The Planning System in NSW and Threatened Species

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At the RZS forum on Grey-headed Flying-foxes it became apparent that some participants were unfamiliar with the operations of the planning system in NSW. This is a key issue since in NSW threatened species conservation is integrally linked with the planning system and the threatened species legislation operates through the planning legislation. This paper was written to assist those interested in conserving threatened species, such as the Grey-headed Flying-foxes, and their habitat, in this case the flying-fox camps, understand the powers of the planning legislation and its relationship with the threatened species legislation.

ABSTRACT

In NSW, threatened species conservation operates through legislation. When the government of NSW introduced these Acts, it integrated the threatened species legislation with the planning legislation and so consideration of threatened species issues became a mandatory part of the planning system. This changed the status of threatened species issues bringing them into the mainstream of planning and development approval, requiring all elements of the community of NSW to take threatened species into account when planning decisions are being made. This has been of great benefit for threatened species but it also requires persons working with threatened species to fully understand the intricacies of the planning system. Recognising that the NSW planning system is very complex, this paper sets out to explain, in straightforward terms, how the planning system operates and how threatened species conservation is integrated into the planning system and how it operates in practice. Some comments on the system are provided.

Key words: critical habitat, development approval, environmental assessment, environmental impact assessment, NSW planning, planning system, recovery plans, threatened species conservation, threatened species, populations and ecological communities, threats.

Introduction

In NSW, the *Environmental Planning and Assessment Act 1979*, (EP&A Act), provides the principal statutory basis for land use planning and environmental assessment across the state. The conservation of threatened species* in NSW operates through the *Threatened Species Conservation Act 1995*, (TSC Act), which covers native terrestrial and aquatic plants and animals and the *Fisheries Management Act 1994*, (FM Act) which protects threatened and protected fish and native marine plants. The planning system plays the key role in the decision making relating to how development is managed and controlled. So when the TSC Act and the threatened species amendments to the FM Act were introduced by the government they were integrated with the EP&A Act and operate through that Act.

This paper outlines the planning system in NSW. It introduces the planning powers of the EP&A Act and it provides an outline of the planning system and the development assessment and environmental assessment processes in that Act. It briefly outlines the features of the threatened species legislation and explains how threatened species conservation is integrated into the planning system and how it operates in practice. Comments are provided on the consequences of this system and potential pitfalls.

The EP&A Act

The EP&A Act is a very powerful and wide-ranging piece of legislation. Its objects are set out in s5 which states that

Pages 259 - 267 in *Managing the Grey-headed Flying-fox as a Threatened Species in New South Wales*, edited by Peggy Eby and Daniel Lunney, 2002. Royal Zoological Society of New South Wales, Mosman NSW.

"The objects of this Act are -

(a) to encourage -

(i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment;

(ii) the promotion and coordination of the orderly and economic use and development of land;

(iii) the protection, provision and co-ordination of communication and utility services;

(iv) the provision of land for public purposes;

(v) the provision and co-ordination of community services and facilities; and

(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities and their habitats, and

(vii) ecologically sustainable development; and

(viii) the provision and maintenance of affordable housing; and

(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State; and

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment."

With objects as specific as these, which cover such broad areas, it has the capacity to enable decision-makers to ensure that nature conservation is a primary consideration when the human use of the natural environment is being considered. This does not mean that the natural environment will always be totally preserved or fully protected, but it should ensure that impacts on it will be considered and taken into account when development is proposed.

Before this Act was introduced there was little consideration of the impact of proposals and the *modus operandi* was a primary emphasis on development. However, despite its potential it has been queried whether this Act's powers have been utilised fully to deliver these objects but the Act certainly contains powers which would enable decision-makers to ensure that the environment of NSW is properly managed and protected and its natural resources appropriately conserved.

The planning powers in this Act are found in Parts 3, 4 and 5 of the Act.

The Planning System

Environmental planning in NSW is achieved through the development of formal planning instruments or plans, which set out the policies and provide the basic rules for land management. This is complemented by the development assessment process which flows from the plans.

