

# *Batwatch Australia*

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<b>Document Purpose:</b>	Submission of comments to the Senate inquiry into the effectiveness of threatened species ecological communities' protection in Australia
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## **Batwatch**

Batwatch is a Sydney based NGO that monitors for actions that impact animals of the order *Chiroptera* (bats) that have habitat in Australia.

Much of our effort is focused on issues relating to species of bats that are listed as threatened under state and/or federal legislation<sup>1</sup>.

## **Executive Summary**

We would like to take this opportunity to thank the committee for allowing stakeholders and other interested parties to make submissions of comments on this matter.

Our submission is aligned to the terms of reference.

In summary:

- There is no overarching strategy for the funding of threat abatement and recovery activities and the current processes are not achieving measurable positive outcomes
- The process of developing recovery plans does not have an appropriate priority leading to unacceptable delays in recovery plan adoption
- Recovery plans do not have an appropriate focus on the core objective of improving the conservation status of listed species
- Identification and protection of critical habitat is inadequate
- Threatened species protection should remain a function of the Commonwealth and not be delegated to the states/territories or 3<sup>rd</sup> parties
- The federal environment protection legislation, administered by the Commonwealth, remains the most effective way of protecting Australia's native ecology

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<sup>1</sup> Ten species of bats that have habitat in Australia are listed as threatened under the EPBC Act, three of which are classified as critically endangered (one – the Christmas Island pipistrelle - is assumed to now be extinct)

## **Term of Reference (a) - of key threats to listed species and ecological communities;**

### **Threat management and funding**

There are key markers to suggest that threat management/abatement is inadequate. These include:

- The assumed/actual extinction in late 2009 of the Christmas Island pipistrelle (*Pipistrellus murrayi*)
- The reality that once a species is listed as threatened, it is exceptionally rare for sufficient action to be taken to mitigate threats and recover species numbers so as to allow the species to be delisted.

We acknowledge that there will always be less funding available for threat abatement than is required to mitigate even high and medium priority threats for all threatened species; compromises have to be made so that the limited funds are used effectively.

Within this context, there is a need for a publicly available overarching strategy for the allocation of funding for threat abatement and management which demonstrates government commitment to the process of species recovery and can articulate where and why compromises are being made with the intent of maximising the use of limited funds.

No such plan appears to currently exist and this makes it impossible to gauge the effectiveness, or lack thereof, of funding disbursements and/or threat abatement activities. For example, whilst substantial funding has been allocated to flying-fox related issues it has not been allocated to the highest priority conservation issues and not for the purposes of conservation.

### **The SPRAT register**

The National Species Profile and Threat register, SPRAT<sup>2</sup>, plays a critical role in providing guidance as to the key threats facing listed species and communities. However, there appears to be little emphasis placed on maintaining the currency of the SPRAT profiles and this inevitably compromises the value of the register.

For example, the SPRAT profile for the grey-headed flying-fox (*Pteropus poliocephalus*)<sup>3</sup> has not been updated to reflect that:

- the Queensland government now issues licenses allowing farmers to shoot the species as a method of crop protection
- heat stress now represents a significant cause of mortality
- Food shortage across the whole species range was detected in 2010

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<sup>2</sup> <http://www.environment.gov.au/cgi-bin/sprat/public/sprat.pl>

<sup>3</sup> [http://www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon\\_id=186](http://www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id=186) (Retrieved 30/11/2012)

## **Term of Reference (b) - development and implementation of recovery plans;**

### **Background**

Where a recovery plan exists for a listed species, it creates context for decisions by the relevant state and/or federal authorities insofar as decisions made by those agencies, or the responsible Minister, must be consistent with the recovery plan.

The intent of this is clearly to limit the likelihood that actions will be approved that may impact the recovery of the species. A consequence of this requirement is that, on the adoption of a recovery plan, some actions that might previously have been approved will have to be rejected, or subject to more rigorous scrutiny, because they are contrary to the recovery plan.

This creates a particular problem in regards to species that are listed as threatened but are also a source of conflicts that lead to community calls to reduce or otherwise control the species population.

The grey-headed flying-fox is an example of this contradiction.

