



EDOs of Australia

Inquiry into flying-fox management in the eastern states

18 November 2016

EDOs of Australia (formerly ANEDO, the Australian Network of Environmental Defender's Offices) consists of eight independently constituted and managed community legal centres located across the States and Territories.

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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1. Introduction

Environmental Defenders Offices of Australia (**EDOA**) welcomes the opportunity to provide input to the Inquiry into flying-fox management in the eastern states.

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- 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.

Given our specific expertise, our comments to this Inquiry focus on the regulatory framework for managing the flying-foxes in relation to the following Terms of Reference:

- *the circumstances and process by which flying-foxes are listed and delisted as threatened species at both the state and Commonwealth levels;*
- *the interaction between the state and Commonwealth regulatory frameworks;*
and
- *opportunities to streamline the regulation of flying-fox management.*

2. Context

There are seven species of flying-fox in Australia. All native animals in all states and territories are protected, with certain species of flying-foxes listed as threatened in various states. Queensland has identified one species of flying-fox that is extinct in the wild, the Dusky Flying-fox (*Pteropus brunneus*).¹

Species that are protected under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) are the vulnerable Grey-headed Flying-fox (*Pteropus poliocephalus*), the vulnerable Spectacled Flying-fox (*Pteropus conspicillatus* subsp. *conspicillatus*) and the critically endangered Christmas Island Flying-fox (*Pteropus melanotus* subsp. *natalis*), found only on Christmas Island. A National Recovery Plan exists for the Spectacled Flying-fox² and a draft National Recovery Plan exists for the Grey-headed Flying-fox.³ EDOA submits that it is important to protect all populations of flying-foxes but consistent with the Terms of Reference for this Inquiry, this submission focuses on the Grey-headed Flying-fox, the Spectacled Flying-fox, the Black Flying-fox (*Pteropus alecto* subsp. *gouldii*) and the Little Red Flying-fox (*Pteropus scapulatus*).

¹ *Nature Conservation (Wildlife) Regulation 2006* (Qld), Schedule 1, Part 1, Item 2.

² Available at: <https://www.environment.gov.au/resource/national-recovery-plan-spectacled-flying-fox-pteropus-conspicillatus>.

³ Department of Environment, Climate Change and Water NSW. 2009. *Draft National Recovery Plan for the Grey-headed Flying-fox Pteropus poliocephalus*. Prepared by Dr Peggy Eby. Department of Environment, Climate Change and Water NSW, Sydney, available at: www.environment.nsw.gov.au/resources/threatenedspecies/08214dnrpflyingfox.pdf.

3. Circumstances and process by which flying-foxes are listed and delisted as threatened species at both the state and Commonwealth levels

EDO strongly supports the role of a scientifically-based, independent scientific committee in determining listing status of threatened species at both the state and Commonwealth levels. We briefly examine how each of the eastern states and Commonwealth meet this standard.

New South Wales

Under the NSW *Threatened Species Conservation Act 1995* (**TSC Act**), the NSW Scientific Committee is not subject to the control or direction of the Minister (s 135 TSC Act) and is solely responsible for determining whether any species, population, ecological community or threatening process should be listed or omitted from one of the threatened species lists (s 17 TSC Act).

Any person may nominate for a listing or removal, and recommendations for nominations must be publicly consulted on, but the responsibility for a final listing decision remains with the Scientific Committee. A relevant Minister can ask the Scientific Committee to reconsider its decision, but can only do so once and only on scientific grounds (s 23A TSC Act). The *Biodiversity Conservation Bill 2016*, that was approved at the time of preparing this submission, maintains this independent scientific process.

It is an offence to vexatiously nominate a species for de-listing or listing (s 21(5) TSC Act).

Victoria

The Victorian *Flora and Fauna Guarantee Act 1988* (**FFG Act**) allows for members of the public to nominate species to the Scientific Advisory Committee for listing or repeal of listing (s 12 FFG Act). The Scientific Advisory Committee (s 8 FFG Act) considers the nomination (including any information provided during public consultation) and makes a listing recommendation to the Minister for Energy, Environment and Climate Change. The Minister must consider this recommendation and any comments of the Conservation Advisory Committee, the Victorian Catchment Management Council and the Minister for Agriculture and Food Security, before making a final decision on whether or not to recommend to the Governor-in-Council that the item be listed or delisted. Listing or delisting is effected by a Governor-in-Council Order. In making a recommendation, the Minister may only have regard only to nature conservation matters (s 10(7) FFG Act).

