



Environmental Defender's Office ACT Inc.



Ph: (02) 6243 3460 ♦ Fax: (02) 6243 3461 ♦ Email: edoact@edo.org.au ♦ GPO Box 574 Canberra ACT 2601 ♦
www.edo.org.au ♦ ABN 32 636 009 247

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Ms Kathryn Tracy
Senior Manager, Natural Environment and Resource Management
Department of Environment, Climate Change, Energy and Water
GPO Box 158, CANBERRA ACT 2601
By email: environment@act.gov.au

Dear Ms Tracy

The ACT Environmental Defender's Office (EDO) welcomes the opportunity to comment on the review of the *Nature Conservation Act 1980 (ACT)*.

The EDO is a non-profit, community legal centre specialising in public interest environmental law. Our office is one of nine independently constituted and managed Environmental Defender's Offices in each state and territory of Australia. We provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer education programs designed to facilitate public participation in environmental decision-making.

The Nature Conservation Act (the Act) has been in operation for over 30 years. The Act is failing to deliver the existing Government objective 'to protect significant areas of land containing endangered ecological communities'. Nor is it adequately providing for the protection and conservation of native animals and native plants. Consequently the EDO believes the Act and associated planning laws and policies require substantive amendment in order to effectively protect the biodiversity in the ACT.

In summary our key comments are:

1. **Act needs objectives.** The Act is the ACT's key legislation for protecting biodiversity. While this is implicit this is not actually specified in the legislation. Any amendments to the Act need to clearly define objectives. The objective should indicate that the intent of the Act is to maintain and enhance ACT biodiversity. The ideal biodiversity protection legal framework should be designed to ensure that biodiversity is maintained such that genetic diversity, populations of species and ecological communities do not get to a point of having to be listed as endangered, and so that currently listed threatened species and ecological communities can be taken off the list. In addition the Act needs to specify that it will be interpreted and administered in accordance with the international law of biodiversity conservation as evolving through the decisions of conferences of the parties to various conventions and agreements,¹ and the principles of ecologically sustainable development (ESD). For example, the Biodiversity Convention's COP10 adopted Decision X2 on a

¹ The Convention on Biological Diversity, Convention on International Trade in Endangered Species of Wild Flora and Fauna, Convention on Migratory Species, Ramsar Convention on Wetlands, UN Convention to Combat Desertification, UN Framework Convention on Climate Change, World Heritage Convention, Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment (CAMBA), Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction and their Environment (JAMBA), Agreement between the Government of Australia and the Government of the Republic of Korea on the Protection of Migratory Birds (ROKAMBA)

'Strategic Plan for Biodiversity 2011–2020 and Aichi Biodiversity Targets. This international law should inform the objectives, content and interpretation of the Act, just as the content of the human rights protected in the ACT evolves with international law under the provisions of the ACT's *Human Rights Act 2004*.²

2. **Adopt an ecosystem approach.** The Act is currently based on a species framework and any amendments or changes should include a shift in emphasis to reflect an ecosystem approach, in addition to the current species protection measures.
3. **Provide legal strength to subsidiary documents.** A key structural feature of the current Act is a reliance on a range of subsidiary documents such as the Nature Conservation Strategy and action plans for declared threatened species, ecological communities or threatening processes as well as management plans for reserved areas under the *Planning and Development Act 2007*. It would strengthen biodiversity outcomes if provisions of these various documents were binding on decision-makers. In addition while these documents are required under the Act, there are no substantive legal requirements for regular review, implementation or reporting of outcomes (see comment below).
4. **Legal requirement for monitoring and evaluation, and regular reporting and review.** There are currently no legal requirements for regular review of the Act or subsidiary documents such as action plans and the Nature Conservation Strategy or reporting of biodiversity outcomes. Provisions should be included in the Act for regular reporting and review as well as outcome reporting against clear indicators. Ideally such reporting should be incorporated into existing agency reporting requirements such as via agency Annual Reports and Budget Papers, as well as the proposed new accountability and reporting framework. This will require increased resourcing and the broadening and deepening of partnerships with stakeholders.
5. **Adequate enforcement and compliance.** As the discussion paper outlines there has been very little enforcement of the Act. Effective regulation relies on effective enforcement. A wider range of enforcement options, such as remediation orders, could improve biodiversity outcomes and increased penalties could bring the penalties into line with other jurisdictions.
6. **Address key threats.** It appears that planning decisions relating to urban development and climate change impacts are the key threats to biodiversity in the ACT that to date have been substantially unaddressed. Any changes to the Act therefore should reflect legislative measures and processes to ensure that the impacts of urban planning decisions are based on adequate biodiversity data and consider ecosystem impacts very early in the urban planning process. Likewise appropriate monitoring and research needs to be undertaken to assess climate change impacts on biodiversity, such that consideration can be given to mitigation activities prior to significant biodiversity losses.
7. **Legal protection of existing ACT genetic diversity, threatened ecological communities and threatened species.** The EDO supports legislative measures to ensure the ACT's biodiversity and remaining genetic diversity and threatened ecological communities are protected and planned around rather than 'lost' and subject to offsetting measures. We suggest that an option to achieve this would be inclusion of a biodiversity overlay in the Territory Plan and active use of the existing Strategic Environmental Assessment (SEA) provisions of the *Planning and Development Act 2007*. In particular the EDO supports mechanisms to ensure biodiversity mapping is undertaken well in advance of land release and structural planning activities.
8. **Integrate policies, plans, strategy and legislative tools.** Any amendments to the Act need to ensure integration of higher level strategic policy outcomes and effective operational delivery of the Act and its associated instruments. Likewise the Act needs to be streamlined with other key

