(Why) Do we need threatened species legislation?

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ABSTRACT

This paper focuses on the relationship between threatened species listing and command regulation designed to protect habitat on privately owned land. After outlining the historical development of threatened species regulation in NSW from its early origins in legislation designed to control hunting, it explores the role of approval processes and prosecution in the implementation of command regulation in the threatened species context. It examines the extent to which compensation is payable where land use restrictions are imposed, comparing the approach taken in other Australian states, and exploring the case for compensation in the context of the current debate about property rights, landholder duty of care and stewardship payments. Finally, the paper considers the potential of the NSW environmental planning system to protect threatened species habitat in targeted areas and, in particular, explores the relationship between environmental planning instruments and recovery plans. A case is made for a strategic approach to the use of command regulation, in which government takes the initiative rather than reacting on a piecemeal basis to individual project proposals. The Minister for the Environment, advised by what has recently become the NSW Department of Environment and Conservation[2], should play a key role in the strategic planning process.

Key words: historical origins; listing; command regulation; prosecution; compensation; environmental planning.

The origins of threatened species legislation in NSW[3]

In his 1991 decision in *Corkill v Forestry Commission of NSW*,[4] Justice Paul Stein of the New South Wales Land and Environment Court had to determine the meaning of sections 98 and 99 of the *National Parks and Wildlife Act* 1974 (NPWA), as they then stood, which made it an offence to "take" protected and endangered fauna without a licence. He held that "take" should be interpreted as going beyond activities causing direct physical injury to fauna to include "conduct which modifies habitat in a significant fashion thus placing the species of fauna under threat by adversely affecting essential behavioural patterns relating to feeding, breeding or nesting". "Take" included habitat destruction or degradation which adversely affected a threatened or protected species "leading either immediately or over time to a reduced population".[5] The crucial factor leading to this conclusion was that the legislation defined "take" to include "disturb".[6]

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[2] Following recent administrative changes, the National Parks and Wildlife Service has been incorporated into a new Department of Environment and Conservation. References in legislation to the Service and the Director-General of National Parks and Wildlife are now to be interpreted as references to that Department and its Director-General. See *Public Sector Employment and Management (Environment and Conservation) Order* 2003, cl 6, *Government Gazette* No 152, 24 September 2003. The Service will, however, continue to have a separate identity. See http://80-www.nationalparks.nsw.gov.au.ezproxy.uow.edu.au:2048/npws.nsf/Content/new_department. Those employees of the Service who worked on protected area management are now to be found in the Parks Services Division of the Department. Consideration is being given to locating the Service's off-reserve regulatory functions in the Environment Protection and Regulation Division.

[3] See Jarman and Brock (2004).

[4] *Corkill v Forestry Commission of NSW* (1991) 73 LGRA 126.

[5] Ibid at 139-140. On appeal, the Court of Appeal felt it unnecessary to go into this issue in depth because it was at least clear that the proposed logging programme of the Forestry Commission necessarily involved the taking and/or killing of protected fauna: *Forestry Commission of NSW v Corkill* (1991) 73 LGRA 247 at 250.

[6] NPWA s 5.

Pp 30 - 48 in *Threatened species legislation: is it just an Act?* 2004, edited by Pat Hutchings, Daniel Lunney and Chris Dickman. Royal Zoological Society of New South Wales, Mosman, NSW, Australia.

This was a pivotal moment in the evolution of NSW threatened species legislation from its humble beginnings at the end of the nineteenth century. The early legislative initiatives were designed to protect "game" birds and other animals during breeding seasons so that they could be hunted at other times of the year. "Game" was not restricted to indigenous species. The first piece of legislation, enacted in 1866, was entitled *An Act to provide for the preservation of Imported Game and during the breeding season of Native Game*.[7] Legislation in 1879[8] proclaimed that it was "expedient to encourage the importation and breeding of Game not indigenous to the Colony of New South Wales and also to prevent the destruction of Native Game during the breeding season". It made it an offence to "shoot capture kill take or destroy" any listed native or imported game during the closed season.[9] Pheasant, partridge, grouse and deer were identified as game, but the list also included the Sooty Oyster-catcher which has now graduated from being a game species to a vulnerable species,[10] the "Dragoon-bird"[11] and the "Regent-bird".[12] The list could be extended to include any animals "known to be destroyers of snakes, vermin or insects which are injurious to vegetation". The threats to these species were not insignificant: the legislators felt it necessary to forbid the use of firearms with a barrel length greater than six feet or with a bore exceeding one inch in diameter.[13]

The word "take" which was to play a decisive role in the *Corkill* decision over a century later, appeared in the 1879 legislation, but in a context where it could hardly have been argued that it included the destruction of habitat.[14] It disappeared in the subsequent version of the legislation: the *Birds Protection Act* of 1881.[15] The prohibition only covered those who "willfully kill capture or injure".[16] This legislation claimed to have the same objectives as the 1879 legislation. However, it also protected listed "song birds", including the Indian Minah,[17] the Starling and some native birds, including the "Great Kingfisher – commonly known as the Laughing Jackass".[18] This represents the first move towards conservation other than for hunting, because song birds were protected throughout the year, not only during closed seasons. But this protection ceased after five years.[19] It was renewed from 1893, but again only for another five years, and extended to a broader range of native birds, including Lyre Birds *Menura* and the Emu *Dromaius Novae Hollandiae*,[20] which some feared were in danger of extermination (Stubbs 2001, 33).

The formula of "kill capture or injure" was again used in the *Birds Protection Act* of 1893,[21] the *Birds Protection Act* 1901 and the *Native Animals Protection Act* 1903. By 1901, the Indian Minah had been naturalised, listed as an "Australian Bird". Third parties were encouraged to become involved in the enforcement process, with one half of the penalty going to those providing information leading to conviction. The other half went to the Zoological Society.[22] Walker (1991, 19) reports that the Society received seven pounds eleven shillings and three pence in 1903.

In 1918, significant modifications were made to the provisions relating to protected birds and mammals. These changes signaled a movement in the legislation away from a narrow focus on conserving game and songbirds to a much broader focus on protecting fauna (Stubbs 2001, 51). It was at this point that the prohibition on "take or kill", defined to include "disturb", [23] emerged,[24] although its significance was not to be fully realised until 1991.

[7] 29 Vic 22.

[8] 42 Vic 10: *An Act to secure the protection of certain birds and animals.*

[9] Ibid s 2.

[10] TSCA Schedule 2, Part 1.

[11] This is probably a reference to the noisy pitta (*Pitta versicolor*). See the correspondence at http://menura.cse.unsw.edu.au:64800/2001/09/msg00200.html.

[12] This is probably a reference to the regent bowerbird (*Sericulus chrysocephalus*). Scientific names were not provided in the Act.

[13] 42 Vic 10, s 3.

[14] Ibid s 2.

[15] 45 Vic 29. However, the *Local Government (Validation and Amendment) Act* 1922 provided that ordinances could be made "to regulate the taking, use, sale or destruction of fauna …".

[16] Ibid ss 5, 6.

[17] The spelling is now "Mynah".

[18] 45 Vic 29, Schedule 3. Scientific names were not provided in the legislation.

[19] Ibid s 5.

[20] *Birds Protection Act* of 1893, s 6.

[21] 56 Vic 18.

[22] *Birds Protection Act* of 1881, s 14; *Birds Protection Act* of 1893, s 15; *Birds Protection Act* 1901, s 15; *Native Animals Protection Act* 1903, s 9. This provision disappeared with the enactment of the 1918 legislation.

[23] It was defined to *mean* "hunting, shooting, killing poisoning, netting, snaring, spearing, pursuing, taking, disturbing, or injuring". Under the *National Parks and Wildlife Act* 1974, interpreted in *Corkill*, "take or kill" was defined to *include* "hunt, shoot, poison, net, snare, spear, pursue, capture, disturb, lure or injure": s 5(1).

[24] *Birds and Animals Protection Act* 1918, ss 6, 3. This broad definition continued under subsequent legislation: *Fauna Protection Act* 1948, s 4; *National Parks and Wildlife Act* 1974, s 5(1).

Only if an open season was declared could protected species be taken.[25] The 1918 legislation also abandoned the approach of specifically listing protected fauna. All birds and mammals were defined as protected *unless they were listed*.[26] The list identified *unprotected* species, a practice that has continued to this day.[27]

"Rare" fauna first appeared on the scene in the *Fauna Protection Act* 1948. There was no provision for rare fauna to be listed in the legislation. Rare fauna were simply to be proclaimed by the Governor from time to time, without the benefit of a definition. The consequences of designating a protected species as rare were limited. The penalty for taking/killing was increased, from a fine to a prison sentence of six months. Licences could only be issued in very particular circumstances – for scientific specimens and nuisance animals.[28]

The decision in *Corkill* ushered in what was perceived to be a radical new approach to the protection of rare fauna,[29] although it was one that had lain nascent in the law since 1918. It became an offence in NSW to carry out land use activities that significantly modified the habitat of endangered fauna unless this was permitted under the terms of a licence. This was confirmed in amendments made to the NPWA by the *Endangered Fauna (Interim Protection) Act* 1991. Prohibited "take" of listed fauna was defined to include "significant modification of the habitat of the fauna which is likely to adversely affect its essential behavioural patterns".[30]

In spite of what was, in the popular understanding, an ostensibly dramatic expansion in land use regulation, there were, at this stage in the law's development, significant limits on its overall impact. In the first place, the regulatory system only covered *significant* habitat modification, although no guidance was provided as to what was significant. Secondly, although frogs as a group were covered for the first time, invertebrates and plants were not covered. While the *Wild Flowers and Native Plants Protection Act* 1927 made it an offence to pick a native plant/flower identified by proclamation as protected, and "pick" included "destroy", the operation of this offence was significantly restricted because it did not apply to plants grown on private land which were picked with the consent of the landholder.[31] Private landholders could authorise picking of protected native plants from their land for sale.[32] As a result of amendments in 1945,[33] however, sales of protected native plants grown on private land, other than Christmas Bush *Ceratopetalum gummiferum*, were outlawed except where the landholder was licensed to grow them for sale.[34] The basic objective of the provisions was now to regulate commercial exploitation of particular native plants. Private landholders could "pick" threatened plants, including clearing and destroying them, provided that the plants in question were not subject to commercial exploitation and were not picked for that purpose. These provisions continue in operation under the NPWA.[35]

The *Threatened Species Conservation Act* 1995 (TSCA) removed one of the constraints on the operation of the threatened species regime by extending the listing process to cover invertebrates and plants: all species of animals and plants can now be listed as threatened; so can ecological communities, defined as "an assemblage of species occupying a particular area", and populations.[36] Another constraint was removed by abandoning the requirement that *significant* habitat damage be caused before an offence is committed.[37] Section 118D of the NPWA provides, expansively, that a person must not "do anything that causes damage to any habitat … of a threatened species, an endangered population or an endangered ecological community if the person knows that the land concerned is habitat of that kind". Under section 118A(2), it is an offence to "pick" a threatened plant species or a plant that is part of an endangered population or ecological community, with "pick" defined to include "destroy" and "injure".[38]

[25] *Birds and Animals Protection Act* 1918, s 6.

