PROTECT THE LAWS
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Assessment of the adequacy of threatened species & planning laws

This report was commissioned by the Places You Love Alliance

report

UPDATED September 2014

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All states and territories

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This report was commissioned by the Places You Love Alliance of more than 42 environment groups and prepared by the Australian Network of Environmental Defender's Offices Inc (ANEDO).

The Australian Network of Environmental Defenders Offices Inc consists of eight independently constituted and managed community environmental law centres across the States and Territories of Australia. Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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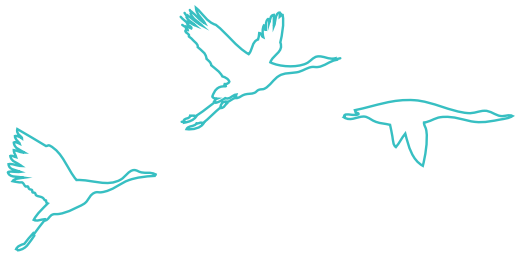

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executive summary

In 2012, the Place You Love Alliance of over 42 environmental groups commissioned a report assessing the adequacy of threatened species and planning laws in Australian jurisdictions. The key finding of the 2012 audit was that no state or territory meets all the core requirements of best practice threatened species legislation.

Since release of that audit, many state laws have been amended with potentially worse outcomes for threatened species. Significant changes include amendments to major project planning laws in Queensland; changes to native vegetation laws in Queensland, Victoria and New South Wales; and the introduction of new offset policies.

Contrary to the rationale of the flawed "one stop shop" policy, the gap between the environmental standards in state laws and national standards is widening, not aligning.

Notwithstanding the continued inadequacies of state legislation, the Australian Government is poised to hand over assessment and approval powers to States and Territories. Memoranda of Understanding have been signed with all jurisdictions, assessment bilateral agreements have been exhibited in most jurisdictions, and two approval bilateral agreements are expected to be signed imminently.

It has been argued by some that there is significant duplication between state and Commonwealth laws for environmental assessments and approvals. As part of this updated audit, we identified the core standards in the EPBC Act relating to matters of national environmental significance, and key procedural safeguards. We undertook a desktop study in each jurisdiction to identify whether the legislation did actually explicitly refer to key elements of the current Commonwealth law, such as the international agreements that underpin the EPBC Act. Our analysis shows that despite the claims of duplication, State and Territory planning laws generally do not even include references to the key international agreements that Australia has committed to implementing.

The gaps between standards are summarised by the following table for the key legislation in each State and Territory, with some qualification regarding the various different approaches taken to standards in different instruments. Specific detail of the approach taken in each jurisdiction is contained in the body of this report.

Based on feedback and updates 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: recent trends, 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.

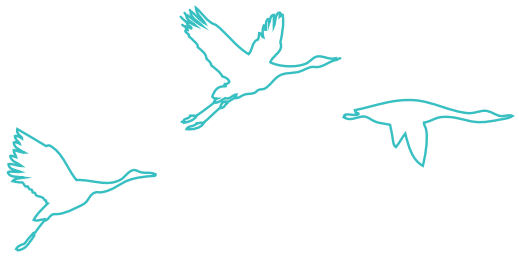
As noted in our 2012 audit:

> *"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."*[4]

This updated audit confirms that no state currently implements 'model' legislation, and confirms a number of key findings.

Our analysis confirms the finding that, despite assurances that the 'one stop shop' policy would ensure State and Territory laws met national standards, no State or Territory law currently 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.

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. Recent changes to resources legislation compromise balanced decision-making in NSW and reduce third party rights to object to certain projects in Queensland.

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. This subjugation has increased recently in jurisdictions such as NSW, where legal instruments have been introduced to ensure mining projects can be approved for economic reasons even where social and environmental impacts may be clearly unacceptable.

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 need to be reviewed, strengthened, and fully resourced and implemented.

Jurisdiction	MOU signed	Assessment Bilateral	Approval Bilateral[1]
Victoria	13 December 2013	22 April 2009	(deferred to post-election)
NSW	5 November 2013	20 December 2013	Exhibition closed 13 June 2014
South Australia	13 December 2013	Exhibition closed 17 March 2014[2]	-
Western Australia	13 December 2013	Exhibition closed 27 June 2014	-
Queensland	18 October 2013	13 December 2013	Exhibition closed 13 June 2014
Tasmania	13 December 2013	Exhibition closed 15 August 2014	Exhibition until 11 September 2014
Northern Territory	13 December 2013	Exhibition closed 6 May 2014[3]	-
ACT	13 December 2013	16 June 2014	Exhibition until 12 September 2014

Comparison Table – Do state planning laws explicitly incorporate core EPBC standards?

EPBC Act core standard	Qld[i]	TAS	ACT	SA	NT	VIC	NSW	WA
Does the state (or territory) planning law explicitly refer to the principles of **ESD** in objects?	Partly[ii]	Partly	Yes	Partly	Partly[iii]	**No**	Yes[iv]	Partly[v]
Does state planning law explicitly refer to the World Heritage Convention?	**No**[vi]	**No**	**No**	Partly	**No**	**No**	**No**[vii]	**No**
Does state law specifically refer to the **Ramsar** (Wetlands) Convention?	Partly[viii]	**No**	Partly[ix]	**No**	**No**	**No**	**No**[x]	**No**[xi]
Does state threatened species list include all **federally listed species and communities**?	**No**	**No**	Partly[xii]	**No**	**No**	**No**	**No**[xiii]	**No**
Does state planning law specifically refer to the **Convention on Biological Diversity**?	No	No	Partly[xiv]	**No**	**No**	**No**	**No**	**No**
Does state threatened species list include all **federally listed migratory species?**	**No**	**No**	Partly[xv]	**No**	**No**	**No**	**No**	**No**
Does state law specifically refer to **Convention on Migratory Species, JAMBA, CAMBA, ROKAMBA?**	Partly	**No**	**No**	**No**	**No**	**No**	**No**	**No**
Does state law prohibit the approval of **nuclear actions?**	**No**[xvi]	Partly	**No**	Partly	Partly	Yes[xvii]	Partly[xviii]	**No**[xix]
Does state law provide equivalent **standing for third parties**[xx] to bring proceedings in relation to major projects?	Partly[xxi]	Yes	Partly[xxii]	**No**	**No**	**No**[xiii]	Partly[xxiv]	Yes
Do state **offset standards** meet Commonwealth standards regarding 'like for like' and limited use of indirect offsets?	**No**[xxv]	**No**[xxvi]	Partly[xxvii]	Partly	Partly	Partly[xxviii]	**No**[xxix]	Partly[xxx]
Is the state **environment minister** responsible for approving major projects?	**No**	**No**[xxxi]	**No**	**No**	**No**	**No**	**No**[xxxii]	Partly[xxxiii]
Does state appoint **independent decision makers** for state-proposed projects?	**No**	**No**[xxxiv]	**No**[xxxv]	Yes	Yes	**No**	**No**[xxxvi]	**No**[xxxvii]
Do state laws provide special procedures for **early refusal** where project impacts are 'clearly unacceptable'?[xxxviii]	**No**	**No**[xxxix]	**No**[xi]	Partly	Partly	Partly	**No**[xli]	Partly[xlii]

For full analysis of the laws in each jurisdiction see the updated Audit Report.

i Responses based on the Sustainable Planning Act 2009 (Qld) which is currently under review. The State Development and Public Works Organisation Act 1971 (Qld) separately concerns major projects.

ii Sustainable Planning Act 2009 (Qld), section 3 states: 'The purpose of this Act is to seek to achieve ecological sustainability, with specific principles noted in s. 5.' The objects of the Nature Conservation Act 1994 (Qld) are to be achieved via (among other things) 'ecologically sustainable use' of protected areas and species – sections 5, 11.

iii Clause 4.1 of the North Territory Planning Scheme mentions the principles of 'sustainable development' without the world 'ecologically'. ESD is explicitly mentioned in the objects of the Fisheries Act 2011 (NT).

iiiv The Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act) s. 5 includes, as one of ten equally-weighted objects, an object to encourage ecologically sustainable development, as defined in the Protection of the Environment Administration Act 1991 (NSW), s 6. Note that the NSW Government's Planning Bill 2013 (withdrawn in 2014) omitted reference to ESD and its principles.

v The WA planning legislation does not refer to principles of ESD, but the Environment Protection Act does.

vi The WHC is not explicitly referred to in the SP Act but there are references to all MNES which are then cross-referenced to EPBC Act. For the purpose of the table, there is indirect referencing but not explicit inclusion.

vii There are very limited references in National Parks and Wildlife Act 1974 (NSW): for example, when reserving lands under Part 4 the Director-General (DG) is to have regard to the desirability of protecting world heritage properties and values (s. 7).

viii A reference in the Environmental Protection Regulation 2008 (Qld) to the Convention is then cross-referenced in Sustainable Planning Regulation 2009 (Qld).

ix The Nature Conservation Act 1980 (NC Act) (ACT) was recently reviewed by the Nature Conservation Bill 2013 (the Bill). Part 8.4 of the Bill governs Ramsar wetlands management plans and whilst it does not refer specifically to the Convention, it cross-references to the EPBC Act, for example s176 - What is a Ramsar Wetland? - refers to s17 of the EPBC Act.

xx There is limited general protection of wetlands in NSW. The State Environmental Planning Policy [SEPP] 14 (Coastal Wetlands) under the EP&A Act (NSW) applies to limited coastal areas and does not apply to State Significant Infrastructure projects. It requires consent of the local council and/or Director of Planning (the latter excluding Part 3A major projects) to clear or develop coastal wetlands

xi Note that there is currently a proposed reform bill to the Wildlife Conservation Act 1950 (WA): Biodiversity Legislation (Priority Reforms) Bill 2014 (does not include reference to Ramsar Convention).

xii Section 97(2) Nature Conservation Bill 2013 refers to s528 of the EPBC Act that cross-references listing provisions s178 and 181.

xiii Threatened Species Conservation Act 1995 (TSC Act), s. 9 requires the NSW Scientific Committee to consider whether to list nationally listed threatened species in NSW.

xiv The ACT Nature Conservation Bill 2013 does not specifically refer to the "Convention on Biological Diversity", however, Part 8.5 governs "Access to biological resources in reserves ". This Part appears to reflect the broad objectives of the CBD.

xv Section 97(2) Nature Conservation Bill 2013 refers to s528 of the EPBC Act that cross-references listing provision s209.

xvi There is a proposed policy change: Queensland Government, 2013, An action plan to recommence uranium mining in Queensland – Delivering a best practice framework, available here: http://mines.industry.qld.gov.au/assets/Uranium-mining/uranium-action-plan.pdf at 1 (accessed 24 May 2014).

xvii The Nuclear Activities (Prohibitions) Act 1983 prohibits uranium mining, uranium processing and construction of nuclear facilities.

xviii Since 2012 NSW laws allow uranium exploration, but uranium mining and construction of nuclear facilities are prohibited (see Mining Act 1992; SEPP (Mining, Petroleum Production and Extractive Industries) 2007; Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986).

xix The Uranium Mining Prohibition (Keeping WA Free From the Nuclear Fuel Chain) Bill 2009 proposed to insert s 154A into the Mining Act 1978 (WA), which would have made it an offence to mine uranium. This was unsuccessful and uranium can be mined in WA. Further approvals are required if the proposed activity will impact on a registered heritage site as defined under the Aboriginal Heritage Act 1972 (WA). The WA EPA must assess and approve all proposed uranium projects.

xx For example, 'interested persons' or 'persons aggrieved' (see EPBC Act sections 475(6); 487) or better (e.g. 'open standing').

xxi In relation to major projects requiring an Environmental Authority, only for 'site-specific' applications where a submission was made – per sections 520(2) and 524 Environmental Protection Act 1994 (Qld). Part 4A State Development and Public Works Organisation Act 1971 (Qld) does not exclude statutory judicial review, however there is no extended standing for judicial review akin to s.487 or for third party enforcement akin to s.475 EPBC Act and there is no third party enforcement including for offences for providing false and misleading information. Part 4 State Development and Public Works Organisation Act 1971 (Qld) expressly excludes statutory judicial review and omits third party enforcement.

xxii Section 4A of the Administrative Decisions Judicial Review Act 1989 (ACT) provides an 'eligible person' (i.e. an individual or a corporation in certain circumstances) can make an application for judicial review, subject to subsections (2) and (3). Subsection (2) provides that a person may make an application only if the person's interests are, or would be, adversely affected by the decision. Subsection (3) relates to legislation other than the Planning & Development Act 2007; an entity can seek an ACAT review of a decision to approve a development application in the 'impact track' provided the entity lodged a representation and the approval of the development application may cause the entity to suffer 'material detriment': Planning & Development Act 2007, s.407 & Sch. 1.

xxiii An 'interested person' can apply for merits review of the grant of a planning permit if they previously objected to the grant of the permit, unless the Minister 'calls in' the project in which case no merits review is available. There is no merits review for major transport projects and or major mining projects. Judicial review is more limited than the EPBC Act as the common law 'special interest' test applies.

xxiv EP&A Act (NSW) generally allows 'open standing' to bring civil proceedings against a breach of the Act or Regulations (s 123) (except, for example, regarding Critical State Significant Infrastructure – s 115ZK). There is limited third party standing for 'objectors' to bring merit appeals against major private project approvals (i.e. 'designated development' and 'State Significant Development' (SSD) – but SSD appeal rights do not apply where Planning Assessment Commission holds a public hearing) (s 98).

xxv Offsets providing social, cultural, economic or environmental benefits are allowed in national parks – Environmental Offsets Act 2014 (Qld) s 7(3). Financial settlement offsets (i.e. paying money for the government to provide an offset) are available upon the proponent's election – Environmental Offsets Act 2014 (Qld) s 18. Calculation of offset area required has capped ratios that are not scientifically-based.

xxvi The General Offset Principles published by the Department of Primary Industries, Parks Water and Environment provide general guidance only, stating that offsets "should aim to maintain or improve conservation outcomes, and offsets should generally be for the same species, native vegetation community, or other natural value that is to be adversely impacted by the proposal." The Principles do not explicitly deal with indirect offsets.

xxvii At the time of writing the ACT is developing an offsets policy. The draft guidelines provide for 'like for like' and a limited use of indirect offsets (10%).

xxviii Victoria allows limited use of indirect offsets, however does not require like for like offsetting.

xxix 'NSW allows various (voluntary) offsetting pathways including ad hoc offset negotiations; the 'Biobanking' and regional 'biocertification' schemes; and a draft (mandatory) Offsets Policy for Major Projects (2014). None of these policies meet federal offsets policy (2012) standards. Biobanking is the strongest but is in danger of being progressively weakened.

xxx WA allows limited use of indirect offsets, however like for like standard is replaced with 'proportionate' impact requirement.

xxxi The Tasmanian Premier approves declared "projects of state significance".

xxxii NSW Minister of Planning or delegate is the decision maker. Since 2011, NSW Planning Minister has delegated all private State Significant Development approvals to the Planning Assessment Commission or Planning Department.

xxxiii The WA Environment Minister is responsible under the EP act, but not under planning law.

xxxiv The EPA Board makes decision or Tasmanian Planning Commission. There is no distinction between state-proposed and private.

xxxv Note the ACT Commissioner for the Environment and Sustainability is an independent statutory position whose functions include the investigation of complaints about the management of the environment by the ACT government and can initiate investigations into actions of an agency where those actions would have a substantial impact on the environment of the ACT.

xxxvi NSW Minister of Planning or delegate is the decision maker. See EP&A Act (NSW), Part 5.1, State Significant Infrastructure, sections 115W-115ZB. The Minister has discretion to seek a report or advice from the Planning Assessment Commission (PAC) (sections 23D; 115ZA(2)(c)).

xxxvii A senior project coordination team can be assigned to assist in WA.

38 The federal Environment Minister may decide within 20 business days to inform proponent, etc. (EPBC Act, Part 7, Div. 1A (s 74B-74C)).

xxxix Although a local council may reject an application within 7 days (see, s.57(2) Land Use Planning and Approvals Act 1993 (Tas), this power is generally exercised only where the application is incomplete or for a use or development that is currently prohibited under the planning scheme.

xl S.189, Planning and Development Act 2007, deals with the revocation of development approvals if the approval was obtained by fraud or misrepresentation; Division 7.3.11 deals with the correction and amendment of development approvals.

xli Although incomplete or illegible applications can be rejected within 14 days (see, for example, EP&A Regulation 2000 (NSW), cl. 51; see also cl. 8D).

xlii Again, the EP Act does allow for early refusal, however the WA planning laws do not.

part 1

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.[5] With a spectacular number of endemic plants and animals,[6] Australia's 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,[7] 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.[8]

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

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.

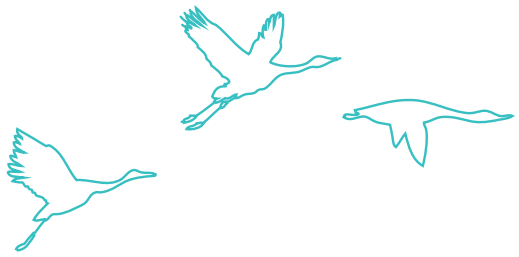
However, many of our most threatened biota live outside of protected areas and are subject to key threatening processes in areas marked for future development. A study in 2010 in the international scientific journal Conservation Biology shows that Australia's most endangered species are extremely poorly 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.[9] It is therefore necessary to assess the effectiveness of threatened species laws outside the reserve system.[10]

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. This audit focuses on identifying the key laws in each jurisdiction as, although many policies exist, including standards as aspirational goals in policy may not be legally enforceable.