² See s3 definition of international law, *Human Rights Act 2004 (ACT)* plus s5, 7, 30, 31

environment and planning legislation with biodiversity implications such as the *Tree Protection Act 2005*, *Pest Plants and Animals Act 2005* and the *Planning and Development Act 2007*.

9. **Consolidate and streamline institutional arrangements.** The above point applies equally to administrative and institutional arrangements for operational delivery. It would be useful to have agency responsibility for biodiversity protection consolidated. The role of the Conservator is important in this regard and his/her powers should be widened and strengthened. The Conservator should be a statutory appointee independent of Government and the Office of the Commissioner for Sustainability and the Environment who reports directly to the Minister and the ACT Legislative Assembly.

10. **Links with other processes.** The review and / or amendments to the Act need to be considered in light of other processes. It is disappointing that the review of the Act is taking place in isolation from a broader review of the *ACT Nature Conservation Strategy 1997*. The strategy is now over 13 years old and hence well overdue for updating. Similarly, both the *Tree Protection Act 2005* and the *Pest Plants and Animals Act 2005* are due to be reviewed as soon as practical after they have been in operation for five years – which is now. Given both have key biodiversity objectives they should be considered in tandem to changes to the Nature Conservation Act. Likewise it is very difficult to comment on changes to certain parts of the Act in the absence of greater detail and understanding of the offsets policy being developed by the ACT Government.

We provide more details on these broad comments and also address many of the questions as framed in the discussion paper in **Attachment A**.

If you wish to discuss any of these matters further please contact me on 0419 266 110 or Kirsten Miller on 02 6243 3460.

Yours sincerely



Clare Henderson
EDO Advisor

Summary of Recommendations

Recommendations relating to Nature Conservation Act

1. streamline the Act with other key environment and planning legislation with biodiversity implications and consolidate administrative / institutional arrangements for biodiversity protection in order to allow for more efficient operational delivery
2. include an objects provision in the Act – with the primary object to conserve, protect and enhance biodiversity of the ACT and promote ecologically sustainable development
3. ensure all of the objects of the Act are given practical application in the Act
4. require decision-makers to give effect to the objects, as well as ESD principles, in making decisions and carrying out functions under the Act
5. provide for the automatic listing of key habitat for listed species
6. ensure all features of the Act, such as action plans, are undertaken and developed in the context of an ecosystem approach to biodiversity
7. include climate change as a key threatening process
8. provide for the final decision on listing species/habitats to be made by an independent scientific committee based on scientific criteria only, not economic considerations
9. require annual reporting via the Annual Report process and the Budget Papers on the status of the ACT's biodiversity using key indicators, performance measures, and future targets, as well as reporting on key outputs of the operations of the Act
10. greater integration between all the various strategies and actions plans under the Act
11. regulatory weight given to action plans and other key documents under the Act
12. regular review of the Act and key policy documents under it such as the Nature Conservation Strategy be a legislative requirement
13. extend the operation of vegetation protection mechanisms, currently only provided on reserved areas, to all land tenures
14. include a wider range of enforcement options and increase penalties
15. ensure the Act applies to government authorities and public authorities and utility providers
16. provide for measures to ensure remediation is undertaken
17. include clearly defined legislative functions for the Conservator which include oversight of biodiversity mapping, biodiversity research as well as regular reporting on the biodiversity status of the ACT and implementation of the Act
18. the Conservator will also be a key decision-maker on a range of matters relating to biodiversity protection including through input into planning decisions and the issuing of licensing and permits
19. support appeal mechanisms which allow appeal by interested parties – i.e. third party review rights.