[26] Ibid s 3.

[27] See *Fauna Protection Act* 1948, subsequently repealed by the *National Parks and Wildlife Act* 1974, which continues to define "protected fauna" as fauna not named in Schedule 11: s 5(1).

[28] *Fauna Protection* Act 1948, ss 20, 25, 26. These restrictions on the grant of licences disappeared in the NPWA: ss 99(2), 120.

[29] The decision in *Corkill* was even more dramatic than this because it covered the habitat not only of endangered but protected fauna. This aspect of the decision was quickly neutralised by the *Endangered Fauna (Interim) Protection Act* 1991, Schedule 1(8), which inserted s 98(5) into the NPWA, making it clear that incidental takings of protected fauna in the course of carrying out activity under some other approval, such as a development consent, were exempt from regulation.

[30] NPWA s 5(1).

[31] *Wild Flowers and Native Plants Protection Act* 1927, ss 4(1), 2.

[32] Ibid s 5.

[33] *Wild Flowers and Native Plants Protection (Amendment) Act* 1945.

[34] *Wild Flowers and Native Plants Protection Act* 1927, s 5, as amended.

[35] The list of protected native plants set out in Schedule 13 now includes those used in the cut-flower industry, along with orchids, ferns and waratahs.

[36] TSCA Part 2.

[37] *Donnelly v Delta Gold Pty Ltd* [2001] NSWLEC 55. In spite of drawing this distinction, however, Bignold J, in finding that the activity in question did not damage habitat, relied principally on evidence which had been advanced in the case relating to *significant* impact: [292]-[296].

[38] NPWA s 5.

The decision in *Corkill*, and its subsequent confirmation in the *Endangered Fauna (Interim Protection) Act* 1991, placed threatened species legislation at the forefront of clearing regulation, because vegetation clearance poses a major, and perhaps the biggest, threat to biodiversity (EPA 1997, para 4.1.3; NPWS 1999, p 6; EPAA 2003, para 6.2). The TSCA further consolidated its role in this context by removing some of the remaining constraints on its operation. But in August 1995, State Environmental Planning Policy 46 had been introduced, extending controls on broadacre land clearing throughout the State, and this was followed by the *Native Vegetation Conservation Act* 1997 (NVCA) which came into operation at the beginning of 1998 (Farrier *et al.* 1999: 361-370).[39] As we shall see, the two strands of regulation are closely integrated, but significant issues remain about whether, from one perspective, integration has gone far enough, and from another, whether an appropriate balance has been achieved.

Listing as a trigger for command regulation

From a landholder's perspective, the core element of threatened species legislation – the provision for listing species as threatened – standing alone, should be uncontroversial. Listing is not, however, an end in itself. Nor is it designed solely to alert people in the community of the need to take voluntary action at their own expense. Listing is controversial because it triggers various forms of regulation which involve allocation of community resources and/or the imposition of legal constraints on behaviour. These may include recovery planning, conservation agreements, protective orders, species impact statements and criminal offence provisions.

Some of these do not pose a threat to landholders because they depend on a consensus being reached, for example, voluntary conservation agreements. The effect of more invasive regulatory provisions, such as special directions to particular landholders restricting land use, are frequently softened in practice by requiring agencies to take into account socio-economic impact as well as the conservation needs of listed species, and to pay compensation (see below). Criminal offence provisions, on the other hand, are controversial where they restrict the activities of private landholders generally, without offering compensation. The effect is aggravated where they flow *directly* from a decision to list a species made exclusively on scientific grounds, and the list is continually expanding as new information about the conservation status of species comes to light. In broad terms, this is the kind of regulatory system that is in place in NSW. The question is whether we are expecting too much of it in terms of delivering conservation outcomes.

Not all Australian jurisdictions use listing as a direct trigger for criminalising activities that are likely to have an adverse impact on threatened species habitat. In Victoria, for example, the offence provisions are not triggered until critical habitat has first been designated,[40] and this has occurred only once during the life of the legislation (Moorrees 2003).[41] The Minister has the power to make interim conservation orders regulating private land use,[42] lasting for up to two years,[43] but they can only be made to conserve the *critical habitat* of a species that has been at least nominated for listing.[44] In practice, no orders have been made (Raff 1998, 659). In Tasmania, it is not clear whether listing directly triggers offence provisions.[45] The Minister does, however, have the power to make 30-day interim protection orders, to conserve habitat on private land where activities threaten taxa that have been listed or "accepted" for listing by the Scientific Advisory Committee.[46] As in Victoria,[47] social and economic consequences must be considered before an order is made[48] and compensation is payable for financial loss.[49]

[39] The *Native Vegetation Act* 2003 will eventually repeal (s 52) and replace the *Native Vegetation Conservation Act* 1997, but, as at May 2004, had still not been proclaimed to commence.

[40] *Flora and Fauna Guarantee Act* 1988 (Vic), ss 46-48 and 3(1): definition of "take". Protected flora on private land which is not critical habitat can be taken by or with the consent of the landholder. See also *Wildlife Act* 1975, ss 41-43, relating to offences of taking endangered, notable and protected animals. "Take" is not defined.

[41] This declaration was later rescinded.

[42] *Flora and Fauna Guarantee Act* 1988 (Vic), s 27(b), (c).

[43] Ibid s 32.

[44] Ibid s 26(1)(c), (d).

[45] As in a number of other jurisdictions, this depends on the precise meaning to be given to the concept of "take". "Take" is defined broadly to include " kill, injure, catch, damage, destroy and collect": *Threatened Species Protection Act* 1995 (Tas), s 3(1). However, the offence provision draws a distinction between "disturb" and "take", with the former offence only applying on land subject to interim protection orders and land management agreements: s 51(1). This suggests that the offence was not meant to cover habitat destruction except where there is proof that particular individuals are injured, damaged or destroyed. In 2002, however, the legislation was amended to put it beyond doubt that those carrying out forestry under a certified forest practices plan, among other things, do not need a permit to "take" species unless specifically required: s 51(3). This lends considerable force to the argument that where habitat is destroyed other than by activities covered by this provision, habitat destruction does constitute a "take". See also *Nature Conservation Act* 2002 (Tas), ss 3(5),(7); 26-27. For the position in other jurisdictions, see *National Parks and Wildlife Act* 1972 (SA), ss 5, 47, 51; *Nature Conservation Act* 1992 (Q), ss 88, 89 and Schedule; *Wildlife Conservation Act* 1950 (WA), ss 16(1), 23F, 6(1); McDonald et al (2003).

[46] For interim conservation orders in Queensland, see *Nature Conservation Act* 1992 (Q), ss 102, 103, 105, 108.

[47] *Flora and Fauna Guarantee Act* 1988 (Vic), ss 26(5), 43.

[48] *Threatened Species Protection Act* 1995 (Tas), s 32.

[49] Ibid s 45.

This paper assesses the role of threatened species listing in triggering regulation consisting of demands made by government, enforced by government agencies, potentially leading to the imposition of sanctions against those in breach. Economists have pejoratively labelled it *command and control regulation*, to distinguish it from economic instruments, such as pollution charges, tradeable permits and subsidies. It will be referred to here as *command regulation* in that it takes the form of top-down orders issued by government. Whether it succeeds in *controlling* behaviour in such a way as to achieve desired conservation outcomes is quite a different matter.

Criminal offences, such as those found in sections 118D and 118A of the NPWA, are the stereotypes of command regulation. However, command regulation in the environmental context contains important features that distinguish it from traditional criminal offences. Consequently, we need to question assumptions about how it should be enforced in this context insofar as these are based on how it has traditionally been enforced in other contexts. These distinguishing features and their ramifications will now be explored.

Command regulation and approvals processes

The objective of most command regulation in the environmental context is not to outlaw specified behaviour entirely, but to herd those proposing to carry out particular activities into assessment and approvals/licensing processes. This is inevitable to some extent because the acceptability of proposals depends on the particular configuration of site and activity. For those who get to the stage of making an application, the emphasis within these processes is likely to be not so much on determining whether any approval should be given, but on facilitating the activity by allowing it to go ahead subject to conditions that attempt to ameliorate environmental impact. The theory is that proposals that are completely unacceptable are deterred in preliminary discussions with the approval agency, before they become formal applications.

Under the NSW legislation, the approval required to avoid committing an offence under sections 118D or 118A is, in most situations, development consent under Part 4 of the *Environmental Planning and Assessment Act* 1979 (EPAA).[50] If, for example, a proposed development is permissible with consent under the zoning tables of a local environmental plan, the consent authority will usually be a local council. The Minister for Natural Resources also acts as a consent authority under Part 4 when deciding whether to approve the clearance of native vegetation under the NVCA.[51] Where Part 4 procedures are followed and development consent is granted, a separate licence from the Department of Environment and Conservation (formerly the National Parks and Wildlife Service) is not required.

What has happened here is that the current legislation has largely abandoned the separate licensing system under the auspices of what was then the National Parks and Wildlife Service that operated in relation to activities involving habitat destruction following the decision in *Corkill* and, subsequently, under the amendments contained in the *Endangered Fauna (Interim Protection) Act* 1991. Threatened species issues are now taken into account in the course of other approvals/licensing processes. Usually they are dealt with under EPAA Part 4. The separate licensing system under TSCA Part 6 now only operates at the margins, to cover activities otherwise prohibited by sections 118D and 118A, for which neither development consent under Part 4, nor an approval or licence under any other legislation is required.[52]

Forestry on private land, for example, is frequently exempted from the need to obtain Part 4 development consent from the Minister for Natural Resources for clearing native vegetation under the NVCA.[53] Nevertheless, in some local government areas, particularly on the NSW south coast, local environmental plans require development consent to be obtained for private forestry in rural/non-urban zones, but from the local council rather than the Minister. If development consent is obtained, then activities otherwise prohibited by NPWA sections 118D and 118A are allowed if they are essential to carrying out the consent.[54]

In other local government areas, particularly on the north coast, most of the equivalent plans do not require development consent for private forestry (Kelly and Prest 2000). However, it is an offence to cause waters to be polluted without an environmental protection licence, and this would include diffuse run-off resulting from private forestry.[55] If private forestry was to be licensed

[50] NPWA s 118D(2)(b)(i), for example, provides that it is a defence to show that the activity was essential to carrying out development in accordance with development consent. See also s 118A(3)(b)(i).