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 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 2

Jurisdictional analysis

This report follows the approach of the 2012 audit report in assessing the adequacy of threatened species laws with recent trends noted for 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

4 Victoria

The Victorian and Australian Governments signed an MOU to enter into bilateral agreements under the 'one stop shop' policy in December 2013. An existing assessment bilateral agreement signed in 2009 is currently in place. A deadline of September 2014 was set for all willing jurisdictions to have an approval bilateral agreement in place, however, Victoria has deferred the process until after the state elections that are due in November.

In the meantime, the current Victorian Government has made changes to native vegetation assessment and to planning laws. These changes have the potential to significantly impact biodiversity and are noted below.

4.1 Overview of threatened species legislation in 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.'[11] 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 (2013) found that threatened species in Victoria continue to decline.[12] Furthermore, Victoria has the highest number of threatened species by sub-region in Australia,[13] with some 294 animal species listed as threatened and 9 already extinct and 778 plant species listed as threatened with 51 extinctions.[14] 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.

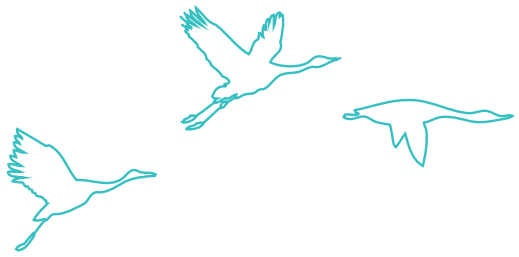
In order to achieve its objectives, the FFG Act establishes a process to list threatened species and ecological communities and potentially threatening processes.[15] To be eligible for listing, a species or community must be in a demonstrable state of decline which is likely to result in extinction.[16] 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.[17]

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.[18]
- Flora and fauna management plans – plans for the conservation and management of threatened species and communities and management of threatening processes.[19]
- Critical Habitat Determinations – declarations areas of habitat critical to the survival of a species or community.[20]
- Public authority management agreements –agreements with public authorities to provide for the management of species, communities and threatening processes.[21]

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.[22]



- Controls over the handling of protected flora.[23]
- Controls over the handling of listed fish.[24]

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 Environment and Primary Industries (DEPI) is primarily responsible for administering the FFG Act and the Wildlife Act. (DEPI was formed in 2013 with the merger of the Department of Sustainability and Environment (DSE) and Department of Primary Industries (DPI).) Much of DEPI'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'.[25]

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.[26]

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.[27] 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.[28] 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,[29] including recognition of the precautionary principle and the irreversibility of biodiversity loss; indigenous involvement in biodiversity management and the importance of transparency and accountability.

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.[30] Further, there is a need to adopt a broader, more strategic landscape scale approach which emphasises the interrelated, holistic and dynamic nature of biodiversity.'[31] 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.[32]

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.[33] 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 that 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[34] 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 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.[35] 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.'[36] 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.[37] The Auditor-General notes however that major system development and integration projects are underway to address current shortcomings.[38]
- 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 DEPI to prepare Action Statements and sets out what the Action Statement must include, the Act lacks legislative power to compel DEPI and other agencies to complete directives within Action Statements.[39] 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.

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.[40]

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.[41] 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.[42] 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 DEPI 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.[43]

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.

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.[44] 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 July 2014, 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.[45]

- Development of Flora and Fauna Guarantee Strategy - Similarly, the Act requires the Secretary of DEPI 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.[46]

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.' DEPI 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.[47]

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 Minister.[48]

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 to declare or decide not to declare a Critical Habitat is also solely at the discretion of the Secretary.[49] 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.[50] 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.[51] Therefore, the Orders can be subject to the discretion of a number of Ministers or government bodies.[52]

As noted above, since the commencement of the Act, only one CHD has been made, and this declaration was revoked almost immediately.[53] 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.

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.[54] No management plans have been made to date. The Victorian Auditor-General reports that DSE (now DEPI) 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 explained 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.[55]

For example, although DSE had 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.[56]

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, DEPI is the only body able to take action for offences committed under the Act. This has the potential to further compromise the efficacy of the Act, especially given DEPI'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.[57] 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 conserva-

tion 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 DEPI, 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 species. There is a need to adopt a broader, more strategic approach which seeks to emphasise the 'interrelated, holistic and dynamic nature of biodiversity'.[58] 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.[59] 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.[60] 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 2012 EDO Victoria (now Environmental Justice Australia) 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.

DEPI does not report on compliance and enforcement activity separately for each Act; rather the limited data available is combined data for all activity under the 11 key Acts and 20 Regulations administered by the Department. DEPI has made a commitment to providing more thorough reporting of its compliance and enforcement activity by 2015.[61]

In October 2012 the Victorian Auditor-General released a performance audit, examining the effectiveness and efficiency of DPI and DSE's compliance activities, Effectiveness of Compliance Activities: Department of Primary Industries and Sustainability and Environment (the two Departments have now merged for form DEPI). With respect to DSE's compliance approach, the Auditor-General concluded that the deficiencies are substantial. DSE were '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]DEPI has stated that it is addressing these issues, however it is unclear what reforms are proposed.[64]

4.4.1 Compliance monitoring and enforcement activity

DEPI's compliance monitoring activities include audit programs, inspections (planned and reactive), patrols and operations and analysis of complaints and other information.[65] The department's enforcement activities include education, information provision, conducting investigations, imposing penalties and undertaking prosecutions.[66] The Department states that its primary step to ensure compliance is education and information.[67]

As noted, DEPI 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. Alarmingly the most recent data states that no prosecutions were commenced and no penalties imposed for the 2011/12 year under any Act that DEPI administers (compared with 89 prosecutions and 259 penalties two years prior).[68]

4.4.2 Potential Breaches

As noted in the EDO Victoria report, in the years 2008-2010 DSE received more than 300 calls each year from the public regarding potential breaches of environmental legislation including the FFG Act and Wildlife Act. These calls concerned 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.[69] However DEPI has failed to provide this data in subsequent years and it is unknown how many complaints were received in the years 2010-2012. As we observed in our report, it is not possible to comment on the value of information received from the public in detecting contraventions, as DEPI 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.[70]

4.4.3 Charges

In 2012 DSE reported on its website that the department laid 601 charges involving wildlife, forestry, marine and hunting offences in Victoria for the year, however it did 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.[71] DEPI no longer reports on its website the number of charges it has laid, but as noted above, the most recent VCEC report states that no charges were laid by the Department under any Act in the 2011-12 year.[72]

4.4.4 Investigations and prosecutions

DEPI does not publish 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 DEPI 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, in the past DEPI has not had 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.[73] DEPI has not indicated what process it is making to implement the Auditor-General's recommendations.

4.4.5 Inadequate penalties

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

4.4.6 Offences are limited

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).[74] 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 to other Ministers as to whether the project should proceed and on what conditions. The recommendation is not binding.

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.[75]

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 Native vegetation clearing controls

In December 2013 a new regulatory framework for the clearing of native vegetation came into force in Victoria. Known as the 'permitted clearing' laws, the aim of the regulation is to fast track clearing applications while protecting rare or threatened species.

The objectives of the new regulatory arrangements have changed significantly. There has been a shift from the desire of clearing controls to achieve a 'net gain' in the quality and extent of native vegetation across Victorian landscapes. The new objective is to achieve 'no net loss in the contribution made by native vegetation to Victoria's biodiversity'. The policy is targeted in particular to Victorian threatened species habitat protection and restoration, combined with a generally available permission to clear native vegetation. The new laws also expand the role of economic models in native vegetation by increasing reliance on native vegetation offsets.[76]

A major change in the approach to the assessment and approval of native vegetation clearing lies in the use of 'risk-based' decision-making. The whole of Victoria has now been categorised according to the 'value' of native vegetation via location risk maps. The maps have been compiled largely through modelling of vegetation types likely to exist in an area, with some on-ground data included. Whether or not vegetation can be cleared is largely determined by the online map which determine whether clearing should be in the low, medium or high risk pathway. It has been estimated that over 90% of Victoria has been categorised as low risk which means that the decision-maker cannot refused clearing on biodiversity grounds, provided the

applicant pays for an offset.

The maps have been heavily criticised as not accurately reflecting the vegetation that actually occurs on the ground[77]. There are many instances of rare or threatened species which have been identified as present on the ground which do not appear in the maps, and therefore can be cleared without any further investigation. In addition, the database only contains rare and threatened species listed in the Victorian lists - EPBC Act listed species that are not on the Victorian list are not included. Therefore the permitted clearing laws as they stand are not capable of protecting EPBC listed species.

4.5.4 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.[78]

4.5.5 Ongoing Reform

Although the State Government committed in March 2012 to replacing the EE Act in accordance with the recommendations of a Parliamentary Committee this has not yet occurred.[79] If reformed in accordance with these recommendations, the EE Act process would be significantly improved. At present the Government is refusing to release any information on this process. It appears that those reforms have been abandoned in light of negotiations with the Commonwealth to achieve accreditation of approval bilateral agreements.

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".[80]

The NSW State of Environment Report 2009 highlights the dire situation for biodiversity (a finding repeated in the 2011 report). 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. In the three years to 2012, 35 additional species were added to the listings, including 11 terrestrial vertebrates. Three more species were listed as extinct.[81] Over 1000 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.

In June 2013 the NSW Government announced a major review of biodiversity laws.[82] This announcement came on top of existing reviews of the Native Vegetation Regulation 2005 (which regulates land clearing under the Native Vegetation Act 2003), the Biobanking offsets scheme, and the Threatened Species Priority Action Statement (PAS). In June 2014 the incoming NSW Environment Minister announced an independent panel to undertake the broader review of biodiversity laws.[83] The panel will evaluate the existing legislative framework, consider the evidence base for government intervention, and propose new legislative arrangements for biodiversity conservation. The panel is to deliver an interim report by October and a final report by December 2014.

Notwithstanding the review, other incremental changes are currently being made to relevant legislation. While anticipated changes to the planning laws in NSW failed to pass parliament in 2013, native vegetation laws are being weakened. A new Native Vegetation Regulation was passed in 2013, marking a negative shift towards 'self-assessable codes', new exemptions for additional 'routine' clearing, and weaker penalties for breaching the law. This is despite the ongoing listing of land clearing as a key threatening process under the NSW Threatened Species Conservation Act 1995, and evidence that the existing native vegetation framework had made significant inroads into land-clearing across NSW. Furthermore, mining laws have been amended to prioritise economic considerations over social or environmental considerations, and a new draft offsets policy has been proposed for major projects. These are discussed further below.

NSW has an MOU and assessment bilateral agreement signed, and an approval bilateral agreement has been publicly exhibited. It is expected that the approval bilateral agreement will be signed imminently, despite the uncertainties of the NSW legislative reform agenda and the current inadequacies.

5.1 Overview of threatened species legislation in NSW

In NSW, threatened species are dealt with 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 (offsets);
- The National Parks and Wildlife Act 1974 contains additional licencing provisions, and provisions for criminal offences; and
- The Environmental Planning and Assessment Act 1979 (EP&A Act) 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.

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.

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. Many Acts have been amended and further policies have been introduced since this time.

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)
- 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. (However certain major projects are exempt from this requirement.[84])

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". Since 2007 the preparation of recovery plans has largely been subsumed by the Threatened Species Priorities Action Statement process (discussed below).

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.[85] 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.

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 Priorities 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. In early 2014, OEH consulted publicly on a review of the PAS. Its strengths and weaknesses are discussed below.

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 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.[86] 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.[87] A threat abatement plan (TAP) is a plan to abate, ameliorate or eliminate the adverse effects of KTPs[88] and must include actions necessary to reduce the impact of a KTP on threatened species, etc.[89] Like recovery plans, priorities for TAPs are now determined in accordance with the PAS.[90] 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.[91]

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.[92] However, in the context of a limited conservation budget, TAPs must be made shorter, simpler and focus more readily on threat abatement actions and outcomes.

However, more resources need to be focused on threat abatement planning. This is because threat abatement planning addresses the drivers of biodiversity decline, and is likely to benefit multiple species in a cost-effective way.[93] 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 are targeted to priority areas.[94] 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.[95] Due to this bias, as well as time lags and lack of knowledge, many species at risk of extinction may not be currently listed.[96]

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 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.

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:[98]

- 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;[99]
- 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;[100]
- Decisions to list species are made on the basis of 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

Critical habitat is a rarely used conservation tool in NSW. There are currently only four areas declared as critical habitat under the TSC Act: for the Wollemi Pine, the Gould's Petrel, Little Penguin population in Sydney Harbour, and the Mitchell's Rainforest Snail.[101] 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.[102]

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.[103] 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.[104] 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'.[105]

5.3.4 Problems with Recovery Planning and Priorities 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.[106] Priorities for recovery plans in NSW are determined in accordance with the PAS.[107] The PAS 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 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:[108]

- 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;[109]
- 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.[110]

In early 2014, OEH consulted publicly on its internal review of the PAS (PAS Review). The eight recommendations of the PAS Review are to be carried forward under OEH's new Saving our Species conservation program. The PAS Review recommendations attempt to address some concerns noted above:

1. Establish six new management streams to better target the management of each threatened species.
2. Enhance uptake of the PAS and raise community awareness.
3. Make PAS actions, and their timing, more specific.
4. Provide a framework for local actions to contribute to statewide outcomes for species.
5. Target investment at the minimum set of actions that are crucial for securing a species.
6. Develop a sound, repeatable and transparent process for prioritising effort between species statewide.
7. Develop a process for monitoring and reporting on the outcomes of projects and actions for threatened species.
8. Develop a simple, user-friendly database to support program delivery.

While these recommendations are generally positive, in its 2014 submission to the PAS Review, EDO NSW made 27 recommendations to improve threatened species protections under the PAS and more broadly. These included three overarching issues which the NSW biodiversity protection framework (including the PAS) must better integrate and improve on to deliver lasting positive outcomes. First and foremost, until fundamental issues of interaction between planning and biodiversity laws are addressed (see 5.5 below), it is difficult to have confidence in the ability of State laws to protect threatened species over the long term. Second, the regulatory framework must prioritise attention to the current and accelerating impacts of climate change. Third, there is a need to increase funding to OEH to provide meaningful, integrated protection for biodiversity and sensitive habitats.[112] Among other recommendations, there is also a need for an integrated habitat or 'ecosystem functioning' approach to managing threatened species, including identification of keystone species and regional habitats

important to maintaining and improving ecosystem services.

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.

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.[113]

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.

- 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[114] - 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. Problematically, this category is likely to include clearing done under a self-assessable code in the near future.

- 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.

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.

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Plath[115] 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, 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.[116] 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 did not apply to the assessment of the largest developments in NSW under the now repealed major projects fast-track provisions in Part 3A of the EP&A Act. Major private projects (State Significant Development) are still exempt from the SIS requirement.

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,[119] 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.

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,[120] and 'open standing' to enforce breaches in the specialised NSW Land and Environment Court.[121]

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 – the 'Part 3A' regime – was symbolic of this disconnection.

5.5.2 'Assessment of significance'

There are significant problems with the current assessment of biodiversity under NSW planning laws, 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 is applied inconsistently across Local Government Areas in NSW.[122] 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.[123] 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 impact assessments of threatened species. 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 assessment in a timely manner which creates a culture in which dealing with ecological issues is seen

Case study – Local Council decisions contrary to listing status (and limited consideration of recovery plans)

In 2011 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.

EDO NSW brought judicial review proceedings on behalf of Western Sydney Conservation Alliance challenging Penrith City Council's approval of four residential subdivisions on land containing the critically endangered Cumberland Plain Woodland.[117] The Land and Environment Court found that the Council had failed to consider the Cumberland Plain Recovery Plan (February 2011) as required under the EP&A Act. However, the Council later regranted the development applications for subdivision with a minor alteration, this time taking into account the Cumberland Plain Recovery Plan, notwithstanding the species' critically endangered status. Significantly, the Court also held that the main decision-making considerations in NSW planning law (s 79C of the EP&A Act) do not require a species recovery plan to be considered when evaluating the environmental impacts of a development, or the public interest.[118] This reduces the impetus for consent authorities to take positive steps to help recovery of a threatened species when assessing development applications, and may lead to a scenario of 'death by a thousand cuts'.

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. This is despite the fact that one of the objects of the EP&A Act is to encourage 'ecologically sustainable development' (ESD); and ESD itself requires 'that conservation of biological diversity and ecological integrity should be a fundamental consideration'; and 'that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations'.[124]

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".[125]

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).[126] The Minister (or delegate) is still the consent authority for these projects,[127] which are assessed by the Planning Department.

The EIA process for SSD is set out in the Director General's Requirements (DGRs) for the specific project, and requirements in the regulations.[128] The EP&A Act also sets out certain exhibition and submission requirements.[129] A slightly different process applies for SSI.[130] The SSD system narrows the scope of projects that were eligible for fast-tracking under Part 3A.[131] It also reinstates the statutory assessment considerations that apply to decisions on Part 4 development.[132] Merits appeals against SSD projects are available in some circumstances.[133] 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.[134] 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.[135]

5.5.6a Planning law amendments relegate threatened species considerations

In November 2012, the NSW Government amended its State mining policy (the Mining SEPP), elevating the economic benefits of a mining project to be the 'principal consideration' under the SEPP, when decision-makers such

as the Planning Assessment Commission (PAC) consider new mining developments and expansions.[137] The Mining SEPP prioritises the significance of the mineral resource over other listed environmental, social and economic considerations such as:

- dust and noise pollution affecting local residents
- limiting truck traffic on local roads near houses and schools
- compatibility with other land uses such as farming, villages, vineyards or horse studs
- conditions for protecting water resources, threatened species and biodiversity, minimising greenhouse emissions and waste, and rehabilitating the land.

