



Environmental Defender's Office
AUSTRALIAN CAPITAL TERRITORY

10 January 2014

Manager - Natural Environment
Environment and Sustainable Development Directorate
ACT Government
GPO Box 158
Canberra ACT 2601

By email: environment@act.gov.au

Dear Sir/Madam,

Re: EDO ACT submission¹ - Exposure Draft Nature Conservation Bill 2013

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.

We refer to our previous correspondence in relation to consultation on the Nature Conservation Bill 2013 requesting an extension of time for the analysis of this important and complex piece of legislation and to the Minister's letter dated 16 December 2013 granting an extension of time until 31 December 2013. It was not realistic for this one person office to have a full and detailed submission filed by the time of the extension granted. The office was closed over the Christmas period and on 17 December 2013 all Environmental Defenders' Offices were informed that their Federal funding was to be cut effective immediately. This office relies on the Commonwealth funding almost entirely and for this reason the priorities of our work were immediately altered to focus on the urgent matter at hand.

Accordingly, and as discussed with an officer at the Directorate, the submission herein is an overview only of a limited number of areas pertaining to the Bill. It does not comment

¹ This submission has been prepared by the Executive Director and Principal Solicitor at the EDO (ACT) Inc, Ms Camilla Taylor, assisted by volunteers, Ms Virginia Trescowthick, Ms Jessica Ward and Ms Gabrielle Ho. The authors are grateful for the review comments provided by the EDO (ACT) Chair, Dr Hanna Jaireth.

on all of the issues we would have preferred to have commented on and it is by no means comprehensive. It does not, we believe, discuss broad policy variations nor does it go into the specific detail that we would have otherwise provided on such matters. As discussed, we would welcome the opportunity to provide further detail and are available to discuss any matter arising.

We otherwise rely on our submissions filed with your Department on 9 March 2011.

1. ECOSYSTEM V INDIVIDUAL SPECIES APPROACH

Issue

The ACT EDO's 2011 submission for the *Nature Conservation Act 1980* proposed the adoption of an ecosystem approach. We noted that the Act was 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.²

The Convention on Biological Diversity, finalised at the Earth Summit in 1992, stressed the importance of conserving ecosystems, not merely protecting species,³ and the ecosystem approach has been elaborated in decisions of the Conferences of the Parties (COPs) since its adoption in 2000.⁴ Recognition of the need for an ecosystem approach to biodiversity conservation has been clear within an Australian policy context for at least 20 years.⁵

Gerry Bates, in his seminal text *Environmental Law in Australia*, argues that:

There is little point in seeking to protect individual species of flora and fauna if the habitats in which they exist are not also preserved. The Rio Declaration on Environment and Development, endorsed by Australia, commits the signatories (Principle 7) to conserving, protecting and

² Environmental Defender's Office (ACT), Submission to the Department of Environment, Climate Change, Energy and Water, *Nature Conservation Act 1980*, 9 March 2011, 2.

³ *Convention on Biological Diversity*, opened for signature on 5 June 1992 (entered into force on 29 December 1993) Art 8.

⁴ COP Decision V/6, Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity *Nairobi, Kenya* 15 - 26 May 2000 <<http://www.cbd.int/decision/cop/default.shtml?id=7148>>.

⁵ Jenny Pope, and Moore, Susan, *Planning and Assessment for Biodiversity Conservation at a Landscape-Scale: an evaluation of current approaches and opportunities in Australia* (National Environmental Research Program, 2013) <<http://www.nerplandscapes.edu.au/system/files/Pope%20%26%20Moore%20%282013%29%20Planning%20%26%20Assessment%20Report%20-%205%20April%202013%20WEB.pdf>> 1.

restoring the health and integrity of the earth's ecosystems. An ecosystem approach to conservation and management therefore emphasises preservation of habitat as integral to the survival of species; and forms the basis of the concept of protection of biological diversity enshrined in the Convention on Biological Diversity.⁶

The species approach, in singling out particular species and ecological communities and their habitat for enhanced protection, may be seen as taking positive action to restore the status of species under threat. Yet it can also 'be seen as placing undue emphasis on particular species and ecosystems, while at the same time devaluing the status of biodiversity that is not currently so classified'.⁷

*It does seem clear that without proper attention to conservation of biodiversity that is not currently classified as formally 'threatened', many more species could be invested with that status in the years ahead, throwing further strain on the resources available for dealing with threatened species.*⁸

Rather than identifying threatened species, and then reacting, our laws should operate proactively. Such an approach was recommended in the Bruntland Report on sustainable development.⁹ The EDO believes that by failing to adopt an ecosystem approach, which anticipates and prevents biodiversity loss, the Bill represents a missed opportunity to adopt the best-practice approach to biodiversity conservation.

