Inquiry into the Effectiveness of threatened species and ecological communities' protection in Australia

14th December 2012

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Dear Committee,

The Australian Network of Environmental Defender's Offices Inc (ANEDO) is a network of 9 independent community legal centres in each State and Territory, specialising in public interest environmental law. ANEDO welcomes the opportunity to contribute to the **Inquiry into the effectiveness of threatened species and ecological communities' protection in Australia**.

ANEDO was recently commissioned by the Places You Love Alliance of over 35 environment groups to undertake an analysis of the adequacy of threatened species and planning laws in each State and Territory, including the Commonwealth. We have prepared a report entitled: ***An assessment of the adequacy of threatened species and planning laws in all Australian jurisdictions***, December 2012.

We would like to provide the Report to the Committee to assist with the Inquiry (see **Appendix 1**).

The Report makes a number of key findings.

> No state or territory meets all the core requirements of best practice threatened species legislation.
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> While the laws in some jurisdiction look good on paper, they are not effectively implemented. There are a number of important legislative tools available for managing and protecting threatened species that are simply not used. For example, interim conservation orders and management plans are not utilised in Victoria, no native plants have been declared prescribed species on private land in South Australia, no critical habitats have been listed and no interim protection orders have been declared in Tasmania, and no essential habitat declarations have been made in the Northern Territory.
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> Key provisions are often discretionary. Critical tools such as recovery plans and threat abatement plans are not mandatory. Time frames for action and performance indicators are largely absent.
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> Effective implementation is further hampered by a lack of data and knowledge about the range and status of biodiversity across Australia.
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> Current threatened species laws do not prevent developments that have unacceptable impacts on threatened species from going ahead. It is clear that no State or Territory planning laws meet best practice standards for environmental assessment. Project refusals on the basis of threatened species are extremely rare, for example, a handful of refusals under the EPBC Act, or are the result of third party litigation. 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.
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> Planning laws, in particular provisions for the assessment of major projects, effectively override threatened species laws in all jurisdictions. Levels of impact assessment required tend to be discretionary, and projects can be approved even where they are found for example, to have a significant impact on critical habitat. The quality of different levels of species impact assessment is highly variable, and rarely audited.

In addition, there is poor integration between threatened species laws and other natural resource management laws in most jurisdictions. Threatened species laws are further subjugated in many jurisdictions by the absence of third party rights that enable communities to enforce the laws to protect threatened species.

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**. Given the decline in biodiversity in each State and Territory, combined with increasing population pressures, land clearing, invasive species and climate change, now is *not* the time to be streamlining and minimising legal requirements in relation to threatened species assessment.

The key findings of our assessment are directly relevant to the Inquiry **Terms of Reference**. These are set out in detail in the report and some examples are briefly noted below.

(a) Management of key threats to listed species and ecological communities

Identifying key threats to listed species and communities is fundamentally important and yet no State or Territory currently has a comprehensive list of threats legally recognised.

The relevant laws in jurisdictions such as NSW, Tasmania and the Commonwealth recognise and provide for the listing of key threatening processes and making of threat abatement plans. Other states, such as South Australia and Western Australia do not have any specific legislative provisions to list threats or to guide threat abatement that may be undertaken.

Even in jurisdictions where there is provision to formally recognise threats, key provisions are often discretionary. For example, it is not mandatory to make Threat Abatement Plans in New South Wales. Time frames for action and performance indicators are largely absent across Australia.

A key threat to many listed species and communities is loss of habitat through clearing for development. Management of this and other threats is frequently undermined by planning and development laws in all jurisdictions. The Report analyses State and Territory planning laws and a consistent finding across Australia was that there is poor integration of threatened species, natural resource management, and planning laws. In particular, we found that provisions for the fast-tracking of impact assessment for major projects often override threatened species laws.

Finally, we found a consistent gap in most laws regarding the threat of climate change to listed species and communities. Very few laws explicitly recognise and provide strategies to ameliorate the impacts of climate change, assist adaptation (where possible) and build species' resilience.

(b) Development and implementation of recovery plans

Recovery planning is not formally provided for in some State laws, even though it is a vitally important tool. As with threat abatement planning, our analysis showed that where recovery planning is recognised, it is: often discretionary, a slow process to complete, chronically under-funded, and often lacks time frames and performance indicators. Some states such as Western Australia may carry out some recovery activities, but lack the statutory mandate to do so or take specific actions, with the result that that one in five threatened fauna and less than half of threatened flora have a recovery plan, while full

implementation of the plans that are in place often does not occur. Even in States where recovery plans are provided for in legislation, planning rates are poor. For example, in Tasmania recovery plans are prepared for only 20 percent of listed species, and the effectiveness of existing recovery plans is rarely assessed.

(c) Management of critical habitat across all land tenures

There are no provisions for listing and protecting 'critical habitat' in South Australia, Northern Territory, Australian Capital Territory or Western Australia.