[51] This will continue to be the position when the *Native Vegetation Act* 2003 is brought into operation: ss 13-14. Clearing is also permissible under a property vegetation plan approved by the Minister: ss 12(1)(b), 27.

[52] NPWA ss 118D(2), 118A(3).

[53] The exemption covers "private native forestry", defined as the "clearing of native vegetation in a native forest in the course of its being selectively logged on a sustainable basis or managed for forestry purposes (timber production) (NVCA Schedule 4, cl 3; State Environmental Planning Policy 46, Schedule 3). It does not apply to private forestry on State protected land (primarily, steeply sloping land and land along river banks: NVCA ss 4(1), 7) and in the Western Division. In his second reading speech on what is now the *Native Vegetation Act* 2003, the Minister indicated that private forestry would be regulated through property vegetation plans. However, these can only authorise the clearing of remnant native vegetation and protected regrowth if the proposed clearing will "improve or maintain environmental outcomes" (s 29). This phrase is not defined in the legislation, but the Minister indicated his belief that "[a] sustainable forestry operation should, by definition, maintain or improve the long-term condition of the forest through sound silvicultural practices" (*Hansard*, Legislative Assembly, 12th November 2003).

[54] NPWA ss 118D(2)(b)(i), 118A(3)(b)(i).

[55] *Protection of the Environment Operations Act* 1997, ss 120(2), 122, and Dictionary.

under these pollution control provisions after being assessed under the environmental assessment provisions of EPAA Part 5, then activities otherwise prohibited by sections 118D and 118A would be allowed to the extent to which they are essential to carrying out the licensed activity.[56] In practice, however, the former Environment Protection Authority (now the Department of Environment and Conservation) did not encourage applications for environmental protection licences in these circumstances. Consequently, in this situation, a separate licence from the Department of Environment and Conservation (DEC) under TSCA Part 6 would be required to authorise activities which would otherwise amount to an offence under sections 118D or 118A, but only where there is likely to be a significant effect on listed species, populations or ecological communities.[57]

Situations in which a separate licence is required from the DEC will, however, be exceptional. Usually, development consent under EPAA Part 4 will be required, or, alternatively, the proposal will be subject to assessment and approval under Part 5 of that Act. Where a proposal is processed under Part 4 or Part 5, the DEC is reduced to playing a back-stop regulatory role in exceptional circumstances: the Director-General can only veto or attach conditions to proposals which are referred to it by local councils or other approval agencies on the grounds that they are *likely to significantly affect* threatened species, populations or ecological communities.[58] In this event, a species impact statement must be provided.[59] The DEC loses even this limited regulatory role in two situations. In the first place, where the Land and Environment Court upholds an appeal under EPAA Part 4 by an applicant for development consent, it does not need the concurrence of the Director-General before deciding to grant consent, nor does it have to incorporate conditions attached to any concurrence which has been given.[60] Secondly, where a Minister is the decision-maker under EPAA Part 4 or 5, the DEC simply has to be *consulted*.[61] This is the position, for example, under the NVCA because it is the Minister for Natural Resources rather than the Department who formally makes decisions under this legislation on whether or not to give development consent for proposals to clear native vegetation.[62]

While the theory is that the DEC will get to know about situations where there is likely to be a significant effect, the gatekeeper of this preliminary decision, frequently a local council, may not have the expertise to make it, and the DEC has no power to call in proposals so that it can make the determination on likely significant effect itself. In these circumstances, the DEC is largely marginalised as a decision-maker. Where a gatekeeper determines that a proposal is *not* likely to significantly affect threatened species, populations or ecological communities, then, except in those limited situations where the Land and Environment Court is successfully invited to overturn this decision,[63] assessment of the proposal's threatened species implications and the final decision on whether proposed destruction of habitat should proceed is left in its hands - a decision-maker with limited expertise, or, in the case of some local councils, none at all (Douglas 1999, 137-141).

In practice, few proposals get through to the DEC for its consideration. The practice appears to be for the gatekeeper to encourage proponents to put in place ameliorative measures so that any likely significant effect is removed (Saxon 1997, 90).[64] The scientific basis of these measures (for example, translocation and corridors) may be quite questionable (Farrier *et al*. 2002; Kelly and Prest 2000, 596-598).

There are not only issues about the expertise of decision-makers on the front-line in relation to threatened species issues but also about the culture in which some of them operate. Where local councils are involved in decisions on whether to give consent to development under EPAA Part 4, there are inbuilt systemic biases in favour of development, which many councils will find it difficult to resist. So, for example, Andrew Kelly has pointed to the vital interest that local councils have in loosening

[56] NPWA ss 118D(2)(b)(iii), 118A(3)(b)(iii).

[57] TSCA s 95(2). In situations where there is not likely to be such an effect, a certificate to this effect must be issued, and this will again constitute a defence to proceedings under NPWA ss 118A or 118D: NPWA ss 118A(3)(a1), 118D(2)(a1).

[58] EPAA, s 79B(3),(8). The Director-General also has concurrence powers where critical habitat has been designated (see text below at notes 133-136).

[59] Ibid s 78A(8)(b).

[60] *Land and Environment Court Act* 1979, s 39(6). The Court will, however, take into account the views of the Department in evidence, provided that this does not involve undue delay: *Australand v Sutherland Shire Council* [2004] NSWLEC 9.

[61] EPAA s 79B(3). In these circumstances, the recommendations of the Director-General must nevertheless be forwarded to the Minister responsible for the final decision, and if the latter does not accept them, (s)he must give reasons and these must be made available for public inspection at the DEC's head office: EPAA s 79B(6),(7).

[62] NVCA s 14.

[63] *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55.

[64] *Smyth v Nambucca S.C.* (1999) 105 LGERA 65. However, the Land and Environment Court draws a distinction between measures which are part of the proposal, which can be taken into account in determining likely significant effect, and those introduced as a condition attached to a development consent, which cannot: *Drummoyne M.C. v Maritime Services Board* (1991) 72 LGERA 186; *Byron Shire Businesses for the Future Inc v Byron Council* (1994) 84 LGERA 434; *Westport Marina Development Pty Ltc v Concord Council* (2000) 109 LGERA 451; *Silverwater Estate Pty Ltd v Auburn Council* [2001] NSWLEC 60. But see the comments of Bignold J in *Donnelly v Delta Gold* [2001] NSWLEC 55 on the difficulties of drawing such a distinction. See also *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* (1999) 104 LGERA 133 at 152.

subdivision restrictions, motivated by their considerable dependence for income on rates. Unimproved land values for rateable rural properties are increased when rural land is rezoned for residential purposes. In addition, the number of rateable properties will be increased by the creation of new allotments through subdivision approval (Kelly and Farrier 1996, 385). The result is that the rating system operates as a perverse incentive in the development control process.

On top of this, where land has been zoned under an environmental planning instrument so as to make specified development, such as rural residential subdivision, permissible with consent on a project-by-project basis, there is inevitably a built-in presumption that some configuration of development of that particular kind will be given approval. The focus, then, is on the details of the development rather than on whether it should be allowed to go ahead at all. In considering the details, particularly constraints stemming from threatened species considerations, local councils will inevitably have in mind the need to keep development economically viable, and seem likely to avoid attaching stringent conditions that, from the proponent's point of view, might constitute a de facto refusal. At this stage in the process, it is usually far too late to start carrying out surveys to detect the presence of threatened species and to use these as a basis for refusing development consent altogether. The focus at this point is inevitably on the environmental impact of the particular configuration of the proposed development, not on whether it should be allowed to go ahead at all. This is an issue which ought logically to have been determined when the earlier decision about the appropriate zoning of the land was made.

Given the significance of the approvals process, command regulation in the environmental context lacks many of the characteristics with which it has been associated, in the context of traditional criminal offences. What is formally a system of command regulation relies much more in practice on bargains being struck rather than orders issued. This stems in part from the fact that the decision-maker's brief is not to protect the interests of threatened species at all costs, but to balance the socio-economic interests of the proponent and the broader community against the community's interest in threatened species conservation. Even in those few situations where the DEC becomes involved in the decision-making process, the Director-General must still take social and economic considerations into account in deciding whether or not to grant concurrence.[65] We have seen that local council decision-makers may have a direct self-interest in seeing a project go ahead, while in other agencies the recency of environmental management responsibilities may clash with a long-established agency culture supportive of the interests of landholders, one in which the focus in the past has been on facilitating access to natural resources rather than conserving them.

Command regulation and prosecution

In core areas of criminal law, offenders are likely to be prosecuted and punished if they are caught. Where command regulation has been used to regulate behaviour impacting adversely on the environment, this close association breaks down. Prosecution and punishment are the exception rather than the rule (Hawkins 1984; Bartel 2003; Grabosky and Braithwaite 1992).

In part, this stems from the fact that, as argued above, the function of command regulation in the environmental context has traditionally been not to outlaw specified activities outright but to herd them into approvals processes, where decisions are made on the merits of particular proposals. The criminal law is perceived as no more than a backstop to deal with those who operate outside the approvals system altogether. The expectation is that they will be few and far between. The operating assumptions are that most of those carrying out activities which require approval will want to play within the rules, that their activities are to be encouraged in general terms because of the socio-economic contribution their proposal will make, and that they should be facilitated when they are carried out under conditions which minimise environmental impact, as distinct from preventing it altogether. These assumptions may be valid for the most part in an urban development context, where there is a long tradition of command regulation of this kind and where major developers specialise in bringing forward development proposals, and consequently have an ongoing interest in maintaining good relationships with regulators. However, they may not ring so true where agricultural land clearing is involved. Even in the context of urban development, anecdotal evidence suggests that criminal law offers no guarantee that, once approval has been secured, proponents will comply with its terms and, in particular, conditions designed to minimise environmental impact (Rawling 2004). It seems likely that more vigorous enforcement is needed at this stage.

A more vigorous approach to enforcement need not, however, mean an increased emphasis on prosecution. Command regulation in the environmental context can generally be enforced not only through the criminal process but also via civil law enforcement mechanisms. Under NSW legislation, these allow not only enforcement agencies but also any member of the community to bring proceedings to restrain breaches and remedy them.[66] Under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC), even financial penalties can be awarded in civil proceedings brought by the Commonwealth environment Minister.[67]

In civil proceedings, the objective is prevention and remediation rather than retributive or deterrent punishment. Consequently, safeguards designed to protect the innocent from conviction traditionally associated with

[65] EPAA s 79B(5)(h).

[66] EPAA s 123; NPWA s 176A; TSCA s 147.