Reform Options

While the Act adopts a species approach, the EDO acknowledges that 'landscape scale conservation' is discussed in the ACT Nature Conservation Strategy 2013-23,¹⁰ and that the Act provides that 'the conservator must take reasonable steps to implement the strategy'.¹¹ However, there are no explicit ramifications for situations where 'reasonable steps' have not been taken. The EDO recommends **a strengthening of clause 51 of the Act to ensure implementation of the strategy**. This may involve identifying

⁶ Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 8th ed, 2013) 428.

⁷ *Ibid* 543.

⁸ *Ibid*.

⁹ World Commission on the Environment and Development, *Report of the World Commission on the Environment and Development: Our Common Future*. UN Doc A/42/427, June 1987, <<http://www.un-documents.net/wced-ocf.htm>>.

¹⁰ Environment and Sustainable Development Directorate, *ACT Nature Conservation Strategy 2013-23* (ACT Government, 2013) 14.

¹¹ Nature Conservation Bill 2013, s 51.

environmental outcomes or standards enunciated in the strategy that are not to be compromised, or are to be achieved, as the case may be.¹²

The EDO notes that ‘in exercising a function, the conservator may have regard to... the nature conservation strategy for the ACT’.¹³ In line with recent comments from the Hon. Brian Preston, Chief Judge of the Land and Environment Court of NSW, that ‘environmental statutes are bountiful in bestowing discretionary powers on regulatory agencies but rarely burden them with duties and obligations’,¹⁴ the EDO urges the **discretionary ‘may’ in s 18 to be changed to an obligatory ‘shall’**.

Critical Habitat

Issue

Given that an ecosystem approach to biodiversity has not been adopted by this Bill, but rather, a focus on threatened species and communities, we urge that greater attention be directed to the protection of habitat critical to the survival of particular threatened species, populations and ecological communities.

Reform Options

The EDO recommends the **addition of ‘critical habitat’ as a subclass to Chapter 4 – ‘Threatened native species and ecological communities’**. The Bill should be focusing on habitat in addition to individual species, at least in relation to the critically endangered, endangered and vulnerable classes.

The EDO notes that the Nature Conservation Strategy includes well developed and holistic attention to ecosystems,¹⁵ however there is no statutory basis for this scheme. The EDO recommends that **the strategy be given a statutory basis**.

¹² Brian J. Preston, ‘Adapting to the Impacts of Climate Change: the Limits and Opportunities of Law in Conserving Biodiversity’ (2013) 30 *EPLJ* 375, 376.

¹³ Nature Conservation Bill 2013, s 18(4)(b).

¹⁴ Preston, above n 12, 381.

¹⁵ Environment and Sustainable Development Directorate, *ACT Nature Conservation Strategy 2013-23* (ACT Government, 2013) 17.

Critical Habitat – role of the Conservator, Scientific Advisory Committee and the public

Issue

The Conservator is responsible for the drafting of action plans.¹⁶ Otherwise, the Act does not provide that the Conservator can determine an area to be critical habitat, nor does it provide criteria for determining the eligibility of areas as critical habitat.¹⁷

Similar to the listing process under the Bill, the Scientific Advisory 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. Similar to the listing process, the Act ought to allow a member of the public to nominate an area as Critical Habitat.

Reform Options

In much the same way as the listing process under the Act currently operates, **the Conservator in consultation with the Scientific Advisory Committee should be responsible for identifying areas of critical habitat** (based on scientific criteria, not social and economic considerations) and refer recommendations to the Minister to make the final determination.

It is preferable for the Scientific Advisory Committee to make recommendations for areas to be declared critical habitat as the Scientific Advisory Committee is less likely to be influenced by factors not related to nature conservation (particularly if it is guided by legislative criteria). It should be mandatory for the Minister to declare an area as critical habitat on the basis of the Scientific Advisory Committee's recommendations.

¹⁶ Nature Conservation Bill 2013, s 90.