Recommendations relating to nature conservation and planning – Planning and Development Act

20. undertake mapping of key habitats and ecosystems in the ACT as a matter of priority
21. provide for ongoing monitoring of the 'biodiversity map' and update to take into account climate change impacts and ecosystem changes
22. require biodiversity values to be considered as part of a strategic environment assessment for land use planning changes
23. include a biodiversity overlay in the Territory Plan
24. provide a review role of environmental impact assessments (EIA) prepared under the *Planning and Development Act 2007* to the Conservator with the power to reject unsatisfactory EIAs
25. require decision makers on a development proposal to refuse consent where an environmental assessment has shown that there will be an unacceptable impact on threatened species, their habitat or endangered ecological communities.

Miscellaneous recommendations

26. allow offsets only as a true last resort with a requirement for a statement outlining alternative options considered prior to offsetting and reasons for their rejection
27. any offsetting policy to be subject to a number of principles including net gain and like for like
28. place measures to protect biodiversity from domestic animals into Act and extend provisions.

Attachment A

Specific comments on the Nature Conservation Act review discussion paper

Climate change and biodiversity

Australia's biodiversity is already under threat from a number of sources such as land clearance, feral animal and pest plant invasion, climate change, trade in wildlife and wildlife products, fragmentation of ecosystems and pollution, amongst other threats.

Climate change impacts represent another threat to the sustainability of certain communities. The climate change impacts on ecosystems are well documented and include increases in temperature, sea level rise, increase in sea surface temperature, altered rainfall and run off patterns, altered frequency of extreme weather events (such as bushfires, cyclones) and elevated CO² in the atmosphere. However while the impacts on climate change on biodiversity are likely to be significant there are still uncertainties as to how individual species and ecological communities will respond.

The Australian Network of Environmental Defenders' Office (ANEDO) provided significant material on the predicted impacts on climate change on biodiversity in its submission to the ten year review of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC).³

In summary the submission sets out the predicted impacts of climate change on biodiversity:

- range shifts and species movements towards higher latitudes and altitudes;
- some species might not be able to migrate through fragmented landscapes;
- extinctions of local populations at range boundaries at lower latitudes or elevations;
- geographic distributions of most species are likely to contract and become increasingly fragmented;
- increasing threats to ecosystems as extreme events become more frequent or severe;
- increasing invasion by opportunistic, weedy or highly mobile species, especially to sites where local populations of existing species are declining;
- progressive decoupling of species interactions e.g. plants and pollinators, as a result of phenological changes and changes in geographic distribution; and
- changes in community composition and structure.

ANEDO advocated that to minimise climate change impacts we need to facilitate adaptation of biodiversity by minimising disruption to the adaptation mechanisms of species as much as possible. The best way to facilitate adaptation of natural systems is to enhance their resilience (through representation and resilience, protecting and creating large patches of habitat, providing connectivity, improving management of off-reserve lands, identifying and protecting refugia, adjusting focus to protecting ecosystem function and process and protecting key functional species), as well as incorporating a few other key principles such as recognising and managing for uncertainty, prioritising protection and considering triage and exploring assisted migration/translocation.

These comments are applicable both at a national level and for the ACT where climate change impacts identified are increased temperature, decreased rainfall and increased likelihood of bushfire.

To assist in minimising these impacts the EDO supports a biodiversity overlay being included in the Territory Plan to ensure ecological communities and corridors are recognised and to assist in their protection. This should be required under the Nature Conservation Act.

In addition, EDO recommends that a specific protective listing category under the Nature Conservation Act be considered for those species particularly susceptible to the impacts of climate change (in addition to the current categories of endangered, vulnerable, protected or specially protected).

³ <http://www.edo.org.au/policy/090219epbc.pdf>, pp59–68

Recommendations

- the Act should include climate change as a key threatening process
- appropriate monitoring and research should be undertaken to assess climate change impacts on biodiversity, such that consideration can be given to mitigation activities prior to significant biodiversity losses.

Reporting, indicators and review

Presently the Act has no formal review or reporting mechanisms. This is the case for very high level strategic documents such as the Nature Conservation Strategy as well as the various action plans. Hence it is very difficult to get a sense of the status of biodiversity in the ACT, and whether action plans are delivering their objectives or indeed being implemented at all. The ACT State of the Environment Report does provide a partial review of the effectiveness of biodiversity governance mechanisms, but more rigorous monitoring and evaluation of specific management instruments is required, as the Commissioner recommended in the *ACT State of the Environment Report 2007*.⁴

Therefore the EDO recommends a key part of the revised Act should be legislative provisions providing for regular reporting and review as well as outcome reporting against clear indicators. Ideally such reporting should be incorporated into existing agency reporting requirements such as via agency Annual Reports and Budget Papers, as well as the proposed new accountability and reporting framework.

The reports should provide an update on:

- status of the ACT's biodiversity
- key biodiversity indicators
- conservation status of all listed threatened or protected species and listed ecosystems
- status of listed pest plants and animals
- outputs under the Act.

