13 August 2019

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
CANBERRA ACT 2600

Submitted to: ec.sen@aph.gov.au and online

Dear Secretary,

Inquiry into Australia's Faunal Extinction Crisis – Submission – Case Study of Yeelirrie Project

The Environmental Defender's Office Western Australia (**EDOWA**) and the Conservation Council of WA Inc (**CCWA**) welcome the above Inquiry. EDOWA and CCWA present this submission as a case study of the WA-based Yeelirrie uranium ore mine (**Yeelirrie project**), the subject of recent federal approval (EPBC 2009/4906) and a decision of the WA Court of Appeal (*Conservation Council of WA Inc & Ors v The Hon. Stephen Dawson MLC, Minister for Environment; Disability Services & Anor* [2019] WASCA 102). In the latter case, CCWA was one of the parties to the litigation and instructed EDOWA as its solicitors.

EDOWA also refers to the submission of the EDOs of Australia (**EDOA**) dated 10 September 2018, and presents this submission by way of supplementary comment specific to the Yeelirrie project.

We refer particularly to the following items of the Terms of Reference:

(d) the adequacy of Commonwealth environment laws, including but not limited to the Environment Protection and Biodiversity Conservation Act 1999, in providing sufficient protections for threatened fauna and against key threatening processes;

(e) adequacy and effectiveness of protections for critical habitat for threatened fauna under the Environment Protection and Biodiversity Conservation Act 1999; and

(j) the adequacy of existing assessment processes for identifying threatened fauna conservation status.

This submission presents the Yeelirrie project as a case study demonstrating the inadequacy of the existing legislative and regulatory framework in addressing Australia's faunal extinction crisis.

Set out below is a brief background to the Yeelirrie project, the significance of decisions made in relation to it, and further comments on the nature of law reform required.

Background

The Yeelirrie project has been subject to environmental regulation at both State level, under the *Environmental Protection Act 1986* (WA) (**EP Act**) and Commonwealth level, under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

At the Commonwealth level, the Yeelirrie project was approved by then Minister for the Environment Melissa Price on 10 April 2019. This followed an assessment by the Department of Environment and Energy which concluded that the project risked extinction of several species – the Department recommended a set of conditions requiring the proponent to prove this would be avoided, however the Minister determined that this would compromise potential economic and social benefits and therefore chose to impose a less stringent set of conditions that will not prevent the forecast extinctions.

We note that the environmental impact assessment for the Yeelirrie project was conducted in respect of some matters by the WA Environmental Protection Authority (**EPA**) through an accredited assessment under s 87(1)(a) of the EPBC Act.

At a State level, the Yeelirrie project was subject to a full EPA assessment which included a finding that it would have unacceptable impacts on subterranean fauna species unique to the project area, therefore recommending that it should not be implemented. This conclusion of the EPA report was subject to several merits appeals under the EP Act, eventually dismissed by the Minister for Environment (thereby appearing to affirm the finding that the project was environmentally unacceptable). The Minister for Environment then published a decision under the EP Act, approving the implementation of the Yeelirrie project (**State approval**).

Litigation under the EP Act

CCWA, along with three Tjiwarl traditional owners of land at Yeelirrie, filed an application for judicial review of the State approval on the basis of s 45(6)(a)(ii) of the EP Act, which required in this case that the proposal not be implemented otherwise than in accordance with the decision made on the appeal of the EPA's report. The application was dismissed by the then Chief Justice in *Conservation Council of WA Inc & Ors v The Hon. Stephen Dawson MLC, Minister for Environment; Disability Services & Anor* [2018] WASC 34.

An appeal to the WA Court of Appeal was heard on 5 March 2019, with reserved judgment delivered on 31 July 2019 in *Conservation Council of WA Inc & Ors v The Hon. Stephen Dawson MLC, Minister for Environment; Disability Services & Anor* [2019] WASCA 102 (**Yeelirrie Appeal**).

The decision of the WA Court of Appeal confirms that WA laws allow the Minister for Environment to approve a project in the knowledge it will cause extinction and against the accepted scientific advice of the EPA. Commonwealth environmental protection laws have proven unable to fill the gap and preserve biodiversity in line with Australia's international commitments and the national public interest.

Relevance to Commonwealth framework

The approvals for the Yeelirrie Project at both a State and Commonwealth level share some significant characteristics. We set out below the key elements of the EP Act approval, drawing links to the EPBC Act, and highlight inadequacies in these parallel frameworks.

The EP Act provides for a similar framework of assessment and approval of activities impacting the environment to that of the EPBC Act. This framework was described in the Yeelirrie Appeal as a three stage process comprising:

- referral of proposed activity for environmental impact assessment (progression of which includes a prohibition on persons implementing the project);
- assessment and preparation of a report on the environmental impacts of the proposed activity, including a recommendation as to whether the activity should be approved; and
- a decision on whether to approve the proposal.

For both the EP Act and EPBC Act, the ultimate decision on approval has been construed as a more discretionary decision, involving the balancing of various policy factors. In their Honours joint judgment, Buss P and Beech JA (with whom Pritchard JA agreed on this point) emphasised that the second stage of the process is more constrained (in the EP Act context, the EPA can only consider environmental factors) and the ultimate third stage decision is more discretionary and political.

In this regard, we emphasise the importance of scientific evidence in the decision-making process. Acknowledging the explicit objects of the legislation and the framework which requires consideration of various principles relating to ecologically sustainable development, it seems antithetical that there are no constraints on the allocation of weight between accepted scientific evidence of environmental impacts and hypothetical social, economic or political benefits which are barely mentioned in the text of the statute.