¹⁷ Lawyers 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'.

For example, in Tasmania, where the Secretary, after consultation with the Scientific Advisory Committee, is satisfied that an area is critical habitat, the Secretary *must* determine the area to be Critical Habitat.¹⁸

Also, similar to the current listing process, **a public nomination process for areas of critical habitat should be established.** Anyone should be able to nominate an area as critical habitat.

The EDO recommends that **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.

Adaptive Management

Issue

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. For a regulatory framework to have teeth, it must fulfil two basic requirements. First, it must strive to implement ecologically sustainable development (ESD). Second (and in order to translate ESD into outcomes), it must be based on best-available science, which requires governments to fund specialised research units over the long term.¹⁹

Reform Options

The EDO calls for the Bill to ensure its mechanisms such as action plans are subject to adaptive management. The EDO encourages the ACT to accept this challenge and position itself as a national leader in adaptive management modelling and to invest in additional and continuing scientific research so that the biodiversity protection and

¹⁸ *Threatened Species Protection Act 1995* (Tas), ss 23, 8.

¹⁹ Environmental Defender's Office NSW, Submission to Standing Committee on Natural Resource Management (Climate Change), *Sustainable Water Management Inquiry*, 13.

management framework is based on the best available ecological science. A contemporary management system of this nature allows the Act and its functions flexibility to address the risk arising from future key threatening processes including climate change.

2. CONSERVATOR

Decision Making

The role of the Conservator is vital to the identification and protection of biodiversity in the ACT. The Conservator is required to have regard to the Objects of the Act in exercising the functions under the Act. However, it is left to the Conservator's discretion whether to have regard to the ACT Nature Conservation Strategy in exercising a function under the Act. This discretion of making the Strategy an option to consider is at odds with the Conservator's obligation to take reasonable steps to implement the Strategy and the importance of the Strategy to the fulfilment of the Act's objectives. In exercising a function under the Act, such as preparing a draft action plan, it ought to be mandatory for the Conservator to regard the ACT Nature Conservation Strategy.

Making this task more stringent is aimed at increasing accountability for implementation of the Nature Conservation Strategy (s 51).

The Objects identify the goals of the Act and the Conservator must have regard to the Objects in exercising their functions (s 18(3)(a)). However, 'having regard to' is insufficiently directive and instead, the Act should require the Conservator, in exercising a function pursuant to the Act, to ensure that that is done in a manner consistent with the implementation of the Objects of the Act.

In a recent decision of the Federal Court of Australia, in *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 the Court set aside a decision of the Commonwealth Minister for the Environment because he failed to have regard to 'approved conservation advice' concerning a listed threatened species, as required by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) before approving

an action that could have a significant impact on the listed threatened species. The Court held that the Minister was obliged to give genuine consideration to the approved conservation advice, and that it was insufficient to say in a statement of reasons that 'any relevant conservation advice' had been taken into account, notwithstanding that in some form or another the conservation advice had been before the Minister.

Similarly, all decision-makers exercising functions and powers under the Nature Conservation Act should be **required** to give genuine consideration to the Nature Conservation Strategy and the Conservator's advice.

Planning matters

Issue

The Conservator should be a key decision-maker on a range of matters relating to biodiversity protection including through input into planning decisions. The Conservator's main functions are 'to develop and oversee policies, programs and plans for the effective management of nature conservation in the ACT' (s 18(1)(a)). The Conservator must prepare a draft action plan for each relevant species, relevant ecological community and key threatening process (s 90(1)).

Reform Options

The Conservator plays a significant role in relation to the conservation of biodiversity in the ACT. However, the powers of the Conservator to influence planning and development decisions should be expanded and strengthened. **The Conservator should have a stronger role in planning matters that have a significant impact on biodiversity, including input into the strategic environmental assessment component of the *Planning and Development Act 2007 (P&D Act)* 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 a strategic environmental assessment to be prepared for a draft reserve plan (s 164(1)) or draft land management plan (s 322(1)) without Conservator input into strategic environmental assessments.

Strategic Environmental Assessment (SEA) and Environmental Impact Statements (EIS)

Issue

No changes have been made to the role of the Conservator in relation to the EIS and SEA. There is no trigger in the P&D Act for the Conservator to assess the adequacy of or comment on an EIS.