Measuring Our Progress is a key reporting document for the ACT yet it does not include any indicator for the ACT's biodiversity.

Recommendation

- the Act should require annual reporting via the Annual Report process and the Budget Papers on the status of the ACT's biodiversity using key indicators, performance measures, and future targets, as well as reporting on key outputs of the operations of the Act. This will require increased resourcing and the broadening and deepening of partnerships with stakeholders.

Integration

At present biodiversity protection is managed through a range of Acts and fragmented institutional responsibilities. The legislation covering biodiversity includes:

- *Nature Conservation Act 1980*
- *Planning and Development Act 2007*
- *Tree Protection Act 2005*
- *Pest Plants and Animals Act 2005*
- *Domestic Animals Act 2000*.

Institutional responsibility is shared between:

- Territory and Municipal Services (TAMS)
- Department of Environment, Climate Change, Energy and Water (DECCEW)
- ACT Planning and Land Authority (ACTPLA)
- Land Development Agency (LDA) — part of the Land and Property Services portfolio.

⁴ <http://www.environmentcommissioner.act.gov.au/publications/soe/2007actreport/conservingbiodiversity07>

The Office of Commissioner for Sustainability and the Environment has a role through various investigations into biodiversity issues, such as the Grasslands Report 2009 and the current inquiries into the Urban Forest and Canberra Nature Reserves. The Commissioner also has an ongoing role in reporting on biodiversity in the four yearly State of the Environment Report.

The ACT Legislative Assembly, the ACT Auditor-General and the ACT Ombudsman also have oversight responsibilities in relation to biodiversity conservation and ESD.

The EDO suggests there is some scope for consolidation of the legislation while recognising some key aspects should continue to sit within the *Planning and Development Act 2007*.

Likewise the EDO suggests administrative and institutional arrangements for biodiversity protection could be consolidated in order to allow for more efficient operational delivery.

The key objective of any changes is to ensure higher level strategic policy outcomes for biodiversity conservation and restoration, and to ensure that there is effective operational delivery of the Act and its associated instruments.

Recommendation

- the Act needs to be integrated and streamlined with other key environment and planning Acts with biodiversity implications, such as the *Tree Protection Act 2005*, *Pest Plants and Animals Act 2005*, *Domestic Animals Act 2000* and the *Planning and Development Act 2007*. Administrative / institutional arrangements for biodiversity protection should also be consolidated in order to allow for more efficient operational delivery.

Ecosystem approach

See pages 15–18 of discussion paper

A key issue is that the current Act is based on a species by species framework and any amendments should include a shift in emphasis to reflect an ecosystem approach, in addition to the current species protection measures.

The current approach in the Act and associated planning legislation has not delivered an effective strategic approach to species or habitat protection. Decisions that allow the removal of habitat of a listed threatened species at a particular site must be taken in the context of assessing the status of habitat for the threatened species across the ACT and its surrounds, and in the context of minimising fragmentation and maintaining connectivity.

While the EDO supports the existing approach to protect threatened species and ecological communities through the mechanism of listing such species and then applying various controls on activities affecting those listed, it is mindful that biodiversity is also much more than these species. An ecosystem approach affords greater protection and acknowledgement to a wider range of species and to habitat that support threatened species. The ideal biodiversity protection legal framework should ensure critical biodiversity is maintained such that species or ecological communities do not get to a point of having to be listed as endangered and so that currently listed threatened species can be taken off the list.

A key part of an ecosystem approach is maintaining connectivity. This does not only mean creating corridors of remnant vegetation linked to larger patches of remnant vegetation. In the context of Canberra it might also mean maintaining or creating connections between the urban forest and habitat in reserves as well as on private (leased) land.

While the current Territory Plan and Spatial Plan make some mention of the need to consider connectivity and wildlife corridors in planning, this is at the level of a policy statement and it is unclear how this has been operationalised within the planning processes and decision-making.

The key principle underlying any changes to an ecosystem approach is to ensure key habitats and ecosystems are identified and mapped, consideration is given to how these ecosystems can be connected and that this occurs as part of the planning process well before development decisions are made. Identification of key ecosystems and considerations of these in the planning process should be a mandatory legal requirement.

Recommendations

- provide for the automatic listing of key habitat for listed species
- release the results of all ecosystem assessments undertaken in the ACT to date, and undertake mapping of any unmapped key habitats and ecosystems in the ACT as a matter of priority
- ensure all feature of the Act, such as action plans, are undertaken and developed in the context of an ecosystem approach to biodiversity.

Biodiversity mapping / Territory Plan and strategic environment assessment

See pages 20–21 of discussion paper

The EDO supports an approach whereby a biodiversity map or overlay is developed across all land types (leased and unleased as well as Commonwealth land) of the ACT which identifies habitat for threatened species, threatened ecological communities and biodiversity corridors, as well as general areas of significant biodiversity, including within the urban landscape.