Part 3 of the EP&A Act provides for the making of these plans which are called Environmental Planning Instruments, (EPIs). An EPI can be made for the purposes of achieving any of the objects of the Act. They comprise State Environmental Planning Policies (SEPPs), Regional Environmental Plans (REPs) and Local Environmental Plans (LEPs). EPIs set out the rules which affect development - either how the land covered by the instrument can be developed, or how a particular type of development is to be dealt with. They can specify that certain development can or cannot be carried out, they can specify what approvals (consents or concurrences) are required for certain types of development and they can prohibit certain types of development, set controls over the types of development permitted or where a development can be located.

The State government is responsible for developing SEPPs and REPs. Local Government is responsible for developing LEPs and Development Control Plans, (DCPs). They are not strictly hierarchical and if a SEPP is to prevail over a REP or LEP, (or a REP is to prevail over a LEP), then this must be expressly stated.

Prior to the introduction of the threatened species legislation various SEPPs were introduced to promote the conservation of natural resources and the protection of the environment. These include SEPPs 14 - *Coastal Wetlands*, 19 - *Bushland in Urban Areas*, 26 - *Littoral rainforests*, 39 - *Spit Island Bird Habitat,* 44 - *Koala Habitat Protection* and the now repealed 46 - *Protection and Management of Native Vegetation.* Once the threatened species legislation was introduced it was no longer necessary to introduce specific SEPPs to cover threatened species issues as they are now fully integrated into the planning system.

Further details about Environmental Planning Instruments are set out in Appendix 1.

Development and Environmental Assessment

The EP&A Act provides the framework for assessing and managing the potential environmental impacts of public and private developments. This assessment process is set out in Parts 4 and 5 of the EP&A Act.

Part 4 is called Development Assessment and applies where development consent is required by an environmental planning instrument. A development application, DA, must be made to the consent authority, usually the local council or the Minister in certain circumstances. The DA must be accompanied by the appropriate information for the consent authority to decide whether to approve the proposal or approve it with certain conditions or refuse it. The required information includes details of the likely impacts on the environment and measures to mitigate these impacts, usually in the form of a Statement of Environmental Effects. For certain developments designated as such in the Environmental Planning and Assessment Regulation, the DA must be accompanied by a full Environmental Impact Statement (EIS).

The process of assessment of a development application (DA) is set out in Appendix 1.

Part 5 of the EP&A Act is called Environmental Assessment. Under this Part, s111 requires that all government authorities when making a decision about an activity which does not require development consent must "examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity". This Part of the Act refers to the determining authority, which is the Minister or public authority on whose behalf the activity is to be carried out or whose approval is required for the activity. If the activity is "likely to significantly effect the environment" (s112) or is a prescribed activity, then an EIS must be prepared and considered by the determining authority before any approval can be granted. In any event, appropriate environmental information must be provided, usually in the form of a Review of Environmental Factors or in the EIS.

Threatened Species Conservation

Threatened species conservation in NSW is covered by two Acts, viz the *Threatened Species Conservation Act 1995* which covers terrestrial and aquatic plants and animals and the amendments made to the *Fisheries Management Act* in 1997, which cover "fish" (including both finfish and aquatic invertebrates) and marine plants (including mangroves, seagrass and algae).

Both these Acts amended the EP&A Act, and integrated the consideration of threatened species conservation matters into the environmental planning and assessment process. They introduced requirements to take into account threatened species matters both when developing environmental planning instruments and when making environmental assessment decisions. These requirements introduced by both of these Acts are identical. As a result of these amendments the EP&A Act's objects now specifically state that the Act is "to encourage the protection of the environment,… including threatened species, populations and ecological communities and their habitats" (s5).

The Threatened Species Conservation Act

The TSC Act, came into effect on 1 January 1996 and provides for the protection of all threatened plants and animals native to New South Wales except fish and marine plants. The TSC Act provides for the conservation and recovery of threatened species and makes provision for the management of threats to species under the Act. The TSC Act introduces the following terms: - threatened species, populations and ecological communities; critical habitat; recovery plans and key threatening processes as well as Species Impact Statements (SISs).