Reform Option

Biodiversity conservation objectives should be integrated in other legislation to strengthen overall biodiversity management. The P&D Act should be amended to require any EIS to address any plans or strategies made under the Act.

Land Management Agreements (LMAs)

The definition of 'Public Land Management Plan' in the *Planning and Development Act 2007* has been amended to mean either a 'reserve management plan' or a 'land management plan'. Planning for public spaces such as reserves, national parks, wilderness areas and catchments is to be determined under the Act. However plans for other public spaces such as urban parks are still under the *Planning and Development Act 2007* as 'land management plans'.

Under the proposed changes, the Conservator is no longer able to prepare draft variations of a plan of management.²⁰ This function is to be undertaken solely by the custodian of the public land in question. **The Conservator should have a greater role in the Land Management Plans in order to ensure consistency in biodiversity management within urban and non-urban spaces.** This would also acknowledge the links between urban and non-urban spaces (or reserves) and the role urban areas play in ensuring species and ecosystem connectivity. The Bill has proposed that the Conservator's role in developing Land Management Plans is to consult with the Custodian who will prepare the plan. There is no obligation for the Custodian to implement the Conservator's initial advice in preparing the plan unless he/she makes an objection to the plan during the public consultation period. It is only following this that

²⁰ Currently specified in the P&D Act, s 318 (b)(i).

the Custodian has to justify why the recommended changes have not been implemented. This seems to be a contrived means of ensuring the plan meets biodiversity objectives.

The Conservator should **retain the ability to prepare the plan**, or the Act should be amended to **ensure that the Custodian adopts the Conservator's recommendations in the first instance**. i.e. s 321(2) should go further to mandate implementation of the Conservator's recommendations.

Land Management Agreements for private landholders occur under s 283 of the P&D Act and are only made in relation to rural leases. An approved LMA must be completed before a lease can be issued. These agreements are to be signed by the Conservator and the private landholder.²¹ As there is no indication that the agreement must be made public (either in the P&D Act or the *Nature Conservation Act*), these agreements suffer from a severe lack of transparency. The agreement should at least be made available to parties with a demonstrated interest in order to increase the likelihood of consistency with any plans or strategies under the NCA and ensuring the Conservator is taking reasonable steps to implement these plans and strategies.

According to the Price Waterhouse Coopers report, the Conservator's role should be confined to setting the policy framework and guidance for development and management of LMAs. The Bill has not specifically addressed LMAs (for private land), rather it focuses on the public land management (particularly for reserves). The Conservator does not appear to have any specific role in setting a policy framework for LMAs. This is a major omission. Rural leaseholds are being replaced over time by subdivided, suburban development, but LMAs on some inner-city rural lease areas, such as a former lease in the Aranda Bushland area, have included Conservator's directions aimed at protecting its high conservation value. Compliance was neither monitored nor enforced and this has been a concern for the Friends of Aranda Bushland for more than a decade. It is recommended that this omission be rectified.

²¹ P&D Act, s 283 (3).

3. OBJECTS OF THE ACT

The inclusion of specified Objects in the Act is a positive step and the EDO commends the Government for the Object of the Act now included in section 6. However, we recommend that certain amendments are made and additional Objectives be added to ensure an adaptable and forward looking regime, particularly in light of emerging issues such as the threats posed by climate change to biodiversity. In particular the Objectives should be updated to reflect current ecological thinking.

Amendments to existing Objects

Issue

Protection to biodiversity is limited to biodiversity of local, regional and national significance (s6(b)).

Reform Options

This wording could be improved by adopting similar wording to that in the Convention on Biological Diversity, national and state biodiversity strategies and the *National Parks and Wildlife Act 1974* (NSW), to cover ‘biological diversity at the community, species and genetic levels.’

Insertion of additional Objects

Issue

The Objects provision does not specifically refer to the protection of ecosystems. The word ‘ecosystems’ is used in the *National Parks and Wildlife Act 1974* (NSW), which refers to the conservation of ‘habitat ecosystems and ecosystem processes’.²²

Reform Options

The EDO recommends **the Objects be amended to specifically refer to ‘ecosystems’** similar to that adopted in NSW.

²² s 2A(1)(a)(i).

Issue

Object provisions often contain competing aims, which means that some Objects may be favoured when a conflict arises. The priority or weight to be given to each Object should be clearly stated, rather than being left to the discretion of the decision-maker.