The biodiversity overlay should be given some level of legislative weight for example by being included in the Territory Plan and National Capital Plan (in cooperation with the Commonwealth). The overlay could be proscriptive – i.e. it could specify that no activities could take place that would negatively impact on large areas of high conservation value, threatened ecological communities or habitat of listed threatened species, or which fragments biodiversity corridors and breaks connectivity. For areas of lower conservation value the overlay may be advisory only.

A biodiversity overlay in the Territory Plan and National Capital Plan (in cooperation with the Commonwealth) is the EDO's initial preference as biodiversity then sits front and centre in the process of decision-making for planning and development of the ACT. The overlay should integrate the data found in action plans and other biodiversity assessment information sources. The EDO recognizes that issues with an overlay include:

- the need for regular updating as ecosystems change over time
- an assumption that areas outside of the overlay may not have biodiversity values.

In order to address these issues the EDO suggests that the current provisions of the *Planning and Development Act 2007* and associated regulations regarding strategic environmental assessment (SEA) be used as a basis to assess appropriate areas for inclusion in any biodiversity overlay. The initial overlay for the Territory Plan could be prepared following a territory wide biodiversity specific SEA with subsequent updates to reflect any ecosystem changes. In addition, more detailed and specific SEAs could be mandated as part of any major development, particularly urban development, well before structure plans and the like are put in place.

The advantage of using the SEA approach for subsequent developments is that it could enable the consideration of biodiversity values as well as a range of other environmental issues, including climate change impacts, transport options, water issues, as well as delivery of other government strategic objectives such as meeting the greenhouse gas emissions reduction target of 40% by 2020 and housing affordability, allowing for more integrated planning.

SEAs should not obviate the need for site specific environmental assessments during later development. The time between an SEA and a final development application may be several years and possible changes in ecosystems and available data can change significantly over this time, which may necessitate a specific environmental assessment at the development approval stage.

The EDO recognizes that mapping and protection of key biodiversity areas are preliminary steps and that appropriate ongoing management plans and resourcing is required to ensure that biodiversity values, once identified, are maintained and enhanced.

Recommendations

- require biodiversity values to be considered as part of a strategic assessment for land use planning changes
- Include a biodiversity overlay in the Territory Plan.

Biodiversity objectives

See pages 31–32 of discussion paper

The EDO believes the Act should include a primary objective to: 'conserve, protect and enhance the ACT's biodiversity for current and future generations by applying the principles of ecologically sustainable development'.

To provide guidance on how this primary objective is to be achieved the Act should also include the following objectives and goals:

- identification and mapping of biodiversity values of the ACT and region
- conservation of significant habitat, threatened species, ecosystems and ecosystem processes
- processes to list threatened species and ecological communities as well as threatening processes
- measures to protect listed threatened species *et al*
- bushland restoration
- ongoing monitoring and research of the status of ACT biodiversity
- regular reporting and review of delivery of actions plans and other measures put in place to enhance biodiversity protection
- a collaborative approach to biodiversity management in the ACT
- public participation and transparency regarding the operations of the Act
- promoting public awareness and understanding of the biodiversity values of the ACT
- implemented in accordance with international biodiversity conservation law.

To give effect to any objectives each object should be given some practical effect within the legislation.

Finally the Act and decision-making under the Act should be subject to the principles of ESD as applied in other ACT legislation – i.e.:

'Ecologically sustainable development means the effective integration of economic and environmental considerations in decision-making processes achievable through implementation of the following principles:

- (a) the precautionary principle;
- (b) the inter-generational equity principle;
- (c) conservation of biological diversity and ecological integrity;
- (d) improved valuation and pricing of environmental resources.'

It is recommended that the Act include a specific provision that decision-makers, the Minister and the Conservator are required to give effect to the objects, as well as the principles of ESSD, in making decisions and carrying out functions under the Act.

Recommendations

- include an objects provision in the Act with the primary object to conserve, protect and enhance biodiversity on the ACT
- ensure all objects of the Act are given practical application in the Act
- require decision-makers to give effect to the objects, as well as ESD principles, in making decisions and carrying out functions under the Act.

Environmental Impact assessments and development proposals

See pages 32–33 of discussion paper

Urban development is one of the key threats to biodiversity conservation in the ACT. There is often a clash between biodiversity outcomes and land use planning and development outcomes. One of the most significant failings of the current system is that even where an endangered species or community is declared it only introduces procedural protections and does not guarantee the protection of that species or community. Currently development proposals which are likely to have a significant adverse environmental impact on endangered, vulnerable, protected species or ecological communities or threatening processes must undergo an environmental impact assessment process and are referred to the Conservator for Flora and Fauna under the Planning and Development Act.

