

29 April 2014

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Commissioner for Sustainability and the Environment
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By email: Robert.neil@act.gov.au

Comments on the Nature Conservation Bill 2014

Dear Commissioner

Following the workshop at which you participated on 17 February and the Roundtable of 14 April which you chaired we welcome the opportunity to provide our comments on the Nature Conservation Bill 2014.

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

The Conservation Council ACT Region Inc (Conservation Council) is the peak non-government environment organisation for the Canberra Region. We have been the community's voice for the environment in the Canberra region since 1979.

Our mission is to achieve an ecologically sustainable and zero net carbon society through advocacy, education, research and engagement with community, the private sector and with government.

We represent more than 40 member groups who in turn represent over 15,000 supporters. We harness the collective expertise and experience of our member groups and networks. We work collaboratively with Government, business and the community to achieve the highest quality environment for Canberra and its region.

The Conservation Council is active in a number of campaign areas. Our current focus includes:

- **Biodiversity Conservation** – protecting our unique ecological communities and the Bush Capital
- **Climate Change** – a regional, national and global challenge
- **Planning** – the right things in the right places
- **Transport** – connecting people and places
- **Waste** – being efficient through closed-loop systems
- **Water** – smart use of a scarce resource
- **Governance** – for a Smarter, Sustainable Canberra

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1) Index of Recommendations

1. The purpose of the Act should be to conserve, protect and enhance the biodiversity of the ACT and region and this should be reflected in the preamble.
2. The definition of biodiversity be included in "important concepts" in Part 1.3 of the Act
3. A mandatory requirement be included in the Act allowing for an ecosystem framework to inform the Nature Conservation Strategy, Action Plans and the proposed biodiversity research and monitoring program.
4. The Nature Conservation Strategy be given statutory recognition in the Act.
5. The Act should require the Scientific Committee to develop and regularly review principles of ecological connectivity. Draft principles and review of principles should be subject to public consultation.
6. Provision is made in the Act to ensure that the Planning Authority and other decision makers have regard to ecological connectivity.
7. Amend Section 21 to require that the Conservator must:
 - Prepare and publish a biodiversity research and monitoring program based on Guidelines developed and reviewed at least every 5 years by the Scientific Committee; and
 - Publish an annual report on this program and its implementation.The Commissioner for Sustainability and the Environment to review effectiveness of the monitoring program and its outcomes at least every five years.
8. The biodiversity research and monitoring program referred to in Recommendation 7 include an overall assessment of the condition of the biodiversity and ecosystems of the ACT and region as well as matters of NES or listed ACT threatened species and ecological communities.
9. The Nature Conservation Strategy must require an Adaptive Management Strategy which is regularly reviewed based on the reporting from the biodiversity research and monitoring program.
10. A provision requiring the Conservator to work with rural landholders and conservation groups to develop principles, guidelines and strategies to facilitate biodiversity conservation on rural lands and other off-reserve areas. Off-reserve management to include incentive schemes.
11. The Conservator be suitably qualified, the role be a dedicated position and independent of potential for conflict of interests with other decision-making responsibilities or other management tasks.
12. Expand the Conservator's functions under section 18 to direct that land management actions be undertaken on sites of threatened ecosystems or threatened species habitat when the condition of such sites has deteriorated and the conservation status of the site is at risk.
13. Transfer section 18(4)(b), (c) and (e) to section 19(3) so that the Conservator must ensure that functions are exercised in a way that is consistent with implementation of those plans; or in section 18(4) change "may" to "must" so that the Conservator is obliged to have regard to the matters listed including reports by the Commissioner for Sustainability and the Environment.
14. Strengthen section 53 to require the Conservator to report on implementation of the Nature Conservation Strategy to the OCSE annually. Include in section 53 or elsewhere in the Act a requirement for the Commissioner for Sustainability and the Environment to

- review, at least every 5 years, the implementation of the Nature Conservation Strategy and biodiversity outcomes.
15. The Conservator must be able to provide advice unfettered by considerations of cultural, social and economic values. Delete section 6(2)(f) and amend section 6(3) to add "and may take into account cultural, social and economic values once the best available knowledge is to hand about the conservation, protection, enhancement, restoration and improvement of biodiversity".
 16. The Delegate under the Planning and Development Act should provide greater transparency of the Planning Authority decisions in relation to advice provided by the Conservator, by providing more comprehensive reasons as to why a decision has been made which is inconsistent with the Conservator's advice when approving development applications and related decisions. These decisions should also be reviewable.
 17. Consequential amendments are made to the *Planning and Development Act 2007* to provide for the Conservator's input into the strategic environmental assessments, land management agreements and environmental impact statements.
 18. Amend section 30(2) so that at least five members of the Scientific Committee are not ACT public servants, retain the provisions for the development of criteria for listings to sit with the Scientific Committee and require all reports of the Scientific Committee to be publicly available.
 19. That an integrated Conservation Agency be established.
 20. Amend section 21 so as to allow the Conservator to liaise with appropriately trained volunteer/community groups to identify monitoring and data transfer responsibilities and consequential cooperative arrangements for sharing data.
 21. Include in section 178 provision for a full public consultation process, or at the very least, consultation with known stakeholder groups.
 22. The Act be amended to include provision for alternative dispute resolution.
 23. A) Biodiversity offsets principles and governance mechanisms as described should be incorporated into the Nature Conservation Act.

B) Include in Conservator's functions the obligation to (i.e. the Conservator 'must') review proposed offsets and their implementation, report on them and recommend changes to meet stated outcomes.
 24. The Objects of the Act provide for the consideration of climate change as a threat to biodiversity and a matter to be taken into account in decision-making.
 25. That the Scientific Committee be directed by the Minister to consider listing climate change as a key threatening process.
 26. Create a provision for actions which trigger 'mini-SEAs' pursuant to the Nature Conservation Act.
 27. The Act should require certain components as above to be included in Action Plans.
 28. -The Scientific Committee is to assess for listing, areas of habitat that is critical to the ongoing evolution and development of a species/community in the wild,
-The public and the Conservator in consultation with the Scientific Committee be able to nominate an area to be critical habitat, and
-The Scientific Committee to develop criteria for determining eligibility of areas to be declared critical habitat.
 29. Include greater accountability for management of reserves by a custodian, opportunity for public input and publicly accessible reporting.

