13 February 2012

Committee Secretary
Senate Standing Committees on Environment and Communications
By email: ec.sen@aph.gov.au

Dear Secretariat,

Below are responses to two questions taken on notice on behalf of the Australian Network of Environmental Defenders Offices (ANEDO) at the Public hearing into the EPBC Amendment (Emergency Listings) Bill 2011 on 3 February 2012.

1) **Are there emergency listing processes for species to get onto the threatened list at the state level?**

Summary
NSW is the only State with an emergency listing process for threatened species.

Victoria
There are no emergency listing procedures for threatened species in Victoria. The process for listing of species is in the *Flora and Fauna Guarantee Act 1988.* The Minister cannot list a species until it has gone through a full scientific advisory committee process which under the Act can take up to three years. There is provision to make a 'critical habitat determination' to protect critical habitat of any species (not just those listed) and then implement some management arrangements, however those processes are also lengthy and are not suited to emergency situations. Further, no critical habitat determination has ever been made.

Western Australia
WA does not have threatened species legislation as such. It has a Wildlife Conservation Act, and flora and fauna can be listed as rare under this Act, however it is not integrated with the development assessment process. The state environment agency does have its own non-statutory lists of threatened species which it takes into account when asked to comment in the context of an EIA, however there is no statutory process for emergency listing, because the listing process depends entirely on departmental discretion. With the absence of threatened species legislation in WA, we rely on Federal controls to ensure that there is a proper transparent process for consideration of threatened species impacts.

Tasmania
There are no emergency listing procedures in the *Threatened Species Protection Act 1995*. Under s 32, the Minister can make an interim protection order in respect of habitat for a listed species, or a nominated species which has been accepted by the Scientific Advisory Committee (SAC) for listing, but the SAC approval process is lengthy so wouldn't generally be useful in an emergency situation. An interim protection order (IPO) can prohibit activities, require work to be done or require further permits to be obtained, but the IPO only remains in force for 30 business days on private land (65 business days for Crown land).

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NSW

The *Threatened Species Conservation Act 1995* (TSC Act) provides for a process for emergency listing of threatened species in Division 4.[1] The NSW Scientific Committee may list a species on an emergency basis by giving it a provisional listing.[2] Generally the Committee is to consider an emergency nomination as soon as practicable, and in any case must generally make a determination about a nomination within 6 months.[3]

Once a determination for provisional listing is published, the TSC Act (Schedule 1 or 1A – endangered and critically endangered species) is taken to have been amended to include the species, until the provisional listing ceases to have effect.[4]

Northern Territory

There is no process for emergency listing of threatened species in the NT. The process for listing of threatened species is regulated by the *Territory Parks and Wildlife Conservation Act* (NT), Part IV, Div 2, Subdivision 1.

Queensland

There are no emergency listing procedures in the *Nature Conservation Act 1992* (Qld) (NCA). A major criticism of the listing process in Queensland is that it is very slow (many years). However, the NCA allows the Minister, upon being satisfied of certain things, to issue an interim conservation order (ICO) (see s.102). An ICO may prohibit or place controls on a specified threatening process. It is for a limited duration (up to 60 days with possible extension for up to 90 days).

2) If a new species is found after a project has been referred for assessment, under state law is there any provision for that species to be considered as part of the state-level environmental impact assessment process?

Summary

NSW is the only state where a non-listed species which is discovered after project referral but before the final decision, is required to be taken into account in the assessment. In most other States the species can be taken into account, but it is at the discretion of the decision-maker and there is no requirement to do so.

Victoria

There is very little legal protection of flora and fauna in Victoria. There is no legal requirement for project assessments to consider listed or non-listed species, so whether a newly discovered species is considered as part of project assessments is at the discretion of the agency conducting the assessment. If a decision is appealed to the Victorian Civil and Administrative Tribunal, the Tribunal it will hear the appeal de novo so could consider the species at that stage, but again there is no legal requirement to do so.

Western Australia

As noted above, flora and fauna can be listed as rare under Wildlife Conservation Act, however it is not integrated with the development assessment process and therefore there is no requirement to consider species.