However the Conservator currently does not have a role in assessing the adequacy of any environmental impact statement (EIS) in addressing the biodiversity impacts of the proposal. It is noted, however that even those declared protected species are not guaranteed protection against development. While an EIS must include a description of the effects on ecological communities, this is only one of the considerations to be taken into account by the decision maker when approving a development application.

Hence once an EIS is taken into account even if significant impacts on threatened species or communities are identified the development may still be approved.

With urban development one of the key threats to biodiversity conservation in the ACT, until biodiversity outcomes are given greater supremacy in the planning process, then biodiversity conservation outcomes will be difficult to achieve.

Recommendations

- provide a review role of environmental impact assessments prepared under the Planning and Development Act to the Conservator with the power to reject unsatisfactory EIAs
- require decision makers on a development proposal to refuse consent where an environmental assessment has shown that there will be an unacceptable impact on threatened species, endangered ecological communities or their habitat.

No net loss of biodiversity / biodiversity offsetting

See pages 19–20 of discussion paper

In principle the EDO supports legislative provisions which would apply the concept of an overall net gain of significant biodiversity. However it is very difficult to comment more definitely on this without a greater understanding of the offsets policy being developed by the ACT Government.

The EDO has a number of concerns regarding offsetting generally, however, also specific concerns in relation to the ACT.

While a common caveat to biodiversity offsetting is that it occurs as a last resort after 'all prudent and feasible measures have been taken to avoid and minimize impacts'⁵ often this is not the case.

⁵ Department of Environment, Climate Change, Energy and Water *Review of the Nature Conservation Act 1980, Discussion Paper* November 2010, p 20

Ecological issues and limits of biodiversity offsetting are outlined by Gibbons and Lindemayer.⁶ They list a number of factors including:

- like for like offsetting can still mean that while a high value conservation area may gain formal protection, nonetheless another high conservation value area is lost
- allocating offsets based on an assumption of restoring an area is subject to significant scientific uncertainty in term of biodiversity gains
- ecosystems are complex and biodiversity values are difficult to quantify
- methodologies are currently simplistic
- there are time lags between losses in biodiversity and subsequent biodiversity gains
- issues in regard to lack of compliance as well as resourcing to monitor compliance.

Specifically, in terms of the ACT given our relatively small land base and an already high proportion of land in reserves (54%) it is difficult to see how an offsets policy can be achievable within ACT borders. This is particularly the case as a large portion of the biodiversity already protected in ACT reserves is forest ecosystems rather than the threatened ecological communities of yellow-box red-gum woodlands and temperate grasslands. Likewise it is very difficult to see how cross border offsetting could be implemented with any guaranteed outcomes. In that context the EDO supports measures to ensure that all significant high conservation remnants of threatened ecological communities – notably yellow-box red-gum woodlands and temperate grasslands be retained.

In the event of any offsetting policy the EDO supports the following principles and measures:

- no offsetting of high conservation value listed threatened ecological communities or habitats of listed threatened species
- for all other land
 - avoid or minimise impacts on biodiversity values before considering offsets with clear criteria for assessing other alternatives
 - only offset as a last resort with a requirement to provide detailed reasons as to why other options are not feasible
 - like for like offsetting in the ACT
 - net gain
 - scientifically assessed
 - assurances regarding the long-term viability of offset sites
 - funding to allow for ongoing management of offset sites
 - regular and public reporting on offsetting outcomes
 - liability arrangements for failed offsets.

Recommendations

- release a copy of any offsets policy being developed
- allow offsets only as a true last resort with a requirement for a statement outlining alternative options considered prior to offsetting and reasons for their rejection
- any offsetting policy to include the above principles.

Urban-bushland edge

See page 22 of discussion paper

A significant threat to urban biodiversity is domestic pets particularly where the urban edge abuts nature reserves. The *Domestic Animals Act 2000* provides a number of mechanisms that place controls on management of domestic animals which in turn minimise negative impacts on biodiversity. A key measure in this regard is the ability to declare cat curfews in suburbs if cats are a serious threat to native flora and fauna [s.81]. The Domestic Animals Act empowers the relevant Minister, currently the Minister for

⁶ P. Gibbons and D. Lindenmayer (2007). Offsets for land clearing: no net loss or the tail wagging the dog? *Environmental Management and Restoration*, 8, pp 26-31.

Territory and Municipal Services, to declare a cat curfew if cats in a particular area are a serious threat to native flora and fauna.

The *Domestic Animals (Cat Curfew Area) Declaration 2004 (No 1) DI2004–201* declares the suburbs of Bonner, Forde, Mulligans Flat, and Gorooyarroo as Declared Cat Curfew Areas. This means that cats must be kept inside domestic houses or appropriate outdoor enclosures for 24 hours a day. The owner of a cat is in breach of the Domestic Animals Act if the cat is not confined to the premises of a keeper or carer [s.82].