2. Introduction

The Conservation Council and the Environmental Defenders Office welcome the opportunity to comment on *the Exposure Draft of the Nature Conservation Bill 2013* and the subsequent *Consultation Draft Nature Conservation Bill 2014* (the Bill). The *Nature Conservation Act 1980* (the Act) is the key legislation to protect and enhance the ACT's unique and nationally significant biodiversity values.

In short we broadly support the provisions within the Consultation Draft Bill and welcome the modernising of 34 year old legislation. We also welcome the alignment of it with national legislation – the *Environment Protection and Biodiversity Conservation Act 1999*. This document details the major concerns we have for what is not included in the Bill. Namely:

- an ecosystem approach in addition to the traditional focus on individual threatened species and ecological communities, with an emphasis on connectivity
- the protection and enhancement of biodiversity values to be outcomes based with clear indicators and targets as well an increased emphasis on biodiversity monitoring and compliance
- enhanced governance and administrative arrangements, particularly in regard to the role and responsibilities of decision-makers: the Minister, Conservator, Scientific Committee and an Integrated Nature Conservation Agency.
- increased public consultation, transparency and reporting
- other areas we propose should be included in the legislation are:
 - governance mechanisms for biodiversity offsets or if not included, referenced in this Act
 - specific reference to climate change as a key threatening process
 - mechanisms to enhance off-reserve management of biodiversity including use of Conservation Trusts and other incentive based approaches
 - protection of critical habitat
 - improvements to Strategic Environment Assessment processes.

We note and support the comments of the Minister Corbell in announcing the review of the Nature Conservation Act in 2010 where he said:

"This is an appropriate time for the ACT Government and community to review the Act so that it reflects more recent conservation initiatives, which focus on ecosystem resilience and connectivity... Some of the issues that need to be considered include whether the objectives of the Act are still valid ... and whether it provides a 'best practice' approach to nature conservation".

Other issues to be considered include landscape connectivity, resilience and ecological functioning of the ACT's natural landscapes and the effective management of the ACT's biodiversity within and outside of reserves.

These words all reflect the need for a 'landscape' or ecosystem approach to biodiversity protection.

3. Overview of the process

As outlined in our previous correspondence¹ we support and encourage an approach which allows for a dialogue between Government and stakeholders. The Bill is complex and consultation limited to written submissions only does not allow for the best possible outcome in achieving protection of the ACT's precious biodiversity.

We, therefore, welcomed the opportunity to participate in the Roundtable to discuss the *Exposure Draft* chaired by the Commissioner for Sustainability and the Environment held on 14 April 2014. We believe any future consideration of the Bill must also use this collaborative approach.

Our preferred outcome is introduction of legislation which requires little or no amendment once re-introduced, legislation that has tri-partisan support and has the agreement of all major stakeholders such as the EDO, the Conservation Council and its member groups – including Catchment and Parkcare groups and groups such as the Rural Landholders Association.

We want to see legislation which is also "future proof" i.e. takes up current and likely new challenges so the legislation can last the distance of time.

4. Ecosystem approach to biodiversity conservation

We support an approach which embraces an ecosystem or landscape approach to biodiversity planning, protection and enhancement. It is an approach with a shift to looking not just at individual species or ecological communities or managing areas of biodiversity within reserves, but rather the broader landscape. It also has a focus on addressing actual biodiversity outcomes.

A key component of an ecosystem approach is that it requires proactive action which anticipates and prevents biodiversity loss rather than waiting for a species or ecological community to become under threat.

In this submission we refer to an 'ecosystem approach' rather than the term landscape. The need for such an approach is outlined in Hon Justice Brian Preston "Adapting to the Impacts of Climate Change: The Limits and Opportunities of Biodiversity Law" *Environmental and Planning Law Journal* 2013.ⁱ

In short, such an approach requires acknowledgement of the limitations of the current biodiversity laws and the need for new additional requirements to address these limitations.

An ecosystem approach is also reflected within the:

- Convention of Biological Diversity
- Australian Biodiversity Conservation Strategy 2010-2030 and
- ACT Nature Conservation Strategy 2013-2023

It is also addressed by the last major review of national biodiversity law via the independent

¹ Correspondence from the Conservation Council ACT Region to Simon Corbell MLA, Minister for Environment and Sustainable Development, 15 November 2013, 13 December 2013, 5 February 2014.

review of EPBC by Allan Hawke in 2009.²

The existing legislation and the *Consultation Draft Bill* both contain the limitations of a species-based biodiversity law which focuses on processes and not necessarily on achieving biodiversity outcomes. For example, the proposed Bill has a large number of provisions setting out requirements and processes yet few that require meeting biodiversity targets or reporting on biodiversity outcomes.

Purpose of the Act

At the highest level there should be recognition within environmental protection legislation that its purpose "is to conserve protect and enhance the biodiversity of the ACT". We therefore welcome and support the amendment of the Exposure Draft to include this as the main object of the Act. We also support the definition of 'biodiversity' which reflects the definition in the international Convention on Biodiversity.

The preamble to the proposed Bill states it is "an Act: to make provision for the protection and conservation of native animals and native plants, for the management of reserves and for other purposes". [refer page 1]

As outlined above, we support a broader ecosystem approach to the legislation in addition to the current species based approach. We propose this be reflected in the preamble to the legislation.

Recommendation 1:

The purpose of the Act should be to conserve, protect and enhance the biodiversity of the ACT and region and this should be reflected in the preamble.

In order to give weight to the importance of the definition of biodiversity we propose that it also be included in the important concepts section of the Act. [Part 1.3]

Recommendation 2:

The definition of biodiversity be included as an "important concepts" in Part 1.3 of the Act.

