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16 December 2012

Dear Secretary,

**Submission to the Senate inquiry on threatened species and ecological communities' protection.**

The Nature Conservation Council of NSW (NCC) welcomes the opportunity to provide comment to the Senate inquiry on the effectiveness of threatened species and ecological communities' protection in Australia.

NCC is the peak environment group for NSW, representing more than 100 community environment groups across the state. This submission is informed by NCC's longstanding involvement in threatened species policy and supporting publications that provide further detail.

In 2006, NCC commissioned the Environmental Defender's Office (EDO) to conduct a review of the effectiveness of biodiversity-related laws in NSW<sup>1</sup>. We will mail that report as an addendum to this submission and include the Nature Conservation Council's submission on the review of the *Threatened Species Conservation Act 1995* as a second addendum to this submission.

One of the best investments Australia can make is the protection of our biodiversity. Healthy, natural ecosystems and ecosystem processes provide clear air and water, billions of dollars worth of goods and services and are essential for the wellbeing of local communities and businesses in NSW. Maintaining the current regulatory framework for biodiversity is not an acceptable option in light of the rate of decline of biodiversity and increasing threat across the country.

There is evidence to show recovery of threatened species is possible where sufficient resources and expertise have been applied. Given resources and commitment, our conservation initiatives can yield positive outcomes, however responses will need to be

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<sup>1</sup> *The statue of biodiversity conservation in New South Wales and recommendation for its reform.* November 2006. Environmental Defenders Office and Nature Conservation Council of NSW.

substantially scaled up because the current level of conservation action is outweighed by the magnitude of threat.

Implementation of all existing recovery plans would go along way towards reversing the biodiversity crisis in Australia. Yet one major stumbling block in the success of recovery plans is the lag time between the listing of species and the development and implementation of effective plans. New South Wales has over 1,017 listed species and communities and only about 96 recovery plans.

There are currently only four areas declared as critical habitat in New South Wales under the *Threatened Species Conservation Act* including the Wollemi Pine, the Gould's Petrel, Little Penguin population in Sydney Harbour, and the Mitchell's Rainforest Snail. In all cases except for the Little Penguin, areas of critical habitat have only been declared entirely within existing protected areas.

To improve protection and management of endangered species, critical habitat should be part of the key performance indicators of all national parks and the government should make better use of listing critical habitat under the *Environment Protection and Biodiversity Conservation Act*. One fifth of species considered critically endangered have no formal protection in Australia. It is therefore also necessary to assess the effectiveness of threatened species laws outside the reserve system.

The existing process for listing threatened species, populations and ecological communities under the NSW *Threatened Species Conservation Act* has a number of important positive features that should be retained, including the expert membership and independent role of the Scientific Committee; provision for nomination of a species, population or ecological community by any person; the opportunity for public comment on the Scientific Committee's preliminary determination; requirement to consider only scientific matters in making a listing determination; and provision for the listing of endangered ecological communities.

Harmonisation of federal and state assessment processes is a desirable outcome, provided that the level of protection afforded to threatened species is not adversely affected. In the absence of comprehensive information about the location and condition of threatened species, it is essential that any integrated approval process retains a requirement to undertake site-level assessment.

Of great concern is the lack of resources at both the Federal and State and Territory level for the listing process. The data required to make a proper assessment of whether a species or population should be listed often does not exist, in large part due to consistent under-funding of relevant State agencies.

Serious under-resourcing means that even when limited data indicates that further research is required which would likely support the listing or upgrading of threatened flora and fauna, the required work is rarely undertaken. NSW Government resources in this area are increasingly more limited due to relevant agencies facing budget cuts and the loss of personal.