Consideration of these matters is to be 'proportionate' to the economic significance of the mineral resource, based on advice from the State mining department. This approach is not consistent with the objects of 'ecologically sustainable development' (ESD[138]) in state and federal laws – including the EP&A Act (NSW) (under which the Mining SEPP is made), and the EPBC Act.

In addition to prioritising the economic benefits of mining, the November 2013 amendments limit the conditions that can be placed on mining projects in relation to five environmental and social impacts – cumulative noise levels, air quality levels, air blast overpressure, ground vibration and aquifer interference. If 'non-discretionary development standards' for these impacts are met, the project cannot be refused on those grounds, and the decision-maker cannot require 'more onerous standards'. However, if impacts exceed these standards, decision-makers may still approve the project.[139]

The policy changes followed a rare successful challenge by the residents of Bulga village, in the Hunter Valley, to the expansion of the Warkworth coal mine beyond 2021.[140] The Land and Environment Court refused the expansion, overturning the PAC's development approval due to significant adverse noise, dust and social impacts on Bulga residents; and impacts on biodiversity, including endangered plant and animal species, and clearing of an area previously set aside as an offset area. The case also scrutinised the economics behind the mine expansion. Rio Tinto and the NSW Planning Department challenged the Court's decision in the NSW Court of Appeal, but the appeal was dismissed.

The new weighting of factors under the Mining SEPP could now make the refusal of a mine approval on environmental and social grounds, similar to Bulga, even more difficult. At the time of writing, Rio Tinto had re-lodged an expansion application for the Warkworth coal mine under the new Mining SEPP rules.

5.5.7 Tools to integrate threatened species

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.[141]

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 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.[142] 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

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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.[143]

Biobanking

The NSW TSC Act also facilitates a biodiversity offset scheme whereby developers can buy biodiversity credits to offset the impacts of their developers.[144] 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.[145]

The biobanking scheme in NSW is currently under statutory review.

NSW Offsets Policy for Major Projects

In March 2014 the NSW Government released a draft Offsets Policy for Major Projects.[146] The proposal is billed as the State's first mandatory biodiversity offsetting scheme, as there are now several voluntary pathways for offsets (including biocertification, biobanking and ad hoc negotiation between developer and Planning Department). Although it attempts to improve on offsetting proposals in the former Planning Bill 2013, there are still major environmental efficacy concerns with the draft policy.[147] Concerns include a weakening of 'like for like' requirements that are at the heart of the science of offsetting; and a proposal to allow 'discounting' of offsets requirements where a project has significant economic or social benefits (particularly worrying in the context of major mining and energy projects). Various other aspects also fail to meet the standards of the Commonwealth's EPBC Act Environmental Offsets Policy (October 2012)[148] – which, while not perfect, that policy remains the Australian benchmark to date.

The key EDO NSW recommendation on the Draft Offsets Policy for Major Projects was that it only be finalised once a comprehensive and independent review into offsets has been undertaken, and a rigorous national standard for offsetting is developed. The national standard must be based on robust and objective science and apply the fundamental principles of environmental offsetting. Once a best practice national standard has been developed through expert and public consultation, state standards and relevant legislation should be amended to meet the national standard. Accreditation of state standards must not occur until this precondition is met.

Notwithstanding these potential options, many environmental stakeholders and significant scientific literature note serious concerns as to whether biodiversity offsetting is actually possible, given the unique nature of local biodiversity. Furthermore, where offsets are used, outcomes are difficult to measure.

5.5.8 Ongoing Reform

Between 2011 and 2013 the NSW planning system underwent a comprehensive review process which, mid-way through 2014, has yet to reach resolution. Following an independent review report, the NSW Government released a planning Green Paper for consultation in June 2012, and a further White Paper and Exposure Bill in April 2013.[149] The Green and White Papers proposed 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. However, there were significant concerns that community participation at the individual project assessment stage would be weakened by expanded 'code-assessable development', and that this would have implications for the ability of local communities to protect threatened species.[150]

There were also a number of other ways in which the Planning Bill 2013 was seen as watering down environmental protections, and missing opportunities for improvement. This included an excessive emphasis on economic growth and a retreat from the long-standing concept of ecologically sustainable development (ESD) and its principles, which have shaped environmental and planning law in Australia for over 20 years (at least on paper). There were no mandatory requirements for strategic planning to consider climate change impacts or cumulative impacts of development on the environment. The Planning Bill also proposed further centralising powers within the Planning Department for environmental authorisations and concurrences (under threatened species, water management and other laws). It also maintained and expanded exemptions from these authorisations to fast-track major projects. The Bill maintained limited merit appeal rights for community objectors against major projects, but rejected recommendations from the Independent Commission Against Corruption (ICAC) to expand public rights of appeal.

The Planning Bill was introduced into NSW Parliament in October 2013, with some changes to address certain stakeholder and community concerns about matters such as public participation, heritage protection and zoning proposals. The amended Bill passed the Lower House but was significantly amended by the Opposition and cross-bench in the Upper House, including the removal of 'code-assessable development'. The Upper House also proposed to repeal recent changes to the State mining policy (Mining SEPP) that prioritise the economic significance of mineral resources as the 'principal consideration' ahead of other impacts under the Mining SEPP (discussed above).

The Government refused to pass these Planning Bill amendments through the Lower House, and withdrew the Bill from Parliament in 2014. The NSW Government is now understood to be considering the implementation of various planning reforms through regulation rather than legislation, under two new ministers and closer administrative ties between the Planning and Environment port

In June 2013 the NSW Government announced a major review of biodiversity laws.[151] This announcement came on top of existing reviews of the Native Vegetation Regulation 2005 (which regulates land clearing under the Native Vegetation Act 2003), the Biobanking offsets scheme, and the Threatened Species Priority Action Statement (PAS). A new Native Vegetation Regulation was passed in 2013, marking a negative shift towards 'self-assessable codes', new exemptions for additional 'routine' clearing, and weaker penalties for breaching the law. This is despite the ongoing listing of land clearing as a key threatening process under the NSW Threatened Species Conservation Act 1995, and evidence that the existing native vegetation framework had made significant inroads into land-clearing across NSW.

In June 2014 the incoming NSW environment minister announced an independent panel to undertake the broader review of biodiversity laws.[152]The panel will evaluate the existing legislative framework, consider the evidence base for government intervention, and propose new legislative arrangements for biodiversity conservation. The panel is to deliver an interim report by October and a final report by December 2014.

6 South Australia

Since December 2012, there have been no substantive changes to the South Australian legislative framework in relation to the protection and conservation of threatened species.

In 2014, pursuant to section 45 of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), a draft EPBC assessment bilateral agreement to accredit South Australia to undertake a single assessment process for both Commonwealth and South Australian purposes has been developed. Public exhibition ended on 17 March 2014.

The intent of the agreement is to deliver a one-stop-shop for environmental approvals under the EPBC Act removing duplication in the assessment process, while ensuring the objects of the EPBC Act are met for Matters of National Environmental Significance (MNES).

However, the practices, procedures, processes, systems, management plans and other approaches to threatened species protection under the current South Australian legislative framework do not warrant Commonwealth accreditation.[153]

In addition, in the recent SA Budget, resourcing of the Department for Water, Environment and Natural Resources has been substantially reduced, with a nearly 40% cut to operational funding and the loss of more than 100 positions. Such cuts are likely to adversely impact upon the capacity of the SA Government to properly administer its monitoring and compliance duties across the environment portfolio (including threatened species protection and management).

Major project assessment and approval processes in SA require significant changes – through improved assessment standards; greater transparency and public participation; better governance arrangements; leading practice monitoring, enforcement and reporting; and increased access to justice for communities.

The SA Government is undertaking a review of SA's planning laws, with recommendations likely to be made to Government by the end of 2014. The impact of any changes to the major project assessment and other development approval processes will need to be examined in the context of the Draft Bilateral Agreement to ensure that the Commonwealth Minister can be satisfied that the accreditation of new legislation is in accordance with the objectives of the EPBC Act.[154]

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[155] and any advisory and consultative committees[156] 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.[157] Further, it is mandatory for some members to have conservation and ecosystem qualifications;[158] 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.[159] 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.

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.).[160] 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."[161]

6.2.3 Declaration of sanctuaries

In South Australia, sanctuaries can be declared over both freehold and leasehold land.[162] 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.[163] 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.

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.[164]

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.[165]

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.[166] 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 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.[167]

6.3.7 'Open season' can be declared

The Minister may also declare 'open season'[168] on protected animals. This excludes endangered species, or species within a reserve (other than a game reserve), wilderness zone or wilderness protection area.[169]

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).

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 under 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. Expiation notices cover 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.

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.[170] 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.[171]

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).[172] Crown development and electricity infrastructure development are not required to undergo environmental assessment unless directed by the Minister.[173] Where the Minister makes such a direction, the development cannot go ahead without the Governor's approval.[174] Decisions regarding major development are protected from judicial and merits review.[175] 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.

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.

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 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 SA 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.

As noted, the SA Government is undertaking a review of SA's planning laws, with recommendations likely to be made to Government by the end of 2014. The impact of any changes to the major project assessment and other development approval processes will need to be examined in the context of the Draft Bilateral Agreement to ensure that the Commonwealth Minister can be satisfied that the accreditation of new legislation is in accordance with the objectives of the EPBC Act.[176]

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 was also referred to the Federal Environment Minister for assessment and approval under the EPBC Act. The assessment was based on preliminary documentation, a low level of assessment . The State and Federal Governments approved the project.

7 Western Australia

The WA Government signed an MOU to negotiate bilateral agreements with the Australian Government in December 2013. An assessment bilateral agreement has been publicly exhibited until 27 June 2014. The existing assessment bilateral agreement was signed on 16th July 2013.

The current WA Government indicated in 2012 that a biodiversity Bill would be introduced as a matter of priority. However, no Bill has been introduced to date.

7.1 Overview of threatened species legislation in Western Australia

There is currently no specific recent legislation dedicated to protecting biodiversity in Western Australia (WA). The current WA Government indicated in 2012 that a biodiversity Bill would be introduced as a matter of priority. However, no Bill has been introduced to date.

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. These activities are regulated by other legislation, for example, the Environment Protection Act 1986 (WA) (EP Act) and the Planning and Development Act 2005 (WA). The WC Act does 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.[177] It is a defence to any of these provisions if the person taking the action is acting pursuant to an authorisation under another Act.[178] 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.[179]

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.[180] In relation to fauna, the only consequence of listing is that there are higher penalties for taking.[181]

This Act is administered by the Department of Environment Regulation (DER).

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 DER to grant clearing permits.

7.3 Key weaknesses of the legislative framework in Western Australia

7.3.1 No integrated scheme or mandate to ensure biodiversity protection

A significant 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 DER 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 DER threatened species recovery planning is in management of DER 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, DER 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'.[182] 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.[183]

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, the 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 DER, 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.

7.3.4 Insufficient accountability mechanisms

The WC Act does 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, DER is the only body able to take action for offences committed under the WC Act.[184] The EP Act does contain appeal rights for "any person" ie, including, third parties.

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 WC Act with 24 matters pending.[185] A further 552 infringement notices and 435 cautions were also issued in this period.[186] The Environmental Enforcement Unit initiated 21 prosecutions, 6 of which are subject to final determinations and 15 remain before the courts.[187]

The DER 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.

Case study

In Simpson v Department of Environment and Conservation (WA),[188] 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 DER is statutorily bound when issuing modified penalty notices (for first time offenders) of a penalty no greater than 10% of the maximum possible penalty.[189]

We also note that all environmental offences in WA are dealt with in the local courts which do not publish their judgments, 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

Under Part IV of the EP Act proposals and changes to planning instruments which are likely to have a significant impact on the environment may undergo environmental assessment.[190] 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 DER. The Minister for Environment is responsible for making the final decision about whether a proposal may be implemented.[191]

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, DER 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 DER is required for the clearing of native vegetation, unless subject to an exemption.[192] One of the factors which DER 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.[193]

The EIA process in WA has some strengths including:

- The independent EPA plays a significant role and primarily focuses on 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 include:

- The EIA law only applies to major projects with significant environmental impacts (unlike for example, NSW, where most developments receive some form 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. As noted, a the current government has announced an intention for a biodiversity bill, but no bill has yet been introduced, and and a Greens Bill to reform the NCA has not been supported in parliament to date.

8 Queensland

The Queensland Government and the Commonwealth Government signed a 'one stop shop' MOU in October 2013. An assessment bilateral agreement was exhibited and signed in December 2013. An approval bilateral agreement was publicly exhibited in June 2014, and is expected to be signed imminently despite raising significant concerns.[194]

Since our previous audit, significant amendments have been made to the planning and resources legislation in Queensland[195] and a new offsets framework has been introduced, to facilitate the approval bilateral agreements. Proposed changes to the resources laws are set to drastically reduce public comment and objection rights for resource activities.[196] Changes have also been made to native vegetation laws[197] in Queensland that have removed protections for clearing some types of native regrowth vegetation, introduced new allowable types of clearing, reduced the approval and compliance requirements for some types of clearing, and considerably broadened clearing exemptions. As a result, a significant amount of native vegetation is now vulnerable to clearing, including land that was protected due to the presence of essential habitat for threatened species or endangered ecosystems.[198] The various amendments have serious implications for the protection of biodiversity in Queensland and are discussed further below.

8.1 Overview of threatened species legislation in Queensland

The Nature Conservation Act 1992 (Qld) (NCA) and associated regulations establish a framework for the creation of protected areas and the protection of native fauna and flora in Queensland. The objects of the NCA include the conservation of nature, but also allow for 'use and enjoyment' of protected areas by the community and 'social, cultural and commercial use' of protected areas in a way consistent with the area's natural, cultural and other values.[199] In 2013 the NCA was significantly amended in order to broaden the objects of the Act and reduce the categories of protected areas, as well as allowing for a wider range of uses and activities in protected areas, reducing survey requirements for protected plants, and removing some public participation opportunities.

Currently, the Department of Environment and Heritage Protection (DEHP) administers the majority of provisions under the NCA, including the management of nature refuges.[200] In addition, the Queensland Parks and Wildlife Service (QPWS), within the Department of National Parks, Recreation, Sport and Racing (DNPRSR), specifically administers protected area management (other than nature refuges), and the Department of Agriculture, Fisheries and Forestry (DAFF) administers the regulation of demonstrated and exhibited native animals.

8.1.1 Protected areas

There are seven categories of protected area, each of which is subject to different management principles.[201] These categories include: national parks, regional parks, nature refuges and coordinated conservation areas (the latter category to be grandfathered), as well as three types of Indigenous national park.[202] In national parks and regional parks, there is a prohibition on the grant of mining interests,[203] geothermal activities and greenhouse gas storage.[204] This prohibition does not extend to the other categories of protected areas. It also does not encompass licences for petroleum pipelines, and for surveying to identify pipeline access routes, which can be granted in any protected area.[205] Applications for a pipeline licence carry public submission rights.[206] Other activities that can be allowed in national parks include service facilities[207] and ecotourism facilities[208], where they are considered by the chief executive to be in the public interest, ecologically sustainable, and provide, to the greatest possible extent, for the preservation of the land's natural condition and the protection of the land's cultural resources and values.[209] In 2013, grazing of stock for drought relief was temporarily allowed in certain national parks and National Reserve System properties.[210] The NCA contains offence provisions for taking, using, keeping or interfering with cultural or natural resources in protected areas,[211] as well as a range of permits and exemptions for undertaking these activities in particular circumstances.[212]

8.1.2 Protected species

The NCA also provides for the prescription, by regulation, of five categories of protected wildlife, encompassing both native flora and fauna. The categories are: extinct in the wild, endangered, vulnerable, near threatened and least concern.[213] These are consistent with the IUCN categories for threatened species. The NCA does not provide for protection of ecological communities. Threatened species are managed by DEHP's Threatened Species Unit. Resource allocation for the management of species is prioritised using an approach known as the 'Back on Track' framework.[214] The NCA contains offence provisions for taking, keeping or using protected plants and animals,[215] as well as a wide range of permits and exemptions for

undertaking these activities in particular circumstances.[216]

8.2 Strengths of the Nature Conservation Act framework

8.2.1 Listing of protected species science-based and transparent

The process for considering whether to list species under the NCA is undertaken by DEHP's Species Technical Committee, which assesses scientific information about the proposed species against the criteria for each of the protected species categories to determine their eligibility.[217] As the criteria align with the IUCN categories of threatened species, this represents a science-based approach to the protection of threatened species in Queensland.

Any person, including members of the public, can nominate a species for listing.[218] Together with the science-based and internationally recognised criteria for listing, this provides a transparent process, and allows for public involvement and influence. The nomination and assessment process, however, is not formally provided for by the legislation.[219] Therefore, while the science-based criteria exist in the legislation, the decision-making process is subject to change without Parliamentary consideration.