Reform Options

The Act does not assign priority to any one Object in the objects provision. The EDO recommends **the primary objective should be to conserve, protect and enhance the biodiversity of the ACT**. Chief Justice Brian Preston has stated:

...even if the conservation of biological diversity is included as an object or relevant matter in the statute, it will be but one of many objects or matters to be considered. Inevitably, it loses out in the balancing exercise against more powerful economic and social considerations.²³

Issue

Objects are integral to understanding the scope and purpose of the Act and therefore a highly relevant consideration when exercising powers or carrying out functions under the Act. Unlike the Conservator at s18(3) and the Tree Curator at Part 2A s11B(3) the Minister is not required to have regard to the Objects in the course of decision making and fulfilling the functions of the Act.

Reform Options

We recommend **a provision in the Act expressly requiring consideration of the Act's objectives in decision-making under the Act** and in particular that **the Minister must also have regard to the objects of the Act when making decisions and/or carrying out functions pursuant to the Act**.

Issue

The Objects of the Act do not include aspects of accountability and community involvement in decision-making.

²³ Preston, above n 12, 378.

Reform Options

Reference in the Objects should be made to the principle of accountability. See for example the *Sustainability Victoria Act 2005*, section 4(g): the need to facilitate community involvement in decisions and actions on issues that affect the community and the *Environment Protection Act 1970*, (Vic) section 1L, Principle of Accountability: access to reliable and relevant information in appropriate forms to facilitate a good understanding of environmental issues; and opportunities to participate in policy and program development.

Issue

The Objects of the Act do not provide for an increased indigenous involvement and consultation. We note s 6(c) being a parallel provision of *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act),²⁴ however this object on its own is not explicit enough in its acknowledgement of the role and knowledge of Indigenous peoples in biodiversity management.

Reform Options

The EPBC Act contains additional and effective examples of indigenous engagement, namely 'recognising and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity'.²⁵ The EDO recommends a similar provision be adopted here.

Issue

We note Object s 6(a)²⁶ and although we are supportive of this Object, it could be improved by including reference to the preservation of critical habitat. In addition to a focus on threatened species and communities, greater attention should be directed to the protection of habitat critical to the survival of particular threatened species, populations and ecological communities.

²⁴ S 1(d): to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples.

²⁵ EPBC Act, s 2(g)(ii).

²⁶ S6 (a) protect, conserve, enhance, restore and improve nature conservation, including— native species of animals and plants and their habitats.

Reform Options

Specific preservation of critical habitat ought to be included as an Object. See for example, *Threatened Species Conservation Act 1995(NSW)*, section 3(c): to protect the critical habitat of those threatened species, populations and ecological communities that are endangered.

As discussed above regarding ‘critical habitat’, ‘habitat’ is an important concept and its definition ought to also be incorporated into the definition section at Part 1.3.

4. ACTION PLANS

Issue

Giving sufficient regulatory weight to the key protection instruments designed to implement and enforce the practical day to day conservation of protected matters is a vital measure of effective conservation legislation. This includes action plans.

The Conservator must take reasonable steps to implement an ACT Nature Conservation Strategy (s 51), Action Plans (s 95) and Native Species Conservation Plan (s 110). There is no further information in the Act on the regulatory weight to be given to these documents.

The EDO is concerned that there are no obligations or incentives for landholders and land users to implement the strategy and plans, although the Conservator can make enforceable directions in relation to the plan or strategy (s 309, 311). The Act does bind anyone to take any actions or to refrain from taking any actions pursuant to the 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.²⁷

²⁷ Victorian Auditor-General, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009, 31.

Although subsidiary conservation instruments coexist with the Act, the Act itself lacks any general monitoring mechanisms for individual breach or compliance with the plans or strategies.

The monitoring and review of action plans are dealt with in s 96. Conservation and protection strategies such as action plans need to be regularly reviewed or updated to take into account environmental changes or new information available on the listed item. See also page 6 above regarding adaptive management. The Conservator must monitor the effectiveness of action plans, but the Act does not regulate as to compliance. The Act requires a report to the Minister about each action plan at least once every 5 years, but it does not contain performance measures. 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.