Threatened species, populations and ecological communities.

The TSC Act contains the lists of Species, Populations and Ecological Communities which have been classified as threatened. Threatened species are listed under two categories: - *Endangered*, which includes Endangered Species, Populations and Ecological Communities and species presumed extinct and *Vulnerable* species. The Scientific Committee set up under the Act is responsible for listing the Endangered Species, Populations and Ecological Communities and the Vulnerable species. Any person may nominate a species, population or ecological community for listing.

Critical habitat

The TSC Act makes provision for the declaration of critical habitat by the Minister for the Environment. Critical habitat is defined as "The

whole or any part or parts of the area or areas of land comprising the habitat of an endangered species, population or ecological community that is critical to the survival of the species, population or ecological community that is critical to the survival of the species, population or ecological community". Critical habitat is identified by the Director-General of National Parks and Wildlife and involves extensive consultation with public authorities, landholders and the wider community.

Recovery plans

The National Parks and Wildlife Service (NP&WS) must prepare recovery plans for each endangered species, population and ecological community as soon as practicable after listing and for each vulnerable species. These recovery plans must be prepared within 3 years of listing, for endangered species, populations and ecological communities and within 5 years for vulnerable species. (For those listed when the Act commenced the time frame is 5 years and 10 years.)

Recovery plans outline actions that stakeholders have agreed upon to promote the recovery of a species. These plans must be taken into account when consent/determining authorities are considering DAs under Part 4 or activities under Part 5 of the EP&A Act.

Threats

Schedule 3 of the TSC Act provides for the listing of key threatening processes. As with the lists of threatened species, the Scientific Committee is responsible for listing key threatening processes.

Key threatening processes are processes which adversely affect 2 or more threatened species, populations or ecological communities or which could cause species, populations or ecological communities that are not threatened to become threatened, (s15). Any person may nominate a key threatening process for listing. For each key threatening process that is listed the NPWS is required to prepare a threat abatement plan. The aim of such a plan is to manage a threatening process in order to abate, ameliorate or eliminate the threat. Threat abatement plans provide the opportunity for all sections of the community to work together to reduce the threats affecting native species in NSW. They must be taken into account when consent/determining authorities are considering DAs under Part 4 or activities under Part 5 of the EP&A Act. The statutory timeframe for threat abatement plans being prepared is 3 years from the listing of the key threatening process.

The Fisheries Management Act

The Threatened Species provisions were included in the *Fisheries Management Amendment Act, 1997* which came into effect in 1998. They contain identical provisions to those outlined above under the TSC Act except that the Scientific Committee makes certain decisions under the TCS Act on its own. By contrast, the Minister for Fisheries makes these decisions on the recommendation of the Fisheries Scientific Committee under the FM Act.

The integration of threatened species conservation in the planning system

Planning Instruments

Part 3 of the EP&A Act was amended to provide for the consideration of threatened species when making a SEPP, REP or LEP. If the making of such a plan is likely to affect threatened species, populations or ecological communities or critical habitat, consultation with either the Director-General of National Parks and Wildlife or the Director of Fisheries must occur. This consultation is required before an environmental study, draft SEPP, draft REP or draft LEP is prepared. Also, once critical habitat is declared, relevant REPs and LEPs must be amended as soon as practicable, to identify any critical habitat on land to which the plan applies. Consequently in time threatened species information will be incorporated in all statutory plans. However, even if the REP or LEP has not been amended and the critical habitat identified, all consent authorities must take into account critical habitat as a relevant consideration.

Impact assessment

One of the key features of the TSC and FM Acts is the integration of the consideration of threatened species matters into the environmental assessment and development control processes under the Environmental Planning and Assessment Act. For any proposal under Part 4 or Part 5, the effect of the development or activity on threatened species must be considered by a consent/determining authority before a decision is made.