8.2.2 Public enforcement rights for some offences

The NCA gives open standing for any person, regardless of whether they are personally affected, to bring proceedings in the Queensland Planning and Environment Court to restrain the commission of a 'nominated offence' under the Act.[220] This provides a public accountability mechanism for enforcing breaches of the Act. However, note that public enforcement rights do not extend to all offences under the NCA. The offences that attract enforcement rights are the major, overarching restrictions on dealing with protected areas and protected species.[221] The offence of driving away flying foxes from roosts without authorisation does not attract public enforcement rights.[222]

8.3 Weaknesses of the Nature Conservation Act framework

8.3.1 Listing of protected areas not transparent

National and regional parks are dedicated via a regulation,[223] and can be revoked after the passing of a motion with 28 days' notice by the Legislative Assembly.[224] The QPWS conducts regional surveys of ecosystems in order to determine suitable potential protected areas, which are then recommended to the Queensland Government for dedication.[225] The fact that ecosystem surveys inform the recommendations for listing indicates that the process is science-based. However, the legislation does not contain decision-making criteria for the listing of protected areas. Therefore, it is unclear upon what basis areas are listed. Further, protected area categories under the NCA do not accord with the IUCN categories for protected areas. This makes comparison of data across jurisdictions difficult. Recent changes to Queensland's protected area categories[226] also make it difficult to compare recent and older data. In addition, all protected areas declared since 2002 are to be reviewed by the Queensland Government, with a particular focus on recent declarations.[227] This is coupled with a reluctance to declare new national parks and protected areas, despite existing areas designated as future national parks being available[228] and that only 4.8 per cent of Queensland is protected in National Park, even though Australia has a national average near 9 per cent.[229]

8.3.2 Very limited public comment rights for listing and management of protected areas

There is no legislative basis for public comment or participation in the dedication of protected areas. After the dedication of a protected area, the chief executive must prepare a management statement,[230] which is a simple administrative document detailing the broad management goals for the protected area. The Minister may also prepare a management plan, if it is considered appropriate in light of the importance and significance of the protected area's values.[231] A management plan involves a more detailed investigation process than that for a management statement; it contains management outcomes for the protection, presentation and use of the area and the policies, guidelines and actions to achieve those outcomes.[232] The preparation of management plans includes some public submission rights,[233] while there are no such rights for the preparation of management

statements.[234] This means that unless the Minister decides that a management plan is warranted, the public will have no opportunity for involvement in the listing or management of protected areas.

8.3.3 Object and focus of the NCA

Recent changes to the NCA[235] broadened the object from 'the conservation of nature', to include 'use and enjoyment' of protected areas by the community, and the 'social, cultural and commercial use' of protected areas in a way consistent with the natural, cultural and other values of the areas.[236] Amendments have also inserted management principles for national parks which provide that a national park should be managed to 'provide opportunities for educational and recreational activities and ecotourism in a way consistent with the area's natural and cultural resources and values.'[237] These changes to the object and management principles represent a shift in focus from conservation to use, and therefore a weakening of protections.

8.3.4 Clearing of protected plants

In line with this changed focus, recent amendments to the management of protected plants[239] moved from a species-focused to an area-focused approach to the regulation of endangered, vulnerable or near threatened (EVNT) plants. Permits are not required for clearing in 'low risk' areas (i.e. areas determined by a 'trigger map' not likely to contain EVNT plants) unless the person clearing becomes aware of the presence of those plants. High and low risk areas are determined according to known records of EVNT plant species, but this is problematic when there is incomplete knowledge about protected plant communities in Queensland. Most of the 'low risk' areas (i.e., most of the 97 per cent of the state) where there are no previous records of EVNT plants, have not previously been surveyed. There is therefore some concern that the trigger map may contain an inherent sampling bias and is not reflective of actual species distribution.

Permits are also not required in 'high risk' areas (i.e. areas likely to contain EVNT plants) if a desktop flora survey shows that the clearing area does not contain EVNT plants.[240]

8.3.5 Ecotourism in national parks

In line with the changes to the objects and management principles, the NCA was also amended to explicitly allow the granting of authorities for the establishment of ecotourism facilities in national parks.[241] An 'ecotourism facility' is defined broadly as a facility designed and managed to facilitate the presentation, appreciation and conservation of the land's natural condition and cultural resources and values.[242]The law provides little clarification on what kinds of ecotourism facility will be acceptable. While the facility must be ecologically sustainable and in the public interest to be permitted,[243] it is not required to follow the 'cardinal principle' for the management of national parks, which involves providing for an area's permanent preservation.[244] Despite the public interest requirement, there are no public comment rights about proposed ecotourism facilities.

8.3.6 Limited resourcing and staff

DNPRSR and DEHP have both received funding and staff cuts,[245] which will limit their ability to effectively manage protected areas and the listing of protected areas and species. The 'Back on Track' species prioritisation framework itself was a measure introduced in order to manage the protection of species with limited funds.[246]

8.4 Compliance and enforcement

The NCA has offence provisions prohibiting, among other things:

- Taking, using, keeping or interfering with cultural or natural resources in protected areas;[247]
- Taking a protected animal outside a protected area;[248]
- Keeping a protected animal that has been taken (regardless of whether the taking was lawful);[249]
- Taking a protected plant in the wild;[250]
- Using a protected plant;[251]
- Keeping or using native wildlife that is reasonably suspected to have been unlawfully taken.[252]

Penalties for contravention include fines, and sometimes also imprisonment. Compliance and enforcement action for protected areas will be managed by the QPWS, while action for protected species outside protected areas will be managed by DEHP. The Queensland Planning and Environment Court can make orders to enforce and restrain breaches.[253] Orders by the court can include ordering to stop or not to start activities that would

constitute an offence, and rehabilitation and restoration of damage done.[254] Members of the public also have some rights to commence proceedings for enforcement of the NCA, as detailed above in section 1.2.2.

For corporations, the NCA places a duty on executive officers to take all reasonable steps to ensure the corporation's compliance, and makes those officers liable for an offence if the corporation does not comply.[255] Placing personal liability on executive officers increases the imperative for corporations to comply with the NCA.

8.5 Interaction with planning and other legislation

8.5.1 Planning and vegetation management

The principal legislation, other than the NCA, that affects the protection of native plants in Queensland is the vegetation management framework, which operates through an interaction between the Vegetation Management Act 1999 (Qld) (VMA) and the Sustainable Planning Act 2009 (Qld) (SPA). The vegetation management framework places restrictions on the clearing of native vegetation in Queensland through a complex framework of planning approvals and exemptions. Whether clearing native vegetation requires a development approval, compliance with a self-assessable clearing code, is exempt, or prohibited, will depend on the tenure of the land proposed to be cleared, as well as the purpose for the clearing.

Recent changes to vegetation management[256] have removed protections for clearing some types of native regrowth vegetation, introduced new allowable types of clearing, reduced the approval and compliance requirements for some types of clearing, and considerably broadened clearing exemptions. As a result, a significant amount of native vegetation is now vulnerable to clearing. One of the most significant changes to vegetation clearing laws introduced this year was to allow for the clearing of 'high value regrowth' vegetation on freehold and indigenous land. This change alone exposed approximately 700,000 hectares of bush land to clearing. Prior to the changes, about 79% of that area was protected due to the presence of essential habitat for threatened species or endangered ecosystems.[257]

More generally, SPA regulates planning and development in Queensland, providing for a system of regional plans. These documents guide and inform the planning requirements written into local government planning schemes. They include designation of an 'urban footprint', within which development ought to be contained, in order to minimise impacts on natural areas outside the footprint. Biodiversity protection is addressed in many regional plans. The effectiveness, however, varies greatly depending on individual local governments and planning their requirements. SPA is expected to be repealed in late 2014 and replaced with new planning legislation.

8.5.2 Resources and major projects legislation

Resources activities (such as mining and CSG) are exempt development under SPA,[258] and are regulated under four main Acts: the Mineral Resources Act 1989 (Qld) (MRA), the Petroleum and Gas (Production and Safety) Act 2004 (Qld) (P&G Act), the Environmental Protection Act 1994 (Qld) (EPA) and the State Development and Public Works Organisation Act 1971 (Qld) (SDPWO Act). The MRA and P&G Act provide for resources tenures, while EPA manages the Environmental Authority for the resource activity. The SDPWO Act has its own comprehensive process, and applies where projects are considered large and complex and are declared as 'coordinated projects'.

Generally, resources activities cannot occur in national parks and regional parks, although they are potentially allowed in other protected areas.[259] Further, petroleum pipelines and survey licences can be granted in protected areas.[260] Applications for a pipeline licence carry public submission rights.[261]

The environmental impacts of resource activities, including any biodiversity loss and impact on protected species, are managed through the application for an Environmental Authority, and undertaking of an Environmental Impact Statement (EIS) process, either under EPA or the SDPWO Act. Occasionally additional permits may be required under the NCA. Proposed changes to the resources laws (due to be legislated in 2014)[262] will reduce public comment and objection rights for resource activities for approximately 90 per cent of mines in Queensland.[263]

In August 2014, the Queensland Parliament passed the State Development, Infrastructure and Planning (Red Tape Reduction) and Other Legislation Amendment Act 2014 (the Red Tape Reduction Act). The Red Tape Reduction Act repealed the Wild Rivers Act 2005 (Qld) and made amendments to the EIS process for coordinated projects and the Environmental Protection Act 1994. Key concerns with the changes include:[264]

- New IAR process for coordinated projects - The changes

include a new environmental impact assessment process, called an Impact Assessment Report (IAR). This is essentially a weaker, less transparent, less accountable process than the EIS process by removing public notification and input into the draft Terms of Reference and the draft EIS. The IAR process does not mandatorily require public participation, scrutiny and input into the environmental impact assessment.

- Removal of the requirement for an EIS for broadscale clearing - the changes removed the prohibition on the Coordinator General declaring that an EIS is not required if the project will result in broadscale clearing for agricultural purposes as well as removing any definition of a project resulting in broadscale clearing. The Coordinator General's decisions are not open to statutory judicial review.[265]

The Queensland Government has also sought to use its major projects legislation, the SDPWO Act, to approve impacts on all MNES including federally listed species and communities. In May 2014, the draft Queensland approval bilateral agreement contemplated the accreditation of the SDPWO Act, and the Queensland Parliament passed amendments to the Act shortly thereafter in anticipation of the accreditation. The new Part 4A SDPWO Act is inferior compared to the equivalent provisions in the EPBC Act, including for the following reasons:[266]

- Part 4A SDPWO Act contains no direct and enforceable obligation on the decision maker, the Coordinator General of Queensland, to act in accordance with Australia's international obligations, including the Conventions on Biological Diversity and World Heritage;
- There are no direct and enforceable obligations on the Coordinator General to act consistently with any recovery plan or a threat abatement plan for federally listed threatened species and ecological communities, or to promote the survival of and/or enhance the conservation status of listed threatened species and ecological communities;
- With increased barriers for public participation in judicial review and enforcement, the SDPWO Act has inferior public participation provisions; and
- The Coordinator General's role is to facilitate economic development in Queensland, which can be a conflicting role to approving significant impacts on MNES.

8.5.3 Offsetting

In May 2014 the Queensland Parliament passed the Environmental Offsets Act 2014 to provide for a single offsets policy to cover all environmental offsets in Queensland, thereby replacing five existing Queensland offset policies concerning koalas, vegetation, marine fish habitat and biodiversity.[267]

The Environmental Offsets Regulation 2014 (Qld) allows for environmental offsets to be used to counterbalance environmental impacts caused under all types of authorities issued under the NCA in protected areas,[268] as well as all development approvals and resources authorities under planning and resources legislation. It also allows offsets for taking a protected plant outside a protected area under a protected plant clearing permit.[269] Offsets will only be required where the action is determined to have a 'significant residual impact' on an environmental matter listed in Schedule 2 of the Offsets Regulation.[270] These matters include endangered or vulnerable wildlife.[271]

Some environmental matters that previously required offsetting and no longer will, include impacts on near threatened wildlife.

Currently, the EPBC Offsets Policy[272] differs from the Queensland framework in a number of ways. For example, the EPBC Offsets Policy does not contain any maximum caps on the calculation or ratio of required offset areas, whereas the Queensland Offsets Policy imposes maximum caps, even where scientific evidence (or uncertainty) may require a higher ratio. A further example is that there is an express requirement in the EPBC Offsets Policy that the offset is informed by scientifically robust information and incorporates the precautionary principle in the absence of scientific certainty, however the precautionary principle is notably absent from the in the Queensland Offsets Policy.

9 Tasmania

The Tasmanian Government signed a 'one stop shop' MOU with the Australian Government in December 2013. An approval bilateral agreement has recently been put on public exhibition for comment until 1 September 2014.

The recently elected state government is committed to creating a single state-wide planning scheme. It is currently unclear whether the proposed state-wide Scheme will include detailed provisions in relation to threatened species.

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.[273]

The TSPA is implemented by the Policy and Conservation Assessment Branch of the Department of Primary Industries, Parks, Water and Environment (DPIPWE), with technical advice from the Threatened Species and Marine Section. 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[274], to identify critical habitats and to prepare listing statements, recovery plans and threat abatement plans for listed species.[275]

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.[276] 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.[277] 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[278]; or
- abandon or release any listed species into the wild.[279]

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.[280]

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.[281] 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 a threatened native vegetation community with other vegetation, agricultural works or residential, commercial or industrial uses.

The Forest Practices Authority must not 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
  - o the conservation of the threatened native vegetation community; or
  - o conservation values in the vicinity of the threatened native vegetation community.[282]

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.[283]

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, at any time, 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.[284]

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 (the RMPAT) to challenge the Minister's decision in relation to the species.[285] There is no right of appeal against a decision in relation to a public nomination,[286] 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.[287] There is no legislated process for considering listing / delisting proposals, however DPIPWE has published guidelines[288] 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 or 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.

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[289] 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.

In recent years, collaboration has significantly improved between the Department of Primary Industries, Parks, Water and Environment and the Forest Practices Authority regarding the management of threatened species and their habitat. More comprehensive planning tools have been developed to guide assessment,[290] and public authority management plans have been adopted for some threatened species (for example, Simson's stag beetle).

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[291] 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. Assessment of likely impacts on threatened species is 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 state-wide 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 generally make recommendations based on desktop assessments rather than inspecting the development site.

The assessment of the impact of proposals on threatened species is not mandated in environmental impact assessment legislation. There is also no legislative guidance for approval agencies on what constitutes (un)acceptable impacts on threatened species.

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 or 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

Despite an increase in overall staff, adequate resources are rarely directed to compliance monitoring or enforcement activities. To date, there have been no prosecutions under the TSPA and no interim protection order declarations.

Prosecutions and other enforcement activities do occur under the Forest Practices Act 1985, but enforcement is rare and penalties remain low. For example, in 2012-2013, fines for unlawful clearing of threatened native vegetation and clearing of vulnerable land ranged from $500 to $2,000.[292]

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 standard exemptions in relation to emergency clearing, clearing for infrastructure etc). Pursuant to agreed procedures between the Forest Practices Authority and DPIPWE,[293]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 have recently been reviewed and significantly updated.[294]

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 rigourous 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 Resource Management and Planning Appeal Tribunal.

Applications for dam permits are assessed by the Assessment Committee for Dam Construction (ACDC).[295] 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.[296]

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

While there are no specific legislative provisions concerning the assessment of impacts of development proposals on threatened species, impacts may be assessed under the following mechanisms:

1. Level 1 Activities – applications are assessed and decided by local councils under the Land Use Planning and Approvals Act 1993 (Tas) (LUPA Act). The council can refer a level 1 activity to the Environment Protection Authority (the EPA) for assessment.

2. Projects of regional significance – applications are assessed by EPA and determined by a specially appointed Development Assessment Panel.

3. Level 2 Activities – pursuant to the Environmental Management and Pollution Control Act 1994 (Tas) (EMPC Act), environmental impacts, including impacts on threatened species, are assessed by the Board of the EPA. The local council deals with planning issues.

4. Level 3 Activities – applications are assessed by the Tasmanian Planning Commission. An activity will only be Level 3 if it has been declared a project of state significance, under the State Policies and Projects Act 1993 (Tas). The Gunns pulp mill (prior to becoming the subject of bespoke legislation) was declared to be project of state significance, as was the proposal by Walker

Corporation to build a canal estate at Ralphs Bay near Hobart.

5. Major infrastructure projects - 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 (Tas). 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).

Developments are categorised as Level 1 or 2 based on a Schedule[297] to the EMPC Act. The Schedule specifies particular activities to be Level 2 either by their nature– for example, coal processing works – or by the amount of material processed – for example, abattoirs producing more than 100 tonnes or more of products per year.

Level 1 activities

The assessment of a proposed Level 1 activity will not involve consideration of the impact on threatened species unless the Planning Scheme requires it. Currently, interim planning schemes have been declared for 28 or the 29 councils in Tasmania. Planning Directive No.1 – The Format and Structure of Planning Schemes – guides the format and structure of these schemes, but does not provide a consistent schedule for assessment of threatened species. However, the Directive does exclude "threatened vegetation"[298] from the provisions exempting vegetation removal from the requirement to obtain a permit.

Each of Tasmania's three regional planning bodies has developed codes relating to biodiversity management, including priority habitat for threatened species, to be implemented through schemes in their region. Some planning schemes have adopted more detailed provisions concerning approvals that will impact threatened species[299].