- The species was listed as vulnerable in 2001 under Commonwealth Environment Protection and Biodiversity Conservation (EPBC) Act, NSW Threatened Species Conservation (TSC) Act and Vic Fauna & Flora Guarantee (FFG) Act as a result of a 30% population decline in the 1990's
- In response to the listing of *P.poliiocephalus*, a recovery plan was commissioned by the Federal Minister for the environment and production was delegated to NSW Department of Environment and Climate Change (NSW DECC)
- Concurrent with the development of the recovery plan, the agencies responsible for the plan itself were also under direct pressure from some sections of the community to authorise camp dispersals<sup>4</sup> and to allow lethal measures to be used against flying-foxes as a method of crop protection<sup>5</sup> both of which are acknowledged on SPRAT to represent threats to species recovery

The recovery plan for *P.poliiocephalus* was drafted within the context of these conflicting priorities.

### **The National Recovery Plan for *P.poliiocephalus***

The initial drafts of the draft recovery plan for *P.poliiocephalus* were prepared, for the Commonwealth, by Dr P Eby, an independent ecologist with extensive experience in flying-

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<sup>4</sup> When large numbers of animals roost together in urban and peri-urban locations, as is increasingly the case, the perceived loss of amenity for local residents and/or businesses gives rise to calls for the animals to be evicted from the roost habitat. The process of eviction, the outcomes from which is poorly understood, is commonly referred to as "dispersal"

<sup>5</sup> During periods of scarce native food resources, flying-foxes will forage in commercial orchards resulting in financial impacts on orchardists and calls by farming bodies (e.g Growcom, NSW Farmers Association) to allow flying-foxes to be culled as a crop protection measure

fox ecology and management<sup>6</sup> and NSW DECC. The recovery team that supported Dr Eby in the preparation of these drafts represented a significant body of flying-fox knowledge (NSW DECC, 2009a, p.vi) from stakeholders including scientists, ecologists, farming bodies and representatives of the federal and state environment departments.

The first publicly available draft of the recovery plan is dated July 2009. This version was placed on display, and comments sought as is required by the EPBC Act, in late 2009. This draft contains a comprehensive set of criteria to allow significant *P.poliocephalus* camps to be defined as “roosting habitat critical to the survival of the species”. Any camp that was categorised as critical habitat according to these criteria would have been provided a significant degree of protection against the possibility of any actions, including dispersal, that might compromise the value of the habitat to *P.poliocephalus*.

Given the broad range of views as to the status and behaviour of *P.poliocephalus*, the strong conservation emphasis that this draft of the recovery plan draft represents is a significant achievement on the part of the Recovery Team.

The Threatened Species Scientific Committee (TSSC) requested a number of changes be made as summarised in the “Draft Minutes of the TSSC meeting March 2010”<sup>7</sup>. The TSSC did not recommend any changes be made to the criteria for identifying roosting habitat critical to the survival of the species.

The next iteration of the draft recovery plan that is in the public domain is dated July 2010<sup>8</sup>.

It is our understanding that NSW Department of Environment, Climate Change and Water (NSW DECCW, formerly NSW DECC) invited neither Dr Eby nor the Recovery Team to contribute to revising the draft despite their involvement with the production of the draft that had previously been placed on public display.

The 2010 draft recovery plan diverges from the 2009 draft in a number of respects, the most significant of which are to:

- alter the criteria used to identify roosting habitat critical to the recovery of the species to the extent that less habitat is protected
- move the emphasis away from the protection of the grey-headed flying-fox and towards the perceived needs of farmers who have flying-foxes foraging in their crops and who may request licenses allowing lethal control measures

The changes that the TSSC requested be made do not appear to have been incorporated in the July 2010 draft.

It is unclear what advice NSW DECCW acted upon when determining that it was appropriate to make extensive changes to the draft that fell outside of the guidance provided to them by

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<sup>6</sup> Ten of Dr Eby's publications are cited as references by the SPRAT entry for *P.poliocephalus* ([http://www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon\\_id=186](http://www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id=186))

<sup>7</sup> A copy of these minutes were released in response to a request under NSW Freedom of Information legislation. A copy can be supplied if required.

<sup>8</sup> A copy of the draft was released in response to a request under NSW Freedom of Information legislation. A copy can be supplied if required.

the TSSC or why they did not invite Dr Eby or the Recovery Team to contribute to those changes.

It is our understanding that ;

- the July 2010 draft was reviewed by Commonwealth Department of Sustainability, Environment, Water, Population and Communities (DSEWPaC) but it was determined that the draft needed further revisions before it could be presented to the TSSC for them to consider whether it should be formally adopted.
- DSEWPaC advised DECCW to make further changes and to then resubmit the revised draft for consideration.
- Neither Dr Eby nor the original Recovery Team were invited to contribute to this further revision of the recovery plan.

