in general, in terms of climate change. First, the focus of the assessment process is on threatened species. As noted in our report, a focus on threatened species may not be the best way to minimise species extinctions under climate change. Second, the assessment process does not explicitly require decision-makers to consider whether a development site is likely to be important for biodiversity under climate change (as a potential habitat corridor or buffer area, etc). While EIAs usually consider the connectivity value of a development site, if threatened species are not present, then the importance of such areas under climate change will often not be adequately considered. The EDO therefore submits that the 7 part test should be amended to require consideration of whether a site is likely to be important for biodiversity under climate change such as whether it is a potential habitat corridor or buffer areas.

#### *5.1.2. Accuracy of environmental impact statements*

As above, 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.

The EDO submits that these issues are symptomatic of three key problems.

First, there is an absence of any processes in either the *TSC Act* or the *EPA Act* to assess the accuracy of environmental impact assessment after the event. We submit that without independent technical review, the outcome of the environmental impact assessment process will always remain fraught with suspicion. To address this issue the EDO submits that DECCW should have a review/audit role of environmental impact assessments prepared under the *EPA Act*. The *EPA Act* and the *TSC Act* should be amended to grant DECCW broad powers to reject an unsatisfactory environmental assessment. We acknowledge that a broad and effective audit role will have resource issues for DECCW but given the importance of ensuring the impacts of threatened species are appropriately assessed, there should be an additional allocation of funding for this purpose.

Second, another key issue is that 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 assessment in a timely manner which creates a culture in which dealing with ecological issues is seen as an administrative burden. To address this issue we submit that the *TSC Act* should include mechanisms to provide councils with funds to commission environmental assessments from independent experts. There have been suggestions made, with some merit, that the *Local Government Act 1993* be amended to require councils to demonstrate that they have the necessary number of suitably skilled staff and the necessary assessment processes to meet their obligations under the *TSC Act*, with appropriate sanctions for breaching this requirement.<sup>40</sup>

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. One practitioner view was that the system currently places emphasis on the findings environmental assessments, but virtually no emphasis on the competency of those who prepare or assess them.<sup>41</sup> Moreover, the 7 part test as currently framed provides too much scope for consultants to favour their clients' interests in how they interpret key triggers in the test.<sup>42</sup> To address this issue, in addition to implementing a assessment review process administered by DECCW as discussed above, there is a clear need to implement an accreditation process for all environmental consultants conducting assessments under the *EPA Act* and the *TSC Act* to ensure that the services provided by them are of high quality and objectivity. An accreditation scheme would ensure a higher quality of work by establishing a system of oversight and requiring minimum qualifications and standards of work on the part of ecologists. The *TSC Act* should therefore be amended to require all environmental consultants conducting assessments under the Act to be accredited. Such a scheme could either be administered by DECCW or be an approved industry-based scheme, for example administered by Ecological Consultants of Australia.

### 5.1.3. Consideration of environmental impact assessments

A key failing of the assessment of threatened species under the *EPA 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 Part 4, Part 5 or Part 3A of the 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. The EDO submits that this discretion must be fettered as a matter of urgency to arrest the continued decline of biodiversity in NSW. As a result, we submit that the *EPA Act* and the *TSC Act* should be amended to require 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. This requirement must apply to Part 3A projects (see below).

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<sup>40</sup> *Ibid* at p147.

<sup>41</sup> Dr Steven Douglas, *pers comm.*

<sup>42</sup> *Ibid.*

## 5.2. Part 3A

The EDO submits that the greatest impediment to the effective functioning of the *TSC Act* in protecting biodiversity in NSW is Part 3A of the *EPA Act*, which applies to the assessment and approval of major projects in NSW. In our view, the *TSC Act* will remain largely ineffectual unless Part 3A is abolished or significantly amended. The main concerns with Part 3A include:

- The 7 part test does not apply to major projects;
- There is no mandatory requirement for an SIS or EIS for critical habitat or where there is likely to be a significant impact on threatened species and communities;
- The extent to which the impacts of a major project on critical habitat and threatened species are assessed depends on the discretion of the Director-General;
- Part 3A projects can override restrictions in Local Environmental Plans which might contain strong biodiversity protections;
- There is no concurrence role for the Minister for Environment in relation to major projects even where the development is within critical habitat; and
- Part 3A overrides the requirements under other legislation, such as approvals to harm threatened species under the *TSC Act*.

The EDO submits that these issues are severely compromising the effectiveness of the *TSC Act*. An example is the proposed Part 3A development of the Huntlee Town Centre in the Lower Hunter which will among other things provide housing for 20,000 people. The EDO acted for the Sweetwater Action Group Incorporated (SWAG) a group of concerned residents who challenged the Concept Plan approval and related rezoning of the site under Part 3A. The Minister for Planning granted approval to the concept plan despite the site including the only known habitat of the critically endangered plant, *Persoonia pauciflora*. The proposed development if it goes ahead will remove a significant amount of the last remaining habitat for this species. This is an unacceptable impact.

The EDO submits that major projects be prohibited within listed critical habitat as a ‘red flag’ area. In addition, the Minister for Planning must be required to refuse consent to a major project where an environmental assessment has shown that there will be an unacceptable impact on threatened species, endangered ecological communities or their habitats. Finally, Part 3A should be amended to prohibit the Minister from overriding the provisions of LEPs that prohibit development or impose strong biodiversity protections.