[67] See, for example, EPBC ss 12, 16, 18, 20, 481-486.

criminal prosecutions can be watered down. Liability need only be proved on *a balance of probabilities*, for example, rather than *beyond a reasonable doubt*. Under NSW legislation, the trade-off is that the ultimate sanction is limited to an order requiring that environmentally harmful activities cease and the environment restored to its previous condition.[68] Yet, in practice, the financial impact of a restoration order may be considerably greater than a fine imposed in criminal proceedings.[69]

Ayres and Braithwaite take a further step in breaking down the assumption that prosecution must inevitably follow breach of command regulation (Ayres and Braithwaite 1992). They start from the position that business regulation is designed to achieve particular objectives, and that the purpose of enforcement is to gain compliance rather than to meet out retributive punishment. Within this scenario, they produce a persuasive rationale for resorting to prosecution only on a very selective basis. They argue that an enforcement strategy designed to change behaviour is much more likely to be effective if it is based on a mix of punishment and persuasion: a "tit-for-tat" strategy. While a firm is cooperating, the enforcement agency should refrain from deterrent responses, particularly prosecution (Ayres and Braithwaite 1992, 5, 21). Most breaches can effectively be dealt with and compliance achieved by informal warnings, or, if this fails, formal notices. These responses are at lower levels of what they call an *enforcement pyramid*, with prosecution close to[70] the pinnacle. The strong expectation is that in most cases, compliance will be secured through these less intrusive interventions towards the base of the pyramid. Only the very few, represented by the tapering off of the pyramid as it moves towards its pinnacle, will resist by continuing to breach the law: for these prosecution is ultimately appropriate (Ayres and Braithwaite 1992, Chap 2).

The argument is that prosecution and punishment will lose much of their impact if they are threatened too soon and too often. Punishment should be "in the background until there is no choice but to move it to the foreground" (Ayres and Braithwaite 1992, 47). At the same time, it must be perceived as inexorable for those who will not cooperate and adjust their behaviour following intervention at the lower levels of the enforcement pyramid:

> "A *paradox of the pyramid is that to the extent that we can absolutely guarantee a commitment to escalate if steps are not taken to prevent the recurrence of lawbreaking, then escalation beyond the lower levels of the pyramid will rarely occur. This is the image of invincibility…*" (Braithwaite 2002, 34).

While Ayres and Braithwaite's conclusions about appropriate enforcement strategies, and particularly the role of prosecution, are likely to be very relevant in some environmental contexts, such as industrial point source pollution control, they rest on a number of assumptions that limit their relevance in the present context. In the first place, they work best where what we are seeking is compliance through positive action to improve environmental performance over the long-term. Secondly, they rest on a fundamental assumption that there is an ongoing relationship between regulatory agency and regulated population, which can tolerate relatively minor breaches in pursuit of long-term improvement. Finally, Ayres and Braithwaite's analysis assumes that the consequences of breach are not irreversible, or at least, that, because of a lack of scientific evidence, we can convince ourselves that they rapidly dissipate, or are a very, very small component contributing to a cumulative impact.

Regulation designed to protect the habitat of threatened species does not fit the scenario envisaged by Ayres and Braithwaite. Where, for example, remnant vegetation is completely cleared, whether for agriculture or residential subdivision, it will take many years to regenerate, will be highly vulnerable to weed invasion, and may never achieve its original state. Clearing of this degree is a dramatic, one-off event that completely removes any opportunity for improved environmental performance through restoration and management. It leaves no room for a continuing relationship between offender and regulatory agency, unless it is formed around restoration. Development in urban contexts has traditionally been treated by the planning system as a one-off event: development is approved once and for all at the outset rather than being licensed on a periodic basis. This approach has undoubtedly gone too far and what has been a system of development control needs to pay much greater attention to ongoing management. There would clearly be room for an enforcement strategy based on the regulatory pyramid where, for example, a condition requiring the retention of habitat is complied with, but there are subsequently breaches of conditions requiring it to be restored and managed. Outside of this scenario, however, we must look to alternative rationales for prosecution policy in the threatened species context.

Constraints on prosecution set by offence definitions

Offence definitions set parameters for prosecution. Under the NSW legislation, "routine agricultural activities" are exempted from command regulation regardless of how much damage they cause to listed species, populations or ecological communities.[71] In part, this reflects a strong sentiment, long espoused in "existing use" provisions in planning legislation, that investment in established land-use activities which complied with regulatory requirements at the time when they were established, should not be undermined by having new regulatory burdens placed upon

[68] EPAA s 124; NPWA s 176A; TSCA s 147.

[69] See, for example, *Al Oshlack v Iron Gates Pty Ltd* [1997] NSWLEC 89.

[70] Licence revocation is identified as being at the highest point of the pyramid: Ayres and Braithwaite (1992), 35.

[71] TSCA s 113A.

them. The Commonwealth's *Environment Protection and Biodiversity Conservation Act* 1999, for example, provides that the continuance of a use which was lawful immediately before the legislation came into operation, and which is not enlarged, expanded or intensified,[72] cannot be subjected to command regulation under that legislation. However, the concept of "routine agricultural activities" in the NSW legislation is not confined to uses already existing at the time the legislation came into operation. Does this, then, mean that any activity that is "routine" in the sense that it is customarily regarded as an agricultural activity within that industry is exempted from regulation, even though it represents a completely new undertaking so far as the particular piece of land is concerned? Or does the activity have to be a related offshoot of a specific, already established and ongoing agricultural operation? Could it seriously be suggested that it would be a routine agricultural activity, for example, for a grain farmer to bring goats on to land and set them loose on remnant vegetation that comprises threatened species habitat?[73]

Secondly, under the offence definition in NPWA section 118D, before taking criminal proceedings the DEC must be in a position to prove beyond a reasonable doubt that the landholder accused of damaging habitat *knew* that the land in question was habitat of a threatened species, an endangered population or an endangered ecological community. This means showing actual knowledge or belief, such as where the landholder has been told by an officer of the DEC that the area comprises habitat of that kind.[74] It may extend to situations where the landholder realised that it was likely that the area comprised habitat, in the sense that there was a significant or real chance that this was the case,[75] but an argument that the accused *ought* to have realised that relevant habitat was involved, and was therefore *negligent*, would fail.[76]

It is apparent from this that the primary objective of this offence is retributive punishment of those who deliberately flout the law and deterrence of those who are tempted to do so.[77] It is not designed to encourage landholders to act more cautiously and carefully. This has a crucial bearing on the enforcement strategy pursued. It would seem to follow that prosecution should be a weapon of immediate rather than last resort. The problem is that it is going to be extremely difficult to catch those who "shoot, shovel and shut up". In addition, where a prosecution is undertaken in these circumstances, the enforcement agency cannot afford to fail as a result of evidentiary problems, because an unsuccessful prosecution is likely to result in a significant loss of credibility with the regulated population (Hawkins 1984, 201), leading to reduced compliance in the future.

In some circumstances, it may be possible to prosecute under NPWA section 118A. The offence under section 118A is narrower than the offence under section 118D in terms of the species it protects. The section only covers situations where a threatened plant species or a plant, which is part of an endangered population or ecological community, is destroyed or injured. Habitat of threatened fauna would only be protected to the extent that it comprises listed flora. On the other hand, the provision is silent on the question of the extent to which the prosecution must prove the landholder's awareness of these facts. In these circumstances, in interpreting the legislation, the courts may decide that Parliament, rather than requiring proof of knowledge, intended that liability should be *strict*.[78] This has been the approach taken, for example, in relation to the offence of polluting waters under the *Protection of the Environment (Operations) Act* 1997.[79] This is also the position under Queensland's *Nature Conservation Act* 1992. It is an offence to destroy or injure ("take") a plant listed as presumed extinct, endangered, vulnerable or rare without a licence,[80] with a defence under the *Queensland Criminal Code* where a landholder acts under an honest and reasonable mistake of fact.[81]

[72] *Environment Protection and Biodiversity Conservation Act* 1999, s 523(2). See also s 522B.

[73] Whatever the position under the TSCA/NPWA, this would appear to amount to the "clearing" of native vegetation under the NVCA, unless it falls within an exemption. "Clearing" is defined expansively to include "substantially damaging or injuring native vegetation in any other way": NVCA s 5(1). Under the *Native Vegetation Act* 2003, when brought into operation, clearing for "routine agricultural management activities" will be exempt from regulation: s 22. However, these are defined narrowly to cover such things as pest control, firewood collection, commercial harvesting of native vegetation, and construction and maintenance of rural infrastructure: s 11. Under the new legislation, there is also an exemption allowing clearing for the continuation of existing cultivation, grazing or "rotational farming practices", essentially an existing use exemption: ss 9(3), 23. But this does not allow clearing of remnant native vegetation, only regrowth.

[74] *Raad* [1983] 3 NSWLR 344; *Hall* (1985) 81 Cr App R 260.

[75] *Bahri Kural* (1987) 162 CLR 502; *Alan Saad* (1987) 70 ALR 667.

[76] Compare the fault requirements for this offence with those for the offence of damaging *critical* habitat under section 118C. Section 118C(2) provides that if a map of the declared critical habitat has been published in the Government Gazette, it is not necessary for the prosecution to prove knowledge. If a map has not been published, then "the prosecution must prove that the person knew that the habitat was declared as critical habitat or that the person knew, or ought to have known, that it was critical habitat": s 118C(3).

[77] *Director-General of National Parks and Wildlife v Wilkinson* [2002] NSWLEC 171.

[78] See *VAW (Kurri Kurri) Pty Ltd v Scientific Committee* (Established under s 127 of the *Threatened Species Conservation Act* 1995) (2003) 128 LGERA 419 at 462, per Hodgson JA; *Hornsby Shire Council v Vitone Developments Pty Ltd* [2003] NSWLEC 272 at [114], per McClellan J.

[79] *Hunter Water Board v State Rail Authority of NSW* [No1] (1992) 75 LGRA 15; *Tiger Nominees Pty Ltd v SPCC* (1992) 75 LGRA 71.

[80] *Nature Conservation Act* 1992 (Q), s 89 and Schedule. It is also an offence to take a common plant: *Nature Conservation (Protected Plants) Conservation Plan*, s 7. However takings carried out by the landholder are exempt: *Nature Conservation (Protected Plants) Conservation Plan*, s 41(1)(b). See also s 97 in relation to the taking of non-listed plants in critical habitat and areas of major interest.

[81] *Criminal Code (Q)* s 24.