Victorian legislation provides for critical habitat determinations, which may be protected by Interim Protection Orders, however, declarations are discretionary, and determinations and orders are rare. In fact, since the commencement of the Victorian legislation, only one determination has been made and it was revoked almost immediately.

Tasmanian legislation does provide for listing of critical habitat. However, landowners who may be financially affected by critical habitat decisions restricting use of land may apply for compensation, and there have been no critical habitats have been listed in Tasmania.

The fact that economic considerations can be taken into account has meant that only 4 areas have been declared as critical habitat in NSW, with 3 out of 4 being in already protected areas. The definition is further limited to "current habitat" only. This is in contrast to Queensland, where the legislative definition includes habitat no presently occupied by the wildlife.

Even in jurisdictions where critical habitat is legally recognised, it seems that development and unacceptable impacts may still be approved under planning legislation.

(d) Regulatory and funding arrangements at all levels of government

In terms of regulatory arrangements, the Report details the diversity of threatened species laws in Australia – ranging from Western Australia that has no recent biodiversity legislation to NSW and the Commonwealth that have detailed schemes in place. As noted, from our analysis, no State or Territory currently meets best practice standards for threatened species laws. While laws differ in each jurisdiction, a consistent finding was that the laws are not effectively implemented across Australia.

No jurisdiction currently allocates adequate funding to administering threatened species laws. A key finding of the Report is that even where laws look good on paper, they simply are not being adequately implemented or enforced.

As noted, vitally important tools such as recovery plans and threat abatement plans are seriously under-resourced. As a result, there are too few plans made and planning processes simply cannot keep pace with burgeoning lists of threatened species and communities.

Resources for implementation of on-ground recovery and threat abatement planning, departmental staff, mapping, enforcement, administration, research, data management, monitoring must be significantly increased for threatened species protection in all jurisdictions.

(e) Timeliness and risk management within the listings processes

Although many threats are imminent, listing processes are lengthy across all jurisdictions.

Where a threat is immediate, there is often no appropriate legislative tool. There are no emergency listing provisions in the legislation of Queensland, South Australia, Tasmania, Victoria, Western Australia, Australian Capital Territory or the Northern Territory. Only New South Wales provides for provisional listing on an emergency basis.

Some jurisdictions provide for interim protection orders, but these may be limited in application – for example, 30 days in Tasmania.

As noted above, a significant factor contributing to time lag between listing, planning and actual on-ground recovery activity, is the lack of resources. Poor resourcing will continue to undermine risk management strategies unless funding for threatened species is improved across Australia.

(f) The historical record of state and territory governments on these matters

The Report identifies key issues in each State and Territory in terms of how the relevant threatened species laws are working. The analysis in the report includes the following 5 elements for each jurisdiction:

1. An overview of the main threatened species legislation in the jurisdiction
2. Strengths of the legislative framework
3. Weaknesses of the legislative framework
4. Compliance and enforcement of the laws
5. Interaction of threatened species laws with planning and other relevant legislation

A clear conclusion is that no State or Territory has a good track record of adequately resourcing or effectively implementing and enforcing their threatened species laws.

Furthermore, no State or Territory currently meets a best practice standard for environmental impact assessment under their respective planning laws.

The Report provides a snapshot of each jurisdiction and we would be happy to provide the Committee with additional information on individual jurisdictions if needed.

(g) Any other related matter

Reform of threatened species laws is needed in all jurisdictions. States where there is no recent law – such as Western Australia – should implement best practice legislation as a matter of urgency. States where there is relatively detailed legislation place – should undertake comprehensive review of their laws with a view to incorporating essential legislative tools that may be missing – such as critical listing categories, interim and emergency protection tools and significant penalties. States that have detailed laws that look comprehensive on paper – such as NSW – should review resourcing and implementation to determine why the laws are still failing to arrest the decline in biodiversity.

Concurrent to State and Territory review and reform, a key finding of the report is that it is absolutely essential for the Commonwealth to maintain a strong leadership role in protecting biodiversity. Not only is this necessary to implement our international

obligations, but it is an important safety net for nationally threatened species and communities.

In this respect, ANEDO submits that the EPBC Act should be strengthened and effectively implemented.[1] Furthermore, given the poor track record of States and territories as detailed in our Report, the Commonwealth must not delegate assessment and approval powers to the States.

We would be happy to appear at an inquiry hearing to provide further detail on the legal analysis we have undertaken.

Yours sincerely,
Rachel Walmsley
Policy & Law Reform Director, EDONSW
On behalf of ANEDO

Appendix 1 - *An assessment of the adequacy of threatened species and planning laws in all Australian jurisdictions*, December 2012.

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[1] See ANEDO Submission to the 10 year review of the EPBC Act, available at: www.edo.org.au.....