Commonwealth

Part 13, Division 1 of the EPBC Act grants the relevant Minister the power to list or de-list threatened species. The EPBC Act creates a process by which the Minister must publish a notice inviting people to nominate items for inclusion on threatened species lists (s 194E EPBC Act) and provide these nominations to the

Scientific Committee for assessment. The Minister must consider advice from the Scientific Committee in deciding whether to add or delete a species from a list or amend a list (s 189 EPBC Act). The Minister also has power to delete a species from one of the lists, by way of a legislative instrument. However, in doing so, the Minister must apply specific criteria (s 186(2A) and 186(2B) EPBC Act), as follows:

- (2A) The Minister must not delete (whether as a result of a transfer or otherwise) a native species from a particular category unless satisfied that:*
- (a) the native species is no longer eligible to be included in that category; or*
 - (b) the inclusion of the native species in that category is not contributing, or will not contribute, to the survival of the native species.*
- (2B) In deciding whether to delete a native species from a particular category (whether as a result of a transfer or otherwise), the only matters the Minister may consider are matters relating to:*
- (a) whether the native species is eligible to be included in that category; or*
 - (b) the effect that the inclusion of the native species in that category is having, or could have, on the survival of the native species.*

This is an especially important provision, as the Minister is prohibited from taking into account any matters other than the scientific matters listed above.

Queensland

In Queensland, the *Nature Conservation Act 1992 (NC Act)* establishes the framework for protection and management of native flora and fauna. Any person can nominate a species for listing or de-listing. The nomination is then assessed by the Species Technical Committee in accordance with the listing criteria for each category set out in the NC Act. Once assessed, the Species Technical Committee provides advice to the Minister, who then determines whether the Governor in Council is to approve an addition or removal to the proposed wildlife categories, by amending the *Nature Conservation (Wildlife) Regulation 2006*.

Conclusion

The role of an independent Scientific Committee in decision making ensures that decisions about listing threatened species are robust and based on the best available science. EDOA supports the strengthening and improved resourcing of these processes. Improved resourcing would address the current time lag that is being experienced between species or community nomination, listing, planning and actual on-ground recovery activity. This is particularly relevant in the case of Grey-headed Flying-foxes where a draft National Recovery Plan has existed since 2009, and is still awaiting approval by the Commonwealth Minister. This appears to be significantly overdue, as the Commonwealth Minister is required to have a recovery plan in place within three years of making the decision that the species requires a recovery plan (s 273 EPBC Act).

4. Interaction between the state and Commonwealth regulatory frameworks and opportunities to streamline the regulation of flying-fox management

Interaction between regulatory frameworks

EDOA has provided extensive comment on the interaction between state/territory and Commonwealth regulatory frameworks, particularly in relation to the so called 'one stop shop' proposals, under which the Australian Government would devolve to state and territory governments important Commonwealth powers of assessment and approval for projects likely to significantly impact on Matters of National Environmental Significance (**MNES**), including threatened species. As discussed in a recent review of the proposed one-stop-shop process,⁴ EDOA strongly supports maintaining strong roles for state and Commonwealth Governments in environmental decision-making because:

- only the Federal Government can provide national leadership on national environmental issues, strategic priorities and increased consistency;
- the Federal Government is responsible for our international obligations, which the EPBC Act implements;
- state environmental laws and enforcement processes are not always up to an adequate standard;
- states are not mandated to act (and do not act) in the national interest; and
- state governments often have conflicting interests – as a proponent, sponsor or beneficiary of the projects they assess.

In 2012, EDOA prepared a report for the Places You Love Alliance examining the adequacy of threatened species and planning laws in all jurisdictions of Australia.⁵ This report, and an updated assessment in 2014,⁶ reached the conclusion that no state or territory has a good track record of adequately resourcing, or effectively implementing and enforcing, their threatened species laws. The report found:

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...