The recently elected state government is committed to creating a single state-wide planning scheme. It is currently unclear whether the proposed state-wide Scheme will include detailed provisions in relation to threatened species.

Level 2 activities

A proponent for a level 2 activity will be advised by the EPA Board what level of assessment is required for their proposal,[300] the potential impacts and issues of public concern that the activity may give rise to[301], and terms of reference for the assessment. The proponent must prepare the assessment documentation in accordance with these requirements.[302]

The EPA Board have published guidelines[303] on the material proponents should include in a Development Proposal and Environmental Management Plan (the DPEMP), the primary assessment document submitted by proponents. The guidelines state the DPEMP should discuss the impact of the proposal on listed threatened flora and fauna.

The EPA Board will seek the advice of the PCAB in relation to threatened species prior to making its determination.

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

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

However, the legislation provides no explicit guidance to the EPA Board regarding the assessment of impacts on threatened species. In the most recent decision concerning approval of a Level 2 activity, a case involving consideration of matters of national environmental significance, in particular impacts on the Tasmanian Devil , the RMPAT did not set out the manner in which the Board should determine whether to approve or refuse an application. To our knowledge, neither the Tasmanian Supreme Court nor the RMPAT has set out the criteria or process for the EPA Board to determine whether to approve or refuse a proposal which is likely to impact upon threatened species.

Furthermore, there is no clear threshold significance of impact above which a proposal must be refused. For example, even if a proposal was certain to result in the extinction of a listed species by virtue of habitat loss, there is no clear requirement in the EMPC Act that the EPA Board should refuse such a proposal.

9.5.2 Major Projects Fast-Tracking

The SPP Act allows projects of 'state significance' to be assessed outside the standard planning process. However, this assessment process is rarely used (and rarely makes

the process faster).[305]

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). The Commission makes a recommendation to the Minister regarding the proposed, however the Minister is not bound to follow the recommendation.[306] If the Minister decides against the TPC's recommendation, Parliament must approve the decision.

Once approved, any authorities necessary for the development to proceed will be issued, including planning permits, environmental authorities and permits under threatened species laws.

There are no rights of review, merits or judicial, of a decision made in respect of a Level 3 proposal.

Similar to the EMPC Act, the SPPA does not specify the criteria upon which a proposal can be approved or refused or provide any guidance in relation to the weight to be given to the impact on threatened species.

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 in accordance with the new Government's pre-election policies,[307] which includes the following elements:

- One single state-wide planning scheme
- Streamlined approvals
- Overhauling major projects approvals, including in-principle approvals
- Ministerial call-in powers
- State policies for consistency
- Limiting third party appeals

It is not clear how such proposals will be implemented, or what impacts that may have on the assessment process or restrictions on rights of appeal.

10 Northern Territory

The NT Government signed an MOU in December 2013 and publicly exhibited a new assessment bilateral agreement in May 2014. An existing assessment bilateral agreement was signed in May 2007.

Since our last audit, the main change in the NT is that on 1 January 2013, the new NT Environmental Protection Authority Act came into force. The new Act increased the responsibilities of the NT Environment Protection Authority (NT EPA) and established the NT EPA as an independent regulatory authority. The NT EPA is now responsible for administering the environmental assessment process in the NT.

10.1 Overview of threatened species legislation in NT

The Territory Parks and Wildlife Conservation Act (TPWC Act) 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.[308]

Classification classes under the TPWC Act are taken from the IUCN Red List.[309] In summary, these categories are : 'Extinct in the wild', 'Critically Endangered', 'Endangered', 'Vulnerable', 'Near Threatened' and 'Data deficient'.[310]

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).[311] 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.[312]

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

10.2.2 Principles of Management

The TPWC Act sets out principles of management.[313] The principles of management are:

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;

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 TPWC Act 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',[314] 'co-operative schemes' in accordance with management plans'[315] or by declaring an area of 'essential habitat'.[316] The TPWCA allows for cooperation with the Commonwealth or a State or another Territory of the Commonwealth to formulate and implement these objectives.[317]

Currently, approximately, 13 species management programs exist.[318]

The Administrator declares areas of essential habitat.[319] This requires consultation with the landowner and interested persons and a recommendation by the Minister.[320] The Minister must provide public notice of the intention to make the declaration and consider submissions before making a recommendation to the Administrator.[321]

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.[322] The Minister must provide public notice of the declaration and consider submissions in order to vary or revoke the declaration and Gazettal.[323]

To date, no essential habitat has been identified under the TPWC Act.[324]

Ecological communities are not currently contemplated by the Act to address the principles of biodiversity conservation.[325]

10.2.4 Compliance

The TPWC Act manages 'protected wildlife'. All species of 'threatened wildlife' are 'protected wildlife'.[326]

Permits can be granted by the Director to take or interfere with wildlife.[327] The taking of threatened wildlife also requires the written permission from the Minister.[328] The TPWC Act 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.[329]

It is an offence to possess, take or interfere with protected wildlife unless the person is authorised to do so under the Act.[330]

Penalties for taking threatened wildlife in contravention of the TPWC Act have an upper limit of a $141,000 fine or 10 years imprisonment for individuals or $ 705,000 for a body corporate.[331]

A person must not damage or destroy an area or part of an area of essential habitat, unless authorised to do so under the TPWC Act. 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 TPWC Act.[332] 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.[333]

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:[334]

- 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.
- 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

On 1 January 2013, the new NT Environmental Protection Authority Act came into force. The new Act increased the responsibilities of the NT Environment Protection Authority (NT EPA) and established the NT EPA as an independent regulatory authority. The NT EPA is now responsible for administering the environmental assessment process in the NT.

The NT government has recently restructured the government departments. The NT 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

The ACT government signed an MOU in December 2013 and publicly exhibited an assessment bilateral agreement in June 2014.[335]

Since the 2012 audit, the ACT Government has commenced a review of the primary biodiversity legislation in the ACT – the Nature Conservation Act 1980. The EDO ACT has previously submitted it is not appropriate for the Commonwealth to accredit laws that are in a state of flux and transition. The bilateral assessment agreement between the ACT and the Commonwealth risks focusing solely on achieving outcomes-based objectives, particularly where assessment procedures are constricted by tight timeframes. The ACT is also developing an offsets policy and is proposing, for example, additionality standards that diverge from current Commonwealth standards. Proposed amendments resulting from the review and proposed policy are discussed below.

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. In 2013 the NC Act was subject to a well overdue review, involving a Nature Conservation Bill 2013 Exposure Draft (the Bill 2013). Although the review is incomplete, this overview refers to the Bill 2013 rather than the NC Act as it is likely the contents of the Bill 2013 will supersede the NC Act in the immediate future.

The Bill 2013 establishes the role of a Conservator of Flora and Fauna,[336] and a Scientific Committee.[337] It provides for the listing of threatened native species, threatened ecological communities and key threatening processes. The Minister must make the lists the criteria for which is developed in consultation with the Conservator and the Scientific Committee. Expanded categories have been included in the Bill 2013 namely, extinct, extinct in the wild, critically endangered, endangered, vulnerable, conservation dependant and provisional.[338]

Action Plans are drafted for a relevant species, relevant ecological community or key threatening process.[339] Action Plans are prepared by the Conservator in consultation with the Scientific Committee for the purposes of the identification, protection and survival of the species or ecological community. If critical habitat is known for the species or community then that is also identified in the Action Plan. The Conservator must monitor the effectiveness of the Action Plans and make the findings of the monitoring publicly accessible unless disclosure could threaten the subject of the Action Plan.

Special protection status is given to all threatened native species, listed threatened species or listed migratory species.[340] The Conservator may prepare a native species conservation plan for native species with such status or for any other native species the Conservator considers appropriate. The conservation plans are prepared in consultation with the Scientific Committee. Again, monitoring is required and may be made publicly accessible if appropriate.

The Minister may declare a native species to be a controlled native species if satisfied the species is having an unacceptable impact for which the Conservator may draft a management plan detailing how the species may be appropriately managed. The plan is also subject to public consultation. The Conservator must monitor the plan which must be reviewed once every 5 years.[341]

The Bill 2013 sets out the offence provisions for the protection of native animals and plants including civil (pecuniary) penalties.[342]

The Conservator may assign a reserve or a part of a reserve to an IUCN category if satisfied the land meets the criteria prescribed by s346(1) of the EPBC Act. Otherwise, reserve management plans are prepared and the plan describes how the planning and development management objectives are to be implemented. The custodian of a reserve must prepare such a management plan and the plan must be prepared for each area of public land identified in the Territory Plan. Draft reserve management plans are subject to public consultation and approved by the Minister.[343]

The Conservator in consultation with the Commonwealth Minister may prepare a draft Ramsar wetland management plan for a Ramsar wetland if it is located on unleased or public land.[344]

Access to biological resources in reserves is also dealt with in the Bill 2013 and appears to reflect the broad Objectives of the Convention on Biological Diversity.[345]

11.1 Strengths of the legislative framework

11.2.1 Scientific Committee

The Minister must appoint 7 members of the Committee if they have appropriate expertise in biodiversity or ecology.[346] Membership is for no longer than 3 years.

11.2.2 Listing process

The Bill 2013 establishes a threatened native species list, a threatened ecological communities list and a key threatening process list. Part 4.4 sets out the Minister's decision making process for including, transferring or omitting an item from a list. The Minister develops the list criteria in consultation with the Scientific Committee and the Conservator; eligible species are divided into categories including critically endangered, endangered, vulnerable and conservation dependant.[347] Each list is a notifiable instrument.

A member of the public may nominate an item to be included in a list (species, community or process).[348] If the Scientific Committee reject the nomination, they must inform the person who made the nomination about the rejection including reasons.

The Scientific Committee must prepare a conservation advice to the Minister about species or communities on the lists within 3 months of their inclusion. The conservation advice sets out what may be done to stop the decline or support the recovery of the species or community.[349]

11.2.3 Draft action plans

The Conservator must prepare a draft action plan for each species, ecological community and key threatening process including the identification of a critical habitat if known. S/he must also prepare a public consultation notice inviting anyone to make written submissions during a period not less than 6 weeks after the notification.[350] Submissions received are considered by the Conservator when preparing an action plan. When an action plan is in force, the Conservator must take reasonable steps to implement the plan. In the ACT the development of action plans is up to date.

Licencing provisions

A nature conservation licence authorizes the licensee to carry out activities that would otherwise be illegal under the Bill 2013.[351] Applications for licences must be made to the Conservator who may issue the licence if reasonably satisfied the applicant is a 'suitable person' to hold a licence and the activity is a 'suitable activity'. The application for a licence must include details of 'suitability information' about the applicant and the activity for the licence. Suitability information about an activity includes the impact of the activity on the animal, plant or land and the purpose of the activity. Offence provisions apply for failure to comply with the conditions of a licence. Licences may be subject to conditions and may not be issued for longer than 5 years.

11.2.4 Third party rights

Merit appeals

In the Bill 2013 any 'person whose interests are affected by the decision' may apply to ACAT for review of a reviewable decision, although the list of 'reviewable decisions' are limited.[352]

Judicial review

The recent ADJR Amendment Bill 2013 and now s4A of the Administrative Decisions Judicial Review Act 1989 (ACT) (ADJR Act) provides an 'eligible person' can make an application for judicial review, subject to subsections (2) and (3) of that section. The result is a more expansive test for standing so a party eligible pursuant to s4A may apply for judicial review if the matter raises a significant issue of public importance.

11.3 Weaknesses of the ACT legislative framework

11.3.1 Does not include an ecosystem approach

The Bill 2013 contains an objective to 'protect, conserve, enhance, restore and improve nature conservation', including 'ecological communities', 'ecosystem processes and functions' and 'ecological connectivity'.[353] This is a positive step, but ultimately both the current Act and its proposed amendment fail to take proactive action which anticipates and prevents biodiversity loss, and instead waits for a species or ecological community to become

under threat. Thus, the core tenet of the ecosystem approach is yet to be adopted.

11.3.2 Appointment and Role of the Conservator

The Conservator is a public servant appointed by the Director-General.[354] 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. The legislated functions of the Conservator need to be strengthened beyond the ability to develop and oversee policies, programs and plans for the effective management of nature conservation and to monitor the state of nature conservation in the ACT. In summary, the Conservator must be empowered to take direct action, particularly where threatened habitat and ecosystems, through inappropriate management or inaction, are deteriorating and the conservation status of the site is at risk. The Conservator must also be given the ability to provide input into the strategic environmental assessments, land management agreements and environmental impact statements (discussed further below).

11.3.3 Appointment and Role of Scientific Committee

The Scientific Committee is to consist of seven members of the scientific community, of which only two may not be public servants.[355] The Committee is to prepare listing advice[356] and conservation advice.[357] The Minister is not bound to act consistently with or follow this advice. These provisions undermine the independence of the Committee from Government, thus undermining community confidence as to the Committee's credibility. We also recommend at least five members of the Scientific Committee are not ACT public servants and that all reports of the Scientific Committee be made publicly available.

11.3.4 Subsidiary documents not strictly binding

A key structural feature of the current NC Act and the Bill 2013 is a reliance on a range of subsidiary documents including the Nature Conservation Strategy 2013-2023 (now to be prepared in consultation with the Scientific Committee (s44)); Action Plans for declared threatened species, ecological communities and threatening processes and management plans for reserved areas under the Planning and Development Act 2007 (the PD Act). These documents are not binding on decision makers and this 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.

11.3.5 The Nature Conservation Strategy

Although the ACT Nature Conservation Strategy is contemporary and aims to address the impacts of climate change, there are a number of flaws including:

- The Conservator must review the strategy only every 10 years (s52);
- Failure to act in accordance with the Strategy is not a reviewable decision at ACAT (Schedule 1).
- The Bill 2013 only provides that the 'Conservator must take reasonable steps to implement the strategy'[358] which falls short of giving the Strategy statutory recognition and which compromises the achievement of environmental outcomes and standards enunciated in the Strategy.
- While it includes objectives which are correlated to actions and performance indicators/targets, there are no explicit obligations to ensure that these targets are met. Furthermore, several of the targets in the Strategy are to produce non-binding 'guidelines'[359] and
- the Bill 2013 does not contain any requirements regarding the reporting of outcomes.

11.3.6 Action Plans limited in application

There are no obligations or incentives for landholders and land users to implement Action Plans. The Bill 2013 does not bind anyone to take any actions or to refrain from taking any actions pursuant to an Action Plan. In our opinion, listing threatened species and communities and developing Action Plans to protect and re-establish threatened species are of value only if the plans are implemented, enforceable and their impact evaluated.

It is difficult to determine whether the Environment and Sustainable Development Directorate can easily identify whether initiatives included in Action Plans are effective

or whether the monitoring of actions is no more than a reliance of the goodwill of other departmental and agency staff to undertake tasks.

11.3.7 Room to improve licensing provisions

There is no statutory review period for licences rather they may be issued for a maximum of five years. There are limited third party appeal rights to ACAT with respect to the granting of a licence. Third parties whose interests are affected by a reviewable decision may apply to ACAT. 'Reviewable decisions' are listed in Schedule 1 and it includes the issuing of a nature conservation licence – imposing a condition only.

11.3.8 What is a key threatening process

The Minister must make a key threatening process list the criteria for which is developed in consultation with the Conservator and the Scientific Committee. The Conservator must prepare a draft action plan for each key threatening process.[360] Planning decisions relating to urban development and climate change impacts are key threats to biodiversity in the ACT that to date have been substantially unaddressed. Changes to the PD Act and 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 to consider ecosystem impacts very early in the urban planning process. Monitoring and research needs to be undertaken to assess climate change impacts on biodiversity so that consideration can be given to mitigation activities prior to significant biodiversity losses. The EDO has recommended the Minister considers listing climate change as a key threatening process.[361]

11.3.9 No obligation to take connectivity principles into account

The National Capital Plan and Territory Plan include the areas protected from development in the Territory and these areas have an ecological function and a degree of connectivity. ACTMAPi includes an ecological connectivity layer which is welcome, however, a challenge is to ensure mapping information is kept up to date. Consideration of connectivity must involve a shift from focusing on only establishing corridors to include consideration of ecological function. While there is a connectivity layer in ACTMapi there is no provision in the current legislation or in the proposed Bill 2013 to ensure that decision-makers must take connectivity principles into account when making decisions and in this respect, integration with the PD Act is required (see below).

11.3.10 Enforcement in the public interest

Under the Bill 2013 anyone can apply to the Supreme Court for an injunction to restrain persons engaged in conduct contravening an urgent direction or a Conservator's direction.[362]

The NC Act currently provides for Injunctive Orders in the Supreme Court regarding a contravention of the Act or where an order is necessary for the protection or conservation of an animal, plant or area, and that in deciding the amount of costs to be awarded against a party to a proceeding, the Supreme Court must take into account the public interest in protecting the environment.[363] These provisions have not been carried over into the Bill 2013. This is likely to detract public interest litigants.

11.3.11 Merit appeals

The Bill 2013 outlines which decisions made under the Act are 'reviewable decisions' and by whom. Any 'person whose interests are affected by the decision' may apply to ACAT for review of a 'reviewable decision', although the list of 'reviewable decisions' is circumscribed to 20 in total.[364] 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.

11.3.12 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 are regulated for ecologically sustainable development, including in relation to Canberra Nature Park.