The Bill also needs to be amended to give practical effect to this approach. We propose this could be achieved if the Nature Conservation Strategy, other strategies, Action Plans and Monitoring programs are required under the Bill to have mandatory requirements to take into account an ecosystem approach in their development and implementation.

² Hawke et al., Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (2009). Available at: < <http://www.environment.gov.au/epbc/review/publications/pubs/final-report.pdf>>

Recommendation 3:

A mandatory requirement be included in the Act allowing for an ecosystem framework to inform the Nature Conservation Strategy, Action Plans and the proposed Research and Monitoring program.

'Landscape scale conservation' is discussed in the ACT Nature Conservation Strategy 2013–23 [page 14]. The Consultation Draft Bill provides 'the Conservator must take reasonable steps to implement the strategy' section 52. We recommend strengthening this aspect of the Bill to ensure the Nature Conservation Strategy is given greater statutory recognition. This would involve identifying and regularly reporting on the environmental outcomes or standards enunciated in the Nature Conservation Strategy that are not to be compromised, or are to be achieved, as the case may be.

Recommendation 4:

The Nature Conservation Strategy be given statutory recognition in the Act.

Ecological Connectivity

An ecosystem approach including an emphasis on connectivity must be adopted in addition to the existing individual threatened species and ecological communities framework.

Ecological connectivity is referenced in the objects of the Bill, but it is not defined nor are there any mechanisms to give effect to identifying, maintaining or enhancing connectivity.

The National Capital Plan and Territory Plan include the areas protected from development in the Territory and these areas have an ecological function and a degree of connectivity. ACTMAPi includes an ecological connectivity layer which is welcome, however, a challenge is to ensure mapping information is kept up to date. Consideration of connectivity must involve a shift from focusing on only establishing corridors to include consideration of ecological function. Connectivity requirements vary from species to species and therefore have to take into account functional requirements for landscape connectivity. Maps are not necessarily able to show this level of complexity. It is also important that the ecological connectivity considerations account for the ACT and its regions.

In order to address these issues we believe that rather than have a specific definition of ecological connectivity, the Scientific Committee ought to develop broad principles which could include:

- connections between habitats containing listed threatened species;
- key environmental processes;
- river and creek corridors; and
- any other aspect of ecological connectivity that is important to the survival of the species/community/habitat.

Recommendation 5:

The Act should require the Scientific Committee to develop and regularly review principles of ecological connectivity. Draft principles and review of principles should be subject to public consultation.

While there is a connectivity layer in ACTMapi there is no provision in the current legislation or in the proposed Bill to ensure that decision-makers must take connectivity principles into account when making planning or other decisions. In this respect, integration with the *Planning and Development Act 2007* is required.

Recommendation 6:

Provision is made in the Act to ensure that the Planning Authority and other decision makers have regard to ecological connectivity.

5. Monitoring of biodiversity

Nature conservation requires the goals and objectives of environmental protection legislation to be complied with. Such laws are only effective when supported by an effective monitoring program and enforcement mechanisms and options. For a regulatory framework to have teeth, it must also be based on the best-available science with its protective mechanisms subject to adaptive management. Protective mechanisms include the need for suitable indicators such as predictive indicators, appropriate resourcing, scientific peer review and public reporting, as well as appropriate independent review. Monitoring must be linked to adaptive management mechanisms so that monitoring is based on measurable outcomes and guides subsequent strategic management. As above, a key component of a protection regime is the capacity to respond pro-actively before the damage occurs rather than at a point where species or ecological communities are becoming vulnerable or threatened.

The independent review of the *Environment Protection and Biodiversity Conservation Act, 1999* (Cth) by Dr Allan Hawke AC³ noted the importance of an efficient suite of compliance, enforcement and audit functions. To be most effective, policy development and decision-making must be informed by comprehensive, accurate and consistent environmental information.⁴

The 2011 ACT State of the Environment Report raised concerns that 'overall, long-term research, monitoring and evaluation remain limited, with previous State of the Environment recommendations to improve these areas only partially implemented'.⁵ In order for adequate monitoring and evaluation to occur, there must be an obligation to identify and to publish the status of key indicators of the ACT's biodiversity on a regular basis.

The Bill introduces the concept of monitoring which is welcome, but is not particularly precise about what this means in practice. [Section 21, page 16]

Effective monitoring provisions are also necessary for the successful implementation of an

³ Hawke et al., Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act, 1999 (Cth) (2009) 268. Available at: < <http://www.environment.gov.au/epbc/review/publications/pubs/final-report.pdf>>.

⁴ Allan Hawke, above n 19, 319.

⁵ ACT State of the Environment Report 2011, Executive Summary, 9.

ecosystem approach. We propose that the monitoring provisions be modified to ensure that:

- monitoring is a mandatory. It should contain a 'must' provision rather than an optional 'may' as per the current Bill Section 21(2)
- the Scientific Committee must either develop guidelines for monitoring rather than the Conservator, or endorse those developed by the Conservator, due to the expertise within the Scientific Committee, and to retain integrity from the reporter and the matters on which they are reporting Section 21(3)
- the Guidelines must be reviewed every five years
- greater clarity and transparency is needed on the reporting and research programs and on making monitoring findings public – i.e. that the Conservator publish a research and monitoring program and must report annually on it. This could be under the *Annual Reports (Government Agencies) Act 2004*.
- there is independent review of biodiversity monitoring guidelines, program and reports. The Commissioner for Sustainability and the Environment is well-placed to include a report on effectiveness and outcomes of the monitoring program in State of the Environment reports which are currently required at 4-yearly intervals.

Recommendation 7

Amend Section 21 to require that the Conservator must –

- **prepare and publish a biodiversity research and monitoring program based on Guidelines developed and reviewed at least every 5 years by the Scientific Committee; and**
- **publish an annual report on this program and its implementation.**

The Commissioner for Sustainability and the Environment to review effectiveness of the monitoring program and its outcomes at least every 5 years.

In order to facilitate an ecosystem approach to biodiversity it is also important that the biodiversity monitoring program not be restricted to listed threatened species or ecological communities. We note that the *Nature Conservation Strategy 2013-2023* at Action 3.5 requires monitoring of five priority ecosystems most vulnerable to threats. This is welcome, however, according to the Implementation Plan for the Nature Conservation Strategy this currently is not resourced.

