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State and Federal Biodiversity Laws in Action

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Summary

There are many Queensland and federal laws which protect biodiversity – either by directly protecting wildlife or by protecting valuable habitat. Habitat destruction and fragmentation is the greatest threat facing native wildlife so this paper discusses laws to protect vegetation as well as laws which directly protect threatened species.

The main Queensland laws which impact on biodiversity protection are:

- The *Nature Conservation Act 1992* (Qld) – which protects national parks and threatened species.
- The *Vegetation Management Act 1999* (Qld) – which regulates tree clearing and in some cases protects threatened species habitat.
- The *Integrated Planning Act 1997* (Qld) – which regulates town planning for development and sets the process for assessment of development applications.

The main federal law which protects biodiversity is:

- The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – which requires actions that are likely to have a significant impact on specified “matters of national environmental significance” to get federal approval before proceeding.

1. Nature Conservation Act 1992 (Qld)

All native species are protected by this act from unlawful “taking” (which includes killing, injury or harm, but not by habitat loss) and any member of the public can take an offender to Court to restrain the taking. A defence to unlawful taking is that it happened in the course of an otherwise lawful activity which was not directed towards the taking and which taking could not have been “reasonably avoided” – in the context of landclearing for an approved residential development, this would mean the developer was obliged to employ wildlife spotters and catchers to catch and relocate native wildlife.

¹ EDO Qld is a non-profit community legal centre specialising in public interest planning and environmental law. EDO Qld is funded from the state and federal legal aid program to advise the community on how to use the law to protect the environment. We do this by providing legal advice and sometimes court representation, presenting community workshops, and assisting conservation groups with law reform campaigns. EDO Qld subsists off limited funding so we rely on memberships and donations from the public to continue our valuable public interest environmental law work – so please join or donate to EDO Qld using the form at [www.edo.org.au/edoqld/edoqld/new/Membership form 2006-07.pdf](http://www.edo.org.au/edoqld/edoqld/new/Membership%20form%202006-07.pdf).

Currently EDO Qld is representing Dr Carol Booth in court against two lychee farmers using electrified wire grids to kill flying-foxes to protect their crops. One case has not come on for hearing yet, and the other case went to the Court of Appeal and is now back in the Planning and Environment Court for re-hearing. We are hoping to get decisions which establish that the defence outlined above does not apply because the grids are directed towards killing the bats, and because there are non-lethal crop protection methods which could reasonably be used instead of lethal electric grids. These cases are able to be taken by Dr Booth because public enforcement rights were added to the Nature Conservation Act in late 2004.

On 2 October 2006 the *Nature Conservation (Koala) Conservation Plan and Management Program 2006-2016* commenced. This Plan and Program are designed to protect remaining koala habitat, by setting the rules for when development in koala habitat will not be permitted. However, in EDO's view the Plan is not strict enough on extractive industries or "committed development" (existing approved development or development that is consistent with the town plan and the SEQ Regional Plan). The Plan does not stop committed development and can only in some cases require that the development be designed, constructed or operated in a way that mitigates adverse impacts on koalas or koala habitat. The Koala Conservation Plan and Management Program can be downloaded from www.epa.qld.gov.au/publications?id=1950.

2. Vegetation Management Act 1999 (Qld)

In 2004 the state government revised these laws and phased out broadscale clearing in Queensland, which was an excellent outcome for wildlife. However, the Act still has its limitations for protecting biodiversity in the urban context, as the Act generally does not protect non-remnant vegetation (which can still be valuable habitat) from clearing. Also, in urban areas, these state-wide clearing rules only apply where vegetation is part of an Endangered Regional Ecosystem, so there is no protection given to Of Concern or Not of Concern Regional Ecosystems in urban areas. Even where an urban area does contain an Endangered Regional Ecosystem, there are still exemptions from the need to get a tree clearing permit, such as where the clearing is for a single residence or for a firebreak.