The EDO supports these measures. However we suggest that this legislative provision be brought into the Nature Conservation Act and the cat curfew be extended to all areas abutting or within a certain distance of nature reserves with an appropriate phase-in time-frame. Alternatively, consideration could be given to declaring certain urban areas near nature reserves as cat free. Measures should be considered for other domestic species.

In addition urban areas need to have appropriate buffers between significant conservation areas and the subsequent border of urban areas. Any buffer zone should be outside of the reserved areas and outside areas of significant value.

The EDO notes the comments in the discussion paper regarding encroachment of private landholders onto reserves. We believe that this needs to be managed while noting that depending on the nature of the land and the type of activity, not all encroachment is necessarily inappropriate or detrimental. The EDO suggests one mechanism could be provision of guidelines and the requiring of a permit for certain 'acceptable' activities. In addition, the EDO supports a range of measures and penalties to deal with inappropriate encroachment onto reserved lands including mediation.

Recommendation

- place measures to protect biodiversity from domestic animals into Nature Conservation Act and extend provisions.

Compliance and enforcement

See pages 23–28 and pages 46–47 of discussion paper

There has been little enforcement of the Nature Conservation Act since its enactment. Lack of enforcement limits the deterrent effect of the offence provisions.

The EDO is of the view that the government authorities and utility companies should be subject to the Nature Conservation Act. Clearance of native vegetation by government bodies and utilities can have a major impact on biodiversity conservation. In all but urgent and emergency situations (for example natural disasters) there does not appear to be any compelling public policy reason why the executive should not be bound by the same rules in relation to biodiversity conservation as other members of the community. Governments throughout Australia are bound by a range of environmental standards.

This would not for example prohibit vegetation clearance by government bodies or utilities, but it would mean that a process of assessment must be undertaken prior to licensing (or not) of the activity.

The EDO believes the compliance and enforcement mechanisms of the Act could be considerably enhanced. Specifically the EDO supports:

- a greater range of enforcement mechanisms including remediation orders and enforceable undertakings
- including offences relating to endangered communities and damaging habitat
- ensuring the Act applies to government authorities and public authorities as well as utility providers
- strict liability provisions for minor offences under the Act
- measures to ensure remediation is undertaken for any damage incurred
- an increase in penalties.

Recommendations

- include a wider range of enforcement options and increase penalties
- ensure the Act applies to government authorities and public authorities and utility providers
- provide for measures to ensure remediation is undertaken.

Inter-relationship with Commonwealth environmental legislation

See pages 27–28 of discussion paper

At this stage the EDO supports greater integration of Commonwealth and ACT nature conservation law as long as this does not lead to lowest common denominator outcomes arising from Federal intra jurisdictional processes, nor restricts the ACT's ability to make its own listings of threatened species, ecological communities etc. The EDO will comment further on this issue in the context of the Federal Government response to the Hawke review of the EPBC Act.

Public lands/ off-reserve conservation – permits for vegetation clearance

See pages 28–30 of discussion paper

The EDO supports the extension of provisions within the Act which control public activities in reserved land to public activities in open space and unleased lands generally. In particular, the EDO recommends that the operation of vegetation protection mechanisms, currently only provided on reserved areas, be extended to all land tenures. Currently the Act regulates the clearing of native vegetation in reserved areas, that is public land reserved under the Territory Plan as wilderness areas, national park or nature reserve. However, apart from the protection of certain significant trees in the built-up urban area under the Tree Protection Act, there is no legislative protection for native vegetation in the ACT outside these reserves. Most other Australian states have legislation which aims to protect the native vegetation of the State as a method of preventing biodiversity loss, commonly by requiring permission or consent prior to clearing native vegetation over a certain area.

Recommendation

- the operation of vegetation protection mechanisms, currently only provided on reserved areas, be extended to all land tenures.

Role of the Conservator

See page 32 of discussion paper

The role of the Conservator is a key and important function under the Act. The EDO supports retention and expansion of the role and specifically suggests that:

- the Conservator's role should be independent of Government
- support the retention of third party appeal rights of decisions of the Conservator
- decisions of the Conservator should be subject to review as appropriate by the Commissioner for Sustainability and the Environment
- the Conservator shall have a stronger role in planning matters that have significant impacts on biodiversity
- the Conservator should be adequately supported by a clearly defined and integrated administrative unit
- the Conservator shall be responsible for administering the strategic environmental assessment component of the *Planning and Development Act 2007*, including the power to trigger a decision to undertake an assessment
- consideration be given to the Conservator being responsible for the preparation of Public Land Management Plans as required under the *Planning and Development Act 2007*
- the Conservator shall have clearly defined legislative functions which include oversight of biodiversity mapping, biodiversity research as well as regular reporting on the biodiversity status of the ACT and implementation of the Act.