An overall biodiversity monitoring program ought to be a legislative requirement. Our experience is that the need for biodiversity monitoring is well recognised, however, if it is not given regulatory weight it generally does not become a priority in terms of resourcing or reporting. Hence our emphasis on the importance of having broad provisions in the legislation to avoid this risk and to cover the condition of biodiversity generally.

ACT Government monitoring would benefit from the opportunity to access the know-how of community organisations such as COG and FOG and programs run by the Catchment Groups (Frogwatch, Waterwatch and Vegwatch).

Recommendation 8:

The biodiversity research and monitoring program referred to in Recommendation 7 include an overall assessment of the condition of the biodiversity and ecosystems of the ACT and region as well as matters of NES or listed ACT threatened species and ecological communities.

Adaptive management

The Bill provides for the Conservator to prepare a biodiversity monitoring program (which we have recommended should attract annual reporting and at least five yearly review) and a Nature Conservation Strategy, with reporting only to the Minister every five years section 53(2) and review every ten years section 53(3). While the Consultation Draft requires the Conservator to include strategies to address actual and potential impacts of climate change in the Nature Conservation Strategy section 42(a)(ii), it is believed that a responsive mechanism should be in the Act for biodiversity programs and monitoring to flow into an Adaptive Management Strategy.

Recommendation 9:

Require the Nature Conservation Strategy to include an Adaptive Management Strategy which is regularly reviewed based on the reporting from the biodiversity research and monitoring program.

The Conservator needs to have the discretion to review or update action plans to take into account environmental changes or new information available on the listed item. Ability to make future adjustments is necessary due to continuing and improved ecological knowledge. Regulatory framework is only effective when it is based on best-available science and which requires governments to fund specialised research units over the long term. We recommend mechanisms (eg action plans) are subject to adaptive management. The ACT Government ought to invest in additional and continuing scientific research so that the biodiversity protection and management framework is based on the best available ecological science. A contemporary management system of this nature allows the Act, its functions and the decision makers the flexibility to address the risk arising from threats such as climate change.

Off-reserve management

The Bill doesn't address off-reserve management in any significant way. For example how reserve systems interact with off-reserve repositories of biodiversity. As above, a key component of an ecosystem approach is the need to manage biodiversity across all land tenures, not just that in reserves. Off-reserve conservation is fundamental to an ecosystem approach. Kosciuszko 2 Coast project provides a good example of how it could be approached, namely voluntary conservation mixed with statutory conservation.

Off-reserve management needs to be implemented on both leased and unleased lands. Significant areas of unleased lands, including roadsides, open space (not reserved) and land awaiting development decisions have recognised ecological values. As these latter are under the management of government their management needs to be based on their ecological requirements, not their land use, with relevant weed control, biomass management and protection from physical disturbance to ensure they are managed in line with their ecological

values.

In regards to rural lands, under existing arrangements Land Management Agreements and Conservator's Directions are the principal mechanisms for biodiversity measures on rural lands. Land Management Agreements and Conservator's Directions are not providing consistent outcomes from a biodiversity perspective. These documents are not publicly available. This restricts the public's awareness of conservation actions or requirements on leased rural land. Such information would be unlikely to require the Commercial-in-confidence restriction. They are not legally binding and there is little capacity for enforcement. They also do not provide incentives to rural landholders to encourage biodiversity conservation. However requiring that LMAs be public documents and legally enforceable is not likely to address or remedy biodiversity outcomes and it may be preferable to require and provide assistance to rural landholders and other land managers to report on biodiversity condition of land in their control.

A preferred approach is for requirements of monitoring and reporting of biodiversity on rural lands to be made public. Rural landholders should be resourced and provided incentives to do so.

Within the constraints of the ACT lease system it is preferable for the ACT to have provisions to allow for conservation covenants on private land. This would encourage voluntary participation and should be linked to incentives for the landholder. Such covenants would not need to be deemed Commercial-in-confidence.

Landholders need to be engaged to protect and conserve areas of ecological value and ecological function on their land. In NSW environmental legislation provides for funding to landholders to assist in environmental management.⁶ This should be extended to the ACT.

In order to enhance an ecosystem approach, the Bill must address off-reserve management in more specific detail with an emphasis on monitoring and reporting on outcomes and incentives.

***Recommendation 10:
A provision requiring the Conservator to work with rural landholders and conservation groups to develop principles, guidelines and strategies to facilitate biodiversity conservation on rural lands and the off-reserve areas. Off-reserve management to include incentive schemes.***

6. Governance

Role and Functions of the Conservator

A key part of the review of the Nature Conservation Act has been the need to strengthen the role of the Conservator and to give the role some independence, and a number of findings from the PricewaterhouseCoopers Review of the Roles and Functions of the ACT Conservator of Flora and Fauna have been included in the Bill.⁷ At one point, consideration was given for the

⁶Native Vegetation Act 2003 (NSW) s 28(d).

⁷ PricewaterhouseCoopers, *Review of the Roles and Functions of the ACT Conservator of Flora and Fauna* (June 2011), 10. The review's recommendations include a more strategic role for the Conservator of Flora and Fauna in Recommendation 3, which has informed the exposure draft of the Nature Conservation Bill 2013 s 18.

Conservator role going to the Commissioner for Sustainability and the Environment. This was ruled out as the Commissioner would then be unable to 'independently' review decisions of the Conservator.

The current situation is that the Conservator role is attached to a public servant position with multiple management responsibilities and there is no requirement for any environmental management or ecological background.

The report into the role and functions of the Conservator recommended consideration be given to creating a dedicated position of the Conservator.⁸

The Bill [Part 2.1] requires that the Director-General must appoint a Conservator with no further requirements. We recommend the Conservator must have relevant qualifications or proven understanding of environmental processes and management. The Conservator role must also be a dedicated position rather than having competing requirements of, and potential for conflict with, other management tasks. These are relevant to key findings/recommendations made in the Pricewaterhouse Coopers' Review of the Roles and Functions of the ACT Conservator of Flora and Fauna.⁹

Recommendation 11:

The Conservator be suitably qualified, the role be a dedicated position and independent of potential for conflicts of interests with other decision-making responsibilities or other management tasks.