In August 2012, a further draft of the recovery plan was issued by NSW Office of Environment and Heritage (NSW OEH, formerly NSW DECC/DECCW)<sup>9</sup>.

The 2012 draft removes any criteria for the identification of roosting habitat critical to the survival of the species. Instead it notes only that “The roosting requirements of Grey-headed Flying-foxes are not well understood, nor are the impacts on the species of loss of long-term sites which may be selected to meet specific requirements” (NSW OEH, 2012, p.14).

Both the 2009 and 2010 drafts of the *P.poliocephalus* recovery plan included explicit criteria that can be applied to any camp to enable a determination to be made as to whether that camp represents roosting habitat critical to the recovery of the species.

The 2012 draft recovery plan lacks this basic detail and identification of critical habitat is relegated to a recovery objective with no clear funding source. With no commitment to fund the activity, the process of identification cannot be guaranteed to be undertaken.

The criteria encapsulated in the 2009 draft were the product of the Recovery Team, including representatives of federal and state environment departments. It is unclear why this was not considered to be an appropriate definition and why the criteria were subsequently modified and then entirely removed from the 2010 and 2012 drafts respectively.

Section 270(2)(d) of the EPBC Act requires that a recovery plan must “identify the habitats that are critical to the survival of the species [to the extent to which is it practicable to do so]”.

Given that both the 2009 and 2010 draft recovery plans were able to provide explicit criteria for the identification of critical habitat, it appears that it would not be appropriate to now claim that critical habitat identification is not practicable.

We would suggest that the 2012 draft of the recovery plan fails to meet the requirements of Section 270(2)(d) of the EPBC Act.

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<sup>9</sup> A copy of the draft was released in response to a request under NSW Freedom of Information legislation. A copy can be supplied if required.

The 2012 draft of the recovery plan was reviewed by TSSC in August 2012. We have no information as to what decision the TSSC took in regards to this draft but as of the time of writing, more than 11 years since *P.poliocephalus* was listed as a threatened species, no recovery plan is listed as having been “made or adopted”<sup>10</sup> and the most recent draft that is publicly available, but only in response to a freedom of information request, is seriously flawed.

### **Obligation to recovery species .v. demands to reduce populations**

Whilst being accountable for producing the *P.poliocephalus* recovery plan, the state and federal agencies were, as noted above, under pressure from some sections of the community to actively reduce *P.poliocephalus* population numbers or to control where grey-headed flying-foxes roost through dispersal.

Shooting and dispersals were both subject to significant public interest during the course of 2008, 2009 and 2010 and were presenting challenges for the government agencies to manage.

Most notably;

- The Botanic Gardens & Domain Trust (BGDT, part of NSW DECC) had applied to disperse a colony of *P.poliocephalus* from the Royal Botanic Gardens Sydney (RBGS), a matter that had led to much public debate as to the justification and likely impacts of the proposal.
- Applications had also been lodged to disperse colonies of *P.poliocephalus* from Maclean, NSW and Singleton, NSW.
- A report commissioned by NSW DECC had concluded that the practice of shooting flying-foxes as a crop protection measure was “ineffective when larger numbers of flying fox visit orchards” and “unacceptable ethically and legally [because of the poor welfare outcomes]”. (NSW DECC, 2009b, p.2)

In relation to the proposal to disperse the colony of *P.poliocephalus* from RBGS, it is relevant to note that, when tested against the criteria encapsulated in the 2009 draft of the recovery plan, the RBGS camp site was categorised as “roosting habitat critical to the recovery of the species”.

In assessing the original referral<sup>11</sup>, the Commonwealth Department of Environment, Water, Heritage and the Arts (DEWHA, subsequently DSEWPaC) accepted this categorisation and cited it as one of the reasons for determining the referral to be a controlled action. However when subsequently approving the project, DEWHA determined that, because the recovery plan was not “made” (i.e. it had not been formally adopted) it was not a relevant consideration and the categorisation of the camp as critical habitat could be set aside.