Recommendations

- the Conservator shall have clearly defined legislative functions which include oversight of biodiversity mapping, biodiversity research as well as regular reporting on the biodiversity status of the ACT and implementation of the Act.
- the Conservator will also be a key decision-maker on a range of matters relating to biodiversity protection including through input into planning decisions and the issuing of licenses and permits.

Roles of Flora and Fauna Committee and Natural Resource Management Advisory Committee

See pages 33–34 of discussion paper

The EDO considers that the agenda and minutes of each meeting of the Flora and Fauna Committee and the Natural Resource Management Advisory Committee should be posted on an accessible ACT Government-hosted website, and that agenda for upcoming meetings should be notified to environmental groups in the ACT.

Joint management

See page 35 of discussion paper

The EDO supports the concept of joint management arrangements for the management of ACT National Parks and other major nature conservation reserves. Models for joint management in Australia include those for:

- Kakadu National Park (NT)
- Uluru-Kata Tjuta National Park (NT)
- Booderee National Park (NSW).

Declaration of species, community or threatening processes

See pages 37–38 of discussion paper

Whilst the EDO supports the current listing process it submits that the final listing decision should rest with a scientific committee such as the Flora and Fauna Committee, not the Minister. It also submits that in order to maintain integrity of the Act and the listing process, listing decisions must be purely scientific. The introduction of other elements for consideration, such as financial considerations 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. There are ample opportunities for social and economic considerations to be taken into account in decisions subsequent to the listing process.

Recommendation

- provide for the final decision on listing species/habitats to be made by an independent scientific committee based on scientific criteria only, not economic considerations. As recommended above, the Committee should operate transparently.

Nature Conservation Strategy and action plans

See pages 35–39 of discussion paper

The Nature Conservation Strategy and the development of actions plans for declared species and ecological communities are a useful mechanism under the existing Act. The EDO is concerned however at the lack of integration across the various documents and processes. The preparation of these documents and the listing of species is of little import if such plans are not implemented and if they are not regularly updated and reviewed. Similarly such documents are of little value if recommendations are not binding on key decision-makers.

Recommendations

The EDO recommends that there be:

- greater integration between all the various strategies and actions plans under the Act
- regulatory weight given to action plans and other key documents under the Act

- regular review of the Nature Conservation Strategy be a legislative requirement.

Private lands – Conservation Directions

See pages 21–22; 43 of discussion paper

In general if land is of high conservation biodiversity value the EDO's first preference is for such land to be formally added to the reserve system. However, the EDO also supports mechanisms that will facilitate and ensure greater protection of biodiversity on private lands in the ACT. The EDO supports the establishment of private conservation reserves and suggests that covenants to do so be:

- attached to the title of land – leasehold – rather than on the current owner
- be binding on current and future landholders to conserve
- financial incentives such as lower rates be considered.

The EDO also supports greater powers to the Conservator in regard to issuing Conservation Directions, as well as including nature conservation issues in Land Management Agreements.

Protection of reserved areas

See pages 29–30; 44–45 of discussion paper

The EDO believes provisions relating to protection of reserved areas could be enhanced. Some changes to include are:

- owners of a vehicle subject to misdeeds of a driver within a reserve area should be similar to other road offences
- hunting without a license should be listed as an offence
- link activities in reserved areas to objects of the Act
- higher protection for certain reserved areas – i.e. wilderness areas, national parks
- restrict commercial use of reserved lands – i.e. prohibit commercial activities in wilderness areas
- place some prohibitions of certain activities outlined in the Act not just in management plans.

Appeal of decisions under the Act

See page 48 of discussion paper

The EDO supports the retention of the current provisions which allow merits appeals by interested parties – i.e. third party review rights.

Currently the Act enables the Supreme Court to make a security of costs order against an applicant for an injunctive order or require an undertaking as to damages. Security for costs involves litigants demonstrating at the beginning of proceedings that they will be able to pay the other side's costs in the event that they are unsuccessful. Such orders can be prohibitive in that public interest litigants are deterred from proceeding with their case or they cannot demonstrate they will be able to pay the other side's costs if unsuccessful or give an undertaking as to damages.

EDO submits that security of costs orders and undertakings as to damages should be prohibited where litigants are taking action in the public interest. Under the Act a person other than the Conservator can only apply for an injunction if it is in the public interest. Consequently EDO submits that cost orders should not be available.

Currently, litigants are entirely reliant upon the discretion of the court which is uncertain and essentially prohibitive to some litigants.

Recommendation

- remove the security for costs and undertakings as to damages provision.