The legislated functions of the Conservator need to be strengthened beyond the ability to develop and oversee policies, programs and plans for the effective management of nature conservation in the ACT section 18(1)(a). The Conservator must be empowered to take direct action, particularly where threatened habitat and ecosystems, through inappropriate management or inaction, are deteriorating and the conservation status of the site is at risk.

Recommendation 12:

Expand the Conservator's functions under section 18 to direct that land management actions be undertaken on sites of threatened ecosystems or threatened species habitat when the condition of such sites has deteriorated and the conservation status of the site is at risk.

At section 18 (4)(b), the Conservator 'in exercising a function, *may* have regard to the Nature Conservation Strategy'. In line with recent comments from the Honorable Brian Preston that 'environmental statutes are bountiful in bestowing discretionary powers on regulatory agencies, but rarely burden them with duties and obligations',¹⁰ we urge the discretionary 'may' in section 18 to be changed to an obligatory 'must'.

⁸ PricewaterhouseCoopers, *Review of the Roles and Functions of the ACT Conservator of Flora and Fauna* (June 2011), 11.

⁹ Ibid.

¹⁰ Preston, above n 12, 381.

In exercising a function, the Conservator should be obliged to either ensure that it is consistent with implementing not only objects of the Act, any Conservator guidelines and the Nature Conservation Strategy [18(3)(a)-(c)], but also any other matters currently identified in section 18(4) of the Consultation Draft. The inclusion in the Consultation Draft of section 18(4)(d) in relation to reporting by the Commissioner for Sustainability and the Environment is noted and supported, but this ought to be strengthened from 'may' to 'must' requiring an obligation on the part of the Conservator to take into account all relevant matters.

Recommendation 13:
Transfer section 18(4)(b) (c) and (e) to section 18(3) so that the Conservator must ensure that functions are exercised in a way that is consistent with implementation of those plans; or in section 18(4) change "may" to "must" so that the Conservator is obliged to have regard to the matters listed including reports by the Commissioner for Sustainability and the Environment.

The Conservator must take 'reasonable steps' to implement the Strategy section 52. However, there are no explicit ramifications for situations where 'reasonable steps' have not been taken. We recommend a strengthening of section 52 to ensure a greater accountability by way of a requirement for the review of implementation and outcomes by the Commissioner for Sustainability and the Environment at least every five years (with the intention of the Commissioner being able to include such a review in his State of the Environment Report). This may replace the Conservator's report to the Minister section 53(2) or be in addition to it, but as in section 18(1)(c) of the Consultation Draft, the Conservator must make data available to the Commissioner for such a report.

Recommendation 14:
Strengthen section 53 to require the Conservator to report on implementation of the Nature Conservation Strategy to the Commissioner for Sustainability and the Environment annually.

Include in section 53 or elsewhere in the Bill a requirement for the Commissioner for Sustainability and the Environment to review, at least every five years, the implementation of the Nature Conservation Strategy and biodiversity outcomes.

We agree the Conservator *must* take into account the Objects of the Act in decision making, but we strongly disagree that the Conservator must also take into account cultural, social and economic values and the best available knowledge section 6 (2)(f). This is not the role of the Conservator. This is the role of the Minister after the Conservator has provided advice, decisions, etc. in relation to effective protection, enhancement and management of nature conservation in the ACT.

The Conservator is responsible for the drafting of Action Plans, section 91¹¹ and the Conservator must also be able to declare an area to be critical habitat and to provide the criteria for

¹¹Nature Conservation Bill 2013, s 90.

determining the eligibility of areas as critical habitat.¹²This must be done in consultation with the Scientific Committee based on scientific criteria, not social and economic considerations, with reference to recommendations to the Minister to make the final determination.

Recommendation 15:

The Conservator must be able to provide advice unfettered by considerations of cultural, social and economic values. Delete section 6(2)(f) and amend section 6(3) to add "and may take into account cultural, social and economic values once the best available knowledge is to hand about the conservation, protection, enhancement, restoration and improvement of biodiversity".

The Conservator plays a significant role in relation to the conservation of biodiversity in the ACT, however, the ability of the Conservator to influence planning and development decisions needs to be strengthened. Comments by Minister Corbell at the Roundtable, about the process under the *Planning and Development Act 2007* in relation to where the Conservator's advice is overridden in favour of other considerations are noted, but we reiterate our view that the Consultation Draft must be amended to include a landscape or ecosystem approach to biodiversity protection. Such provisions would provide a legislative basis to broaden the scope of the Conservator's advice about biodiversity conservation in relation to planning decisions

The corollary to this is that the *Planning and Development Act 2007* must ensure that the Planning Authority, in its decision-making, has due regard to the objects of the *Nature Conservation Act* and this more strategic approach to biodiversity. See Recommendation 6 of this submission.¹³

Also, in line with findings and recommendations of the PricewaterhouseCoopers Report into the *Review of the Roles and Functions of the ACT Conservator of Flora and Fauna*, the decision-making process, particularly where there is a conflict between biodiversity conservation and other considerations, must be more transparent. Decisions often contain competing aims. What priority or weight is to be given to matters should be clearly stated, rather than being left to the discretion of the decision-maker. We recommend that the primary consideration for the Conservator should be the conservation, protection and enhancement of the biodiversity of the ACT.

These would involve consequential amendments to the *Planning and Development Act*.

¹²Lawyers for Forests (Review of FFG Act, November 2002) notes that departmental policies define critical habitat as: 'the area(s) of habitat which would ensure the long-term survival of the dependent taxon and community estimated on the hypothetical basis that the area(s) was the only habitat left to that taxon or community'.

¹³Above n 4, 12.