Where liability is strict, defendants must produce some evidence[82] that they were acting under a reasonable mistake of fact if they are to escape conviction. One possible line of argument would be that they did not realise that a particular listed species was present on the site,[83] and that this belief was a reasonable one. This involves them showing that they actively considered the issue of whether listed plants would be destroyed or injured, and, in addition, that their conclusion that this was not the case was a *reasonable* one.[84] In this scenario, the essential issue is what precautionary steps must be taken before any mistake that results is treated as being a reasonable one. It might be argued, for example, that a reasonable landholder would have carried out a species survey before carrying out the activity, and that therefore the accused ought to have done so.[85]

We might expect enforcement agencies to take a more selective approach to prosecution where liability is strict. This could involve an initial focus, not on prosecution but on educating landholders as to the more precise nature of the precautionary measures that it would be reasonable for them to take before clearing native vegetation. Subsequently, strategic prosecutions could be brought against those who did not make any effort to act reasonably.

Property rights, compensation and landholder duty of care

Compensation consists of backward-looking payments to landholders for lost expectations, based on any reduction in land value attributable to the land use restrictions imposed. Private landholders claim "property rights" in relation to land in an attempt to ward off command regulation of land use without compensation. In the current environment, government's right to regulate is usually, though reluctantly, conceded. The issue is principally about compensation.

It is crucial to distinguish compensation from incentives paid to landholders. Compensation is not designed to induce landholders to change their behaviour. Stewardship payments, on the other hand, acknowledge the difficulties caused for farmers by the imposition of restrictions on their land use, but they pay not for the restrictions themselves but for active conservation management of the land. Where restrictions on land use have resulted in loss of income, they provide farmers with an alternative source of income (Farrier 1995a; Farrier 1995b).

Section 51(xxxi) of the Commonwealth Constitution provides for compensation where there is an "acquisition of property" by the Commonwealth. Although the law in this area is increasingly confused, the preferable view is that it does not require compensation to be paid in situations where the Commonwealth simply regulates land use, even where the restrictions are very significant. The basic principle is that for section 51(xxxi) to come into play, there must be more than simply a taking (destruction of a right). The Commonwealth or others must obtain a benefit. Where the Commonwealth simply regulates the use of land, the argument is that it does not gain any proprietary benefit (acquisition) even if it is to be regarded as having taken property. However, the particular High Court decision in which this position was most clearly stated[86] involved Commonwealth regulation of land owned by a State, and the legal politics may well be different where regulation of private land use is involved. The *Environment Protection and Biodiversity Conservation Act* 1999 covers the possibility that its land use controls could be held to constitute an acquisition under the Australian Constitution by providing that, should this be the case, the Commonwealth must pay "a reasonable amount of compensation".[87]

The current understanding of the constitutional position in Australia can be contrasted with the position in the USA, where it has been held that the equivalent constitutional provision requires compensation to be paid in *some* situations where significant restrictions are imposed by government on land use. In practice, however, it has proved very difficult to define these situations clearly, apart from extreme circumstances when land use restrictions deprive the landholder of all economically beneficial or productive use of the land.[88]

The question of the scope of section 51(xxxi) of the Commonwealth Constitution is, however, largely an academic one. This is because most land use regulation stems from State Governments. It is State Governments rather than the Commonwealth that have historically allocated and managed land in Australia. Section 51(xxxi) does not apply to State legislation. Nor is there anything in the Constitutions of the States that guarantees compensation where development, or even current land use for that matter, is regulated in the public interest.

Where land use restrictions are imposed in the interests of species conservation, State practice differs in relation to the provision of compensation. There is no provision for compensation in NSW.[89] In Queensland, Victoria and

[82] The burden of proof ultimately rests on the prosecution to prove beyond a reasonable doubt that the accused was not acting under a reasonable mistake of fact: *He Kaw Teh* (1985) 15 A Crim R 203.

[83] The conservation status of a species that the defendant knows to be present would be a question of *law* rather than fact, and would not provide the basis for a defence based on a reasonable mistake of *fact*.

[84] *State Rail Authority v Hunter District Water Board* (1992) 65 A Crim R 101.

[85] See the comment by McClellan J in *Hornsby Shire Council v Vitone Developments Pty Ltd* [2003] NSWLEC 272 at [114].

[86] *Commonwealth v Tasmania* (1983) 158 CLR 1. But see Sperling (1999).

[87] *Environment Protection and Biodiversity Conservation Act* 1999, s 519.

[88] *Lucas v South Carolina Coastal Council* 112 S. Ct. 2886 (1992).

[89] In exceptional circumstances, the landholder can require government to purchase the land under the terms of the *Land Acquisition (Just Terms Compensation) Act* 1991, outlined below in note 123.

Tasmania, compensation is available where short-term orders are put in place.[90] In Western Australia, compensation is provided for a period of five years when consent to take "rare" flora is refused, but not rare fauna. After this, consent must be given unless the land is acquired.[91]

Another interesting variation is found in Queensland provisions that allow private land to be declared a nature refuge. Normally, nature refuges are created by a conservation agreement reached between Minister and landholder.[92] But where agreement cannot be reached on a nature refuge proposal, and the Minister considers that the area contains an area of major interest or critical habitat, a procedure can be instituted to make a compulsory declaration,[93] and to attach binding land use covenants.[94] Where compulsory procedures are used, compensation is payable for loss, *but only where this flows from restrictions imposed on the current use to which land is being put*.[95] In other words, it is not provided to the extent that the land's development potential is restricted. One possible rationale for this "half-way house" is that landholders are being offered an alternative to a compulsory declaration – a conservation agreement – in which they might be able to negotiate better terms in relation to land use restrictions, compensation or stewardship payments. By comparison, those whose land is subject to an interim conservation/protection order have no option but to submit to the restrictions on land use that it imposes.

The stance currently taken by some farmers' organisations is not that compensation should be paid for all restrictions imposed on land use. The demand is that it should be paid where land use is restricted *over and above a limited duty of care*. The duty of care reflects the restrictions on land use which farmers are prepared to comply with without compensation. Beyond this, they claim property rights relating to land use and development, for the withdrawal of which they expect compensation.

The NSW Farmers' Association has produced the following definition of the landholder duty of care in a recent *Discussion Paper* (Keogh 2002):

> *"The owner of land used for farming has a duty of care for the land.*
>
> *1. Any action taken on the land should not result in harm to another person or the property of another person, provided always that such harm is foreseeable, able to be predicted on the basis of current knowledge, occurs within reasonable proximity, and it is reasonable for the owner to take action to avoid such harm.*
>
> *2. The land should be managed in a manner that ensures the sustained productive health of the land, by taking all reasonable steps to:*
>
> - *avoid causing or contributing to land degradation*
> - *conserve soil*
> - *protect water resources*
> - *eradicate or to the best extent possible control pest animal and weed species*
>
> *3. Action should be taken by owners of farm land to avoid causing noise or air pollution, but only to the extent that it is reasonable to do so given current agricultural practices*"

What this definition is trying to do is to differentiate between landholder activities that *deliver a community benefit*, for which compensation should be paid, and those that *cause harm to the community*. At first sight, land use restrictions designed to protect threatened species look as if they are designed to provide a public benefit. However, it could equally be argued that loss of biological diversity, with potentially important values – as a source of industrial chemicals and pharmaceuticals, for example – represents a public harm.

Difficulties in apportioning landholder and community responsibilities would arise under this definition where land use restrictions have multiple justifications. For example, a restriction on the clearing of native vegetation may be imposed to prevent land degradation (soil erosion, salinity), to conserve habitat of threatened species and to prevent the release of carbon into the atmosphere. In determining the amount of compensation payable, the contribution made by land use regulation to each of these objectives would have to be apportioned among them. In some situations (where, for example, clearing approval is refused because of a high risk of salinity, which would fall clearly within the landholder duty of care) little, if any, compensation would be payable even though an inevitable consequence might be that habitat is preserved at the same time.

It is possible to contemplate extreme cases where the lines between compensable and non-compensable restrictions are easier to draw, and where there is likely to be extensive agreement on the appropriateness of compensation. For example, there is a very persuasive argument that compensation should be paid where land use restrictions effectively close down a well-established use, as distinct from modifying it, or deprive the land of all economically viable use.

Apart from these equity considerations, there are also very powerful pragmatic reasons from an enforcement perspective for ensuring that landowners see the discovery of a listed species as a blessing rather than a curse. Otherwise, they may be tempted to "shoot, shovel and shut up". Yet this is not necessarily an argument for one-off compensation. Ongoing stewardship payments, as part of a management agreement, may provide a much better conservation outcome.

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[90] *Nature Conservation Act* 1992 (Q), s 108; *Flora and Fauna Guarantee Act* 1988 (Vic), s 43 ; *Threatened Species Protection Act* 1995 (Tas), s 45.

[91] *Wildlife Conservation Act* 1950 (WA), s 23F(7)-(9).

[92] *Nature Conservation Act* 1992 (Q), s 45.

[93] Ibid s 49.

[94] Ibid s 51(3) and Schedule.

[95] Ibid s 67.

Tasmania's Forest Practices Code, 2000, under which forest practices plans required for forestry activities are assessed, imposes a duty of care on landholders. This goes beyond the NSW Farmers' Association version by not only protecting soil and water values but also providing for the "reservation of significant cultural values". However, this is to be achieved not by identifying the values of particular areas but by setting aside arbitrary percentages of land: up to 5% of land to be totally excluded from forestry operations, or 10% where the protection of significant cultural values is compatible with partial harvesting. Anything beyond this is "deemed to be for the community benefit" and is to be secured only on a voluntary basis or through the payment of compensation.[96] This is reflected in provisions in the *Nature Conservation Act* 2002, which allow land owners to apply for compensation if their forest practices plans are amended or refused in order to protect rare or endangered flora or fauna.[97] In return, the landowner must be prepared to enter into a conservation covenant, with terms fixed by an arbitrator where agreement cannot be reached with the Minister.[98] In determining the amount of compensation, the emphasis is on the lost value and potential of the land,[99] although arrangements can be made for additional management payments under the terms of the covenant.[100] If compensation is refused or not paid, certification of a forest practices plan cannot be denied on the ground that it fails to address adequately threatened species issues previously identified, nor can it be amended.[101] The whole scheme and the desired conservation outcomes can be defeated, therefore, if budgets do not make adequate provision for compensation.

Delivering command regulation through strategic plans

The debate is no longer about whether command regulation should be used to protect threatened species habitat on private land. It is clear that, in the short term at least, adequate provision will not be made for biodiversity conservation in the open market place, and that arrangements made on an entirely voluntary basis between government and individual landholders (conservation agreements, land acquisition) will only operate at the margins. Currently, the issue is about the extent to which the blow of command regulation should be softened by monetary payments, and the precise form that these should take.