Where vegetation proposed to be cleared in an urban area is Endangered and the purpose of the clearing is one which requires a permit (such as necessary built infrastructure where there is no suitable alternative site), the clearing will need to meet the criteria in the Regional Vegetation Management Codes. Those codes are currently under review and EDO Qld is the legal advisor and proxy to the Qld Conservation Council and The Wilderness Society on the Ministerial advisory panel which is reviewing the codes. These codes protect the habitat of threatened wildlife, but also allow clearing of an area as long as an offset of sufficient merit is provided elsewhere – which is no help to the wildlife on the site to be cleared. The public have no appeal rights against the grant of tree clearing permits, but can take action in the Courts if clearing is not done in accordance with the conditions on the permit.

Council vegetation clearing laws can also regulate tree clearing in the urban context, but clearing is generally allowed if vegetation is a threat to property or safety. There is no public enforcement for breaches of local vegetation clearing laws so only the Council can prosecute someone who breaches the local laws.

3. Integrated Planning Act 1997 (Qld)²

Most habitat loss in South East Queensland is for urban development. Developments like housing or industrial estates often involve vegetation clearing and other activities which disturb wildlife, so it is useful to understand what the Integrated Planning Act says about how and when development can proceed.

“Development” is broadly defined in the Act and includes building work, operational work, material change of use (rezoning) and subdivision. There are different tiers of development, most of which require a permit from Council to proceed. Sometimes the permission of other government departments is also needed, such as where values protected by those Departments will be impacted.

Where development is “impact assessable” and is advertised for public comment, the public can lodge submissions objecting to the development which must be considered by Council. Council decides the application by considering those submissions and checking whether the development application complies with the town planning scheme’s vision and rules for what development can occur on the site. If Council makes a decision to approve development, people who have made valid submissions to Council about the development application then have the right to appeal Council’s decision to the Planning and Environment Court, which decides afresh whether the development should go ahead on the site, and in what form.

In June 2005 the South East Queensland Regional Plan was enacted by the state government, which limits the extent to which urban subdivision can occur outside the “urban footprint”. Local Councils must reflect these rules in their planning schemes, through Local Growth Management Strategies which are currently being developed. However, there was no additional protection given by the state government to areas of greenspace within the urban footprint, and outside the footprint, nature conservation areas were lumped into a category called “regional landscape and rural production area” and so again received no special protection.

4. Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The ‘EPBC Act’ is the federal legislation that protects federally listed threatened species, migratory species, World Heritage Areas, Ramsar wetlands, and other areas of importance. It does so by establishing a referral and assessment process which requires the federal Environment Minister to approve any action which is likely to have a significant impact on a matter of national environmental significance. This is an extra tier of approvals which a developer must get before proceeding, so can be useful for conservationists to use to attempt to stop or get conditions on the development to protect those federal matters. There is no appeal against the merits of a decision to approve (or refuse) development, but the Minister must follow the proper process or be subject to judicial review.

This Act was successfully used by Dr Carol Booth in 2001 to stop another lychee farmer using electric grids to kill Spectacled Flying-foxes to protect his crop. The Judge found that the farmer had killed almost 20% of the entire population of that species, which was a “significant impact”, without having an EPBC permit. The farmer subsequently applied for an EPBC permit and this was the first refusal by the Minister of such a permit (there have been only four to date since the Act commenced in 2000).

² For more information about town planning laws and how the public can participate, see EDO’s Planning Law Factsheets online at www.edo.org.au/edoqld/edoqld/factsheets/factsheets.htm.

5. Climate change laws?

Unfortunately none of these laws explicitly recognise climate change as a major threat to biodiversity (increased temperatures, water shortages and more extreme weather events, all of which will change the ecology of the landscape and hence the ability for wildlife to survive).

EDO Qld is working with major environment groups including the Queensland Conservation Council to advocate for government take specific action to mitigate climate change, and is also working with a pro bono environment barrister Chris McGrath to identify existing legal avenues to challenge actions which emit large amounts of greenhouse gases.

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