Recommendation 16:

The Delegate under the Planning Development Act should provide greater transparency of the Planning Authority decisions in relation to advice provided by the Conservator by providing more comprehensive reasons as to why a decision has been made which is inconsistent with the Conservator's advice when approving development applications and related decisions. These decisions should also be reviewable.

No changes have been made to the role of the Conservator in relation to the Environmental Impact Statements (EIS) and Strategic Environmental Assessments (SEA). We note with concern that there is no trigger in the *Planning and Development Act 2007* for the Conservator to assess the adequacy of or comment on an EIS. We are of the opinion that overall biodiversity management would be strengthened if biodiversity conservation objectives were integrated with other legislation. A consequential amendment to the *Planning and Development Act* is necessary to require any EIS or SEA to address Action Plans and the Nature Conservation Strategy.

The Conservator should have capacity to provide input into the SEA component of the *Planning and Development Act 2007* and access to enhanced research capability in order to adopt a more strategic approach. It is impossible for the Conservator's function to be carried out effectively when the Minister may direct an SEA to be prepared for a draft reserve plan section 167(1) *Nature Conservation Act* or draft land management plan section 322(1) *Planning and Development Act* without the Conservator's further input into SEAs. This is despite section 322(2) which allows the Conservator to request the Minister to act under (1).

The Conservator must be involved in decisions surrounding strategic environmental assessments, land management agreements and environmental impact statements. To do this will require consequential amendment to the *Planning and Development Act*.

Recommendation 17:

Consequential amendments are made to the Planning and Development Act to provide for the Conservator's input into strategic environmental assessments, land management agreements and environmental impact statements.

Scientific Committee

The Scientific Committee must provide greater support and consultation with the Conservator and the Minister.

What constitutes an ecological community should remain the role of the Scientific Committee. The development of criteria for declaration of threatened species/communities and threatening processes must remain the responsibility of the Scientific Committee to ensure the application of scientific knowledge.

Similar to the listing process under the Bill, the Scientific Committee ought to have a role in determining what areas are critical habitat. Such a determination ought to be incorporated into the provisions of the Act and the determination should have statutory consequence; for example, an interim conservation order made by the Minister.

We note the provisions for membership of the Scientific Committee are the same wording as in the 1980 Act. We recommend that section 30(2) be amended so as to provide greater clarity about “public servants” so that at least five members are *not* ACT public servants thereby securing the Committee’s greater independence from Government and increasing community confidence as to the Committee’s credibility.

Outcomes of scientific reports should be made publicly available.

***Recommendation 18:
Amend section 30(2) so that at least five members of the Scientific Committee are not ACT public servants, retain the provisions for the development of criteria for listings to sit with the Scientific Committee and require all reports of the Scientific Committee to be publicly available.***

Integrated Nature Conservation Agency

An integrated nature conservation agency was apparently the intention of the *Nature Conservation Act 1980* which established the Parks and Conservation Service, however, in more recent years through the Administrative Orders, there has been separation of policy, programs and operational delivery. This includes separation of support and advice to the Conservator from the Parks and Conservation Service. The Bill requires that the Parks and Conservation Service must assist the Conservator and, for unleased land or public land that is a reserve – the custodian - in undertaking their functions section s.22.

***Recommendation 19:
That an integrated Nature Conservation Agency be established.***

7. Public participation

We recommend the inclusion of enhanced public consultation, co-management arrangements with stakeholders and an increased reportage by government of environmental outcomes. There are currently many volunteer groups established in Canberra that regularly band together to improve Canberra’s natural environment. This collective commitment and knowledge could be harnessed by the Government as an opportunity to assist with a program of ongoing assessment, monitoring and reporting. For example, many ParkCare trained volunteers already assist on an ad hoc basis with threatened species sightings and reporting, weed mapping, reporting on the management of threats to the biodiversity, and have the skill to report on the successes or failures of the Nature Conservation Strategy’s Action Plans.

There is an absence of co-management arrangements with ParkCare, Catchment Management Groups and other stakeholders in the Bill. This omission is inconsistent with the development of participatory, collaborative management arrangements for protected areas, and the current reality of ParkCare arrangements in the ACT as well as the IUCN best practice guidelines on governance.¹⁴

¹⁴ See: <http://www.iucn.org/about/work/programmes/gpap_home/gpap_capacity2/gpap_bpg/?13678/Governance-of-Protected-Areas-From-understanding-to-action>

Recommendation 20:
Amend section 21 so as to allow the Conservator to liaise with appropriately trained volunteer/community groups to identify monitoring and data transfer responsibilities and consequential cooperative arrangements for sharing data.

Transparency and the opportunity for public comment ought to be made available for matters that are in the public interest and for decision-making that will impact upon the environment, the health and well being of the community and the use of natural resources. Public participation is a critical process needed to inform high-quality decision-making for the conservation, protection and enhancement of the biodiversity of the ACT.¹⁵

Environmental protection and its laws must clearly prescribe mechanisms for public engagement, and information relating to decision-making must be publicly available. Sufficient timeframes must be set out in legislation to allow active, iterative, and considered participation from local communities. Involving the community should go beyond traditional 'inform and consult' models, and encourage best practice engagement at appropriate points in policy development and nature conservation planning that delivers more widely acceptable outcomes.

Recommendation 21:
Include in section 178 provision for a full public consultation process, or at the very least, consultation with known stakeholders.

Specific requirements must be made for consultation with Indigenous Australians wherever a proposal or assessment involves cultural heritage, and the amendments to the objects in this regard are welcomed.

We strongly recommend the Bill include a complaints and dispute resolution section in addition to other public engagement mechanisms. Chapter 8 in the recently released Productivity Commission's Draft Report on Access to Justice Arrangements¹⁶ includes draft Recommendation 8.2:

*All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.*¹⁷

The inclusion of structured mediation processes especially during policy development is likely to lead to improved policies and a lesser risk of later litigation.

Recommendation 22:
The Bill be amended to include provision for alternative dispute resolution.

¹⁵ See also Hawke et al, above n 1, 242.

