THE SENATE STANDING COMMITTEE ON ENVIRONMENT AND COMMUNICATION

Submission to the Inquiry into the Effectiveness of Threatened Species and Ecological Communities' Protection in Australia

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Overview

Australia has a poor record on species extinctions and despite a number of legislative frameworks for biodiversity protection at Commonwealth and state government level, biodiversity loss continues. These losses are likely to exacerbate with the impacts of climate change, increased frequency of extreme events such as bushfires and with accelerating urbanisation and expansion of peri-urban and regional cities and expansion of resource developments such as mining. Given this range of impacts it is imperative that there are robust measures in place for the Threatened Species and Ecological Communities' Protection in Australia. This submission looks at the (Environment Protection and Biodiversity Protection (EPBC) Act's role with a concentration upon the linkages between the project assessment and approval processes under the EPBC Act and the biodiversity protection provisions.

1. **<u>Stronger Integration of Commonwealth and State Frameworks</u>**

Under the federal governance model adopted in the Intergovernmental Agreement on the Environment there is a designated role for the Commonwealth government in relation to matters of national environmental significance. Under the EIA and approvals regime for the EPBC Act, threatened species and ecological communities are a matter of national environmental significance that 'triggers' assessment and approval of projects. For decisions to be made adequately in relation to project approvals it is vital that information (i.e. listings must be comprehensive, current and

fully representative, and encompass relevant habitat and in situ conservation requirements). Sufficient resources at a Commonwealth level in order to discharge these requirements are vital.

2. Commonwealth- State Interaction

With explicit responsibility for matters of national environmental significance (many of which relate to international obligations under various treaties) the Federal Government needs to initiate and maintain best practice and provide leadership for States. This is crucial in jurisdictions where the legislation contains older models of species protection or is there to ensure Australia meets its international obligations.

For example, an EDO report on the *Flora and Fauna Act 1988* (Vic) found that there are 'a number of deficiencies in DSE's administration of the Act' which includes an inadequate and backlogged listing process, poor monitoring and little accountability.[1]

While it is acknowledged that there is some duplication of listing processes at state and Commonwealth level, further efforts to streamline and coordinate such processes will assist in ensuring effective and comprehensive listing procedures.

Alan Hawke, in his review of the EPBC Act, noted that:

> A single, national list of threatened species and ecological communities would provide better coordination of legal and administrative processes and simplify the process of prioritising and coordinating recovery actions, delivering significant regulatory and conservation benefits.'[2]

The Hawke Review Recommendation 5 (below) is endorsed to the extent that there is no diminution in currency and accuracy of the listing procedures and that adequate resources are made available in support.

> Recommendation 5
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> The Review recommends that the Australian, State and Territory governments move to a single national list of threatened species, including marine species and ecological communities, through accreditation of State and Territory processes for listing endemic species. This process should include:
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> (1) agreed accreditation for listing;
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> (2) agreed protocols;
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> (3) minimum procedural standards; and
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> (4) consistent documentation standards.[3]

3. Cumulative Impacts and Climate Change

There is growing acknowledgement that two particular problems confronting protection of threatened communities and ecological species are the failure to take

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[1] Environment Defender's Office (Vic), *Where's the Guarantee? Implementation and Enforcement of the Flora and Fauna Guarantee Act 1988 & Wildlife Act 1975'* EDO Report Series No. 3 (2012)
[2] Alan Hawke, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (October 2009), 74.
[3] Ibid 75.

into account cumulative impacts and inadequate temporal and spatial scales for considering impacts. A cumulative impact is understood as ongoing, progressive environmental degradation caused by the combined effects of multiple projects in an area. Although each project is individually assessed, the collective effect is commonly described as 'death by a thousand cuts' and it is a major cause of biodiversity loss. This problem will be exacerbated by climate change.

The case-by-case assessment under an EIA does not adequately address cumulative impacts. As we have previously written,

> The discrete, project-based focus of conventional EIA stands in contrast to clear scientific and technical management data that indicates that most significant environmental problems (biodiversity loss, land degradation, salinity, invasive species, marine pollution and climate change) have their source in the accumulation and compounding of smaller scale impacts over a number of years'.[4]

Recommendation:

As the Hawke report notes, 'strategic assessments and other landscape-approaches offer feasible, equitable and cost-effective ways of addressing the cumulative impacts of actions in an area or region.'[5]

We support recommendation 25, of the Hawke report, which states that:

> The Review recommends that the Act be amended to confer power on the Environment Minister to weigh a wide range of environmental considerations when making an approval decision. There are three options for amendment:
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> If a project triggers the Act, the Minister:
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> > (1) must consider the whole of the environment, that is, all environment matters the project impacts upon;
> >
> > (2) may call in the impacts on the whole of the environment for assessment, if it is considered that the action is of 'national importance'; or
> >
> > (3) may consider impacts on all protected matters affected by the project, including impacts that are not significant.[6]

Strategic Assessments assess the environmental consequences of a policy or plan, rather than a specific project. They provide a mechanism to approve classes of development across a region. They thus negate the need for EIA's, which are only necessary 'where strategic assessments and bioregional plans are not in place and where proponents wish to undertake development that is not covered by accredited plans.'[7]

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[4] Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) 300.
[5] *Hawke Review*, above n 2, 78.
[6] Ibid 159.
[7] Ibid 79.