Consideration has to be made as to whether the proposed development is "on land which is, or is part of critical habitat or is likely to significantly affect threatened species, populations or ecological communities or their habitats". A new

s5A was inserted into the EP&A Act which sets out the eight factors which have to be taken into account in deciding whether there is likely to be a significant effect on any threatened species, population or ecological community or their habitat. These are listed in Appendix 1. This has become popularly known as the "Eight Part Test".

If any proposal is on critical habitat or is likely to significantly affect threatened species, populations or ecological communities or their habitats then a Species Impact Statement under the TSC Act must be prepared and taken into account by the consent or determining authority. In these cases, when an SIS is triggered, the consent authority must get the concurrence of the Director-General of NPWS or the Director of Fisheries before a decision can be made, unless the consent authority is a Minister, when the Minister for the Environment or the Fisheries Minister must be consulted. The same provisions apply under Part 4 and 5.

Section 5B requires planning authorities to have regard to the register of critical habitat when exercising their functions under the EP&A Act, both in relation to planning instruments and in assessing development proposals under either Part 4 or Part 5. Once critical habitat is declared all public authorities must have regard to this in relation to their use of the land or when exercising their functions in relation to any such lands. It is noted that at this time no critical habitat has yet been declared under s37.

(It is noteworthy that in recent years, several US Circuit Courts have ruled that the US Fisheries and Wildlife Department has failed to comply with the US endangered species legislation and failure to list species that are worthy of the status to be capricious and arbitrary. Presumably this would also apply to critical habitat.)

Relevant recovery plans and threat abatement plans, once they have been developed, also must be considered by consent and determining authorities when assessing applications under the EP&A Act.

Other actions not covered by the EP&A Act.

Where an action or activity is proposed that does not require approval under the EP&A Act it may require approval under the TSC Act or the FM Act. For actions which are likely to result in harm to threatened species, populations or ecological communities or damage to their habitat, a licence may be required. Some actions or activities have been exempted from the requirement for such a licence such as:

- actions carried out in accordance with an approval/consent under the Environmental Planning and Assessment Act;
- routine agricultural activities, (whatever this means!); or
- actions authorised under the Rural Fires Act 1997 or the State Emergency and Rescue Management Act 1989 and reasonably necessary in order to avoid a threat to life or property

Comment

The integration of the consideration of threatened species issues into the planning system is quite an enlightened step both in ensuring that information about threatened species is spread into the general community and in reducing the problems that arise as a consequence of a developer discovering that there are threatened species issues to be taken into account in relation to a proposed development.

By making it mandatory for threatened species issues to be examined both before a DA can be submitted and before any decision can be made in relation to any proposed development ensures that threatened species are seen as valid environmental issues by all parties including the State government, local government, the development industry and the community.

It also places responsibilities on scientists, NPWS staff, consultants and local government officers and councillors to fully consider these matters.

Information on threatened species must be circulated into the public arena by scientists and NPWS staff as soon as they have details about threatened species, populations or ecological communities, or their habitats. This information must be provided in clear plain English and in a way that the average person can appreciate the implications which flow from the information.

Consultants must be accurate and ethical in the advice they provide, they cannot afford to give inadequate advice. There are many people working as consultants in this field and they have a wide range of professional knowledge, skills and expertise. If inadequate advice is given, then the proponent, the decision-makers, the community and the threatened species can all suffer as a consequence. Inadequate or limited advice can, on one hand, lead to decisions being made which would be detrimental to the conservation of a threatened species or in other circumstances, can preclude development which could be approved whereby both the threatened species and the development could coexist. Both these situations can make it much harder for threatened species conservation to proceed in subsequent cases.

And the decision-makers in councils and the state government must ensure that they are familiar with all the threatened species issues that apply in their areas so they can give appropriate and relevant consideration to any threatened species issues which arise.

In the past threatened species issues often were not discovered until late in the process of a development being planned and often after considerable finance had been committed to the project. Now if the threatened species issue is identified in the environmental planning instruments that apply to the land proposed for development then a developer will know there are issues possibly before the land is acquired but certainly before the design of any proposed development is commenced.

However if the issue is not identified in the EPIs, the developer is still required to submit background information such as a Statement of Environmental Effects or EIS with their DA and this must include consideration of threatened species issues. In preparing this documentation the consultant employed by the developer will usually identify the issue at an early stage.

