



Environmental Defenders' Office
AUSTRALIAN CAPITAL TERRITORY

7 June 2018

Scientific Committee
Environment, Planning and Sustainable
Development Directorate
GPO Box 158
Canberra ACT 2601

By email: scientificcommittee@act.gov.au

Dear Committee,

**Nomination of Unnatural Fragmentation of Habitats as Key Threatening Process:
Environmental Defenders Office ACT Submission**

About the EDO ACT

The Environmental Defender's Office (ACT) Inc ('EDO ACT') is a community legal centre specialising in public interest environmental law. We provide legal representation and advice, take an active role in environmental policy and law reform, and offer community legal educational publications and programs.

The EDO ACT welcomes the opportunity to support and comment on the Nomination of Unnatural Fragmentation of Habitats as Key Threatening Process. As legal experts, the purpose of this submission is to comment on legal aspects of listing unnatural habitat fragmentation as a threatening process and offer some examples from our work. We do not attempt to comment on scientific matters, however we recognise that laws that fail to take an ecosystem approach in protecting the environment are counterproductive to the protection of ecosystems and ecosystem functions as a whole. The EDO ACT welcomes the nomination of unnatural fragmentation of habitats as a key threatening process as a step closer to protecting vulnerable species and ecological communities – often heavily impacted by unnatural habitat fragmentation.

How will listing Unnatural Fragmentation of Habitats as a Key Threatening Process help to protect biodiversity in the ACT?

The process of listing unnatural habitat fragmentation as a key threatening process will support the identification of strategies to reduce unnatural fragmentation of habitats and/or reduce the negative effects of unnatural habitat fragmentation. Action plans are important strategic documents in the protection of the environment. Part 4.5 of the *Nature Conservation Act 2014* (ACT) (NC Act) requires

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the ACT Conservator of Flora and Fauna to prepare action plans for each key threatening process (section 101 *NC Act*). In preparing a draft action plan, the Conservator must consult the scientific committee (section 102 *NC Act*). The draft action plan for a key threatening process, amongst other things, sets out proposals to minimise any effect of the process that threatens a relevant species or relevant ecological community (section 100(a)(iii) *NC Act*). These proposals are important in ensuring that the negative impacts of unnatural habitat fragmentation are avoided.

By listing a key threatening process, the Conservator, Minister and Committee will each have responsibilities in examining the impacts of habitat fragmentation and halting its negative effects. The *NC Act* imposes a duty on the conservator to take reasonable steps to implement action plans that are in force (section 107 *NC Act*) and to monitor and report on their effectiveness to both the public and the Minister at least once every 5 years (section 108 *NC Act*). Action plans are reviewed by the Committee every 10 years or at the Conservator's request and recommendations can be made to amend the plans.

There is an important place for public participation during the process of action plan development, including through consultations. The draft action plan will be made open for public comment (section 103 *NC Act*). Members of the public will therefore have an opportunity to express their concerns and contribute their ideas to minimising any effect the process has on threatened species or ecological communities.

Action plans are used to hold decision-makers accountable. For example, they are used by communities and individuals as evidence in legal challenges to planning decisions. See, for instance, *Thornbrook Pty Ltd and Cowper Pty Ltd v Commissioner for Land & Planning and Ors* [2002] ACTAAT 7, where objectors to a development application tendered two action plans (for the Yellow Box/Red Gum Grassy Woodland and the Regent Honeyeater) into evidence. The EDO ACT often uses action plans as a basis for understanding threats to and aims for the protection of biodiversity in the ACT.

Case study: Impact of development on Scarlet Robin Habitat

A large-scale development is currently proposed on the ACT/NSW border, covering 1000 hectares of land in the ACT and 600 hectares across the border in NSW.

The area to be cleared for development is rich in biodiversity and has high 'ecological integrity and habitat values'.¹ Several ACT and Commonwealth listed endangered and vulnerable species are present in the area, including the Little Eagle, Scarlet Robin, Pink Tailed Worm Lizard, Golden Sun Moth, Superb Parrot, Swift Parrot, Flame Robin, Gang-gang Cockatoo, Spotted Harrier and Speckled

¹ Preliminary Biodiversity Survey of the Ginninderra Falls Area (2016), Dr David Wong (Ecologist and Project Officer at the Ginninderra Catchment Group).