While we recognise the importance of political accountability for decision-making affecting the environment, we reiterate the bottom line that **extinction should not be sanctioned by legislation with the ostensible purpose of protecting the environment and biodiversity**. It would be a perverse outcome if this legislation continued to empower the executive to permit extinction rather than providing recourse to prevent this highest level of environmental harm. To address Australia's faunal extinction crisis, the legislative framework should ask more of government and set meaningful limits on the exercise of approval powers.

Decision under the EPBC Act

Use of discretion

In the statement of reasons for the decision to approve the Yeelirrie project, which we obtained under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the Minister for the Environment acknowledged the strong and serious scientific evidence of likely extinctions. On the other hand, the evidence for economic benefits was based on outdated and speculative figures and subject to uncertainties over the proponent's decisions. However, the Minister explicitly exercised her discretion to favour potential economic and social benefits over established environmental impacts including extinction.

The EPBC Act does not prescribe the weight to be accorded to these competing factors nor any minimum environmental outcomes (despite some wording in s 3A, e.g. in subsection (d) which stipulates that 'the conservation of biodiversity should be a fundamental consideration in decision-making').

Despite the central concern of the EPBC Act being the protection of the environment and biodiversity, the Minister was able to exercise broad discretion to approve extinction associated with the Yeelirrie project on the basis of hypothetical economic and social benefits. In our view **this loose balancing exercise is not appropriate in the face of scientific evidence of likely extinction**. Such a wide extent of discretion for executive decision-makers continues to contribute to Australia's faunal extinction crisis.

Gap in protections

In relation to the EPBC Act, the Yeelirrie project presents a unique circumstance to which, in our view, the current framework has not been able to respond adequately.

The various species of subterranean fauna which are identified as being likely to be made extinct by the Yeelirrie project are not currently on the Commonwealth (or State) lists of threatened fauna. This means the provisions of the EPBC Act which set out requirements for decisions which affect threatened species were not enlivened in relation to subterranean fauna, including an obligation in s 139(1)(a) on the Minister not to act inconsistently with international obligations (e.g. the Biodiversity Convention).

On 23 February 2017, then Senator Scott Ludlam wrote to then Minister for the Environment Josh Frydenberg in relation to the Yeelirrie project and its assessment. This included a direct request that the Minister consider adding the subterranean fauna species to the threatened list by reference to the identified likely impacts of the Yeelirrie project. The species were not listed.

Instead of enlivening further assessment, advice and other regulatory controls, these species fell into a unique gap in the EPBC Act. The Minister for the Environment was able to exercise discretion unfettered by international obligations or approved conservation advice. In fact, if the Yeelirrie project was not a "nuclear action" under s 21 of the EPBC Act, the subterranean fauna species would not even have been a mandatory consideration for the Minister in making the approval decision.

In our view, **it undermines the objects and scheme of the EPBC Act if species with slower or more piecemeal threats are accorded specific protection to the exclusion of species explicitly acknowledged to potentially become extinct as a direct result of a single project.** The current legislative framework has left a gap in protection that was not intended, creating a loophole through which extinction of species in one fell swoop can be authorised. It is not reflective of best practice environmental administration nor in line with community expectations that decisions such as the federal approval of the Yeelirrie project could be made in this manner. Extinction should be directly dealt with in the EPBC Act through meaningful and robust requirements for both assessment and outcomes.

Reform required

It is unacceptable and out of step with community expectations for environmental protection laws to empower the executive to sanction extinction of species against scientific advice which it has accepted as accurate.

As set out in the EDOs of Australia submission, the EPBC Act 'is not prohibitive or particularly restrictive' in application to activities which will have adverse impacts on matters of national environmental significance (at p 7). The approvals for the Yeelirrie project at both State and Commonwealth levels demonstrates that the current legislative framework goes beyond merely "cataloguing extinction" to clearly contemplate, regulate and sanction activities known to cause extinction.

EDOWA and CCWA submit that **a new federal environment statute is required** to respond to modern environmental challenges and provide stronger and more practical limits on executive decision-making. Along with governing processes by which these decisions are made, there must be certain minimum outcomes entrenched in legislation – this includes ensuring that extinction is not subject to governmental discretion. Further, a **national EPA is required** to provide independent expert scientific advice to government.

In the interim, **the EPBC Act must be urgently amended to appropriately respond to the faunal extinction crisis**. This includes:

- insertion of a new provision in Part 9 requiring that the Minister not approve activities which will cause extinction (i.e. an objective factual threshold for approval decisions);
- amending s 139 of the EPBC Act to ensure that the Minister not act inconsistently with international obligations regardless of the type of controlled action; and
- provision for merits review of approval decisions by an independent expert tribunal.

Conclusion

The Yeelirrie project stands to cause the extinction of up to twelve species of subterranean fauna unique to the area. For both State and Commonwealth decisions to approve the project, the relevant Minister did so knowing that extinction was a likely outcome. Each jurisdiction's legislative framework, while requiring the provision and consideration of scientific advice on environmental impacts, clearly does not offer any meaningful protections against extinction in the context of discretionary executive decision-making.

In our view, **environmental protection legislation should not merely catalogue extinction nor empower governments to exercise political discretion to sanction it**. The community expects that a legislative framework for decision-making which affects the environment, as a public asset, should draw a line in the sand at extinction. Key environmental protection legislation should include this fundamental requirement to prevent the worst forms of damage to our environment and ensure Australia's biodiversity can continue to flourish.

EDOWA and CCWA thank the Committee for the opportunity to provide this submission.

Sincerely,

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