If a threatened species issue is identified to occur or be likely to occur, then the "Eight Part Test" is undertaken to determine if the proposal is likely to have a significant effect on any threatened species, populations or ecological communities, or their habitats.

If it is found that the proposal is likely to have a significant effect on any threatened species, populations or ecological communities, or their habitats thereby triggering the requirements for a SIS to be prepared and the concurrence of the Director General of NPWS or the Director of Fisheries. The developer has three alternatives. Continue with the proposal as is - unmodified and risk it being refused, or having to comply with difficult conditions being applied, or canceling the proposed development. Normally however, the proposal will be modified to ensure that it is not likely to have a significant effect on any threatened species, populations or ecological communities, or their habitats. This may be achieved by the development being relocated on the land or redesigned or the timing of the development being changed. Additional actions are often taken such as more appropriate landscaping, or monitoring programs or "prestart" inspections to minimise the impacts. Developers much prefer to make these decisions themselves with advice from their consultants, away from the public eye before criticisms of the development can arise.

The integration of threatened species issues into the planning system does not mean that the environment including threatened species will always be protected. However the impact of a proposed development on the environment must be considered and if a decision is made that a development will proceed, then that decision is made with the knowledge of the impact it will have. It may be determined that it is in the public interest for the development to proceed despite the impacts that it may have and these may include impacts on threatened species. It is common at this stage for the consent/determining authority to impose conditions to mitigate these impacts.

There are further legislative responsibilities which are beyond the scope of this paper which involve threatened species issues in the planning system in NSW.

One of the specific purposes of the *Local Government Act 1993* (LG Act) is "to require councils, councillors and council employees to have regard to the principles of ecologically sustainable development in carrying out their responsibilities." S7(e). This is a very explicit requirement which is reinforced in s89 where the matters for consideration for approvals under the Act are listed. These include the requirement that councils "must take into consideration the principles of ecologically sustainable development." S89(1)(c). The principles of ecologically sustainable development are defined in the Dictionary in the LG Act as including "(c) conservation of biological diversity and ecological integrity - namely that biological diversity and ecological integrity should be a fundamental consideration." Threatened species considerations of course are an integral component of biological diversity and ecological integrity.

The *Protection of the Environment Operations Act 1997* requires local government "to have regard to the need to maintain ecologically sustainable development" (S3(a)) in undertaking their obligations and duties under that Act. ESD is defined in the earlier *Protection of the Environment Operations Act 1991* and continues in the current Act. It is the same definition as is in the LG Act.

The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* introduced nationally threatened species and ecological communities and introduced the concept of matters of national environmental significance and "controlled actions" requiring the approval of the federal Environment Minister.

Conclusion

When the government of NSW integrated consideration of threatened species issues into the planning system through the TSC and FM Acts, changed the status of threatened species issues and this brought them into the mainstream of consideration by all elements of the community of NSW. This has been of great benefit for threatened species but it also requires that persons working with threatened species fully understand the intricacies of the planning system. The EP&A Act is very powerful and people must be vigilant to ensure that it is used to its full capacity thereby ensuring that threatened species issues are properly considered and the impact on threatened species in NSW are fully identified. This will result in the threatened species, populations, communities and their habitats are managed in the best possible way in NSW for the benefit of the WHOLE community!

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APPENDIX 1 Details of matters contained in the Environmental Planning and Assessment Act 1979

Section 5A specifies the eight matters which must be considered to determine if a proposal is likely to have a significant effect on any threatened species, populations or ecological communities, or their habitats. Following this section is commonly referred to as undertaking the eight-part test.

S5A Significant effect on threatened species, populations and ecological communities or their habitats.