Reform Options

Under the Act it needs to be mandatory for an action plan to:

- set out what *has been done* to conserve and manage a species or community and what is *intended to be done*;
- include information on what *needs to be done* to protect and conserve the species or community or to stop the threatening process;
- the Act should include a requirement that decision-making should not be inconsistent with action plans;
- the Act should include a 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 3 years and may make changes to

the Priorities Action Statement pursuant to any such review by adopting amendments to the Statement;²⁸

- 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;²⁹
- the Act should contain 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;
- Action Plans should identify priority actions.

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. In the Victorian Auditor General's performance review of the *Flora and Fauna Guarantee Act 1988* it was recommended that such plans should:

- identify the species of flora and fauna to be protected, or the threatening process to be controlled;
- identify location or locations involved;
- identify the other government agencies that will help facilitate the achievement of the strategies;

²⁸ *Threatened Species Conservation Act 1995 (NSW)*, s 90B(3).

²⁹ *Threatened Species Conservation Act 1995 (NSW)*, s 90B(4).

- state the actions to be taken and who is required to undertake them; and
- outline mechanisms to monitor and report on compliance with the actions and the department's performance in achieving measurable objectives of the plan.³⁰

5. STAKEHOLDER ENGAGEMENT

The EDO is concerned by the absence of co-management arrangements with ParkCare, Catchment Management 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.³¹

6. INDIGENOUS CONSULTATION

Issue

Aboriginal people have rights and responsibilities over land and waters as the traditional owners of those lands and waters. In turn, Aboriginal people require access to lands and waters to continue their traditions. However, there are large areas of lands and waters to which access by Aboriginal people today is restricted.

The EDO notes that, despite the fact that Aboriginal people have managed the natural environments of the ACT for thousands of years, consultation requirements with Aboriginal people are inadequate. The omission appears to occur not only in the subject Act, but across the ACT legislative framework.³²

An Object of the Act is to 'promote the involvement of, and cooperation between, Aboriginal and Torres Strait Islander people, landholders, other community members

³⁰ Victorian Auditor-General's Report, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009, 31.

³¹ See: < http://www.iucn.org/about/work/programmes/gpap_home/gpap_capacity2/gpap_bpg/?13678/Governance-of-Protected-Areas-From-understanding-to-action>.

³² Environmental Defender's Office (ACT), Submission to the ESDD, *Heritage Legislation Amendment Bill 2013*, <<http://www.edo.org.au/edoact/submissions/EDO%20submission%20-%20Heritage%20Amendment%20Bill%202013.pdf>> 8; Environment Defender's Office (ACT), Submission to the ESDD, *Draft ACT Water Strategy 2013* <<http://www.edo.org.au/edoact/submissions/Draft%20ACT%20water%20strategy%202013.pdf>> 22.

and governments in protecting, conserving, enhancing, restoring and improving biodiversity³³ and comment on this Object has been made earlier in this submission. Other than sections 197 and 198, which concern benefit-sharing agreements, this discretionary Object is the *sole* reference to indigenous consultation.

Reform Options

The EDO recommends that **the Act and the conservation instruments be amended to increase indigenous consultation requirements**. In particular, the Act ought to be amended to introduce the concept of *bio-cultural diversity* which encourages dialogue between conservation actors, indigenous peoples and local communities. Decision making and conservation instruments created pursuant to the Act should promote support for traditional cultures and their knowledge to conserve local landscapes and the biodiversity living within them. We note the ACT Nature Conservation Strategy 2013-23 does not mention cultural values or consultation at all other than in the definition of a 'Reserve' as a protected area. **Traditional knowledge and practices should be recognised, valued and maintained** as cultural knowledge alongside contemporary science, can contribute to problem solving and adaptation, for example in the context of climate change.³⁴

Further, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)³⁵ can be used as a policy framework applicable for conservation occurring in the lands and territories of indigenous peoples. The EDO recommends the government review and consider such policy as it will become increasingly relevant in relation to climate change mitigation and adaptation measures.

7. MONITORING AND ENFORCEMENT

Nature conservation requires the goals and objectives of environmental protection legislation to be complied with. Such laws are only effective when supported by fully operational monitoring and enforcement mechanisms and options. The importance of

³³ Nature Conservation Bill 2013, s 6(c).

³⁴ See also: <http://cmsdata.iucn.org/downloads/bcd_ip_report_low_res.pdf>.