⁴ Sahukar, N. (2016) *Australia's environment: Breaking the One-stop-shop deadlock* IMPACT! Issue 97, available at <http://www.edonsw.org.au/impact>.

⁵ EDOA (2012) *An Assessment of the Adequacy of Threatened Species & Planning Laws in all Jurisdictions of Australia* available at: http://www.edonsw.org.au/anedo_report_protect_the_laws_that_protect_the_places_you_love_an_assessment_of_the_adequacy_of_threatened_species_planning_laws_in_all_jurisdictions_of_australia.

⁶ EDOA (2014) *Assessment of the adequacy of threatened species & planning laws* available at http://www.edonsw.org.au/assessment_of_the_adequacy_of_threatened_species_planning_laws.

Given the common failings of legislation in all jurisdictions, a clear finding of this report is that threatened species laws in all jurisdictions needed to be reviewed, strengthened, and fully resourced and implemented. Given the decline in biodiversity in each State and Territory, combined with increasing population pressures, land clearing, invasive species and climate change, now is not the time to be streamlining and minimising legal requirements in relation to threatened species assessment.⁷

EDOA remains of the view that streamlining regulation of threatened species, including flying-foxes, is not in the best interest of threatened species. This view has been strengthened by the fact that state and territory based legislation for threatened species is currently being weakened in some jurisdictions⁸ despite the fact that the number of threatened species and the threats facing those species are increasing. Rather the Commonwealth Government's focus should be on strengthening processes and outcomes for threatened species, ecological communities and their habitats.

Further streamlining unnecessary in current regulatory environment

As outlined below, recent state and Commonwealth Government policy initiatives, such as the development of camp management plans which increase the use of dispersal actions, have already been implemented with the stated aim of streamlining regulation for flying-fox management.

Queensland

In Queensland, the NC Act allows local government an as-of right authority to manage flying-fox roosts in Urban Flying-Fox Management Areas. This authority authorises local Councils following a Code of Practice⁹ to use non-lethal methods to destroy a flying-fox roost; drive away, or attempt to drive away, a flying-fox from a flying-fox roost; and disturb a flying-fox in a flying-fox roost (s 88C).

Local government may also obtain a Flying-fox Roost Management Permit to the undertake activities that are not code compliant and/or develop a flying-fox management plan covering an entire local government area which, if endorsed by the Queensland Government, provides for a three-year approval to manage flying-fox roosts outside of urban areas. In addition, any person may undertake low impact activities at roosts in accordance with the *Code of practice – Low impact activities affecting flying-fox roosts*.¹⁰

In EDOA's opinion, the Codes allow management activities without adequate environmental assessment.

⁷ EDOA (2012) *An Assessment of the Adequacy of Threatened Species & Planning Laws in all Jurisdictions of Australia*, pp 3-4

⁸ See for example the EDO NSW submission on the NSW biodiversity legislation review: http://www.edonsw.org.au/biodiversity_legislation_review. The consequential Biodiversity Conservation Act 2016 was passed at the time of preparing this submission.

⁹ Code of Practice – Ecologically sustainable management of flying-fox roosts, available at <https://www.ehp.qld.gov.au/wildlife/livingwith/flyingfoxes/pdf/cp-wl-ff-roost-management.pdf>.

¹⁰ Available at: <https://www.ehp.qld.gov.au/wildlife/livingwith/flyingfoxes/pdf/cp-wl-ff-low-impact-roosts.pdf>.

NSW

NSW has recently seen a significant policy shift from a focus on maintaining a network of camps to minimising perceived health impacts of flying-foxes, despite recognition that “*human infections with viruses borne by flying-foxes are very rare*”.¹¹ The NSW Government has expressly advised, “There are no reports of any infections with Hendra virus or Australian Bat Lyssavirus among wildlife handlers working with flying foxes or in people living in proximity to flying fox colonies. This suggests that living near a flying fox colony does not pose a significant risk for infection with these viruses.”¹²