## 5.3. Coordination with environmental planning instruments

The EDO is of the view that a key shortcoming of the *TSC Act* is that the listing of threatened species does not activate a requirement to consider such listings (particularly of Endangered Ecological Communities) when making or reviewing Local Environmental Plans (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”<sup>43</sup>.

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<sup>43</sup> 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.

Moreover, as we noted in our biodiversity and climate change report, 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 for LEPs all councils 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.

In response to the above deficiencies, the EDO submits that there is a need to ensure that land-use plans such as LEPs have the overall effect of adequately protecting biodiversity, including under climate change by amending the *EPA Act* to introduce a compulsory legal test that requires a decision-maker to be satisfied that the land-use plan as a whole will adequately protect biodiversity, or it cannot be approved.

## **6. Biocertification**

In relation to biocertification, the EDO has a long history of engagement on the issue, and more recently we have provided advice to the DECCW on amendments to the *TSC Act* and the development of a robust and scientifically sound methodology for assessing proposals at a landscape level. Our public submissions relating to biocertification are available on our website.<sup>44</sup>

There are clear advantages of developing landscape scale approaches to biodiversity conservation. 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 potential participants risks the ecological credibility and overall success of the scheme.

Our main concerns with the current methodology relate to the integrity of the “maintain or improve biodiversity values” test.<sup>45</sup> 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

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<sup>44</sup> 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.

<sup>45</sup> 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](http://www.edo.org.au/edonsw/site/pdf/subs10/100730draft_biodiversity_certification_methodology.pdf).

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 has highlighted a number of problems with the proposed federal strategic assessment of the Sydney Growth Centres.<sup>46</sup>

## **7. Biobanking**

In relation to Biobanking, the EDO has been involved in analysing the development of the scheme for a number of years and is a member of the Ministerial Reference Group on Biobanking. We have provided advice directly to DECCW on the biobanking methodology and made several public submissions on various aspects of the scheme, which are available on our website.<sup>47</sup> Given the failures in implementation of the current Act, the EDO supports investigating innovative tools to better value biodiversity and we particularly support schemes that provide income for land owners to manage biodiversity for conservation. However, we submit that any such schemes must be underpinned by robust objective scientific principles. Any offsetting must be as a very last resort after all efforts to avoid and then minimise impacts have been undertaken, and any offsets must be according to scientific "like for like" criteria.

We are currently drafting a separate submission providing feedback on amendments to the biobanking methodology, and we understand a more comprehensive review of biobanking will be undertaken (as required by the Act) in 2011. The EDO will provide a detailed response to this process with input from our expert scientific register.

## **8. NSW Biodiversity Strategy**

The EDO strongly supports the retention of the NSW Biodiversity Strategy as a statutorily required policy to inform biodiversity planning for NSW. We believe that the strategy should clearly identify conservation objectives, how the objectives are proposed to be achieved (including responsibilities for the implementation of actions), measurable

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<sup>46</sup> See:

[www.edo.org.au/edonsw/site/pdf/subs10/100625growth\\_centres\\_strategic\\_assessment%20\\_EPBC.pdf](http://www.edo.org.au/edonsw/site/pdf/subs10/100625growth_centres_strategic_assessment%20_EPBC.pdf)

<sup>47</sup> 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.

performance targets and timeframes for achieving objectives and mechanisms to measure whether performance targets are being met.

In addition, as mentioned in our climate change and biodiversity report, decisions about which approach to take in terms of biodiversity conservation under climate change will involve ethical questions such as what to protect and why. Given the importance of these decisions, the EDO submits that there is a clear need for national and State-wide debates over the next few years on the appropriateness of our current approach to biodiversity conservation. The debates should discuss the realities of the impacts of climate change on biodiversity and should focus on the fundamental question of how we should go about trying to achieve our aspirational legislative objectives under climate change.

We believe that the *NSW Biodiversity Strategy* is an appropriate starting point to facilitate the debate. As the Strategy is reviewed every five years, it provides a mechanism to regularly review current approaches, while at the same time enabling longer-term planning.

## **9. Advisory Councils**

The EDO supports a statutorily created independent advisory body to provide advice to the NSW Government on issues relating to biodiversity and natural resource management more generally. We note that the Act provides for two advisory councils, namely the Social and Economic Advisory Council and the Biological Diversity Advisory Council. These are not currently operational and have not been for some time.

The EDO is of the view that these bodies may not be required as long as there remains an overarching independent body charged with advising the Government on biodiversity. We note that the Natural Resource Commission, created by the *Natural Resources Commission Act 2003*, has a broad mandate to provide advice on natural resource management including recommending state-wide standards, undertaking inquiries and advising the Minister on priorities for research.<sup>48</sup> This mandate includes examining and commenting on social and economic issues related to natural resource management.

The EDO supports the retention of the Natural Resources Commission as the primary independent advisory body to government on environmental issues in NSW. We support the retention of its full mandate, including approving and assessing any changes to the methodology under the biobanking scheme.

**Attachment A:**        *Climate Change and the Legal Framework for Biodiversity Protection in NSW: a legal and scientific analysis*

**Attachment B:**        *The Status of Biodiversity Conservation in NSW*

**For any questions in relation to this submission please contact Rachel Walmsley,  
EDO Policy and Law Reform Director, on [rachel.walmsley@edo.org.au](mailto:rachel.walmsley@edo.org.au)  
or (02) 9262 6989.**

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<sup>48</sup> Section 13, *Natural Resources Commission Act 2003*.