11.3.13 Volunteer contribution should be recognised

The legislation does not recognise and outline the role and responsibilities of government agencies and community groups in relation to volunteer contributions. There are currently many volunteer groups established in Canberra that regularly band together to improve Canberra's natural environment. This collective commitment and knowledge could be harnessed by the Government as an opportunity to assist with a program of ongoing assessment, monitoring and reporting. Many ParkCare trained volunteers already assist on an ad hoc basis with threatened species sightings and reporting, weed mapping, reporting on the management of threats to the biodiversity, and have the skill to report on the successes or failures of mechanisms such as the Nature Conservation Strategy and Action Plans. The Bill 2013 also failed to address co-management arrangements with ParkCare, Catchment Management Groups and other stakeholders.

11.4 Monitoring and enforcement

Historically a number of important legislative tools available for managing and protecting threatened species are not used. Key provisions are often discretionary and critical tools such as action plans and land management agreements are not mandatory or transparent. Timeframes for action and performance indicators are absent and not made publically available and effective implementation is further hampered by a lack of data and knowledge due to a lack of resources and consequentially a lack of reporting.

11.4.1 Lack of legal requirement for monitoring and evaluation

The 2011 ACT State of the Environment Report raised concerns that 'overall, long-term research, monitoring and evaluation remain limited, with previous State of the Environment recommendations to improve these areas only partially implemented'.[355] Provisions should be included in the NC Act requiring regular reporting and review as well as outcome reporting against clear indicators.

The Bill 2013 introduces the concept of monitoring which is welcome, but is not particularly precise about what this means in practice.[366] Monitoring provisions could be improved if:

- monitoring is made mandatory.
- the Scientific Committee either develops guidelines for monitoring rather than the Conservator, or endorses those developed by the Conservator.[367]
- greater clarity and transparency is given to the reporting and research programs and making monitoring findings public. The Conservator could publish a research and monitoring program annually under the Annual Reports (Government Agencies) Act 2004.
- there were an independent review of biodiversity monitoring guidelines, program and reports. The Commissioner for Sustainability and the Environment is well-placed to include a report on effectiveness and outcomes of the monitoring program in State of the Environment reports which are currently required at 4-yearly intervals.

In order to facilitate an ecosystem approach to biodiversity it is also important that the biodiversity monitoring program not be restricted to listed threatened species or ecological communities. The Nature Conservation Strategy requires monitoring of five priority ecosystems most vulnerable to threats. This is welcome, however, according to the Implementation Plan for the Strategy this currently is not resourced. An overall biodiversity monitoring program ought to be properly resourced and made a mandatory requirement.

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.[368] However, it is arguable the current penalties are insufficient to deter offenders in the ACT.

11.5 Interaction of threatened species and planning laws in the ACT

The main EIA law in the ACT is regulated by the Planning and Development Act 2007 (the PD Act). In the development approval process, an EIS is required for major projects. However, in some limited cases, this requirement can be avoided by approval of an Environment Significance Opinion (ESO).[369] 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.[370]

The EDO ACT has submitted previously that biodiversity objectives ought to be integrated within the PD Act in order ensure threatened ecosystems and species are

recognised within the assessment process,[371] for example, there is no trigger in the PD Act for the Conservator to assess the adequacy of or comment on an EIS. Mandatory consultation with the Conservator in the course of both the environmental assessment process and the strategic assessment process is required, particularly as the Conservator is in a position to advise on the reaches of the Nature Conservation Strategy and other protection mechanisms applied pursuant to the NC Act, otherwise a consequential amendment to the PD Act is necessary to require any EIS or Strategic Environmental Assessments (SEA) to address Action Plans and the Nature Conservation Strategy. It is impossible for the Conservator's function to be carried out effectively when the Minister may direct an SEA to be prepared for a draft reserve plan[372] or draft land management plan[373] without the Conservator's further input into SEAs. Consultation with the Conservator will also avoid a largely proponent-based environmental assessment process.

Further amendments are needed to the PD Act to ensure ACTPLA, in its decision-making, has due regard to the Objects of the NC Act and, as noted above, to take connectivity principles (or the ACTMapi) into account when making planning or other decisions.

A lack of public consultation occurs during the environmental assessment process. The PD Act does not require public consultation at the following stages:

- Preparation of a scoping document: ACTPLA is required to establish 'guidelines' for matters to be addressed by an EIS in a scoping document.[374]
- Revised draft EIS: The PD Act offers no opportunity for further public consultation following consultation on a draft EIS.[375]

Third party standing for review of the environmental assessment and planning process should be broadened under the PD Act. Anything less than open standing places unnecessary restriction to access to justice for genuine third party grievances. Currently, third party standing pursuant to the Administrative Decisions (Judicial Review) Act 1989 is limited to persons whose interests are 'adversely affected' by decision made pursuant to the PD Act.

Third party merits review to the ACAT is available for a limited number of 'reviewable decisions' (three)[376] and is restricted to third parties who come within the definition of an 'eligible entity', that is, those parties who have previously made a representation and who may suffer a 'material detriment' in relation to that decision.[377]

There is a great deal of scope for the NC Act 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 PD Act. 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 Scientific Committee and the ACT NRM Council.

ACT Bilateral Assessment Agreement

Currently the ACT Government is in the process of reviewing the Nature Conservation Act 1980 and the EDO ACT has previously submitted it is not appropriate for the Commonwealth to accredit laws that are in a state of flux and transition.[378] The bilateral assessment agreement between the ACT and the Commonwealth risks focusing solely on achieving outcomes-based objectives, particularly where assessment procedures are constricted by tight timeframes.[379]

EDO ACT has numerous specific concerns about the agreement, in particular the EDO ACT is concerned that fast-tracking may override important environmental protection laws; reduce the transparency of the approvals process; undermine public participation in the approvals process; the agreement does not adequately account for monitoring and compliance, offset policies, and dispute resolution processes fall short under the agreement.

The agreement endorses current gaps in the PD Act which currently fail to take into account biodiversity objectives and other protection mechanisms in respect of the NC Act (see above for detail).

Streamlining will also put appeals and public consultation at risk. In respect of ACT legislation, the Australian Capital Territory (Planning and Land Management) Act 1988 (Cth) makes no provision for appeals relating to the merits or otherwise of planning and development approvals or refusals by the National Capital Authority (NCA). Community consultation is needed to effectively assess the potential impacts a development may have and to ensure stakeholder interests are appropriately recognised.

The EDO ACT is also concerned that the agreement does not clearly stipulate how monitoring, auditing, reporting, compliance, and enforcement will operate. In particular, whilst the agreement provides that the Commonwealth Auditor-General may audit the performance of Commonwealth public sector operations, there is no provision for a similar requirement in relation to the ACT

Public Service. This gap accentuates shortcomings in ACT implementation of environmental protection standards. At the very least, the agreement should be amended to include a role for annual scrutiny and independent reporting.

Offsets

The ACT Government is currently developing its offsets policy. A serious concern is that the ACT is seeking to use offsets within existing conservation reserves. The ACT Environmental Offset Draft Guidelines at page 4[380] states that the Commonwealth requirement for additionality and conservation gain does not preclude offsets within existing reserves as long as it can be demonstrated that the outcomes to be gained through the offset are additional to current requirements. EDO strongly disagrees with this statement. It appears this highly controversial policy is being taken due to the ACT's relative small land mass so as to allow development in the ACT to be approved with no actual additional offset areas required.

It is not known whether the Conservator will play a key role in proposals regarding biodiversity offsets. We recommend the Conservator must review proposed offsets and their implementation, report on them and recommend changes to meet stated outcomes. To date there has not been a reporting on biodiversity offset decisions, an update of achievements or a review of the outcomes.

12 Commonwealth

Since our 2012 audit, there have been a number of developments in relation to the Commonwealth Environment Protection and Biodiversity Conservation Act (EPBC Act).

Bilateral agreements

As noted throughout this report, all jurisdictions have signed memoranda of understanding under the one stop shop policy to hand over Commonwealth assessment and approval powers. New assessment bilateral agreements have been publicly exhibited in NSW, South Australia, Western Australia, Queensland, Tasmania, Northern territory and the ACT. Approval bilateral agreements have been exhibited in NSW and Queensland.

Standards for accreditation

In 2014, the Australian Government re-released Standards for Accreditation of Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999, which articulate the environmental standards and considerations for accreditation of state and territory approval processes through bilateral agreements. The Standards set out:[381]

1. Environmental and systems outcomes–to be achieved through bilateral agreements with states and territories
2. Standards for accreditation–which reflect the specific accreditation requirements of the EPBC Act, and requirements of Commonwealth law that will be important for the Commonwealth to be satisfied that high environmental standards will be maintained
3. Commonwealth considerations–which provide additional guidance on areas that the Commonwealth Environment Minister may take into account in considering whether to enter approval bilateral agreements.

Similar standards were published in 2012, and a number of concerns were raised about the fact that State and Territory laws currently do not meet the suite of standards identified; and that some of the 'considerations' are not enforceable standards.[382]

New matter of national environmental significance - water trigger

Amendments to the EPBC Act became law on 22 June 2013, making water resources a matter of national environmental significance, in relation to coal seam gas and large coal mining development. The Department released significant impact guidelines to assist any person who proposes to take an action which involves a CSG development or a large coal mining development to decide whether the action will have or is likely to have a significant impact on a water resource.[383] The amendments also established an Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development.

Environment Protection & Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014

On 14 May 2014, Minister Hunt introduced a bill into Parliament that would allow the Minister to accredit state and territory approval decisions on large coal mining and coal seam gas developments that are likely to have a significant impact on a water resource (commonly known as the 'water trigger'). The legislation also makes technical amendments to the EPBC Act to facilitate the One-Stop Shop policy and the operation of bilateral agreements.[384]

The Bill is therefore designed to facilitate the handover of Commonwealth environmental approval powers to the States, through bilateral agreements. The Explanatory Memorandum to the Bill states the amendments are designed "to facilitate the efficient and enduring implementation of the Australian Government's one stop shop policy for environmental approvals." The changes are described as "technical amendments … to ensure that [bilateral] agreements will operate effectively and efficiently and to provide certainty to proponents."

With some exceptions, the amendments proposed by the Bill are largely procedural and seek to clarify and codify existing practices. However, key concerns with the Bill include:[385]

- CSG and large coal mining developments are no longer exempt from being subject to an approval bilateral.
- Accreditation of processes that are reflected in policies and guidelines rather than laws may facilitate amendments to processes without public or parliamentary oversight. Without regulatory guidance in relation to the criteria for enforcement / implementation of such guidelines, the breadth of documents that may be

sought to be accredited is not clear.

- The Minister may take "any other matter" into consideration when determining whether to accredit an authorisation process, broadening the non-environmental matters which may be considered.
- Minor amendments can be made without public or parliamentary oversight, unless the changes can be demonstrated to result in a "material adverse impact" on a protected matter or participation rights.
- Many of the amendments will apply retrospectively, allowing referrals made prior to an authorisation process being accredited (or amended) to be assessed under the new process.

These changes facilitate the hand-over of environmental assessment and approval powers to States and territories. As this updated audit demonstrates, while State and Territory laws have some strengths, no laws currently meet the necessary suite of process and outcome standards needed to effectively protect and manage biodiversity and matters of national environmental significance.

12.1 Overview of Commonwealth threatened species legislation

The purpose of the EPBC Act is to provide for the protection of the environment on a national scale.[386] Under the Act, the Commonwealth is responsible for regulating matters of national significance (MNES) which include:[387]

- World Heritage sites;[388]
- National Heritage places;
- National protected wetlands (recognised by the Ramsar Convention);[389]
- Nationally listed threatened species and ecological communities;
- Listed migratory species;
- Nuclear actions
- Commonwealth marine areas;
- Land owned by the Commonwealth
- Activities by Commonwealth agencies
- Great Barrier Reef Marine Park and
- a water resource, in relation to coal seam gas development and large coal mining development.

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.[390]

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')[391] would require approval from the administering minister.[392]

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.[393] The term 'significant impact' is not defined 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'.[394] There are also Significant Impact Guidelines designed to clarify when a project may have a significant impact on a matter of national environmental significance.[395]

There are exemptions from the need for approval, which include authorizations accepted prior to the commencement of the Act,[396] bilateral agreements (agreements which allow state approval processes to determine EPBC Act approval),[397] actions declared by the minister as compliant[398] or actions conducted under a regional forestry agreement.[399] A matter may be referred to the Minister by the person taking the action,[400] by state or local council,[401] by the Environment Minister (Cth),[402] or by a Commonwealth agency.[403] During referral no actions can be conducted until the application has been approved.[404]

Upon receipt of an application, the Environment Minister determines whether a proposed activity can be approved (within 20 days).[405] The Environment Minister must apply ecologically sustainable development principles,[406] 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.[407] Approval can be given subject to satisfying

certain conditions[408] which are legally enforceable.[409]

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.[410] Only actions which impact MNES or are of national environmental significance can be assessed.[411] The ministerial discretion as to assessment is not afforded for actions covered by a bilateral agreement[412] or ministerial declaration in force.[413]

Since the EPBC Act was brought in, almost 4000 actions have been referred for federal consideration.[414] Of the 3744 referrals where a decision was made, only 7 have been refused on the grounds of having a clearly 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.[415] In the vast majority of actions a federal assessment has been triggered by potential impacts on listed threatened species or ecological communities.[416]

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:[417]

- 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.

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:[418]

- 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.

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.

- 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.[419]
- 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.

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.

appendix 1

The state of biodiversity in Australian states and Territories

Queensland

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). There are 767 plant and animal species listed as threatened under the NCA.

Around 70% of Australia's native mammals (210 species) and 80% of bird species (594) live in the state; 39 mammals and 51 bird species are listed as threatened. While the general trend is not positive, there are more than 50 previously unknown plant species are being described in Queensland every year. 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 1000 plants, animals and ecological communities at risk of extinction in New South Wales alone, including the Koala, Humpback whale and Wollemi pine.

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, 34 species of plants, 12 species or subspecies of birds, two invertebrates and one species each of reptiles and fish are also now listed as presumed extinct under threatened species legislation.

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, 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.

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. 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 and 35 species remain listed as threatened.

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 ~350 are listed under the Victoria's Flora and Fauna Guarantee Act 1988. There has been a significant decline in mammal species since European settlement, with 9 species listed as extinct.

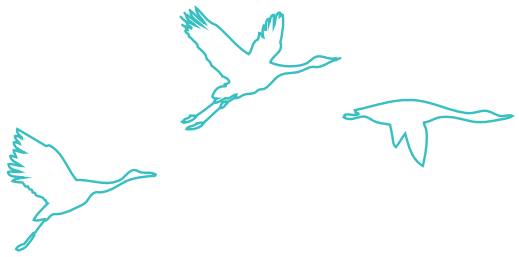
There are concerns about declines in forest and woodland birds where these habitats have been disturbed. Of 447 total recorded species, 126 are included on the Advisory List of Threatened Vertebrate Fauna (versus 78 listed under the Flora and Fauna Guarantee Act 1988)

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, 41 plant species presumed extinct and 828 listed as threatened,

Significant changes have been recorded in mammal numbers. At least 24 species have become extinct since



European settlement and there are currently, 476 species are listed as threatened, representing approximately 40% of the total known species.

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 showed 493 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 12 of the 25 Tasmanian native species.

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).

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, 12 are presumed extinct and 44 are listed as threatened.

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

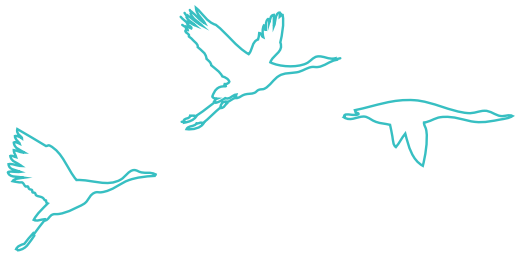
Historically, the most significant decline in endemic species has been seen in the southern states, however recent reports have indicated major changes in both animal and plant species. The most significant changes have been shown in reports of major declines in numbers of small mammals with 164 species listed as extinct, and 25 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, 27 species are listed as threatened bird species and 2 have 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.

appendix 2

Places You Love Alliance members



birdlife AUSTRALIA

Environmental Justice Australia

Australian Marine Conservation Society

invasive species council

HUMANE SOCIETY INTERNATIONAL

IFAW International Fund for Animal Welfare WWW.IFAW.ORG

Friends of the Earth Melbourne

National Parks Association

NATIONAL PARKS ASSOCIATION OF NSW protecting nature through community action

National Parks Association of Queensland Inc WWW.NPAQ.ORG.AU

National Parks Australia Council Inc ... working together for nature conservation areas

Nature Conservation Council The voice for nature in NSW

Queensland Conservation

tasmanian conservation trust inc

rainforest rescue Protect Rainforests Forever

SUNSHINE COAST Environment Council

TNPA TASMANIAN NATIONAL PARKS ASSOCIATION INC

Householders' Options to HOPE Protect the Environment Inc.

Total Environment Centre for the future

Australian Rainforest Conservation Society

references

1 The States without drafted Approval Bilateral have signed an 'Intention to develop a draft bilateral agreement with the State of [...] under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)'

2 Current agreement signed 2 July 2008.

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

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8 Australian Bureau of Statistics (2009). Endangered Species in Australia. Year Book Australia 1990.

9 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.

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11 Flora and Fauna Guarantee Act 1988 (Vic) (FFG Act), s4.