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<sup>10</sup> <http://www.environment.gov.au/biodiversity/threatened/recovery-list-common.html> (Retrieved 10/12/2012)

<sup>11</sup> EPBC Referral 2008/4646 ([http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=current\\_referral\\_detail&proposal\\_id=4646](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=4646))

We suggest that, had the 2009 draft of the recovery plan been “made” at the time the RBGS project was approved, then the outcome of the assessment would have been different as a result of the camp having to be categorised as roosting habitat critical to the survival of the species. That the recovery plan was not made at this time allowed the Minister the latitude to determine that the loss of RBGS as roosting habitat was not critical to the survival of the species despite the advice to the contrary in the 2009 draft recovery plan.

The RBGS project provided the government agencies with the opportunity to consider the additional burden that would have been placed on them had the 2009 draft recovery plan been made at the time the project was assessed. This may in turn have influenced the redrafting of the recovery plan so as to provide a framework which allowed more latitude, once the recovery plan was made, to approve actions that might impact the recovery of the species.

In relation to the issue of shooting, and as noted above, the 2010 draft of the recovery plan places significantly more emphasis on the needs of farmers impacted by any loss of crops to *P.poliocephalus* than it does on the conservation of the species. This provides sufficient latitude for government agencies to approve culling of *P.poliocephalus* whilst limiting the likelihood, after the recovery plan is made, of acting inconsistently with the plan.

We suggest that the 2009 draft of the recovery plan for *P.poliocephalus* placed an appropriate emphasis on the actions necessary to recover the species but that the 2010 and subsequent drafts retreated from this position despite the negative impact this may have on species recovery.

As a consequence, the later drafts of the recovery plan reduce the protection afforded to *P.poliocephalus* and cannot be held to achieve a key aim of recovery plans which is, as stated on the Department of Sustainability, Environment, Water, Population and Communities website “... to maximise the long term survival in the wild of a threatened species”<sup>12</sup>:

### **Consultation and stakeholder engagement**

The EPBC Act requires that draft recovery plans be placed on public display and subject to a comment period. Whilst we acknowledge that the 2009 draft had been displayed for public comment, Batwatch made a request that public comment be invited on the 2012 draft.

The basis of this request was;

- the extensive differences between the 2009 and 2010 drafts
- the assumption that the 2012 draft would be based primarily on the 2010 draft rather than the 2009 draft
- the apparent absence of input from Dr Eby or the recovery team into the post-2009 draft.

The request by Batwatch was rejected and a copy of the draft was only released in response to a request under NSW freedom of information legislation.

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<sup>12</sup> <http://www.environment.gov.au/biodiversity/threatened/recovery.html>

The EPBC Act requires the Minister to invite comment on proposed recovery plans. We suggest that the 2012 draft recovery plan for *P.poliocephalus* diverges so significantly from the 2009 draft recovery plan that the Minister was obliged to invite public and stakeholder comment.

The failure to do so significantly undermines the credibility of the recovery plan and the process through which it has been produced. More importantly the recovery of *P.poliocephalus* may be compromised by the adoption of a recovery plan that does not place sufficient emphasis on critical conservation measures including the identification of critical habitat.

As a consequence, the recovery of the species will inevitably be compromised through habitat destruction (within this context a dispersal should be considered to be equivalent to habitat destruction as the animals are being denied use of the habitat) and shooting.

### **The Christmas Island pipistrelle**

The fate of the Christmas Island pipistrelle (*Pipistrellus murrayi*) is a stark lesson as to the possible outcomes from an ineffective species listing and recovery planning process.

An alarming drop in species numbers was recorded in 1997 but the species was not listed as endangered until 2001 and a recovery plan was not developed until 2004. In the intervening period, species numbers had fallen further to the point where the species listing was upgraded to critically endangered in 2005.

The recovery plan itself lacked measures that could be used to gauge the effectiveness of recovery actions and this, allied to a painfully slow government response to the emerging crisis, contributed to the assumed species extinction in late 2009.

In the case of the *P.murrayi*, the markers were there to indicate that the species was at imminent risk of extinction. Furthermore, at least one independent expert body, the Australasian Bat Society, made significant science-based representations to government agencies highlighting the likely risk to species survival if inadequate conservation measures were undertaken promptly. Yet still the species was allowed to become extinct.

This is perhaps the most damning indictment that the recovery and conservation process is critically flawed and it strongly suggests that threatened species management and recovery is no longer a priority to Australian government agencies.

### **Term of Reference (c) - management of critical habitat across all land tenures;**

Failure to identify critical habitat is a persistent failure in the recovery and conservation planning process.