However, strategic assessment should not be treated as providing 'blanket zones' for development that does not allow more finely graded assessments and approvals to operate in respect of threatened species and ecological communities.

Consideration might be given to strategic assessments which adopt a landscape ecology approach and which identify priority conservation zones where the case for development might involve the precautionary principle, such that where there is a risk of irreversible harm this alters the burden of proof to one where the development needs to discharge a 'no harm' threshold.

4. Greater Caution needed for approvals with biodiversity 'offsets'

Environmental Offsets cannot adequately compensate in terms of the overall retention of the levels of threatened species and communities.

Offsets are defined by the DEWHA as 'measures that compensate for the residual adverse impacts of an action on the environment'.[8] There is considerable research that has examined whether offsets can effectively compensate for biodiversity loss.

More research is needed into the long-term repercussions of the practice of offsetting on biodiversity protection and how this practice aligns to measures such as conservation planning. More careful monitoring over longer time spans is required to ensure that offsetting where it does occur continues to achieve the biodiversity protection objectives in the long term.

Recommendation: The submission urges that the 'practice' of offsetting as a condition on approvals of developments be re- examined with a view to ensuring that higher order biodiversity protection measures such as AVOIDING or minimising the loss be given greater priority.

5. Need for stronger Monitoring, Auditing and Resources

Monitoring and compliance are vital, if often overlooked areas. Greater consideration needs to be given to examining how well the laws and regulations that seek to protect threatened species and ecological communities are enforced and how compliance occurs. There is also a need to ensure that the actual listings are relevant to and reflect what is happening on the ground (e.g. is the habitat of protected species actually covered by the laws that are meant to protect them).

At state level for example, an EDO report found that the DSE does not have a compliance monitoring and enforcement policy under the *Flora and Fauna Guarantee Act.*[9] There have been relatively few prosecutions under the EPBC Act and there are significant gaps in Commonwealth monitoring of projects conditions.

Recommendations:

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[8] Department of Sustainability, Environment, Water, Population and Communities, 'Environmental Protection and Biodiversity Conservation Act 1999: Environmental Offsets Policy' 7.

[9] Environment Defender's Office (Vic), *Where's the Guarantee? Implementation and Enforcement of the Flora and Fauna Guarantee Act 1988 & Wildlife Act 1975'* EDO Report Series No. 3 (2012) 27.

Consideration needs to be given to guidelines or regulations that explicitly state what mechanisms are in place to ensure adequate information gathering and monitoring. Further, sufficient resources should be made available for robust long term monitoring and a more proactive approach is given to compliance matters.

6. **Complexity in management of threatened species and ecological communities**

Biodiversity protection is characterised by complexity, understood as the 'multidimensional nature of environmental problems, governance structures and regulatory frameworks'. Often there will be a large number of regulatory frameworks that impact on biodiversity protection. There is a need for greater coordination and integration of measures.

Examples:

- The Biodiversity Fund Under the Clean Energy Act 2011 was established to provide $946m over six years to projects that a) establish new native vegetation and habitats; b) Manage and Enhance existing native vegetation and c) control weeds, pests and feral animals. How does this initiative align to EPBC Act processes?
- Invasive species typically are dealt with under separate laws, but are a major threat to threatened species and vulnerable ecological communities and the laws intersect and impact ecological communities' and threatened species protection.

Below is a list of publications of relevance to the points raised in this submission. Publications 4 and 5 are attached.

Lee Godden

1. Zahar, A., Godden, L., Peel, J., *Australian Climate Law in Global Context,* Cambridge University Press (2012).
2. Godden, L. and Peel, J., *Environmental Law: Scientific, Policy and Regulatory Dimensions*, Oxford University Press (2010).
3. Godden, L., 'Native Title and Ecology: 'Agreement-making in an Era of Market Environmentalism', Weir, J. (ed) *Native Title, Ecology and Country* ANU E Press. (2012).
4. Burgman, M., Carr, A., Godden, L., Gregory, R., McBride, M., and Flander, L., "Redefining Expertise and Improving Ecological Judgement" (2011) 1(2) *Conservation Letters*, pp.81-87.
5. Burgman, M., Walshe, T., Godden, L., and Martin, P., 'Designing Regulation for Conservation and Biosecurity' (2009) 13 *The Australian Journal of Natural Resources Law and Policy,* pp. 93-112.

We thank the Committee for the opportunity to make this submission.

Professor Lee Godden