The Australian Network of Environment Defenders Office has conducted a thorough assessment of threatened species laws and planning legislation in each jurisdiction.<sup>2</sup> It

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<sup>2</sup> *An assessment of the adequacy of threatened species and planning laws in all jurisdictions in Australia*, December, 2012, Australian Network of Environmental Defender's Offices Inc. (ANEDO).  
[http://www.edo.org.au/edonsw/site/policy\\_discussion.php](http://www.edo.org.au/edonsw/site/policy_discussion.php)

shows that no State or Territory planning laws meet best practice standards for environmental assessment. The failings of State and Territory laws to effectively avoid and mitigate impacts on threatened species is most apparent in relation to provisions for the fast-tracking of environmental impact assessment for major projects. Given the common failings of legislation in all jurisdictions, a clear finding of this report is that threatened species laws in all jurisdictions needed to be reviewed, strengthened, and fully resourced and implemented.

Australia is facing a decline in biodiversity across the country. Given increasing population pressures, land clearing, invasive species and climate change, this trend will continue if urgent steps are not taken. Now is *not* the time to be streamlining and minimizing legal requirements in relation to threatened species assessment.

NCC is also engaged in extensive comment in relation to planning reforms under way within NSW. It is important for long term sustainability that there is effective interaction across not only jurisdictions but also between legislative instruments. At present the NSW Green Paper on Planning does not bode well for important and fundamental aspects of biodiversity conservation.

NCC supports the submission made by our member group, the National Parks Association of NSW and the above mentioned EDO publication, *An assessment of the adequacy of threatened species and planning laws in all jurisdictions in Australia*. NCC requests the right to speak at the public hearing on this matter.

Yours sincerely,

Katherine Smolski  
Campaigns Director

Tom Grosskopf  
Director, Landscapes and Ecosystems Conservation Branch  
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PO Box A290, Sydney South NSW 1232

By email: [tscact.review@environment.nsw.gov.au](mailto:tscact.review@environment.nsw.gov.au)

19 November 2010

Dear Mr Grosskopf,

**Submission on the review of the *Threatened Species Conservation Act 1995***

The Nature Conservation Council of NSW (NCC) welcomes the opportunity to provide comment on the statutory review of the *Threatened Species Conservation Act 1995* ('the Act').

NCC is the peak environment group for NSW, representing more than 100 community environment groups across the state. This submission is informed by NCC's longstanding involvement in threatened species policy and input from NCC member groups including, most recently, a consultation workshop on the review of the Act held at the NCC Annual Conference.

In 2006, NCC commissioned the Environmental Defender's Office (EDO) to conduct a review of the effectiveness of biodiversity-related laws in NSW.<sup>1</sup> This submission draws on the findings of that review, as well as more recent EDO publications in relation to biodiversity and climate change.<sup>2</sup>

Yours sincerely,

Pepe Clarke  
Chief Executive Officer

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<sup>1</sup> Environmental Defender's Office (2006) *The Status of Biodiversity Conservation in New South Wales and Recommendations for Reform*, Nature Conservation Council, Sydney, Australia.

<sup>2</sup> Environmental Defender's Office (2009) *Climate Change and the Legal Framework for Biodiversity Protection in New South Wales: A legal and scientific analysis*, Environmental Defender's Office, Sydney, Australia.

## NCC SUBMISSION ON THE REVIEW OF THE THREATENED SPECIES CONSERVATION ACT 1995

**‘Maintaining the current regulatory framework for biodiversity is not an acceptable option in light of the rate of decline of biodiversity and the increasing threats in New South Wales’.<sup>3</sup>**

NCC recognises the important role of the *Threatened Species Conservation Act 1995* (‘the Act’) in identifying and protecting threatened species, populations and ecological communities.

Notwithstanding its limitations, the Act has positive features that should be retained or enhanced. Any legislative reform arising from the current review must result in improved biodiversity conservation outcomes, rather than a weakening of the existing protections contained in the Act.