As noted above in our discussion of the recovery planning process for *P.poliocephalus*, the strong critical habitat provisions that were documented in the 2009 draft of the recovery plan have, in subsequent drafts of the plan, been reduced and then removed without the apparent oversight of the recovery team.



Dispersal of the RBGS camp, categorised by the 2009 draft recovery plan as roosting habitat critical to the survival of the species, was approved by both state and federal agencies.

In the case of the RBGS dispersal, the proponent was allowed to claim that wherever the dispersed animals moved to, it should be considered to be a provision of replacement habitat (BGDT, 2010, p.148). Both federal and state agencies allowed this argument to stand and in effect allowed an offset for lost critical habitat to be claimed without any physical offset actually being set aside.

None of the species of bats listed as threatened under EPBC Act, one of which is now assumed to be extinct, have had critical habitat identified and protected. Regardless of other measures taken to recover the species, a failure to adequately protect roosting and foraging habitat will inevitably result in these species further decline.

### **Term of Reference (d) - regulatory and funding arrangements at all levels of government;**

#### **Funding for species recovery**

It has to be acknowledged that there will always be less funding available for species recovery than is needed to attain all recovery objectives. Compromises have to be made so that the limited funds are used effectively.

Within this context, there is a need for there to be an overarching strategy for species recovery funding which demonstrates commitment, at all levels of government, to the process of species recovery and can articulate where and why compromises are being made so as to maximise the use limited funds.

No such plan appears to currently exist and this makes it impossible to gauge the effectiveness, or lack thereof, of funding disbursements and/or species recovery actions.

#### **Project monitoring**

A critical aspect of threatened species management is the oversight of projects that have been approved and have potential impacts on threatened species. The purpose of oversight should be to ensure that the project executes in a manner consistent with the approval granted to it and that threatened species impacts are minimised.

Our experience is that compliance oversight is inadequate as neither state nor federal agencies have sufficient funding to effectively monitor post-approval compliance.

In an apparent response to this, the Commonwealth, as part of the approval of the RBGS camp dispersal, effectively outsourced a significant component of compliance monitoring to an expert panel which is funded by the proponent of the action, the Botanic Gardens and Domain Trust.

In the case of the RBGS project, the condition of approval that lays down the requirement for the expert panel<sup>13</sup> suggests that the panel is independent but it is not clear how a panel that is funded by the proponent and has influenced the methods and protocols to be used in the project can be held to be fully independent.

Whilst approach taken in relation to the RBGS project externalises the cost of compliance monitoring, it should be seen as a poor substitute for monitoring managed by the Commonwealth itself. Ideally cost recovery mechanisms should be put in place so that the Commonwealth retains the responsibility to manage the compliance activities but can recover the cost of these from the persons taking action.

**Term of Reference (e) - timeliness and risk management within the listings processes;**

Please see above, our comments in relation to the Christmas Island pipistrelle and grey-headed flying-fox recovery plans.

**Term of Reference (f) - the historical record of state and territory governments on these matters**

An exhaustive assessment of the state and territory government records in relation to threatened species management would be a huge undertaking and we have, by the necessity of time and available resources, limited our submission to a number of key issues that we believe to be indicative of poor state management processes:

- the failure by the Queensland government in 2002 to list the spectacled and grey-headed flying-foxes as threatened species despite a recommendation by the governments scientific advisors that the listing under state legislation was warranted
- the reintroduction by the Queensland government of damage mitigation permits (DMPs) allowing the culling of all species of flying-foxes including the federally listed spectacled and grey-headed flying-foxes
- the failure by the NSW government to manage flying-fox camps according to its own Flying-fox camp management policy (FFCMP)
  - Approval of the dispersal of a colony of *P.poliocephalus* from Royal Botanic Gardens Sydney contradicts FFCMP Policy Provision 1 which states that the department will “protect and manage flying-fox camps on lands managed by [the department]”. (NSW DECC, 2007, p.6)
  - Dispersal of colonies of *P.poliocephalus* from Royal Botanic Gardens Sydney, Maclean and Singleton Burdekin Park were all approved despite none of the

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<sup>13</sup> Condition of approval 2(b) in the approval of referral 2008/4646  
(<http://www.environment.gov.au/epbc/notices/assessments/2008/4646/approval-decision.pdf>)

applications being compliant with FFCMP Policy Provision 6 which states that “Preparation and implementation of a strategic plan to manage a camp *in-situ* ... should precede any proposal to relocate the camp”