The NSW Flying-Fox Camp Management Policy 2015¹³ has the stated aim of streamlining regulatory approvals for significant dispersal activities and, again in the opinion of EDOA, does so without requiring adequate environmental assessment of impacts. In particular, increased focus on dispersal actions compared to previous policies (which focused on education and living with flying-foxes); the length of approvals of up to 5 years in duration; listing issues for ‘consideration’ rather than mandatory minimum requirements to minimise harm; and the lack of consideration of cumulative impacts, risk significant harm to flying-fox populations. In addition, the NSW Office of Environment and Heritage routinely issues exemptions from licensing requirements under the TSC Act.¹⁴

Commonwealth

In September 2015, the Commonwealth Government finalised the *Referral guideline for management actions in grey-headed and spectacled flying-fox camps: EPBC Act Policy Statement*¹⁵ (**Referral Guideline**). The Referral Guideline states:

Actions taken at camps of grey-headed or spectacled flying-fox that are unlikely to require referral under the EBPC Act because they unlikely to have a significant impact include:

- *minor, routine camp management at any camp*
- *clearing some vegetation or other indirect impacts on nationally-important flying-fox camps that are carried out in accordance with the mitigation standards*
- *dispersal of nationally-important flying-fox camps, that are carried out in accordance with the mitigation standards and are done so when the national population is not subject to significant stress*
- *clearing vegetation, dispersal of animals, in situ flying-fox management or other impacts on flying-fox camps that are not nationally-important flying-fox camps that is carried out in accordance with state or territory regulatory requirements.*

¹¹ NSW Office of Environment and Heritage, *Living with flying-foxes*, available here: <http://www.environment.nsw.gov.au/animals/flying-fox-measures.htm>.

¹² NSW Health, *Flying Foxes and Health*, available here: <http://www.health.nsw.gov.au/environment/factsheets/Pages/flying-foxes.aspx>.

¹³ Available at: <http://www.environment.nsw.gov.au/threatenedspecies/flyingfoxcampol.htm>.

¹⁴ A list of relevant exemptions by way of s 95 Certificates are available here:

<http://www.environment.nsw.gov.au/threatenedspecies/S91Tscaregisterbydate.htm>

¹⁵ Available at: <https://www.environment.gov.au/biodiversity/threatened/species/flying-fox-policy-statement>.

As stated in our submission to the draft Referral Guideline,¹⁶ our most significant concern with the policy is the allowing dispersal of flying-fox camps, including camps recognised as being nationally important, without referral to the Federal Minister for the Environment. This seriously weakens the protections that the EPBC Act ostensibly extends to these species, and to the important ecological role that flying-foxes play in propagating native vegetation through their foraging and seed-dispersal function. The role flying-foxes perform in maintaining ecosystems was explicitly recognised by the Federal Court in *Booth v Bosworth*.¹⁷ Further, the dispersal of flying-fox camps is generally not supported by the Australasian Bat Society, an independent scientific organisation with expertise in bats.¹⁸

Victoria

In contrast, the focus in Victoria remains on ensuring sustainable camps exist in locations that minimise negative human interactions.¹⁹

Conclusion

As a person or local government can undertake an action in Queensland or NSW in accordance with the relevant exemptions as outlined above, and in accordance with the Commonwealth Referral Guideline, it is unclear why “streamlining the regulation of flying-fox management” is necessary.

In addition to the potential negative impacts on individual flying-foxes, the use of the current camp management process risks significant cumulative impacts on the population. EDOA is concerned that additional measures to exempt flying-fox camp management from threatened species assessment requirements over and above the existing state and Commonwealth exemption regime, will significantly compromise protection of the species. Any further streamlining of regulation is not appropriate.

¹⁶ Full submission available at: <http://www.edo.org.au/biodiversity1>.

¹⁷ *Booth v Bosworth* [2001] FCA 1453; (2001) 114 FCR 39; (2001) 117 LGERA 168.

¹⁸ The Australasian Bat Society Inc, *Position Statement: Flying-fox camp dispersal*, available here www.ausbats.org.au/download/i/mark_dl/u/4008973680/4601364966/ABS%2520Position%2520statement_Flying%2520Fox%2520Camp%2520Dispersal.pdf+&cd=53&hl=en&ct=clnk&gl=au.

¹⁹ For more information see: <http://www.depi.vic.gov.au/environment-and-wildlife/wildlife/flying-foxes/flying-fox-campsite-management-plan>.