Another matter that requires urgent attention, however, is the way in which command regulation is delivered. We have seen that in NSW, under the TSCA and EPAA, it is currently triggered directly by listing decisions based on purely scientific criteria, although the impact of this on proponents is substantially mitigated by the operation of approvals processes that are weighted towards facilitating proposals. One of the major problems is that regulation is not precisely targeted at those areas where it is clear that development will have an impact on threatened species habitat. It applies wherever habitat of threatened species, endangered ecological communities or endangered populations occurs, but responsibility for determining location is not allocated: there is nothing in the legislation requiring habitat to be identified upon listing, only a provision for *discretionary* identification of *critical* habitat, which in practice is rarely used.[102] At the same time, the criminal offence provisions do not clearly allocate responsibility to individual landholders. The messages are mixed. As we have seen, the offence under NPWA section 118D, with its requirement for proof of knowledge, assumes that there is some mechanism for conveying to particular landholders that their land does indeed comprise protected habitat. The offence under section 118A, on the other hand is silent on the question of whether actual knowledge must be proved or whether proof of negligence will suffice.

The problems are particularly acute where ecological communities are involved. In *VAW (Kurri Kurri) Pty Ltd v Scientific Committee* (Established under s 127 of the Threatened Species Conservation Act 1995),[103] a decision concerned with the validity of a listing determination, Spigelman CJ made it clear that, while the listing had to be "sufficiently flexible so as to enable the protection of communities through periods of seasonal and climatic variation", ecological communities had to be defined by the Committee with "reasonable certainty", because listing triggers offence provisions.

[96] *Forest Practices Code* 2000, Section D, p 52.

[97] *Nature Conservation Act* 2002 (Tas), ss 33, 40.

[98] Ibid s 40.

[99] Ibid s 42.

[100] Ibid s 34(3)(a).

[101] Ibid s 44(8).

[102] Once critical habitat has been designated, activities on the area can be controlled by regulation made under the legislation (TSCA s 51). However, only two critical habitat designations have been made: the habitat of the Mitchell's rainforest snail *Thersites mitchella* in Stotts Island Nature Reserve and the habitat of the little penguin *Eudyptula minor* population in Sydney's North Harbour. The latter explicitly excludes formed backyards and residential areas but does include some private land that is not in use because it is steep and rocky. Regulations have been made in relation to the critical habitat of the little penguin (*Threatened Species Conservation Regulation* 2002). Companion animals are prohibited and there are prohibitions on interfering with burrows and approaching within 5 metres of a penguin on land. A recommendation has been made that the critical habitat of the Bomaderry zieria *Zieria baeurlenii*, be designated within the Bomaderry Bushland. The area in question is public land. See http://www.nationalparks.nsw.gov.au/npws.nsf/Content/Critical+habitat+protection+by+doctype.

[103] (2003) 128 LGERA 419.

This meant that a listing determination has to "enable a citizen to decide whether a specific location falls within it". But this did not require maps identifying where the community was to be found, or even the identification of the minimum number of species required to occur together for the community to exist.[104] The difficulties which this creates were recently explored in *Hornsby Shire Council v Vitone Developments Pty Ltd*.[105] The issue was whether a listed ecological community was so badly degraded that it no longer existed. The Court was faced with the conflicting views of two experts, one of whom argued that account should be taken of the prospect of "assisted natural regeneration" in deciding whether the community was still present.[106] McClellan J accepted that the community had been present in the past. He indicated that, in his view, the listing determination had failed to clearly address the issue of restoration, other than by making it clear that not all of the species identified as characterising the community needed to be present at any one time: this would depend on the disturbance history of the site. He concluded that the extent to which active regeneration could be taken into account would depend on the circumstances of each case, but that here, the community no longer existed.[107]

While the issue in the *Vitone* decision was whether a species impact statement should have been prepared and considered because of the likely effect on a listed community, McClellan J specifically drew attention to the problems created for landholders who have to comply with offence provisions. One solution he offered was to rely on what was "the fundamental mechanism of the planning process": " a catalogue containing the parcels of land where the relevant communities have been identified". There are significant tensions here between the flexibility demanded by ecology in identifying ecological communities, and the criminal law's insistence on a degree of certainty. If this cannot be resolved, they may have to part company.

Another problem with the way in which command regulation to protect threatened species habitat is currently delivered in NSW is that it fails to set development parameters well ahead of specific proposals. It defers difficult decisions to the point when a head of steam has built up, with landholders committed to particular projects. The emphasis at this point is on mitigating environmental impact on a particular site rather than addressing it at a landscape level. The issue is how a detailed proposal can be made appropriate for a site, not what the site is appropriate for. As we have seen, this is accentuated where land has been zoned to allow projects of the general kind proposed to go ahead, albeit with consent. The existing delivery system also defers scientific input, in the shape of the "eight part test" (to determine whether a proposal is likely to significantly affect threatened species, populations or ecological communities, or their habitats) and species impact statements (Farrier *et al.* 2002, Whelan *et al.* 2004), until it is too late to carry out the research, let alone for the results to have a substantial bearing on the decision. Any research that is carried out must be paid for by the developer, and will inevitably focus on the specific site. It cannot adequately inform the issue of cumulative impact.

If we are to get serious about conserving threatened species and their habitats, we need to start making relatively firm commitments in strategic plans rather than deferring the issue to the exercise of broad discretions at a stage when a particular proposal is on the table and the focus is on this rather than the conservation significance of the site in the broader landscape. Significant habitat needs to be identified and protected in planning instruments, upon or soon after listing, rather than being left to the vagaries of eight-part tests and species impact statements, and last minute decisions. Decisions made well in advance in strategic plans will be more palatable because they hose down aspirations before they become expectations. Those who do not take heed will find it difficult to deny culpability based on lack of awareness, opening up the way for implementation of a vigorous enforcement policy.

The land use planning system, set up in New South Wales under Part 3 of the *Environmental Planning and Assessment Act* 1979 (EPAA), provides a mechanism for targeted protection of threatened species habitat (Saxon 1997, 93-94; Douglas 1999, 143-144). This legislation has very broad objectives. One of them is to encourage "the protection of the environment, including the protection and conservation of native plants and animals, including threatened species, populations, ecological communities and their habitats".[108] Environmental planning instruments – local environmental plans, regional environmental plans and State environmental planning policies – can be made for these purposes.[109] They can be used as a delivery mechanism for command regulation of development proposals that impact adversely on threatened species habitat.

Commitments to conservation made in environmental planning instruments need to be firm ones. Provisions that simply defer decisions to the exercise of broad discretions by decision-makers in relation to specific project proposals would simply reflect the status quo. Where there is a risk of habitat being irreversibly destroyed, discretion at the stage of project control must be firmly constrained, or even removed by prohibiting development altogether. There are precedents for this in other States in a different but

[104] Ibid at 423, per Spigelman CJ. See also Beazley JA at 453; Hodgson JA at 459-462.

[105] [2003] NSWLEC 272.

[106] Ibid at [76].

[107] Ibid at [91]-[99]; [114].

[108] EPAA s 5(a)(vi).

[109] EPAA ss 24, 26(1)(e1).

related context: command regulation of native vegetation clearance.[110] The Queensland legislation, for example,[111] severely curtails the exercise of discretion by decision-makers where a development permit is required,[112] in particular areas identified by vegetation mapping. The *Vegetation Management Act* 1999 provides that, until Regional Vegetation Management Plans are approved, clearing applications relating to freehold land are to be assessed in accordance with the *State Policy for Vegetation Management on Freehold Land*,[113] which incorporates the Code for the clearing of vegetation.[114] So far as biodiversity conservation is concerned, the *State Policy* provides[115] that the specified purposes of the Code are to be achieved "by not clearing" in remnant *endangered* regional ecosystems and declared areas of high nature conservation value[116] except in very limited circumstances (where clearing is necessary to protect the area from a threatening process, or essential for establishing infrastructure, such as a fence or road, and no suitable alternative exists).[117]

To ask for firm commitments in strategic land use plans is not to deny the inevitability of adjustment in line with changing community sentiment. The provisions of strategic plans are by no means immutable. National park reservations in NSW can only be revoked by an Act of Parliament.[118] Plans, on the other hand, can be amended following a statutorily defined process of public exhibition and comment.[119] What we have witnessed in NSW in recent years, however, has been a growing erosion of the commitment to implement plans insofar as they impose constraints on development, with the gradual introduction of mechanisms into both the legislation and planning instruments to counteract the alleged "inflexibility" of the strategic planning system (Farrier *et al*. 1999, 91-93). Chief among these mechanisms has been the replacement of outright prohibitions on development with discretionary approvals processes. In theory, discretions are constrained insofar as they must be exercised in line with detailed planning objectives. In practice, however, these constraints have been largely immobilised by the decision of the Land and Environment Court in *Schaffer Corporation Ltd v Hawkesbury City Council*. Here it was held that it is not necessary to show that development promotes or is ancillary to planning objectives, or even that it is compatible, provided that it is not "antipathetic".[120]

[110] In NSW, the *Native Vegetation Act* 2003, which has not yet commenced operation, provides that consent cannot be given for clearance of remnant native vegetation or protected regrowth outside of urban areas (s 5(1)(c) and Schedule 1, Part 3) unless the clearing will "improve or maintain environmental outcomes": ss 8, 14(3), 29. The extent to which this constrains the discretion of the Minister will depend on the precise meaning of "improve or maintain". This is not defined in the legislation, but can be defined in regulations made under the Act: s 15(1)(c). Note that the *clearing* must improve or maintain environmental outcomes, not simply compensate for environmental impacts. This would not appear to authorise an offsets strategy, whereby compensation for environmental harm caused by clearing in one area is provided by restoration/rehabilitation of another area.

[111] See also the *Native Vegetation Act* 1991 (SA). This Act provides that in deciding whether to give consent to an application to clear native vegetation, the Native Vegetation Council must not make a decision which is "seriously at variance with" the principles of clearance of native vegetation: s 29(1). These are set out in Schedule 1 of the Act, delineating a number of instances when native vegetation *should not be cleared*. They include situations where native vegetation has significance as habitat for any type of wildlife, whether or not threatened, comprises a high level of diversity of plant species, includes rare, vulnerable or endangered plants, constitutes a rare, vulnerable or endangered plant community or is significant as a remnant of vegetation in an area which has been extensively cleared. The legislation effectively creates a presumption against clearing in these situations, and takes the further step of forbidding a decision that deviates significantly from this presumption. Even though the Council is required to have regard to the applicant's desire to operate the business as efficiently as possible, this is only to operate as a factor within these overall limits (s 29(3)), representing a significant downgrading of traditional economic considerations in the decision-making process. As a result, the legislation significantly *constrains* the discretion exercised by the Native Vegetation Council. These constraints have been tightened even further by recent amendments which provide that the Council cannot give consent to clearance if the vegetation comprises a stratum which is substantially intact, except to the extent that "harvesting" it will not result in lasting damage, lead to significant soil damage or erosion, or result in any long term loss of biodiversity: s 27(2), (3).