- the reduction of the status of the Department of Environment to that of an office (the Office of Environment and Heritage – NSW OEH) within the Department of the Premier and the ongoing cuts in staff levels in the NSW OEH.
- The cutting of funding to the Queensland Environmental Defenders Office (EDO) legal service by the Queensland government and the proposal by the NSW office to similarly cut funding to NSW Environmental Defenders Office. Challenging government decisions that negatively impact threatened species is costly and beyond the financial capabilities of the majority of groups or individuals who are best placed to mount those challenges. Within this context, the legal service provided by EDO is of critical importance and those services will inevitably be curtailed where funding is reduced.

### **Term of Reference (g) - any other related matter.**

#### **Devolution of Commonwealth EPBC powers to the states and territories**

The Commonwealth has signalled the intent to devolve much of its authority under EPBC Act to the states under the auspices of reducing “green tape”.

In May 2012, Federal Environment Minister Tony Burke wrote to the state Ministers for environment offering to enter Conservation Agreements that would devolve responsibility for approving a number of significant flying-fox camp management activities to the states. Actions that might impact the listed grey-headed and spectacled flying-foxes, and would previously require approval under EPBC Act would, if the Conservation Agreements were enacted, only require approval under state legislation (e.g. NSW TSC Act).

Batwatch obtained, through NSW freedom of information legislation, a copy of Minister Burke’s correspondence to NSW Minister for the environment Robyn Parker on the matter of the conservation agreements and enclosed therein was a draft of the proposed agreement.

Legal advice obtained by Batwatch suggested that the form of the proposed Conservation Agreement was unlikely to meet the requirements of the EPBC Act and Batwatch has subsequently sought, without success, adequate clarification on a number of these deficiencies from DSEWPaC.

The Commonwealth has rejected requests by Batwatch for the final form of the draft Conservation Agreements to be placed on display for public comment prior to them being enacted. We acknowledge that there is no legal requirement under EPBC Act for the Conservation Agreements to be displayed but neither is there any legal reason why they could not be made available for public comment.

We suggest that the process through which the Commonwealth is seeking to enact the flying-fox camp management Conservation Agreements is not acceptable.

The greater concern is that the overarching intent is to devolve, to the states and territories, almost all existing Commonwealth powers under EPBC Act. Proponents of this devolution of responsibilities emphasise that the objective is to facilitate faster approval of projects that impact listed matters. There is no suggestion that the process will provide any net benefit to listed species or ecological communities.

Such fundamental changes to the framework of threatened species legislation must be subject to public debate. In relation to the flying-fox camp management Conservation Agreements, government agencies have committed that the agreements will be published after they have been enacted. This is not a concession; it is a requirement of the EPBC Act. We assume that there will be a similar lack of consultation when the Commonwealth acts to divest itself of its other powers under EPC Act.

In practical terms, the lack of public consultation means that Commonwealth and states/territories will place the interests of commercial entities above those of the community and the environment and enact changes that will fundamentally change the face of threatened species management in Australia.

### **Operation of the EPBC Act**

There is a need for an overhaul in the operation of the EPBC Act so as to more effectively manage and recover threatened species.

The Hawke report into the operation of the EPBC Act did recommend the accreditation of state approval processes of “an appropriate standard” and the Commonwealth’s intent to devolve its responsibilities to the states/territories should be viewed within that context.

The EPBC Act requires that agreements between the Commonwealth and the states and/or territories must be to the net benefit of the species and that protection afforded the listed species affected by the bilateral agreements must be equal to or greater than that provided under EPBC Act. It is not unreasonable to suggest that this requirement for equivalence is a valid interpretation of the Hawke report recommendation that agreements between the Commonwealth and the states must be of “an appropriate standard”.

State threatened species legislation is uniformly less comprehensive than EPBC Act and we suggest that the Commonwealth has an obligation to explain how devolving responsibility for flying-fox camp management to the states will meet the requirements laid out by the EPBC Act or, in the words of the Hawke report be of “an appropriate standard”.

Some of the deficiencies in state legislation are obvious. Again, the dispersal of *P.poliocephalus* from Royal Botanic Gardens Sydney provides a useful case study. This project was assessed under both federal and state legislation and, as with all actions that impact threatened species, the most important test of assessment is to determine whether the proposed action is likely to have a significant impact on the listed matter.