12 Commissioner for Environmental Sustainability, State of the Environment Victoria 2013, p.71.

13 Commissioner for Environmental Sustainability, p.71.

14 Commissioner for Environmental Sustainability, p.71.

15 FFG Act, s10.

16 FFG Act, s 11(1).

17 FFG Act, s11(3).

18 FFG Act, s19(1).

19 FFG Act, s21(1).

20 FFG Act, s20(1).

21 FFG Act s25(1).

22 FFG Act, s27.

23 FFG Act, Division 2.

24 FFG Act, Division 3.

25 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.

26 See for example, Dawson, Dr F, 'analysing the goals for Biodiversity Conservation: Scientific, Policy and Legal Perspectives' (2004) 21(1) EPLJ 6, p26.

27 FFG Act, s12.

28 FFG Act, s10(7).

29 The Intergovernmental Agreement on the Environment provides that ESD principles should be taken into account in decision-making.

30 Ecological Processes in Victoria: Priorities for Sustaining Biodiversity, Discussion Paper prepared for Victoria Naturally Alliance (December 2008), p16.

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

32 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.

33 Young, Margaret., 'At the Crossroads: Protective Mechanisms for Victoria's Biodiversity', (1998) 15 EPLJ 190, p194.

34 For example listing categories based on the IUCN system: extinct, extinct in the wild, critically endangered, endangered and vulnerable.

35 Victorian Auditor-General's Office, p2.

36 Victorian Auditor-General's Office, p2 and 14.

37 Victorian Auditor-General's Office, p21.

38 Victorian Auditor-General's Office, p14.

39 Victorian Auditor-General's Office, p25.

40 FFG Act, s19(2).

41 Victorian Auditor-General's Office, 31.

42 Victorian Auditor-General's Office, p31.

43 Victorian Auditor-General's Report, p31.

44 FFG Act,s19(1).

45 Environment Defenders Office (Victoria), Where's the Guarantee? Implementation and Enforcement of the Flora and Fauna Guarantee Act 1988 (Vic), p10.

46 FFG Act, s21.

47 Auditor-General's Office, p2 and 39.

48 FFG Act, s10(3).

49 FFG Act, s20(1).

50 FFG Act, s26(1).

51 FFG Act s26(4).

52 Lawyers for Animals, Review of the Flora and Fauna Guarantee Act 1988 (Vic), p16.

53 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.

54 FFG Act, s 21(1).

55 Victorian Auditor-General's Office, p42.

56 Victorian Auditor-General's Office, p27.

57 Victorian Auditor-General's Office, p2.

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

59 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.

60 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.

61 See Ministerial Statement of Expectations and DEPI response at http://www.depi.vic.gov.au/about-us/legislation/ministerial-statements-of-expectations

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 See Ministerial Statement of Expectations and DEPI response at http://www.depi.vic.gov.au/about-us/legislation/ministerial-statements-of-expectations

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

66 Department of Environment and Primary Industries, Enforcement webpage, available at: http://www.depi.vic.gov.au/about-us/legislation/enforcement

67 Department of Environment and Primary Industries, Enforcement webpage, available at: http://www.depi.vic.gov.au/about-us/legislation/enforcement

68 Victorian Competition and Efficiency Commission, The Victorian Regulatory System 2013 p 192 available at http://www.vcec.vic.gov.au/Publications/Victorian-Regulatory-System/VRS-2013

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 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.

71 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.

72 Victorian Competition and Efficiency Commission, The Victorian Regulatory System 2013 p 192 available at http://www.vcec.vic.gov.au/Publications/Victorian-Regulatory-System/VRS-2013

73 Auditor-General's Office, Effectiveness of Compliance Activities: Department of Primary Industries and Sustainability and Environment, p9.

74 A review of the EE Act was announced in 2012, but a new legislative scheme for EIA has not been introduced by the current Government.

75 See EDO Victoria's report on the EE Act, available here on our website.

76 For more detail on the new scheme see Environmental Justice Australia's briefing paper available at http://envirojustice.org.au/submissions-and-issues-papers/victoria%E2%80%99s-new-native-vegetation-clearing-laws

77 See for example Yung En Chee, Hidden Flaws in Victoria's New Native Vegetation Laws, The Conversation available at http://theconversation.com/hidden-flaws-in-victorias-new-native-vegetation-clearing-rules-18516

78 See EDO Victoria's summary of the MTPFA and the problems with it, here on our website.

79 See the report of the Committee, and the Government's response, here on the Parliament website.

80 NSW Government, State of Environment Report 2009, Chapter 7, at: http://www.epa.nsw.gov.au/soe/soe2009/chapter7/chp_7.2.htm#7.2.13; State of Environment Report 2012, Chapter 5, at http://www.epa.nsw.gov.au/soe/soe2012/chapter5/chp_5.1.htm#5.1.7.

81 Ibid (2012).

82 Including the NSW Threatened Species Conservation Act 1995, Native Vegetation Act 2003, Nature Conservation Trust Act 2001, and relevant parts of the National Parks and Wildlife Act 1974 and the Fisheries Management Act 1994.

83 See: http://www.environment.nsw.gov.au/biodiversitylegislation/BLRevTerms.htm.

84 Environmental Planning and Assessment Act 1979 (NSW), s 78A(8)-(8A).

85 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.

86 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.

87 (NSW) Threatened Species Conservation Act 1995 s 13.

88 (NSW) Threatened Species Conservation Act 1995 s 74.

89 (NSW) Threatened Species Conservation Act 1995 s 77.

90 (NSW) Threatened Species Conservation Act 1995 s 76.

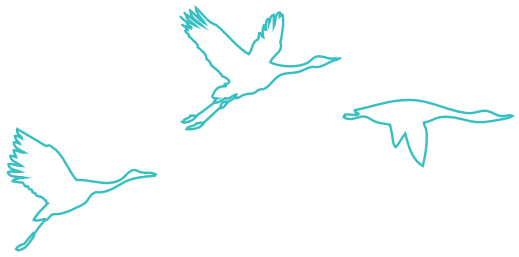
91 DECC (2008) 'Statement of Intent 1: Infection of native plants by Phytophthora cinnamomi', Sydney; www.threatenedspecies.environment.nsw.gov.au/tsprofile/pas_abatement_strategies.aspx

92 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.

93 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;

94 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.

95 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.



96 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

97 Environment Protection & Biodiversity Conservation Act 1999.98 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.

99 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.

100 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.

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

102 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.

103 (NSW) Threatened Species Conservation Act 1995 ss 38, 39.

104 (NSW) Threatened Species Conservation Act 1995 s 44.

105 (Qld) Nature Conservation Act 1992 s13(2).

106 (NSW) Threatened Species Conservation Act 1995 s 56.

107 (NSW) Threatened Species Conservation Act 1995 s 58.

108 See EDO submission on (draft) Threatened Species Priority Action Statement (2006) at: http://www.edonsw.org.au/native_plants_animals_policy; 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.

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

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

111 EDO NSW Submission on amendments to the NSW threatened species Priorities Action Statement (February 2014), at: http://www.edonsw.org.au/native_plants_animals_policy.

112 Cf OEH, Introduction to Saving our Species (2013), 'Summary'. $4.8 million has been allocated to 'kick start' 87 SOS projects over four years (2013-16). See: http://www.environment.nsw.gov.au/SavingOurSpecies/projects.htm.

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

114 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).

115 Note: Gordon Plath is from the then Department of Environment and Climate Change.

116 Except for major projects assessed under Part 3A or as State Significant Development (unless otherwise specified).

117 Western Sydney Conservation Alliance Inc v Penrith City Council [2011] NSWLEC 244. See further: http://www.edonsw.org.au/native_plants_animals_cases.

118 Rather, a recovery plan becomes a relevant consideration only where an SIS is submitted, or in considering whether the proposed development is likely to have a significant effect on threatened species, populations or ecological communities, or their habitats (see for example, Environmental Planning and Assessment Act 1979 (NSW), ss 5A, 79B.

119 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.

120 For projects categorised 'designated development' under Part 4.

121 Although there remains a significant imbalance in merits appeal rights in favour of development proponents.

122 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.

123 Ibid at p137.

124 Environmental Planning and Assessment Act 1979, s 3; Protection of the Environment Administration Act 1991, s 6.

125 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.

126 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.

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

128 See for example, Environmental Planning and Assessment Regulation 2000, Schedule 2. See also EP&A Act, s 78A(8A).

129 EP&A Act, s 89F.

130 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.

131 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.

132 Under s 79C (in Part 4) of the EP&A Act.

133 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.

134 EP&A Act, sections 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.

135 See for example, EP&A Act, sections 115ZJ, 115ZG and 115ZK.

136 State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007, as amended.

137 These amendments are expressed to apply to coal and other minerals, but not coal seam gas (CSG).

138 For example, ESD prescribes the need to balance economic, social and environmental factors in decision-making; consider biodiversity and ecological integrity as a fundamental consideration in decisions; adopt a precautionary approach to decision-making under scientific uncertainty; promote intergenerational equity; and improved valuation of environmental costs and benefits (including via the 'polluter pays' principle).

139 In its August 2013 submission on the draft standards, EDO NSW proposed that they should be improved to meet World Health Organisation recommendations and National Environment Protection Measures; allow for continuous improvement, rather than a ceiling on conditions; and protect a wider range of residents and sensitive natural areas.

140 EDO NSW represented the Bulga Milbrodale Progress Association in this case. See http://www.edonsw.org.au/current_cases#bulga.

141 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.

142 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.

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

144 See: http://www.environment.nsw.gov.au/biobanking/

145 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.

146 See: http://www.environment.nsw.gov.au/biodivoffsets/1480biofpolmp.htm

147 See: EDO NSW Submission on the Draft NSW Biodiversity Offsets Policy for Major Projects, May 2014, Download PDF

148 See: http://www.environment.gov.au/resource/epbc-act-environmental-offsets-policy

149 See: www.planning.nsw.gov.au.

150 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.

151 Including the NSW Threatened Species Conservation Act 1995, Native Vegetation Act 2003, Nature Conservation Trust Act 2001, and relevant parts of the National Parks and Wildlife Act 1974 and the Fisheries Management Act 1994.

152 See: http://www.environment.nsw.gov.au/biodiversitylegislation/BLRevTerms.htm.

153 See: EDO SA submission on the draft assessment bilateral agreement, available at: http://www.edo.org.au/edosa/files/ANEDO_submission_on_Draft_Assessment_Bilateral_Agreement_160314.smallpdf.com.pdf

154 EPBC Act, section 50(a).

155 Ss.15-19D.

156 Ss.19E-19O.

157 S. 15 (5).

158 S. 15 (4) (a), (b) (which allows for the appointment of a person nominated by Conservation SA. And (d).

159 S. 19 (c).

160 S.11 (2).

161 S. 11 (3).

162 S. 44.

163 S. 49A.

164 S. 80.

165 S. 80 (2a)

166 S. 47 (2).

167 S. 51 (1).

168 Allowing for the taking of protected animals of a specified species.

169 S. 52.

170 S. 29.

171 For more, see the entry in the South Australian Law Handbook, available here.

172 S. 46 (7), (8).

173 S. 49, 49A.

174 Ss. 49 (16a), 49A (20). The Governor may issue their approval under s. 48.

175 S. 48E.

176 EPBC Act, section 50(a).

177 WC Act s 23B and s 23D.

178 WC Act s 23B(2) and s 23D(1a).

179 WC Act s 16. It is also unlikely that the crown is bound by the fauna provisions of the Act, and is therefore exempt from the requirement to obtain a licence to take fauna.

180 WC Act s 23F.

181 WC Act s 14(4).

182 http://www.audit.wa.gov.au/reports/pdfreports/report2009_05.pdf

183 http://www.audit.wa.gov.au/reports/pdfreports/report2009_05.pdf

184 WC Act s 26.

185 Department of Environment and Conservation, 2011-12 Annual Report (Government of Western Australia, 2012) 20.

186 Ibid.

187 Ibid, 4. Please note that the EEU enforced provisions from a range of Acts, not just the WC Act.

188 See Simpson v Department of Environment and Conservation (WA)[2011] WASC 206.

189 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.

190 EP Act s 38.

191 EP Act s 45.

192 EP Act s 51C.

193 EP Act s 51O and Schedule 5.

194 See EDO Queensland submission on the draft approval bilateral agreement –available at: http://www.edoqld.org.au/wp-content/uploads/2014/06/2014-06-13-Draft-Cth-Qld-Approval-Bilateral-Agreement-ANEDO-submission.pdf.

195 For example, see EDO QLD Submission on the State Development, Infrastructure and Planning (Red Tape Reduction) Bill, available at: https://www.parliament.qld.gov.au/documents/committees/SDIIC/2014/22-StatDevIPRTROLAB/submissions/082.pdf.

196 The Mineral and Energy Resources (Common Provisions) Bill 2014 was introduced on 5 June 2014 and is expected to pass the Queensland Parliament in 2014. The Bill will remove public notification and objection rights to mining leases for approximately 90 per cent of mines in Queensland. See EDO Qld's submission for further details: <http://www.edoqld.org.au/wp-content/uploads/2014/07/005-EDO-1.pdf>

197 The Vegetation Management Act 1999 was amended by the Vegetation Management Framework Amendment Act 2013 (Act no. 24 of 2013), and the Sustainable Planning Regulation 2009 was amended by the Sustainable Planning Amendment Regulation (No. 7) 2013 (SL no. 258 of 2013) and the Sustainable Planning Amendment Regulation (No. 3) 2013 (SL no. 114 of 2013).

198 One of the most significant changes to vegetation clearing laws introduced this year was to allow for the clearing of 'high value regrowth' vegetation on freehold and indigenous land. This change alone exposed approximately 700,000 hectares of bush land to clearing. Prior to the changes, about 79% of that area was protected due to the presence of essential habitat for threatened species or endangered ecosystems. Source: Taylor, M.F.J. 2013. Bushland at risk of renewed clearing in Queensland. WWF-Australia, <http://awsassets.wwf.org.au/downloads/fl012_bushland_at_risk_of_renewed_clearing_in_queensland_9may13.pdf> (accessed 30 April 2014), p.3. For a detailed analysis of vegetation management framework changes, see Taylor, M.F.J. 2013. Bushland at risk of renewed clearing in Queensland. WWF-Australia, <http://awsassets.wwf.org.au/downloads/fl012_bushland_at_risk_of_renewed_clearing_in_queensland_9may13.pdf> (accessed 30 April 2014) <http://awsassets.wwf.org.au/downloads/fl012_bushland_at_risk_of_renewed_clearing_in_queensland_9may13.pdf>

199 Nature Conservation Act 1992 (Qld) s 4(c).

200 Per the Queensland Government's Administrative Arrangements Order (No. 1) 2014 (accessed 16 July 2014), <https://www.qld.gov.au/about/how-government-works/government-responsibilities/>

201 Nature Conservation Act 1992 (Qld) sections 15-23.

202 Nature Conservation Act 1992 (Qld) s 14.

203 Nature Conservation Act 1992 (Qld) Schedule Dictionary: 'mining interest' includes a mining claim, mineral development licence or mining lease granted under the Mineral Resources Act 1989 (Qld), or a petroleum lease granted under the Petroleum Act 1923 (Qld) or Petroleum and Gas (Production and Safety) Act 2004 (Qld).

204 Nature Conservation Act 1992 (Qld) s 27.

205 Nature Conservation Act 1992 (Qld) s 27(2).

206 Petroleum and Gas (Production and Safety) Act 2004 (Qld) s 411.

207 Nature Conservation Act 1992 (Qld) Schedule Dictionary: 'service facility' includes infrastructure for communications, electricity, water or sewerage, and can also include pipelines for oil or gas.

208 Nature Conservation Act 1992 (Qld) s 35.

209 Nature Conservation Act 1992 (Qld) s 35(1)(c)(iii).

210 Nature Conservation Act 1992 (Qld) s 173S.

211 Nature Conservation Act 1992 (Qld) s 62.

212 Nature Conservation (Administration) Regulation 2006 (Qld) Part 2 Div 1. See also generally the Nature Conservation (Protected Areas Management) Regulation 2006 (Qld).

213 Nature Conservation Act 1992 (Qld) s 71, 76-80. The Nature Conservation (Wildlife) Regulation 2006 (Qld) lists the protected species.

214 Department of Environment and Heritage Protection, 'Back on Track species prioritisation framework approach' (accessed 16 July 2014) <https://www.ehp.qld.gov.au/wildlife/prioritisation-framework/back_on_track_species_prioritisation_framework_approach.html>

215 Nature Conservation Act 1992 (Qld) s 88, 88A, 89, 90, 90A.

216 Nature Conservation (Administration) Regulation 2006 (Qld) Part 2 Div 1. See also generally the Nature Conservation (Wildlife Management) Regulation 2006 (Qld).

217 The criteria are set out in the Nature Conservation Act 1992 (Qld) ss 76-80.

218 Department of Environment and Heritage Protection, 'Process for determining the wildlife category for each species listed under the Nature Conservation Act 1992' (accessed 16 July 2014) <http://www.ehp.qld.gov.au/wildlife/threatened-species/wildlife-category.html>

219 The legislation only provides that protected species can be prescribed by regulation - Nature Conservation Act 1992 (Qld) Part 5 Div 2.

220 Nature Conservation Act 1992 (Qld) s 173D.

221 Nature Conservation Act 1992 (Qld) s 173A.

222 Nature Conservation Act 1992 (Qld) s 88C.

223 Nature Conservation Act 1992 (Qld) s 29; see also s 46 for nature refuges. The Nature Conservation (Protected Areas) Regulation 1994 (Qld) lists the protected areas.