[112] Some activities involving the clearing of native vegetation are exempt from any requirement to obtain development consent. These are clearing to build a single residence; clearing for essential management (safety, infrastructure, garden maintenance) and forest practices (*Integrated Planning Act* 1997 (Q), Schedule 8, cll 3A(a),(b); 13(c)). "Forest practices" are defined in Schedule 10 to cover forest management in plantations, and also in native forests under a native forest management code, provided that the existing forest type is regenerated, trees are not taken for export woodchip, and there is no land degradation. The term does not include clearing for the initial establishment of a plantation.

[113] *State Policy for Vegetation Management on Freehold Land* (November 2002).

[114] *Vegetation Management Act* 1999 (Q), s 20(2); *State Policy for Vegetation Management on Freehold Land*, cl 8.2.2.

[115] *State Policy for Vegetation Management on Freehold Land*, Appendix 2.

[116] *Vegetation Management Act* 1999 (Q), Part 2, Division 4. Areas of high nature conservation value can incorporate an area of regrowth vegetation where it will enhance an endangered regional ecosystem: s 19(1)(d).

[117] Proposals are being explored, at the time of writing, to extend this strong presumption against land clearing to remnant "of concern" regional ecosystems on freehold land, in conjunction with an incentives/compensation package.

[118] NPWA s 37(1)(a).

[119] EPAA Part 3.

[120] (1992) 77 LGRA 21. This decision has most recently been applied in *New Century Developments Pty Limited v Baulkham Hills Shire Council* [2003] NSWLEC 154. See, however, *Dem Gillespies v Warringah Council* [2002] NSWLEC 224, where Bignold J departed from this line of authority and held that "consistent" meant "compatible" in the context of the local environmental plan under consideration in that case.

If plans simply defer decisions to unconstrained discretions exercised at the stage of project control, or they can be changed to accommodate market imperatives without careful deliberation, they cease to be strategic plans. Significant commitments to conservation made in plans should only be reversed after careful consideration, particularly where the results of reversing them – for example, to allow a residential subdivision to go ahead on threatened species habitat – are themselves irreversible. The principles of ecologically sustainable development require us to confirm our allegiance to a process that emphasises cautious decision-making in the face of irreversible development.

The irony is that, at the present time, "commitments" in local environmental plans to *allow development* are being kept at the expense of biodiversity conservation. In the past, in many parts of NSW, areas were rezoned to allow development, particularly residential subdivisions, at a time when requirements for prior environmental assessment were quite inadequate. As a result, the precise configuration of environmental, residential/tourism, recreation and rural residential zones are unlikely to reflect environmental constraints, such as significant vegetation and habitat of threatened species. The law offers no guarantee to landholders that land which has been zoned in the past to allow development will not at a later point be rezoned to restrict or prohibit it ("down-zoning" or "back zoning").[121] Landholders only have a legal right to continue a lawful existing use, not to develop.[122] The only, very limited, concession made is to allow landholders to force purchase by government agencies in limited circumstances where their land has been effectively set aside for public purposes.[123]

Regardless of the law's attitude to down-zoning, there is considerable reluctance to use it in practice. There may well be confusion over the formal legal position, with landholders assuming that a land use allowed under an existing zoning, even one which requires development consent, falls within their "property rights", and local councils fearing actions for negligence.[124] Yet in the light of current levels of scientific uncertainty about the habitat requirements of threatened species,[125] there are compelling arguments for not giving long term guarantees to landholders that development will be allowed to go ahead, or that they will be compensated if it is not. Any suggestion that decisions that zone land for development should be immutable is fundamentally at odds with arguments for adaptive management in the face of scientific uncertainty.

*Intra*generational equity

The down-zoning scenario discussed above clearly raises equity issues about how the cost of biodiversity conservation should be spread among existing generations. Where, however, ownership of land has not changed hands following the initial rezoning that allows development, and the landholder has not invested in any steps to develop the land, then later down-zoning simply defeats expectations, removing what has been no more than an increase in the paper value of the land. Where the land has changed hands and the increased value attributable to the rezoning has been factored into the purchase price, equity considerations are more compelling. However, the reality is that in many cases there is a strong element of speculation in these dealings, and the purchaser has no intention to develop the land in the short-term. With the vendor's cooperation, purchasers can always protect their position by making a development application *before* they purchase land, but the problem from the developer's point of view is that any consent obtained would lapse within a set period of time.[126]

[121] Some restrictions on proposals to down-zone land in draft local environmental plans have been imposed on local councils by the Minister in directions made under EPAA s 117(2). For example, draft plans "shall retain existing provisions enabling a dwelling house to be erected on an existing allotment" (Direction G9(ii)) and "shall not substantially reduce existing zonings of land for industrial development" (Direction G11). However, these are designed to provide for some level of stability in planning over time rather than to protect the interests of private landholders. Moreover, the legislative scheme ultimately allows a final plan to be made that does not comply with the Directions. Besides, in *Smith v Wyong Council* [2003] NSWCA 322, the NSW Court of Appeal held that failure by a council to comply with a section 117 Direction when preparing a draft plan did not make it invalid.

[122] EPAA Part 4, Division 10.

[123] Under the *Land Acquisition (Just Terms Compensation) Act* 1991, ss 21-24, government agencies can be required to purchase land "reserved … exclusively" for specified public purposes in environmental planning instruments made under the *Environmental Planning and Assessment Act* 1979 (EPAA ss 26(c), 27), where owners will suffer hardship if there is any delay. Land is exclusively reserved not only where it is set aside for use for a particular purpose, but also where it is "expressly set apart … for use for such a purpose and also for other purposes, but those other purposes do not constitute a reasonable use of the land". Relevant public purposes include "open space", so it may be possible to argue that a down-zoning which effectively meant that land was being set aside for the conservation of threatened species habitat, triggers these provisions. But this would be an extreme case.

[124] The argument of a thwarted developer would be that the council's initial decision to zone the land for development led to the council being liable in tort for negligence for the loss incurred by the developer because it breached its duty of care by failing to carry out the environmental assessment that a reasonable council would have carried out at that stage. However, in *Alex Finlayson Pty Ltd v Armidale City Council* (1994) 84 LGERA 225, 252, Burchett J of the Federal Court held that a duty of care did not arise in relation to a zoning decision because this was a policy rather than an operational matter.

[125] The intractable problem is that the fewer individuals left, the more difficult it is to carry out research on their habitat requirements. This assumes, of course that a close focus on conserving the habitat of threatened species is the most effective way of conserving biodiversity, a crucial issue which is beyond the scope of the present paper.

[126] EPAA s 95.

This does not, however, address the fundamental equity issue raised in a strategic planning scenario where, depending on the conservation significance of particular areas of land, some landholders may be substantially prevented from developing, while others are allowed to go ahead. It is at this point that the issue of compensation is presented most starkly. From one perspective, it could be argued that landholders must take their land as they find it: constraints are imposed on development not only by geological features, such as landslip, but also by biodiversity conservation imperatives. Yet the latter stem from broad community valuations imposed on landholders rather than what should be the self-interest involved in not erecting a building that might fall down. Apart from this, the reality is that disgruntled landholders make poor conservationists. This might not matter too much if conservation required no more than maintenance of the *status quo*. The reality is that it involves active management, and the person in the best position to carry this out is the landholder. Farrier (1995a; 1995b) has argued that, in these circumstances, stewardship payments by government for active conservation management by landholders make far more sense than paying compensation for loss of land value caused by command regulation.

Activities on land that are established and ongoing when new restrictions are brought into operation present particular difficulties. Provisions in the EPAA prevent the use in planning instruments of command regulation to remove or control "nonconforming" or "existing" uses, provided that they are not expanded or intensified.[127] Depending on the circumstances, this could include activities impacting adversely on the habitat of threatened species, such as the removal of dead wood and bush rock, as well as periodic logging.

Provisions which protect existing operations from the demands of new regulatory initiatives are justified by powerful equity arguments, but these are considerably weakened where the aim is not to shut down an activity altogether but to require modifications to be made, in the interests of threatened species conservation for example. The Victorian planning legislation specifically provides for this,[128] and the NSW legislation should be amended to similar effect.

Where threatened species considerations require more fundamental constraints to be imposed on nonconforming uses, including abandoning them altogether, we need to seriously consider paying compensation or to look to alternatives to command regulation. One approach is for government to purchase the land, another for government to make management payments for stewardship or the provision of environmental services, yet another, to require someone who has been allowed to develop land elsewhere to make payments to those who are to abandon their nonconforming use, as part of an offset scheme.

There is no reason why these alternative policy instruments should not be delivered through strategic land use plans. While it is true that environmental planning instruments in NSW have traditionally been associated with command regulation, this stems from planning tradition rather than legislative constraints. The EPAA specifically provides that environmental planning instruments are not restricted to controlling activities[129] but can, more generally, make provision for "protecting and conserving native animals and plants, including threatened species, populations and ecological communities, and their habitats".[130]

The role of the Department of Environment and Conservation

One crucial issue relates to the role, within the strategic planning process, of the NSW Department of Environment and Conservation (DEC). Currently, in NSW, before preparing draft environmental planning instruments, or the environmental studies which sometimes precede them,[131] councils or the Department of Infrastructure, Planning and Natural Resources must consult with the DEC if of the opinion that threatened species, populations or ecological communities, or their habitats could be affected by the plan.[132] This admits the DEC to a consultation process, in which its views must be heard, but not necessarily heeded.

One way in which the DEC can take the initiative under current legal arrangements is to identify the critical habitat of a listed threatened species, population or ecological community.[133] This must then be reflected in the relevant environmental planning instrument.[134] A species impact statement will have to be prepared by those seeking an approval,[135] which means that, in theory, decision-makers will be better informed. In addition, the concurrence of the DEC is required before approval can be given.[136] However, critical habitat designations are seen to be exceptional rather than a crucial component of the ongoing process of strategic land use planning in the course

[127] Ibid ss 106-109.

[128] *Planning and Environment Act* 1987 (Vic), s 6(4A).

[129] EPAA, s 26(1)(b), (f).

[130] Ibid s 26(1)(e1).

[131] Ibid ss 57, 74(2).

[132] Ibid ss 34A, 5C.

[133] TSCA Part 3.

[134] EPAA s 26(2).

[135] Ibid s 78A(8)(b).