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[1] See EDO NSW factsheet *6.1 Threatened Species and ecological communities*, available at http://www.edo.org.au/edonsw/site/factsh/fs06_1.php#_ftn21.
[2] *Threatened Species Conservation Act 1995* (NSW) s 27.
[3] *Threatened Species Conservation Act 1995* (NSW), s 32.
[4] *Threatened Species Conservation Act 1995* (NSW), s 34. Provisional listing will cease via the earliest of – final determination by Scientific Committee to list; not list; or within 12 months of provision listing (s 36).

Tasmania

There are no specific provisions in relation to this issue, but a planning authority would generally be required to have regard to information available at the date of its decision so would be able to take post-application listings into account. Furthermore, the Resource Management and Planning Appeal Tribunal hears appeals de novo, so is able to have regard to post-application listing / nomination and assessment. All government authorities (including Councils) have an obligation to make decisions in a manner which furthers the objective of "sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity".

New South Wales

Under the *Environmental Planning and Assessment Act* 1979, (EP&A Act), the point at which the consent authority needs to consider impacts on threatened species is the time they are deciding whether or not to approve the development.[5]

In particular, s 79C(1) of the EP&A Act requires the consent authority to take into account impacts on the natural and built environment and the public interest (among other things). This is taken to include impacts on threatened species.

Any determination to grant consent or approve an activity under the EP&A Act must take into account a variety of listed matters in deciding whether there is likely to be a 'significant effect' on a threatened species (s 5A).[6]

Consent authorities must also 'have regard to' the register of critical habitat when deciding whether to grant development consent.[7]

However, if the species is not listed as a threatened species at the time of approval, there is no specific obligation to take it into account. There are general obligations that a consent authority must consider in evaluating a development application, including:

- the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality, and
- the public interest. [8]

Northern Territory

There is no legal requirement to for project approvals to consider species that are not listed. The NT Environment Department (NRETAS), under the Environment Minister, is required to consult with agencies during the EIA process. The Environment Minister is also responsible for listing of threatened species. If a listing process was going on in parallel with the EIA process, presumably the EIA section would become aware of this process through consultation with the threatened species unit of NRETAS. However, the Environment Minister can only make recommendations to the 'Responsible Minister' under the EIA process. As stated above, there are no explicit requirements for interim or emergency listing of species to capture these scenarios.

Queensland

There is no requirement to take into account species that are not listed at the time of project assessment, however the decision maker has some discretion to do so. Under the *Sustainable Planning Act* (SPA) (State planning law), the assessment manager (usually local Council) must assess a development application against the planning schemes, codes, laws or policies that applied at the time the application was lodged. They have a discretion to consider new codes, laws or policies that came into force during the assessment process (but not

[5] See eg *Environmental Planning and Assessment Act 1979*, s 5A and s 79C(1).
[6] "For the purposes of this Act and, in particular, in the administration of sections 78A, 79B, 79C, 111 and 112…"
[7] *Threatened Species Conservation Act 1995* (NSW) s 50(b); *Environmental Planning and Assessment Act* 1979, s. 5B.
[8] *Environmental Planning and Assessment Act* 1979, s 79C(1)(b),(e).

during the decision stage). State government departments, like the Department of Environment & Resource Management (DERM), are referral agencies for certain applications that provide input into development applications. In certain circumstances they can require an application to be refused or approved, subject to certain conditions. So, depending on when the new species was identified / or the listing occurred, and depending how the species was incorporated into the applicable planning instruments / referral agency jurisdictions, the planning authority would be able to take post-application listings into account, however there is no clear legal requirement to do so.

If a decision of the assessment manager is appealed, the Planning & Environment Court of Queensland sits in the position of the assessment manager and hears the evidence anew. It must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies the court considers appropriate. So it is at the discretion of the Court to consider new listings or new evidence about the conservation status of species.

For major infrastructure projects there are broad obligations to consider the environment (as far as we know there are no provisions in the *State Development & Public Works Organisation Act 1971* that expressly exclude consideration of a newly listed species). We expect a new listing would be a relevant consideration. However, for most of these projects (declared 'state significant') there are no appeal rights available (so you can't appeal the decisions on the merits).

Please contact me if you would like further information.

Yours sincerely,

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(on behalf of the Australian Network of Environmental Defenders Offices)