### 1. Objects

The objects of the Act remain relevant. However, to provide improved guidance to decision makers, and ensure the primacy of the conservation purpose of the Act, it is recommended that the objects of the Act be restructured, consistent with the approach proposed by the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (‘Hawke Review’):<sup>4</sup>

- (1) The primary object of this Act is to protect, conserve and restore biological diversity and ecological integrity in New South Wales.
- (2) The primary object is to be achieved by applying the principles of ecologically sustainable development as enunciated in the *Protection of the Environment Administration Act 1991*.
- (3) The Minister and all agencies and persons involved in the administration of the Act must have regard to, and seek to further, the primary object of this Act.
- (4) In pursuing the primary object, the Minister must seek:
  - (a) to prevent the extinction and promote the recovery of threatened species, populations and ecological communities;
  - (b) to protect the critical habitat of those threatened species, populations and ecological communities that are endangered;
  - (c) to eliminate or manage certain processes that threaten the survival or evolutionary development of threatened species, populations and ecological communities;
  - (d) to ensure that the impact of any action affecting threatened species, populations and ecological communities is properly assessed; and
  - (e) to encourage the conservation of threatened species, populations and ecological communities by the adoption of measures involving co-operative management.

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<sup>3</sup> Environmental Defender’s Office (2006) *The Status of Biodiversity Conservation in New South Wales and Recommendations for Reform*, Nature Conservation Council, Sydney, Australia.

<sup>4</sup> Commonwealth of Australia (2009) *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Final Report, October 2009.

### *1.1. Conservation Principles*

To improve biodiversity outcomes, it is recommended that decision-makers be required to exercise functions under the Act in a manner that is consistent with the following conservation principles:

- maintain or improve the conservation status of listed species, populations and communities;
- maintain or improve the extent and condition of natural habitats, including critical habitat;
- protect or restore ecosystem services, processes and functions;
- maintain or improve ecosystem integrity, resilience and resistance;
- maintain or improve connectivity within and between ecosystems;
- protect multiple representative examples of ecosystem types;
- facilitate adaptation to environmental change, including climate change; and
- recognise uncertainty and plan for adaptive management.

### *1.2. Consideration of climate change impacts*

In exercising functions under the Act, decision-makers should be required to have regard to the current and predicted impacts of climate change on biological diversity and ecological integrity, including, but not limited to:

- changes in the geographic range of species;
- changes to the timing of species' lifecycle events;
- changes in population dynamics and survival;
- changes in the location of species' habitats;
- increases in the risk of extinction for species that are already vulnerable;
- increased opportunity for range expansion of invasive species;
- changes in the structure and composition of ecosystems and communities;
- changes in coastal and estuarine habitat due to rising sea levels; and
- changes in the intensity and magnitude of existing pressures, including fire and invasive species.

To provide guidance to decision-makers, the Act should require the publication of guidelines on identifying, managing and minimising the impacts of climate change on biological diversity.

## **2. Listing of threatened species, populations and ecological communities**

### *2.1. Positive features of the existing listing process*

The existing process for listing threatened species, populations and ecological communities under the Act has a number of important positive features that should be retained, including:

- the expert membership and independent role of the Scientific Committee;
- provision for nomination of a species, population or ecological community by any person;
- the opportunity for public comment on the Scientific Committee's preliminary determination;
- requirement to consider only scientific matters in making a listing determination; and
- provision for the listing of endangered ecological communities.

The ability of the Scientific Committee to make final and independent determinations in relation to the status of species, populations and ecological communities is an essential feature of the Act.

## 2.2. Recommended improvements in the listing process

It is recommended that the listing process be improved by:

- harmonising federal and state threatened species lists by requiring the Scientific Committee to list any species, population or ecological community listed as threatened under the *Environment Protection and Biodiversity Conservation Act 1999*, if the Committee is satisfied that the species, population or ecological community occurs, or is likely to occur, in New South Wales;
- transferring the provisions for the listing, protection and recovery of threatened marine species from the *Fisheries Management Act 1997* to the *Threatened Species Conservation Act*;
- requiring the Scientific Committee to have regard to the current and predicted impacts of climate change when considering whether to list a species, population or ecological community;
- explicitly allowing for listing of species that is not currently threatened, but is likely to become vulnerable or endangered as a result of the predicted impacts of climate change; and
- allowing for listing of species that play a key role in ecosystem function ('key functional species').<sup>5</sup>