224 Nature Conservation Act 1992 (Qld) s 32; see also s 50 for nature refuges and coordinated conservation areas.

225 Department of National Parks, Recreation, Sport and Racing, 'How parks are declared' (accessed 16 July 2014) <http://www.nprsr.qld.gov.au/managing/principles/how_parks_are_declared.html>

226 Nature Conservation and Other Legislation Amendment Act (No. 2) 2013 (Qld) s 26.

227 Queensland Government, 'Media Statements - National park estate review to strengthen quality land protections' (accessed 15/6/14) <http://statements.qld.gov.au/Statement/2013/6/2/national-park-estate-review-to-strengthen-quality-land-protections>

228 Australian Broadcasting Corporation, 'Qld Government urged to convert land into national park' (accessed 23 July 2014) <http://www.abc.net.au/news/2013-05-02/qld-government-urged-to-convert-land-into-national-park/4665148>

229 Source: National Parks Association Queensland.

230 Nature Conservation Act 1992 (Qld) s 111.

231 Nature Conservation Act 1992 (Qld) s 112.

232 Nature Conservation Act 1992 (Qld) s 117(1)(b).

233 Nature Conservation Act 1992 (Qld) ss 115A, 116.

234 Nature Conservation Act 1992 (Qld) s 111; Div 3.

235 Nature Conservation and Other Legislation Amendment Act (No. 2) 2013 (Qld).

236 Nature Conservation Act 1992 (Qld) s 4(c).

237 Nature Conservation Act 1992 (Qld) s17(1)(d) and (e).

238 Nature Conservation and Other Legislation Amendment and Repeal Regulation (No. 1) 2014 (Qld).

239 Nature Conservation (Wildlife Management) Regulation 2006 (Qld) s 259.

240 Nature Conservation (Wildlife Management) Regulation 2006 (Qld) ss 254, 256. See also Department of Environment and Heritage Protection, 'Flora survey guidelines' at pages 2-3 (accessed 18/7/14) <https://www.ehp.qld.gov.au/licences-permits/plants-animals/documents/flora-survey-guidelines.pdf>

241 Nature Conservation Act 1992 (Qld) s 35.

242 Nature Conservation Act 1992 (Qld) Schedule Dictionary definition of ecotourism facility.

243 Nature Conservation Act 1992 (Qld) s 35(c).

244 Nature Conservation Act 1992 (Qld) s 17(1)(a).

245 Herald Sun, 'Full list of Queensland public service redundancies' (accessed 23 July 2014) <http://www.heraldsun.com.au/news/national/full-list-of-queensland-public-service-redundancies/story-fndo45r1-1226471881372?nk=c78afdeb6fb7ae257a2b09e2b6c90d47>; Brisbane Times, 'Queensland public service job losses stay below 14,000' (accessed 23 July 2014) <http://www.brisbanetimes.com.au/queensland/queensland-public-service-job-losses-stay-below-14000-20131203-2yoky.html>

246 Department of Environment and Heritage Protection, 'Back on Track species prioritisation framework approach' (accessed 16 July 2014) <https://www.ehp.qld.gov.au/wildlife/prioritisation-framework/back_on_track_species_prioritisation_framework_approach.html>

247 Nature Conservation Act 1992 (Qld) s 62.

248 Nature Conservation Act 1992 (Qld) s 88.

249 Nature Conservation Act 1992 (Qld) s 88A.

250 Nature Conservation Act 1992 (Qld) s 89.

251 Nature Conservation Act 1992 (Qld) s 90.

252 Nature Conservation Act 1992 (Qld) s 90A.

253 Nature Conservation Act 1992 (Qld) s 173D.

254 Nature Conservation Act 1992 (Qld) s 173G.

255 Nature Conservation Act 1992 (Qld) s 162.

256 The Vegetation Management Act 1999 was amended by the Vegetation Management Framework Amendment Act 2013 (Act no. 24 of 2013), and the Sustainable Planning Regulation 2009 was amended by the Sustainable Planning Amendment Regulation (No. 7) 2013 (SL no. 258 of 2013) and the Sustainable Planning Amendment Regulation (No. 3) 2013 (SL no. 114 of 2013).

257 Taylor, M.F.J. 2013. Bushland at risk of renewed clearing in Queensland. WWF-Australia, available at <http://awsassets.wwf.org.au/downloads/fl012_bushland_at_risk_of_renewed_clearing_in_queensland_9may13.pdf> (accessed 30 April 2014), p.3.

258 Sustainable Planning Regulation 2009 (Qld) Schedule 4 Table 5 Items 1-3.

259 Nature Conservation Act 1992 (Qld) Schedule Dictionary: 'mining interest' includes a mining claim, mineral development licence or mining lease granted under the Mineral Resources Act 1989 (Qld), or a petroleum lease granted under the Petroleum Act 1923 (Qld) or Petroleum and Gas (Production and Safety) Act 2004 (Qld).

260 Nature Conservation Act 1992 (Qld) s 27(2).

261 Petroleum and Gas (Production and Safety) Act 2004 (Qld) s 411.

262 The Mineral and Energy Resources (Common Provisions) Bill 2014 was introduced on 5 June 2014 and is expected to pass the Queensland Parliament in 2014.

263 For further details, see the EDO Qld submission on the Bill, available here: http://www.edoqld.org.au/wp-content/uploads/2014/07/005-EDO-1.pdf

264 For further details, see EDO Qld's full submission on the State Development, Infrastructure and Planning (Red Tape Reduction) and Other Legislation Amendment Bill 2014 is available at: https://www.parliament.qld.gov.au/documents/committees/SDIIC/2014/22-StatDevIPRTROLAB/submissions/082.pdf.

265 The only exception being the Coordinator General's decisions under the new Part 4A State Development and Public Works Organisation Act 1971 (Qld) for project impacting on MNES and subject to a bilateral project

declaration under that Act.

266 For a more detailed analysis of whether the SDPWO Act is an appropriate mechanism to approve significant impacts on MNES, see the ANEDO submission the Draft Queensland Approval Bilateral Agreement, available here: http://www.edo.org.au/policy/policy.html

267 Environmental Offsets Act 2014.

268 Environmental Offsets Regulation 2014 (Qld) Schedule 1.

269 Nature Conservation (Administration) Regulation 2006 (Qld) s 15.

270 Environmental Offsets Act 2014 (Qld) s 7.

271 Further examples of environmental matters that previously required offsetting and no longer will, include impacts on watercourses that are not in high ecological value waters and impacts on wetlands that are not in protection areas, of high ecological significance, or in high ecological value waters: Queensland Biodiversity Offset Policy 2011 s 6; Environmental Offsets Regulation 2014 (Qld) Schedule 2.

272 Department of Sustainability, Environment, Water, Population and Communities, Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy (accessed 27 June 2014), http://www.environment.gov.au/system/files/resources/12630bb4-2c10-4c8e-815f-2d7862bf87e7/files/offsets-policy.pdf

273 DPIPWE. 2008. Guidelines for Eligibility for Listing Under the Threatened Species Protection Act 1995. http://dpipwe.tas.gov.au/Documents/Threatspeciesguidelines.pdf

274 Section 10, Threatened Species Protection Act 1995

275 Sections 22-27, Threatened Species Protection Act 1995

276 Sections 29-31, Threatened Species Protection Act 1995

277 Part 4, Threatened Species Protection Act 1995

278 Conservation covenants may be entered into under Part 5 of the Nature Conservation Act 2002.

279 Section 51(1), Threatened Species Protection Act 1995. Activities conducted in breach of an interim protection order are also punishable under s.36.

280 Section 54, Threatened Species Protection Act 1995

281 Section 17(4), Forest Practices Act 1985

282 Section 19(1AA), Forest Practices Act 1985

283 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.

284 Sections 13 and 21, Threatened Species Protection Act 1995

285 Sections 13(5) and 14, Threatened Species Protection Act 1995

286 Llewellyn v Resource Management and Planning Appeal Tribunal [2007] TASSC 21

287 Section 76A, Nature Conservation Act 2002

288 DPIPWE. 2012. Process for Listing Threatened Native Vegetation Communities. Available at www.dpipwe.tas.gov.au

289 http://www.threatenedspecieslink.tas.gov.au/

290 FPA and DPIPWE. 2014. Procedures for the Management of Threatened Species under the Forest Practices System. Available at http://dpipwe.tas.gov.au/Documents/Final%20signed%20Procedures%20for%20the%20management%20of%20threatened%20species.pdf

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

292 Forest Practices Authority, Annual Report 2012-2013, p Available at www.fpa.tas.gov.au

293 FPA and DPIPWE. 2014. Procedures for the Management of Threatened Species under the Forest Practices System.

Available at http://dpipwe.tas.gov.au/Documents/Final%20signed%20Procedures%20for%20the%20management%20of%20threatened%

20species.pdf

294 Please note, a review of the biodiversity provisions of the Forest Practices Code has been ongoing for a number of years but is yet to take effect In addition, Forestry Tasmania, the government-owned forestry corporation, has recently released a draft High Conservation Values Assessment Management Plan for public comment, as part of its bid for Forest Stewardship Council certification. Obligations arising from the management plan will be additional to legislative requirements regarding threatened species management.

295 Part 8, Water Management Act 1999.

296 Section 276, Water Management Act 1999.

297 Environmental Management and Pollution Control Act 1994, Sch 2.

298 Threatened vegetation is defined as "a threatened native vegetation community that is listed in Schedule 3A of the Nature Conservation Act 2002 (Tas) or a threatened native ecological community that is listed under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)

299 See, for example, Kingborough Interim Planning Scheme 2014, Schedule 10 - Biodiversity Code

300 Environmental Management and Pollution Control Act 1994, Div 1A.

301 Environmental Management and Pollution Control Act 1994, s 74(4).

302 Environmental Management and Pollution Control Act 199, s 74(3).

303 General Guidelines for preparing a Development Proposal and Environmental Management Plan

For Level 2 activities and 'called in' Activities Board of the Environment Protection Authority January 2014

304 Tarkine National Coalition Inc. v. West Coast Council and Venture Minerals Limited [2013] TASRMPAT 103

305 Approximately 10 projects have gone through this process since the Act was introduced in 1994.

306 The ultimate decision is made by the Governor, on the recommendation of the Minister.

307 Tasmanian Liberal Party. 2014. A Fairer, Faster, Cheaper, Simpler Planning System. Available at www.tas.liberal.org.au/sites/default/files/policy/A%20Fairer%20Faster%20Cheaper%20Simpler%20Planning%20System.pdf

308 Territory Parks and Wildlife Conservation Act (NT), S29.

309 Territory Parks and Wildlife Conservation Regulations (NT), R2.

310 IUCN Red List, The IUCN Red List of Threatened Species accessed on 13 December 2012 at: http://www.iucnredlist.org/about.

311 Territory Parks and Wildlife Conservation Act (NT), S29.

312 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.

313 Territory Parks and Wildlife Conservation Act (NT), S31.

314 Territory Parks and Wildlife Conservation Act (NT) s32

315 Territory Parks and Wildlife Conservation Act (NT) s35

316 Territory Parks and Wildlife Conservation Act (NT) s37

317 Territory Parks and Wildlife Conservation Act (NT) s32

318 http://www.lrm.nt.gov.au/plants-and-animals/information-and-publications/approved-management-plans

319 Territory Parks and Wildlife Conservation Act (NT) S37(1)

320 Territory Parks and Wildlife Conservation Act (NT) S37(2)

321 Territory Parks and Wildlife Conservation Act (NT) S38

322 Territory Parks and Wildlife Conservation Act (NT) S37(3)

323 Territory Parks and Wildlife Conservation Act (NT) S38

324 Source within Northern Territory Department of Land Resource Management.

325 Natural Resource Management Ministerial Council, 'Australia's Biodiversity Conservation Strategy 2010-2030' (Department of Sustainability, Environment, Water, Population and Communities (SEWPaC), SEWPaC library, 2010) .

326 Territory Parks and Wildlife Conservation Regulations, R3.

327 Territory Parks and Wildlife Conservation Act (NT) S55

328 Territory Parks and Wildlife Conservation Act (NT) S56(2)(b)

329 Territory Parks and Wildlife Conservation Act 2011 (NT) s 67D330 Territory Parks and Wildlife Conservation Act 2011 (NT) s 66331 Territory Parks and Wildlife Conservation Act 2011 (NT) ss66,67

332 Territory Parks and Wildlife Conservation Act 2011 (NT) s 67C

333 Territory Parks and Wildlife Conservation Act (NT), s67C

334 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 .

335 See: EDO ACT submission on the Bilateral Agreement Between the Commonwealth of Australia and the Australian Capital Territory, available at: http://edoact.org.au/node/185.

336 Part 2.1

337 Part 2.4

338 Part 4

339 Part.4.5.

340 Part 5.

341 Part 7.

342 Part 6.

343 Part 8.1.

344 Part 8.4.

345 Part 8.5.

346 Part 2.4.

347 Part 4 of the Bill 2013.

348 Part 4.4.

349 Part 4.4.

350 Part 4.5.

351 Part 11.

352 The Bill 2013, s342; Schedule 1.

353 The Bill 2013, s6(a).

354 Section 17; Part 2.1 of the Bill 2013.

355 The Bill 2013, Section 30.

356 The Bill 2013, Section 75.

357 The Bill 2013, Section 81.

358 The Bill 2013, Section 52.

359 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).

360 The Bill 2013, Section 91 (1).

361 See: EDO ACT and Conservation Council's Comments on the Nature Conservation Bill 2014. Available at: < http://www.edoact.org.au/sites/default/files/20140429-Nature%20Conservation%20Bill%20Submission-FINAL.pdf>

362 Section 316

363 Section 95 of the NC Act.

364 The Bill 2013, s342; Schedule 1.

365 ACT State of the Environment Report 2011, Executive Summary, 9.

366 The Bill 2013, Section 21.

367 The Bill 2013, Section 21 (3).

368 Section 130 of NC Act and s318 the Bill 2013.

369 PD Act, s138AB.

370 PD Act, s158.

371 EDO ACT, Submission on the Draft Nature Conservation Bill 2013 (10 January 2013) <http://www.edoact.org.au/sites/default/files/EDO%20ACT%20submission%20NCBill%202013%20100114.pdf>

372 NC Act, Section 167 (1).

373 PD Act, Section 322 (1).

374 PD Act, s 212.

375 Ibid, s221.

376 Item 4, 6 and 12, Schedule 1

377 'Eligible entities' are listed in Schedule 1, column 4; s 407.

378 EDO ACT submission - Bilateral Agreement Between the Commonwealth of Australia and the Australian Capital Territory.

379 For example, the Planning and Development Act 2007 (ACT), s 214(2)(a). The time to prepare a scoping document is

a maximum of 30 working days from day the application is received.

380 http://www.timetotalk.act.gov.au/storage/ACT%20Environmental%20Offsets%20Draft%20Guidelines.pdf

381 Available at: http://www.environment.gov.au/resource/standards-accreditation-environmental-approvals-under-environment-protection-and

382 See: ANEDO Submission on Draft Framework of Standards for Accreditation of Environmental Approvals under the EPBC Act 1999, 23 November 2012; available at: http://www.edo.org.au/policy/policy.html.

383 See: http://www.environment.gov.au/resource/significant-impact-guidelines-13-coal-seam-gas-and-large-coal-mining-developments-impacts.

384 Available at: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5231.

385 See: ANEDO submission to the Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014; available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1482/attachments/original/1401763257/140530_Senate_Inquiry_into_EPBC_(Bilateral_Agreement_Implementation)_Bill_-_ANEDO_submission.pdf?1401763257.

386 Environment Protection and Biodiversity Conservation Act 1999, s 1(a).

387 See Ibid, Chapter 2 Part 3.

388 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.

389 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.

390 Environment Protection and Biodiversity Conservation Act 1999, s 179.

391 See Environment Protection and Biodiversity Conservation Act 1999, s 67 for definition.

392 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).

393 Ibid, s 523. Actions do not include Commonwealth, state or territory decisions or authorizations granted under some Acts such as Customs Act 1901 (Cth).

394 See Booth v Bosworth [2001] FCA 1453, [99].

395 Matters of national Environmental Significance. Significant Impact Guidelines 1.1, DEWHA, 2009.

396 Environment Protection and Biodiversity Conservation Act 1999, s 43A.

397 See Ibid, Chapter 2, Part 4.

398 Ibid, ss 32-37.

399 Ibid, ss 38-42.

400 Ibid, s 68.

401 Ibid, s 69.

402 Ibid, s 70.

403 Ibid, s 71.

404 Ibis, s 74AA.

405 Ibid, s 75(5).

406 See Ibid, s 3A for ESD definition and s 391 for requirement for Minister to apply precautionary principle.

407 Ibid, s 136.

408 Ibid, s 134.

409 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)).

410 Ibid, s 87.

411 Ibid, ss 82, 87.

412 Ibid, s 83.

413 Ibid, s 84.

414 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.

415 Ibid, pp144 – 145.

416 130 out of 240 controlled actions in 2010-11 related to listed threatened species or ecological communities. Ibid, p148.

417 Note this list is intended to be illustrative and is not a comprehensive list of strengths.

418 Note this list is intended to be illustrative and is not comprehensive.

419 See Defending Environmental Laws, available at: http://www.edo.org.au/policy/policy.html.

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