³⁵ United Nations Declaration of the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

an efficient suite of compliance, enforcement and audit functions was discussed in detail in the thorough and independent review of the *Environment Protection and Biodiversity Conservation Act, 1999 (Cth)* by Allan Hawke AC.³⁶

The most recent national State of the Environment Report stated that ‘while all jurisdictions have appropriate goals in high-level plans, these are often not matched with implementation plans or levels of resourcing that are capable of achieving the goals. State of the Environment Reports from around the nation do not suggest any great improvements in biodiversity or reduction in pressures’.³⁷

The EDO is concerned that this message is not being heeded. We recognise the usually sound law and policy frameworks created by the ACT legislature and executive, but are concerned that a lack of enforcement of legislation allows for a lack of compliance from private and public bodies alike. There is no utility in having such a worthy framework if monitoring, enforcement and promotion of compliance is not rigorous.

Monitoring

Issue

Regarding the status of the ACT’s biodiversity, the 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’.³⁸ In order for adequate monitoring and evaluation to occur, there must be an obligation to publish the status of key indicators of the ACT’s biodiversity on a regular basis. The EDO agrees with the Hon. Justice Brian Preston that ‘what you measure, you manage’.³⁹

³⁶ 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>>.

³⁷ State of the Environment Committee, Department of Sustainability, Environment, Water, Population and Communities, *Australian State of the Environment Report* (2011) 568.

³⁸ ACT State of the Environment Report 2011, Executive Summary, 9.

³⁹ Preston, above n 12, 388.

Reform Options

In 2011, the EDO recommended that the Act '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'.⁴⁰ This recommendation has not been implemented, and **we again call for its inclusion in the Act.**

The EDO also recommended 'regular review of the Act and key policy documents under it, such as the Nature Conservation Strategy, be a legislative requirement'.⁴¹ We note that the Act has been amended to impose set times for review for the Nature Conservation Strategy,⁴² action plans,⁴³ and controlled native species conservation plans.⁴⁴ However, given the changing nature of biodiversity science and the importance of the Nature Conservation Strategy, we recommend the **review time for the Nature Conservation Strategy to be changed from 10 years⁴⁵ to 3 years.** This recommendation is comparable with the *Threatened Species Conservation Act 1995* (NSW), which requires the Director-General to review the Priorities Action Statement every 3 years.⁴⁶ The EDO also recommends that a **review of the Act, every 5 years, becomes a legislative requirement.**

Further, information about the health of biodiversity in Canberra's protected areas could be made available in an annual ACT State of the Parks Report. Transparency and the opportunity for public comment ought to be made available for matters that are in the public interest. Public participation is a critical process needed to inform high-quality decision-making.⁴⁷

There are currently many volunteer groups established in Canberra that regularly band together to improve Canberra's natural environment. This collective commitment and know how could be harnessed by the Government as an opportunity to assist with a

⁴⁰ Environmental Defender's Office (ACT), above n 2, 2.

⁴¹ *Ibid.*

⁴² Nature Conservation Bill 2013 (ACT), s 52.

⁴³ Nature Conservation Bill 2013 (ACT), s 96.

⁴⁴ Nature Conservation Bill 2013 (ACT), s 154.

⁴⁵ Nature Conservation Bill 2013 (ACT), s 52.

⁴⁶ *Threatened Species Conservation Act 1995* (NSW), s 90B(3).

⁴⁷ Hawke, above n 36, 242.

programme of ongoing assessment, monitoring and reporting. For example, many of the strategies described in the Draft Nature Conservation Strategy could be achieved with the help of ParkCare trained volunteers. These groups could assist with threatened species sightings and reporting, weed mapping, reporting on the management of threats to the biodiversity, report on the successes or failures of the Strategy's Action Plans if implemented as well as achieving another of the Strategy's targets which is to strengthen community engagement.

Enforcement

Issue

The Discussion Paper released prior to the Review of the Act discussed the fact that there has been very little enforcement of the Act. Effective regulation relies on effective enforcement. It follows that a wider range of enforcement options is required to ensure compliance with the Act and to improve biodiversity outcomes. The EDO therefore welcomes the new strict liability offences⁴⁸ in the Act.