## 3. Identification of critical habitat

To date, the critical habitat provisions of the Act have made a limited contribution to species protection. To improve protection for listed threatened species, it is recommended that:

- the Scientific Committee be empowered to identify and declare critical habitat;
- critical habitat be defined as 'habitat identified by the Scientific Committee as being critical to the *long-term survival or recovery* of a threatened species, population or ecological community';
- in the case of critically endangered species and populations, the Scientific Committee be required to identify and declare all critical habitat of that species or population at time of listing;
- criteria for the identification of critical habitat be prescribed in regulations;
- the criteria for identification of critical habitat be based on scientific principles only;
- the criteria for identification of critical habitat explicitly require consideration of the current and predicted impacts of climate change; and
- critical habitat of endangered species and populations be protected by expressly prohibiting development, disturbance or detrimental modification of that habitat.

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<sup>5</sup> Environmental Defender's Office (2009) *Climate Change and the Legal Framework for Biodiversity Protection in New South Wales: A legal and scientific analysis*, pp.37-42.

## 4. Threatened species recovery and threat management

### 4.1. Priorities for species recovery

The preparation and periodic review of a Priority Action Statement (PAS), as required under the Act, provides a transparent process for the prioritisation of recovery and threat abatement strategies.

NCC supports the preparation of a PAS that takes into account the value of each species, the cost of management, the benefits of management and the likelihood of success.<sup>6</sup>

The development and application of prioritisation criteria should be transparent, with opportunities for public comment and oversight by the Scientific Committee.

### 4.2. Regional biodiversity planning

Preparation of regional biodiversity management plans is a valuable tool for protecting and restoring biodiversity on a landscape scale.

NCC welcomes the completion of the *Northern Rivers Regional Biodiversity Management Plan*, and supports the continued development of regional biodiversity management plans. To enhance the effectiveness of regional biodiversity planning, it is recommended that the Act be amended to:

- establish a statutory process and timeline for preparation of regional biodiversity plans across New South Wales, including:
  - declaration of regional biodiversity planning boundaries;<sup>7</sup>
  - completion of regional biodiversity assessments, to inform regional biodiversity planning;
  - public consultation and oversight by the Scientific Committee;
- require regional biodiversity plans to apply the following biodiversity planning principles:
  - maintain or improve the conservation status of listed species, populations and communities;
  - maintain or improve the extent and condition of natural habitats, including critical habitat;
  - protect or restore ecosystem services, processes and functions;
  - maintain or improve ecosystem integrity, resilience and resistance;
  - maintain or improve connectivity within and between ecosystems;
  - protect multiple representative examples of ecosystem types;
  - facilitate adaptation to environmental change, including climate change; and
  - recognise uncertainty and plan for adaptive management.
- promote integration between regional biodiversity planning and land-use planning by empowering the Minister to amend environmental planning instruments to support the implementation of relevant regional biodiversity plan(s);

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<sup>6</sup> Joseph L, Maloney R and Possingham (in press) 'Optimal allocation of resources: a project prioritisation protocol' *Conservation Biology*.

<sup>7</sup> Taking into account (1) the boundaries of biogeographic regions or sub-regions, as defined in the Interim Bio-Regionalisation for Australia (IBRA) for terrestrial areas and the Interim Marine Conservation Regionalisation for Australia (IMCRA) for marine areas; and (2) the boundaries of relevant bioregional plan(s) prepared pursuant to the *Environment Protection and Biodiversity Conservation Act 1999*.



- requiring approval authorities, including consent authorities under the *Environmental Planning and Assessment Act 1979*, to give effect to relevant regional biodiversity plan(s);
- empowering the Minister to make binding conservation orders to give effect to regional biodiversity plans; and
- require the periodic review of regional biodiversity plans, recognising the need for adaptive management in the context of scientific uncertainty and environmental change.

#### 4.3. Recovery planning

Recognising the limited resources available for preparation and implementation of recovery plans, it is recommended that recovery plans are made shorter, simpler and more focused on recovery actions and outcomes. Stronger emphasis should be placed on multi-species recovery plans, in cases where species can be reliably grouped based on threat similarity and management needs.