"For the purposes of this Act and, in particular, in the administration of sections 78A, 79C (1) and 112, the following factors must be taken into account in deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats:

(a) in the case of a threatened species, whether the life cycle of the species is likely to be disrupted such that a viable local population of the species is likely to be placed at risk of extinction,

(b) in the case of an endangered population, whether the life cycle of the species that constitutes the endangered population is likely to be disrupted such that the viability of the population is likely to be significantly compromised,

(c) in relation to the regional distribution of the habitat of a threatened species, population or ecological community, whether a significant area of known habitat is to be modified or removed,

(d) whether an area of known habitat is likely to become isolated from currently interconnecting or proximate areas of habitat for a threatened species, population or ecological community,

(e) whether critical habitat will be affected,

(f) whether a threatened species, population or ecological community, or their habitats, are adequately represented in conservation reserves (or other similar protected areas) in the region,

(g) whether the development or activity proposed is of a class of development or activity that is recognised as a threatening process[1],

(h) whether any threatened species, population or ecological community is at the limit of its known distribution."

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Environmental Planning Instruments

State Environmental Planning Policies cover matters which the Minister for Urban Affairs and Planning has determined is, in his or her opinion, a matter of significance for environmental planning in NSW. They can cover all or part of the State. The Director-General of PlanningNSW (formally the Department of Urban Affairs and Planning, prepares draft SEPPs, either after consultation with appropriate public authorities, or at the direction of the Minister for Urban Affairs and Planning, after the Minister has consulted with other appropriate Ministers. The Minister submits the SEPP to the Governor who makes the SEPP.

Regional Environmental Plans cover matters which are, in the opinion of either the Minister for Urban Affairs and Planning or the Director-General of the PlanningNSW, a matter of significance for environmental planning in the region of NSW where the plan is to apply. A REP is preceded by an environmental study* of the land to be covered by the REP. The draft study and REP are exhibited and submissions considered before the final REP is submitted to the Minister who makes the REP.

Local Environmental Plans are prepared by Local Government, by either one or more councils in relation to land within their local government area. A council may be directed by the Minister to prepare a LEP. All LEPs are preceded by a local environmental study* and once the LEP has been prepared it is submitted to PlanningNSW for certification by the department prior to exhibiting the local environmental study and the draft LEP. When finalised by council, the LEP is submitted to the PlanningNSW. The department considers the plan and submits it with a departmental report to the Minister who makes the LEP.

Councils usually also prepare Development Control Plans, DCPs, which set out in greater detail the planning policies and development standards which the council has determined will apply to an area of the LGA or a type of development. These may contain issues to be considered or standards that must be met.

The steps in assessing a development application (DA).

* *Application Lodged*

The applicant lodges the development application, plans and supporting information (such as a statement of environmental effects or for designated developments an environmental impact statement) with the consent authority.

The consent authority is either the local council or the Minister for Urban Affairs and Planning. Where the Minister is the consent authority, development applications are lodged with PlanningNSW.

A set fee is paid, depending on the type of development.

* *Public Consultation*

The extent of public consultation depends on the type of development and the requirements set out in the EPI or in the EP&A Regulation.

* *Assessment*

The application is assessed taking into account:

- the provisions of:
  - any local, regional or state planning instrument, or
  - any draft planning instrument, or
  - any DCP, or

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- any other planning regulation that relate to the site of the proposed development,

- the likely impacts of the proposed development, including environmental impacts on the natural and the built environment and the social and economic impacts in the locality,
- whether the site is suitable for the proposed development,
- any submissions made by neighbours, the wider community and government agencies,
- the public interest.

* *Decision*

The council/Minister will either approve or refuse the development application. If the application is approved, the council/Minister will usually set out conditions that the applicant must fulfil. The applicant can challenge the decision if he/she is dissatisfied with it.

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* In this paper, the term 'threatened species' refers to the statutory formulation - threatened species, populations and ecological communities.

1 There is some confusion in relation to the use of this term. The Act refers to "key threatening processes" which can be listed by the Scientific Committee and which adversely affect 2 or more species. But by not including "key" this reference should be seen as being more extensive and including any threatening process identified in a Recovery Plan or by any scientist or consultant with knowledge of the threatened species issue.

* It is noted that while this is a statutory requirement, this is not always the practice and it seems to have been declining over the last 10 years or so.