However, in light of the fact that there has been very little enforcement of the Act, and that concerns have been raised by successive State of the Environment Reports about the inadequacy of implementation plans and levels of resourcing for achieving the goal of nature conservation,⁴⁹ the following admission in the Explanatory Statement is of great concern to the EDO:

*The Bill has no significant revenue impacts or additional costs of administration. The provisions of the Bill are largely procedural... Associated costs of an administrative nature will be met from existing resources and budgetary allocations.*⁵⁰

Reform Options

Greater monitoring and enforcement capabilities require an injection of resources. Requisite funding is needed to ensure enforcement mechanisms are effectively exercised. Adequate monitoring and enforcement requires, inter alia, an expansion of

⁴⁸ Explanatory Statement, Nature Conservation Bill 2013 (ACT) 4.

⁴⁹ State of the Environment Committee, Department of Sustainability, Environment, Water, Population and Communities, *Australian State of the Environment Report* (2011) 568.

⁵⁰ Explanatory Statement, Nature Conservation Bill 2013 (ACT) 7.

the existing functions and activities of the Commissioner for Sustainability and the Environment. This would necessarily require growth of the current office and an increase in associated funding.

The wider range of enforcement options incorporated into the new Act will improve biodiversity outcomes, but they will only be effective if resources are made available to allow for future compliance enforcement. Only a system of formal monitoring, assessment and auditing process will establish a strong culture of compliance enforcement. Again, requisite resourcing is required to ensure that biodiversity is identified, maintained, enhanced and protected.⁵¹

8. CLIMATE CHANGE AS A KEY THREATENING PROCESS

Issue

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 (s 63). The threatening process is listed in the key threatening processes list (s 64) which is a list notified under s 80 (s 65). The Minister makes the list (s 66), but must develop the criteria in consultation with the Conservator and the Scientific Committee (s 68(4)) and the criteria may only include scientific matters.

Climate change is not explicitly included as a key threatening process in the Act and it will be left to the Minister's discretion whether to list it or not.

Climate change will have a number of impacts on all of our society and our urban and natural environment. It is likely to lead to changes in the availability of water, an increase in drought severity due to high temperatures and an increase in the frequency and intensity of weather events such as storms, floods and bushfires. This in turn is likely to lead to additional pressure on the Territory's water resources and biodiversity, and may significantly change the patterns of bushfire and extreme weather events.⁵²

⁵¹ For more information please see Submission to 2013-14 Budget Consultation Process, EDO ACT, 12 April 2013. Available at [http://www.edo.org.au/edoact/submissions/EDO%20\(ACT\)%20Submission%20to%20Budget%20Consultation%20Process%202013%20-%2014.pdf](http://www.edo.org.au/edoact/submissions/EDO%20(ACT)%20Submission%20to%20Budget%20Consultation%20Process%202013%20-%2014.pdf).

⁵² ACT State of the Environment Report 2011, Executive Summary, 5.

Climate change impacts represent another threat to the sustainability of certain communities and the climate change impacts on ecosystems are well documented.

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 EPBC Act.⁵³

Climate change is likely to exacerbate existing pressures on ecosystems, habitats and biodiversity, as well as give rise to new pressures. Current baseline pressures on natural environments, such as habitat and biodiversity loss, pollution, fire and the spread of weeds and introduced animal species, are likely to increase.⁵⁴

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.⁵⁵

Reform Options

The process to list climate change as a key threat is in place and it needs to be reflected in the final Act. Such an amendment necessitates an adaptive management approach which has been discussed elsewhere in this submission.

Reform of the limitations of the existing laws is needed to reduce baseline pressures and prevent, control and mitigate new pressures.⁵⁶

In this regard there is no fundamental difference between this new Act and the 1980 version. The EDO urges that **adaptive management be adopted and climate change be included as a key threatening process**. Addressing this threat could begin by introducing a biodiversity overlay into the Territory Plan to ensure ecological communities and

⁵³ ANEDO, Submission to the 10 year review of the *Environment Protection and Biodiversity Conservation Act 1999*, January 2009 <<http://www.edo.org.au/policy/090219epbc.pdf>>, 59–68.

⁵⁴ Preston, above n 12, 375.

⁵⁵ Ibid.

⁵⁶ Ibid.

corridors are recognised and to assist in their protection over time. Such a mechanism should be given regulatory weight pursuant to the Act.

Please contact the writer at the EDO <edoact@edo.org.au> should you wish to discuss any matter arising.

Yours sincerely

Environmental Defender's Office (ACT) Inc

Camilla Taylor

Executive Director and Principal Solicitor