The criteria for determining significance under NSW TSC Act are prescriptive and inflexible and, as result, the project was deemed to not be significant. TSC Act requires that any action that is found to not be significant be immediately approved.

The criteria for the assessment of significance under Commonwealth EPBC Act are more pragmatic and, as a consequence, the action that had been determined to not be significant under state legislation was determined to be significant under federal legislation.

It is unclear how this divergence of legislative standards would be resolved if responsibility for approval of camp management activities was devolved to the states. If no changes were made to NSW TSC Act, actions such as the dispersal of *P.poliocephalus* from RBGS would be approved without the extensive oversight and detailed assessment that was required under EPBC Act.

Other differences between federal and state legislation are less clear cut. Batwatch has sought clarification from DSEWPac on how these will be addressed by bilateral agreements but we have yet to receive a response that addresses our concerns.

Differences that fall into this category include but are not limited to:

- EPBC Act requires that referrals (applications) for projects that may have a significant impact on listed species must be placed on public display for comment. NSW TSC Act has no such requirement.
- Decisions under the EPBC Act can be challenged under the Administrative Decisions Judicial Review Act. We are not aware of an equivalent process under NSW legislation.

Flaws in the existing process of assessment under EPBC Act will not be addressed, or may be exacerbated, if those powers of assessment are devolved to the states and territories.

- Cumulative impacts are poorly assessed under EPBC Act. That is to say if there are multiple projects impacting a species, each is assessed in isolation and no consideration is given to the cumulative impact of those projects. If the process of assessment becomes a state-based activity, it is not unreasonable to suggest that the assessment of cumulative impact will be marginalised further as the impacts arising from an action in NSW are unlikely to be considered in the context of concurrent actions that have impact on the same species in other states. This is particularly important in the context of *P.poliocephalus*, a nomadic species where individual animals move throughout the species range which includes parts of Queensland, NSW, Victoria, South Australian and ACT.
- EPBC policy statements are DSEWPac's "public policy documents which provide guidance on the practical application of EPBC Act"<sup>14</sup>. However, in practical terms, the policy statements are of limited utility and devolving responsibility for assessment to the states/territories is unlikely to resolve these issues. There are various issues that limit policy statement relevance and these include;
  - Policy statements that are out of date and/or have limited scope. An example of this is the policy statement for *P.poliocephalus*<sup>15</sup>. This is dated 2003, is limited in scope to issues related to impacts of the species on commercial crops and refers

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<sup>14</sup> <http://www.environment.gov.au/epbc/guidelines-policies.html> (Retrieved 8/12/2012)

<sup>15</sup> <http://www.environment.gov.au/epbc/publications/grey-headed-flying-fox.html> (Retrieved 8/12/2012)

to an inter-agency agreement (on the number of animals that can be culled) that was terminated in September 2008<sup>16</sup>.

- Policy statements that contain guidance which is ignored in the context of the assessment of referrals. An example of this is the policy statement for the wind farm industry<sup>17</sup> which contains clear direction that surveys for threatened species of bats should be taken “at appropriate times of year” and should consider bat species that may “fly through the turbine area” (that is to say that they simply move through the area without stopping to roost and/or forage). It is our experience that wind farm referrals routinely fail to comply with this guidance but that the omission is not adequately accounted for in the assessment of the project.

## **Conclusion**

The Commonwealth has taken a position that its powers under EPBC Act would be better delegated to the states and territories. This is counter-intuitive; state threatened species legislation is uniformly less effective than the EPBC Act administered by the Commonwealth. This despite there being clear issues with the current operation of the EPBC Act that need to be addressed.

Devolving responsibility to the states, which are increasingly reliant on revenues from industry sectors that by their very nature have significant conservation implications, with the justification that it will streamline the process of project approval, is clearly not in the best interests of conservation or the protection of threatened species.

Overall responsibility for the protection of Australia’s threatened species should rest with the Commonwealth and there should be an overarching strategy which can articulate threat abatement and species recovery priorities and funding.

Without this strategic approach, there will continue to be little confidence that government agencies are committed to the recovery of Australia’s threatened species.

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<sup>16</sup> The intent to terminate the agreement was noted by then Federal Environment Minister Garrett in a letter to Ku-ring-gai Bat Conservation Society dated 26/08/2008

<sup>17</sup> <http://www.environment.gov.au/epbc/publications/wind-farm-industry.html> (Retrieved 9/12/2012)

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