[136] Ibid s 79B(3).

of which decisions about appropriate land use are made and reviewed over time. Critical habitat is designated by the Minister for the Environment. It requires proof that the habitat in question is "critical to the survival of the species, population or ecological community".[137] This is hardly precautionary. In practice, only two declarations of critical habitat have been made in NSW at the time of writing, primarily over public land.[138]

In other situations, where critical habitat has not been declared, limited constraints are imposed on the grant of approvals for activities involving habitat destruction. In some situations, where a Minister makes the final decision, for example clearing control under the *Native Vegetation Conservation Act* 1997, the DEC has no power of veto but simply has to be consulted, and then only in situations where there is likely to be a significant effect on threatened species, populations or ecological communities.[139] Where a Minister is not the final decision-maker, the DEC acquires a power of veto through the concurrence process.[140] But we have already seen that this decision involves balancing species conservation against social and economic factors. At this late point in the process, when the whole focus is on a specific proposal by a particular landholder for a particular site, there is little room to manoeuvre when it comes to addressing issues of cumulative impact, trade-offs between socio-economic factors and species conservation, and equity between different landholders.

One possible policy position which might be adopted is that the Minister for the Environment, advised by the DEC, should have a power of veto, not over specific project proposals through the concurrence process, but over provisions in draft environmental planning instruments which are likely to have a significant impact on threatened species habitat. There is a precedent for this. Under the *Water Management Act* 2000, the concurrence of the Minister for the Environment is needed before the Minister for Natural Resources can sign off on a water management plan.[141]

Beyond this, there is a persuasive argument that where a recovery plan has identified specific habitat requirements of threatened species, the Minister for the Environment should be able to take the initiative and put forward proposals for habitat protection in a draft environmental planning instrument, for exhibition and debate.

Links with recovery planning

At present, recovery plans are the poor relations in the broader system of environmental and natural resources planning which exists in NSW under the *Environmental Planning and Assessment Act* 1979, the *Native Vegetation Conservation Act* 1997, the *Water Management Act* 2000 and the *Catchment Management Act* 1989 (Farrier 2002). It is not simply that recovery plans do not bind landholders in the same way that environmental planning instruments, regional vegetation management plans and water management plans do. There is not even a requirement that the provisions of other natural resource management and land use plans should be consistent with the provisions of recovery plans.

On this latter issue, the NSW legislation appears to obfuscate deliberately. At one point it states categorically that Ministers, local councils and public authorities "must not make decisions that are inconsistent with the provisions of a recovery plan".[142] It then goes on, however, to negate this by providing that, where discretion is being exercised, as where a local council is determining the contents of a draft local environmental plan, or the Minister is making a determination on the contents of the final plan, recovery plans must simply be taken into account.[143] In other words, while the measures proposed in recovery plans must be considered, they do not have to be followed.

There is not even a guarantee that a species impact statement will have to be prepared where a proposed activity is inconsistent with a recovery plan. Amendments in 2002 to the so-called "eight part test" only identify consistency with a recovery plan as one of a number of factors to be considered in determining whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats. Even this limited provision has not yet commenced operation.[144]

Recovery plans are given much higher status under the Commonwealth's *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC). Where a plan has been made or adopted under the EPBC, it is binding, but only on Commonwealth agencies and in Commonwealth areas. The Commonwealth must implement recovery plans to the extent to which they apply in Commonwealth areas,[145] and Commonwealth agencies must not take any action that contravenes a plan.[146] On the other hand, when it comes to implementing Commonwealth recovery plans covering land under State jurisdiction, including private land, the Commonwealth's only resort is to seek the *cooperation* of the States.[147]

[137] TSCA ss 37(1), 47.

[138] See note 102.

[139] EPAA s 79B(3).

[140] Ibid.

[141] WMA ss 41(2).

[142] TSCA s 69(1).

[143] Ibid s 69(2).

[144] *Threatened Species Conservation Amendment Act* 2002, Schedules 1[53] and 2.1[4].

[145] EPBC s 269(1).

[146] Ibid s 268.

[147] Ibid s 269(2).

Where the approval of the Commonwealth Minister for the Environment is required, because a proposed activity is likely to have a significant impact on Commonwealth listed species or ecological communities, Commonwealth recovery plans can bite hard. The EPBC provides that in deciding whether or not to give approval, and if so under what conditions, the Minister "must not act inconsistently" with a recovery or threat abatement plan.[148] Where this leads to an adverse Commonwealth decision, it will override any decisions by State agencies and local councils in favour of allowing a proposal to go ahead.

If, for example, a Commonwealth recovery plan did go as far as to identify areas of habitat that need to be protected, it would have a crucial bearing on the Commonwealth Minister's decision on whether to approve a proposal. But unless landholders make a practice of checking the contents of individual Commonwealth recovery plans, this constraint will only became apparent when a specific project is proposed, and then only if the Commonwealth Minister makes the preliminary decision that the proposal requires Commonwealth approval because it is likely to have a significant impact on listed threatened species or ecological communities.[149] There is no requirement to link Commonwealth recovery planning with strategic land use planning at a State level.

Conclusion

NSW provisions relating to the protection of threatened species habitat betray their roots in a system originally designed to regulate hunting. At a symbolic level, heavy reliance appears to be placed on command regulation triggered directly by threatened species listing, and backed up by the threat of prosecution. In practice, however, this is significantly moderated by the operation of an *ad hoc* approvals process dominated by socio-economic considerations, with conservation outcomes a hoped-for side-effect of ameliorating provisions rather than a primary objective. Decision-making processes are driven by individual development proposals rather than strategic thought, and assessment of cumulative impact is a significant casualty. The government agency with expertise in threatened species conservation and scientific research is marginalised.

An alternative approach involves re-orientating the decision-making process away from project control towards strategic planning. Rather than consistently deferring decisions to a time when particular development proposals are put forward for consideration, the initiative should be taken at a much earlier stage. At this point, commitments can be made to the protection of threatened species habitat by heavily constraining the discretion of those responsible for deciding on approvals, or putting in place absolute prohibitions. The orientating principle should not be that we can, at one and the same time, keep our environmental cake as well as consuming it through development, but that destruction of threatened species habitat is largely irreversible and should only be contemplated, and then carefully, at a strategic level. While these commitments should be subject to ongoing review, adjustments should only be through a deliberate process of plan amendment in which community participation in decision-making is central. The DEC can play a much more effective role at this level than it currently plays through the exercise of its limited concurrence powers within the project control process.

References

Ayres, I. and Braithwaite, J. 1992. *Responsive Regulation: Transcending the Deregulation Debate*. Oxford University Press, New York.

Bartel, R. 2003. Compliance and complicity: an assessment of the success of land clearance legislation in New South Wales. *Environmental and Planning Law Journal* **20**: 116 – 141.

Braithwaite, J. 2002. *Restorative Justice and Responsive Regulation*. Oxford University Press, New York.

Douglas, S. 1999. Local Government and the Threatened Species Conservation Act – The Greatest Potential; The Weakest Link. *Australasian Journal of Natural Resources Law and Policy* **6**: 135-148.

Environment Protection Authority (NSW). 1997. *New South Wales State of the Environment 1997*. EPA, Sydney, NSW.

Environment Protection Authority (NSW). 2003. *New South Wales State of the Environment 2003*. EPA, Sydney, NSW.

Farrier, D. 1995a. Policy instruments for conserving biodiversity on private land. Pp. 337-359 in *Conserving Biodiversity: Threats and Solutions*, edited by R. A. Bradstock, T. D. Auld, D. A. Keith, R. T. Kingsford, D. Lunney and D. P. Sivertsen. Surrey Beatty and Sons, Chipping Norton, NSW.

Farrier, D. 1995b. Conserving biodiversity on private land: incentives for management or compensation for lost expectations. *Harvard Environmental Law Review* **19**:303-408.

Farrier, D., Lyster, R., Pearson L. and Lipman Z. 1999. *The Environmental Law Handbook: Planning and Land Use in New South Wales*. 3rd ed., Redfern Legal Centre Publishing, Sydney, NSW.

Farrier, D. 2002. Fragmented law in fragmented landscapes: the slow evolution of integrated natural resource management legislation in NSW. *Environmental and Planning Law Journal* **19**: 89-108.

Farrier, D., Whelan, R. and Brown, C. 2002. Addressing scientific uncertainty in local government decision-making processes. *Environmental and Planning Law Journal* **19**: 429-444.

Grabosky, P. and Braithwaite, J. 1986. *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*. Oxford University Press, Melbourne, Victoria.

Hawkins, K. 1984. *Environment and Enforcement*. Clarendon Press, Oxford, UK.

Jarman, P.J. and Brock, M.A. 2004. The evolving intent, coverage and use of legislation to protect biodiversity in New South Wales. Pp 1-19 in *Threatened Species Legislation – Is It Just An Act?*, edited by P. Hutchings, D. Lunney and C. Dickman. Royal Zoological Society of NSW, Mosman, NSW.

[148] Ibid s 139.

[149] Ibid Part 7.

Kelly, A. and Farrier, D. 1996. Local government and biodiversity conservation in New South Wales *Environmental and Planning Law Journal* **13**: 374 –389.

Kelly, A. and Prest, J. 2000. Implementation of threatened species law by local government in New South Wales. *Environmental and Planning Law Journal* **17**: 584-601.

Keogh, M. 2002. *Property rights and farming in Australia: Defining a Duty of Care for Farm Land*. NSW Farmers, Sydney, NSW, June 2002.

McDonald, L., Bradshaw, S. D. and Gardner, A. 2003. Legal protection of fauna habitat in Western Australia. *Environmental and Planning Law Journal* **20**: 95-115.

Moorrees, A. 2003. Manager Threatened Species and Communities, Department of Sustainability and Environment (Vic). Pers. comm. 25 February 2003.

National Parks and Wildlife Service (NSW). 1999. *NSW Biodiversity Strategy*. NPWS, Hurstville, NSW.

Rawling, J. 2004. Case studies and lessons learnt: translocations conducted as amelioration for development. Australian Network for Plant Conservation Translocation Workshop, 4 June 2004, Mt Annan Botanic Garden, Sydney, NSW.

Saxon, M. 1997. "The Threatened Species Conservation Act 1995 – Is the Development Approval Process Working?" Pp 85-95, in *On the Brink: Your Bush, Their Habitat, Our Act: Is the Threatened Species Act Working?* edited by H. Webb. Nature Conservation Council, Sydney, NSW.

Sperling, K. 1999. If caution really mattered. *Environmental and Planning Law Journal* **16**: 425-440.

Stubbs, B. J. 2001. From 'useless brutes' to national treasures: A century of evolving attitudes towards native fauna in New South Wales, 1860s to 1960s. *Environment and History* **7**: 23-56.

Walker, R. B. 1991. Fauna and flora protection in New South Wales, 1866-1948. *Journal of Australian Studies* **28**: 17-28.

Whelan R., Brown C. and Farrier D. 2004. The Precautionary Principle: What is it and how Might it be Applied in Threatened Species Conservation? Pp 49-58 in *Threatened Species Legislation – Is It Just An Act?*, edited by P. Hutchings, D. Lunney and C. Dickman. Royal Zoological Society of NSW, Mosman, NSW.