#### 4.4. Conservation advices

To provide cost-effective guidance for threatened species recovery, and promote harmonisation between federal and state processes, it is recommended that the Act be amended to:

- require conservation advices for threatened species, populations and ecological communities to be published by the Scientific Committee at the time of listing; and
- to allow for the adoption of existing federal conservation advices by the Scientific Committee.

#### 4.5. Managing key threatening processes

Identification of key threatening processes and preparation of threat abatement plans are important mechanisms for protecting and restoring biodiversity. NCC supports an operational emphasis on threat abatement planning over recovery planning. Threat abatement plans should be made simpler, shorter and more focused on threat abatement actions and outcomes, with an emphasis on threats that affect large numbers of species.

### 5. Regulating actions that impact on threatened species

#### 5.1. Environmental Planning and Assessment Act 1979

Environmental planning, assessment and approval processes under the *Environmental Planning and Assessment Act* play a central role in determining conservation outcomes for threatened species and their habitat. To date, these processes have largely failed to prevent the destruction of threatened species habitat, resulting in an overall decline in the conservation status of threatened species.

To improve protection of threatened species and their habitat, NCC strongly recommends that the *Threatened Species Conservation Act* and *Environmental Planning and Assessment Act* be amended to:

- make completion of the seven part test compulsory for all development proposals, including infrastructure and major projects;

- require the results of the seven part test for every development proposal to be made public, to enhance transparency and accountability, and to ensure that interested members of the public have an opportunity to provide additional information to the approving authority;
- require accreditation for environmental consultants conducting threatened species assessments;
- enable consent authorities to commission an independent expert to review environmental assessment reports, recognising that some consent authorities have limited capacity to conduct a robust assessment of threatened species impacts;
- restore the concurrence role of the Department of Environment, Climate Change and Water for all development proposals that are likely to have a significant impact on threatened species, including major projects and infrastructure development;
- constrain the broad discretion of decision-makers to approve destruction of threatened species habitat by establishing clear decision-making criteria for any development that is likely to have a significant effect on a threatened species, population or ecological community (see below);
- enhance biodiversity outcomes at the landscape level by introducing a requirement that all new planning instruments – and amendments to existing planning instruments – must, in the opinion of the Scientific Committee, ‘maintain or improve’ biological diversity and ecological integrity within the area covered by the planning instrument;
- ensure that biodiversity protection measures contained in environmental planning instruments apply to all development proposals, including major projects and infrastructure development.

To maintain or improve the conservation status of threatened species, the discretion of consent authorities to approve the destruction of threatened species habitat must be constrained by clear decision-making criteria. It is recommended that the *Threatened Species Conservation Act* be amended to introduce a decision-making methodology – with clear and mandatory ‘red flag’ rules – to be applied to every development or activity that may have a significant impact on a threatened species, population or ecological community.

At a minimum, it is recommended that the methodology prohibit:

- any action that is likely to have an adverse effect on declared critical habitat;
- any action that is likely to have an adverse effect on a critically endangered species, population or ecological community;
- in the case of a threatened species, any action that is likely to place a local population of that species at increased risk of extinction;
- in the case of an endangered population, any action that is likely to place a local population of that species at increased risk of extinction;
- in the case of an endangered ecological community, any action that is likely to place a local occurrence of that ecological community at increased risk of extinction;
- any removal, modification, fragmentation or isolation of habitat that is likely to threaten the long-term survival of a threatened species, population or ecological community in the locality;

- any action that is inconsistent with the effective implementation of a recovery plan, threat abatement plan or regional biodiversity plan.

The methodology should make express provision for consideration of cumulative impacts and environmental change (including climate change).

To ensure the integrity of the decision-making methodology, it is recommended that the methodology is developed by the Natural Resources Commission and independently certified by the Scientific Committee as being consistent with the biodiversity targets set out in the *NSW State Plan*.