¹⁶ Access to Justice Arrangements, *Productivity Commission Draft Report*, April 2014. <www.pc.gov.au/projects/inquiry/access-justice/draft>, Recommendation 8.2.

¹⁷ Ibid.

8. Additional matters to be considered

Biodiversity Offsets

Offsetting is an option used as a means for developments to obtain approval despite their environmental impact. We are concerned that offsetting is negotiated on a case by case basis between ACTPLA and the development proponent and that the mechanism is applied on a relatively ad hoc basis with little strategic direction or guarantee of ecological outcome. We are of the opinion that if the intended outcome of an offset is the maintenance or improvement of biodiversity value, then offsets should be administered by the *Nature Conservation Act*.

Further, the Conservator should play a key role in proposals regarding biodiversity offsets including an obligation to report on biodiversity offset decisions, an update of achievements and the review of outcomes.

Offset principles:

There must be no offsetting of high conservation value listed threatened ecological communities or habitats of listed threatened species.

In relation to all other land, there are a number of fundamental principles that must underpin an acceptable offset standard and they must be reflected in legislation.¹⁸ These principles include:

- Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts.
- Offsets must be based on sound ecological studies and principles, such as 'like for like.'
- Legislation and policy should set clear limits on the use of offsets.
- Indirect offsets must be strictly limited.
- Offsetting must achieve benefits in perpetuity.
- Offsets must be based on principles of "net gain".
- Offsets must be additional.
- Offset arrangements must be legally enforceable.

The ACT Conservation Council's policy provides further details on the principles which we believe should be put into place. Namely:

- avoid or minimise impacts on biodiversity values before considering offsets with clear criteria before considering 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, unless the offset area significantly improves connectivity on a regional scale with high conservation areas within the ACT and if it does not impact on the ecological integrity of other ecosystems eg grasslands;
- must be net gain and in perpetuity;
- scientifically assessed;
- additional or supplementary to existing reserves, funding, etc;

¹⁸ For an analysis of current offset principles used in Australia – see: Fallding, Martin, "Biodiversity offsets: Practice and promise" (2014) 31 Environment and Planning Law Journal 11.

- conservation actions must be above the statutory duty of care in place at the site, i.e. there is already a high level duty of care on managers in existing nature reserves so it is preferable that actions take place elsewhere, or else any conservation actions must be higher than the status quo duty of care in those areas, this also includes the duty of care provided by volunteer input of Parkcare groups;
- assurances regarding the long-term viability of offset sites (including resources for management)
- Direct offsets should be prioritised and make up at least 90% of the offsets package – i.e. actual on ground rather than indirect via financial contributions.
- Indirect offsets should be a last resort, but if used should make up a maximum of 10% of the offsets package;
- apply principles of connectivity and high irreplaceability to decisions regarding location of offset sites.

Governance

- a publicly available offsets register;
- baseline data of the development site which is being offset;
- baseline data of proposed offset site;
- appropriate resourcing to manage the offset site over long time frames;
- liability arrangements for failed offsets;
- annual monitoring and public reporting on offset outcomes;
- strategic mapping of offsets site in advance;
- independent review of offset outcomes by the Commissioner for Sustainability and the Environment;
- these requirements being mandatory under the new Nature Conservation Act;
- there should be a clear and well-publicised role for the community in monitoring compliance; the community should be represented on relevant bodies and have a role in assessing priorities for offsetting sites and measures.

***Recommendation 23a:
Biodiversity offsets principles and governance mechanisms as described
should be incorporated into the Nature Conservation Act.***

***Recommendation 23b:
Include in Conservator's functions the obligation to (ie the Conservator
'must') review proposed offsets and their implementation, report on
them and recommend changes to meet stated outcomes***

Climate change as a key threatening process

The Consultation Draft provides that strategies to address actual and potential impacts of climate change are addressed in the Nature Conservation Strategy section section 42(a)(ii). We believe that climate change is more critical and is a threatening process which needs to be included in the Objects of the Act in order to ensure that intermediate and long-term change are taken into account in environmental decision-making.

Recommendation 24:

The objects of the Act provide for the consideration of climate change as a threat to biodiversity and a matter to be taken into account in decision-making.

The Conservator must prepare a draft action plan for each relevant species, relevant ecological community and key threatening process section 91(1). A key threatening process is a process that threatens, or may threaten, the survival, abundance or evolutionary development of a native species or ecological community section 64. The threatening process is listed in the key threatening processes list section 66 which is a list notified under section 81. The Minister makes the list section 67, but must develop the criteria in consultation with the Conservator and the Scientific Committee section 69(4) and the criteria may only include scientific matters.

Climate change will lead to additional pressure on the Territory's water resources and biodiversity, and may significantly change the patterns of bushfire and extreme weather events. The implementation and effectiveness of strategies to enable biodiversity to adapt to climate change is dependent in part on the law. The existence of the current baseline pressures that ecosystems, habitats and species face is evidence that the existing laws are inadequate. Hence, continuation of the existing laws, with their limitations, will not reduce the baseline pressures.

Reform of the limitations of the existing laws is needed to reduce baseline pressures and prevent, control and mitigate new pressures. The process to list climate change as a key threat is in place and we recommend adaptive management be adopted and climate change be included as a key threatening process.

Recommendation 25:

The Scientific Committee be directed by the Minister to consider listing climate change as a key threatening process

Strategic Environmental Assessment

Strategic environmental assessment (SEA) is in its early stages and it must be undertaken according to rigorous, objective and transparent requirements. A SEA must:

- be based on comprehensive and accurate mapping and data;
- be undertaken at the earliest possible stage;
- assess alternative scenarios and cumulative impacts;
- involve ground-truthing of impact assessment;
- involve extensive public consultation; and
- complement, but not replace, site-level impact assessment.¹⁹

We recommend provisions for actions that would trigger 'mini-SEAs'. Mini-SEAs should be undertaken for any development which:

- abuts a nature reserve or critical habitat;
- impacts on Matters of National Environment Significance under the EPBC Act; and/or
- impacts over a certain percentage threshold.