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Warbler.² The development will fragment the existing habitat of several of these species. The Scarlet Robin (*Petroica multicolour*),³ for example, is found in eucalypt woodlands and dry, open forest. As a listed vulnerable species, the Scarlet Robin has an Action Plan in place for its protection, which states that '*the main threat to the Scarlet Robin is the loss of its open forest or woodland breeding and foraging habitat and habitat degradation*'.⁴

The Scarlet Robin Action Plan notes that '*open nesting, small, passerine birds (e.g. robins, flycatchers, whistlers and honeyeaters) experience poor nesting success in fragmented and degraded eucalypt woodlands (Woinarski 1985, Robinson 1990, Ford et al 2001, Higgins and Peter 2002)*'.⁵ Habitat fragmentation benefits the Noisy Miner, which aggressively excludes small woodland birds such as the Scarlet Robin.⁶ A recent and extensive monitoring programme conducted in the ACT over a fourteen year period on woodland bird species' response to urban encroachment, observed that the Scarlet Robin is a species that avoids urban environments and is negatively impacted by urban development, up to 5km from the urban area.⁷ Urban expansion has been shown to cause a long-term decline in Scarlet Robin populations.⁸

Despite the action plan and known impacts of urban development on the scarlet robin, the development is proceeding. Although a conservation corridor will be allocated as part of the development, it is unlikely to halt the predicted local extinction of the Scarlet Robin, because its reserve design does not resolve the issue of habitat fragmentation.⁹ Urban environment negatively impacts the Scarlet Robin to a 5km radius. In addition the current proposed reserve does not use best practice principles,¹⁰ in that it is too small to meet conservation needs and it is shaped as a narrow corridor along the Murrumbidgee River waterway that has a very large edge to area ratio which is exposed to the edge of the corridor.

It is hoped that the nomination of unnatural habitat fragmentation as a threatening process, together with the future action plan to be developed, and the action plans of vulnerable species will, in effect, increase the protection of threatened species and ecological communities.

² See EDO ACT Submission to West Belconnen Project EPBC Strategic Assessment Report (June 2016).

³ The Scarlet Robin was declared a vulnerable species on 20 May 2015 in accordance with section 38 of the former *Nature Conservation Act 1980* (repealed and replaced with the *NC Act 2014*, which lists the Scarlet Robin as a threatened species (Instrument no NI2015-438 and Instrument no NI2016-265)). The scientific name of the Scarlet Robin was changed to *Petroica boodang* on 20 May 2015.

⁴ Scarlet Robin Action Plan (Instrument no NI2015-438 and Instrument no NI2016-265) page 11.

⁵ Scarlet Robin Action Plan (Instrument no NI2015-438 and Instrument no NI2016-265) Page 12.

⁶ 'Aggressive exclusion of birds from forest or woodland habitat by abundant Noisy Miners' as a Key Threatening Process under legislation (Department of Environment 2014).

⁷ Laura Rayner et al; 'Avifauna and urban encroachment in time and space' (2015) 21(4) *Diversity and Distributions* 428-440.

⁸ Laura Rayner et al; 'Avifauna and urban encroachment in time and space' (2015) 21(4) *Diversity and Distributions* 428-440.

⁹ Dr David Wong (Ecologist and Project Officer at the Ginninderra Catchment Group), 'A Vision for a Nature Reserve in the Ginninderra Creek Murrumbidgee River Peninsula – a Discussion Paper', 2016.

¹⁰ Dr David Wong (Ecologist and Project Officer at the Ginninderra Catchment Group), 'A Vision for a Nature Reserve in the Ginninderra Creek Murrumbidgee River Peninsula – a Discussion Paper', 2016.



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In his seminal text, *Environmental Law in Australia*, Dr Gerry Bates notes that the 'failure to list key threatening processes may be seen as a significant omission. Many of the processes that threaten biodiversity are undeniably of human origin, yet to list a human process such as logging or development or removal of native vegetation as a threatening process, and thereby trigger the obligation to prepare a threat abatement plan (under the EPBC Act) is often politically unpalatable.'¹¹

The EDO ACT notes that unnatural habitat fragmentation is the first threatening process to be listed in the ACT to date. Yet unnatural habitat fragmentation is a key issue in the ACT as noted above – and this is only one of many examples. Habitat fragmentation has already been recognised as a threatening process in other jurisdictions such as Victoria, who have already listed habitat fragmentation as a listed potentially threatening process under the *Flora and Fauna Guarantee Act 1988* (Vic).¹² Given the ACT is a progressive and environmentally-minded jurisdiction, it is important that the impacts of unnatural habitat fragmentation are recognised and managed by listing it as a key threatening process.

If you have any questions or wish to clarify any of the above, please do not hesitate to contact the EDO ACT on (02) 6243 3460 or stephanie.booker@edoact.org.au.

Yours faithfully,

Stephanie Booker
Principal Solicitor

¹¹ Gerry Bates, *Environmental Law in Australia*, 7th edition [12.02] page 519:

¹² https://www.environment.vic.gov.au/__data/assets/pdf_file/0012/50241/201612-FFG-Processes-list.pdf