### 5.2. Integration with federal assessment and approval processes

Harmonisation of federal and state assessment processes is a desirable outcome, provided that the level of protection afforded to threatened species is not adversely affected. In the absence of comprehensive information about the location and condition of threatened species, it is essential that any integrated approval process retains a requirement to undertake site-level assessment.

## 6. Strategic planning for biodiversity conservation

Strategic planning for biodiversity conservation presents opportunities for managing cumulative impacts, restoring landscape connectivity and enhancing resilience to climate change impacts.

However, in the absence of comprehensive information about the location and condition of threatened species, strategic planning is not an adequate substitute for site-level assessment. On this basis, NCC opposes further use of biocertification to 'switch off' site-level assessment.

To provide enhanced protection for threatened species, it is recommended that the *Threatened Species Conservation Act* is amended to:

- establish a statutory process and timeline for the preparation of regional biodiversity plans;
- establish minimum biodiversity planning standards for all new environmental planning instruments (and amendments to existing environmental planning instruments); and
- establish a statutory process and timeline for reviewing and amending existing environmental planning instruments to ensure compliance with these biodiversity planning standards.

To ensure the integrity of the biodiversity planning standards, it is recommended that the standards are developed by the Natural Resources Commission and independently certified by the Scientific Committee as being consistent with the biodiversity targets set out in the *NSW State Plan*. In particular, the standards should seek to ensure that environmental planning instruments:

- maintain or improve the conservation status of listed species, populations and communities;
- maintain or improve the extent and condition of natural habitats, including critical habitat;
- protect or restore ecosystem services, processes and functions;
- maintain or improve ecosystem integrity, resilience and resistance;
- maintain or improve connectivity within and between ecosystems;
- protect multiple representative examples of ecosystem types;
- facilitate adaptation to environmental change, including climate change; and
- recognise uncertainty and plan for adaptive management.

## 7. Biodiversity offsets

It is recommended that offsets are not taken into account in approval decisions until such time as empirical research demonstrates improved species recovery and habitat protection through offsets.

If biodiversity offsets continue to be used, all offsets should be required to comply with a standard offset methodology, certified by the Scientific Committee. The methodology should:

- provide for the rigorous application of the following mitigation hierarchy:
  - avoid biodiversity impacts where possible;
  - manage and minimise biodiversity impacts; and
  - as a last resort, allow for biodiversity offsets.
- ensure that offsets maintain or improve biodiversity outcomes;
- take into account all direct and indirect impacts of the development or scheme;
- ensure that offset area is equivalent or superior to the disturbed area in terms of size, ecosystem type, function, structure, complexity, species composition and connectivity;
- ensure that offset areas are in place before the impacts occur, unless it can be proven that the time lag between impact and offset will not materially affect biodiversity;
- prohibit the use of offsets for endangered species, populations and ecological communities or declared critical habitat;
- require appropriate legal, financial and institutional arrangements to be in place to ensure the long-term conservation, management and monitoring of offset areas;
- exclude consideration of the mitigation effects of a biodiversity offset when there is a high risk of failure, or when the long term security of the offset cannot be assured;
- promote landscape scale conservation outcomes and support the implementation of regional biodiversity plans (e.g. restoring habitat corridors, improving connectivity); and
- establish mechanisms for monitoring and evaluating the performance of biodiversity offsets approved pursuant to the methodology.

## 8. Biodiversity Strategy

NCC supports the statutory requirement to prepare and periodically review the NSW *Biodiversity Strategy*. The strategy should set out a strategic program for protecting, conserving and restoring biodiversity and ecological integrity in New South Wales. The strategy should identify measurable performance targets, and a process for periodic reporting on progress towards these targets.

Consistent with *Australia's Biodiversity Conservation Strategy 2010-2030*, NCC supports a strategic emphasis on mainstreaming biodiversity, enhancing strategic investment and partnerships, building ecosystem resilience, restoring ecosystem function and reducing threats to biodiversity. NCC looks forward to providing feedback on the draft NSW *Biodiversity Strategy*.