¹⁹ANEDO Submission to the Joint Select Committee on Northern Australia Inquiry into the Development of Northern Australia, 14 March 2014, 10.

The land size of the ACT is relatively small and ought to be treated as a single, integrated region thereby maximising the relevance and application of policies and actions for those who live there.

Recommendation 26:
Create a provision for actions which trigger 'mini-SEAs' pursuant to the Nature Conservation Act.

Action Plans

There are no obligations or incentives for landholders and land users to implement Action Plans. The Bill does not bind anyone to take any actions or to refrain from taking any actions pursuant to an Action Plan. Listing threatened species and communities and developing Action Plans to protect and re-establish threatened species are of value only if the action plans are implemented and their impact evaluated.

It is difficult to determine therefore whether the ESDD can easily identify whether initiatives included in Action Plans are effective or whether, after the preparation of the Action Plan, the monitoring of actions is no more than a reliance of the goodwill of other departmental and agency staff to undertake tasks.

The following amendments should be made to the Bill in relation to Action Plans:

- A requirement that decision-making should not be inconsistent with Action Plans;
- Requirement to monitor and evaluate initiatives included in Action Plans *as well as* an update and review of Action Plans within statutory time limits or within time limits noted in the plan. For example, under the *Threatened Species Conservation Act 1995 (NSW)*, the Director-General is to review the Priorities Action Statement every three years and may make changes to the Priorities Action Statement pursuant to any such review by adopting amendments to the Statement;²⁰
- Action Plans should be prepared in consultation with ecological experts to ensure that management actions will be effective in conserving a species or community or managing a threatening process. For example, under the *Threatened Species Conservation Act 1995 (NSW)* the Director-General is to seek advice from the Natural Resources Commissions, the Scientific Committee, Biological Diversity Advisory Council, Social and Economic Advisory Council and such other State government agencies as the Director-General considers appropriate in preparing or reviewing a Priorities Action Statement;²¹
- A mandatory requirement that Action Plans include information on what *needs* to be done to protect and conserve species and communities or manage threatening processes. We are of the opinion that for Action Plans to be effective they should set out clearly what needs to be done, where it is to be done and how the species or community will benefit from the action including the identification of other government agencies that might facilitate the achievement of the strategies; and
- The identification of priority actions.

²⁰*Threatened Species Conservation Act 1995 (NSW)*, s90B(3).

²¹*Threatened Species Conservation Act 1995 (NSW)*, s90B(4).

Recommendation 27:

The Bill should require certain components as above to be included in Action Plans

Protection of critical habitat and habitat restoration

Greater attention is needed towards the protection of habitat critical to the survival of particular threatened species, populations and ecological communities. This is consistent with our requirement for inclusion of a landscape or ecosystem approach to best practice biodiversity conservation and nature conservation legislation.

In the same way as the listing process under the Act currently operates, the Scientific Committee, in consultation with the Conservator and any other experts or appropriate stakeholders, should be able to make recommendations for areas to be declared critical habitat including the criteria for determining eligibility of areas as critical habitat.

In the process of preparing action plans, the Conservator is likely to identify areas which s/he considers to be critical for protection of threatened species and/or ecological communities and should be able to nominate such areas for listing. Also, similar to the current listing process, a public nomination process for areas of critical habitat should be established.

Criteria for determining eligibility of areas as critical habitat should be included in the Act or Regulations. Criteria should consider areas critical to the ongoing evolution and development of a species in the wild and not be limited to critical habitat for the maintenance of a minimum viable population. Criteria should also be developed in the context of climate change and associated species adaptation.

Recommendation 28:

- ***The Scientific Committee is to assess for listing areas of habitat that is critical to the ongoing evolution and development of a species/community in the wild,***
- ***The public and the Conservator in consultation with the Scientific Committee be able to nominate an area to be critical habitat, and***
- ***The Scientific Committee to develop criteria for determining eligibility of areas to be declared critical habitat.***

Reserve Management

At present there is no public accountability for management of reserves. There is no requirement to monitor effectiveness, no requirement to report on effectiveness only a requirement for the custodian to report to the Minister about implementation of a reserve management plan at least once every five years. There is no reporting and as a result no information accessible in the public arena. This is inadequate. Reserve management plans are to be reviewed only every ten years (and may be extended) with a requirement for consultation only with the Conservator. Monitoring and reporting should be publicly accessible and reviews should include public consultation.

***Recommendation 29:
Include greater accountability for management of reserves by a
custodian, opportunity for public input and publicly accessible reporting.***

If you have any queries regarding this submission please contact: Clare Henderson
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Yours sincerely

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Attachment A:

Disallowable instruments and notifiable instruments

Overall, we are satisfied with the explanation given at the Roundtable about the change from the use of disallowable instruments in the 1980 Act to the use of notifiable instruments in the Bill, with the exception that **Action Plans should remain disallowable instruments**. They are primary overarching documents focussed on critical objectives/outcomes in the Act, and need the highest level of scrutiny/accountability at political level.

Must and may provisions

Move paragraphs section 18 (4) (b)(c) and (e) to section 18(3) so that in exercising a function, the Conservator *must* ensure that it is exercised in a way that is consistent with:

- an action plan for a species, ecological community or process;
- a reserve management plan for a reserve;
- any other government policy or plan relating to nature conservation. (see Recommendation 13)

Amend section 18 (4) from 'may' to 'must' so that in exercising a function, the Conservator *must* have regard to any other relevant matter, including the following:

- the findings of monitoring programs under section 21;
- any response of the government to a state of the environment report under the *Commissioner for Sustainability and the Environment Act 1993*; or a special report under the *Commissioner for Sustainability and the Environment Act 1993* (see Recommendation 13)

Amend section 21 (2) to ensure that the Conservator *must* either carry out a nature conservation monitoring program' or commission another entity to carry out a nature conservation program (See Recommendation 7).

Amend section 21 to include that the Conservator *must*:-

- prepare and publish a biodiversity research and monitoring program based on Guidelines developed and reviewed at least every 5 years by the Scientific Committee; and
 - publish an annual report on this program and its implementation. (see Recommendation 7)
-