SUBMISSION TO

INDEPENDENT BIODIVERSITY LEGISLATION REVIEW PANEL

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Submission by Sophie Riley, to the Independent Biodiversity Legislation Review Panel

1. INTRODUCTION

1.1 Expertise

My name is Sophie Riley and I am a senior lecturer in the Faculty of Law at the University of Technology Sydney. Amongst other things, my scholarship, research interests and publications encompass the regulation of invasive alien species and animal welfare regulation.[1] Select conferences and publications relevant to this submission include:

2014

- Sophie Riley, Rio + 20: What Difference has Two Decades Made to State Practice in the Regulation of Invasive Alien Species (2014) 38 (2) *William and Mary Environmental Law and Policy Review* 371.
- Sophie Riley 'Buffalo Belong Here, as Long as he Doesn't Do too Much Damage: Indigenous Perspectives on the Place of Alien Species in Australia' (2014) 16 (2) *Australasian Journal of Natural Resources Law and Policy* 157.
- Sophie Riley, Australia - Country Report, (2014) *IUCN Academy of Environmental Law e-journal*, 42; Online Files: ej2012-1-v3[1].pdf.
- Sophie Riley, conference presentation, 'The Birds and the Bats: Using Adaptive Management to Find the Balance of Public Interest in Wind Farm Development", IUCN Colloquium July 2014, Tarragona, Spain.

2013

- Keely Boom, Dror Ben Ami, Louise Boronyak and Sophie Riley, 'The Role of Inspections in the Commercial Kangaroo Industry', Occasional Papers (2013) *International Journal of Rural Law and Policy*, 162.
- Sophie Riley, 'Peak Coordinating Bodies And Invasive Alien Species: Is The Whole Worth More Than The Sum Of Its Parts?' (2013) 35 (3) *Loyola of Los Angeles International and Comparative Law Review*, 453.
- Sophie, Riley, Submission to the Australian Senate on the draft exposure of Australia's Biosecurity Bill.
- Sophie Riley, Australia - Country Report, (2013) *IUCN Academy of Environmental Law e-journal*, 50; http://www.iucnael.org/en/e-journal/current-issue-.html .
- Sophie Riley, 'The Last Word: Environmental Justice in NSW', (2013) 18 (1) *Alternative Law Journal* 68.

2012

- Sophie Riley, 'Law is Order and Good Law is Good Order: the Role of Governance in the Regulation of Invasive Alien Species' (2012) *Environmental Planning and Assessment Law Journal* 16.

[1] Other research interests include pedagogy for widening participation in higher education, particularly with respect to improving learning outcomes for international students.

- Sophie Riley, Using 'Threatening Processes' To Protect Freshwater Biodiversity From Invasive Alien Species' (2012) 1 *Canberra Law Review* 58.
- Sophie Riley, Australia - Country Report, (2012) *IUCN Academy of Environmental Law e-journal*, 42; http://www.iucnael.org/en/e-journal/previous-issues/239-issue-20111.html
- Paul Martin, Miriam Verbeek, Sophie Riley, Robyn Bartel and Elodie Le Gal *Innovations in Institutions to Improve Weed Funding, Strategy and Outcomes, Research Agenda*, RIDC (2012).

2011

- Sophie Riley, 'Heads I Win, Tails You Lose: Uncertainty and the Protection of Biodiversity from Invasive Alien Species' (2011) 14 (1&2) *Asia-Pacific Journal of Environmental Law*, 139.
- Robyn Bartel and Sophie Riley, 'How do We Radically Improve Weeds Laws? Critical Action for Wicked Problems', 16th NSW Weeds Conference, July 2011 in Coffs Harbour

2010

- Sophie Riley, Submission on Australia's Native Vegetation Framework Consultation Draft: a national framework to guide the ecologically sustainable management of Australia's native vegetation for ecosystem resilience.

2009

- Sophie Riley, 'Preventing Transboundary Harm from Invasive Alien Species' (2009) 18 (2) *RECIEL* 198.
- Sophie Riley, **'**A Weed by any Other Name: Would the Rose Smell as Sweet if it Were a Threat to Biodiversity', (2009) 22 (1) *Georgetown International Environmental law Review* 157.
- Submission to The Department of the Environment, Water, Heritage and the Arts on Australia's Biodiversity Conservation Strategy 2010-2020.

2005

- Sophie Riley, "Invasive Alien Species and the Protection of Biodiversity: The Role of Quarantine Laws in Resolving Inadequacies in the International Legal Regime" *Journal of Environmental Law* (Oxford) JEL Vol 17 No 3. Available from http://jel.oxfordjournals.org/cgi/content/abstract/eqi028?ijkey=zcsWXONzbH12x3x&keytype=ref

1.2 Scope of Submission

The inquiry is very broad-ranging and accordingly, this document focusses on Theme 4: Conservation in development approval processes, and in particular ecologically sustainable development in land planning regulation, with an emphasis on whether the regulatory system (planning laws) adequately protects listed threatened species, populations and ecological

communities. The author largely refers to the *Environmental Planning and Assessment Act 1979* (NSW) (EPAA), rather than the Planning Bill 2013 (Planning Bill) because the Planning Bill is not yet in force; and also, the Issues Paper on page 8 refers to the EPAA.

2. ECOLOGICALLY SUSTAINABLE DEVLEOPMENT, PLANNING LAWS, AND LISTED THREATENED SPECIES

Legislation that deals with threatened species and land planning embraces objectives based on ecologically sustainable development (ESD). Section 3 of the *Threatened Species Conservation Act 1995*, for example, sets out objects that entail the conservation of biodiversity and the promotion of ESD. Section 5 of the EPPA lists the objects of the EPPA as encompassing: the proper management of natural resources including natural areas, forests, native plants and animals; encouraging the use of principles of ecologically sustainable development; and, promoting the orderly and economic use and development of land.[2]

The components of ecologically sustainable development are set out in section 6 of the *Protection of the Environment Administration Act 1991* (NSW) as requiring "the effective integration of economic and environmental considerations in decision-making processes." According to the section, this entails the implementation of concepts such as the precautionary principle, notions of intergenerational equity, conservation of biodiversity and improved valuation, pricing and incentive mechanisms.[3]

At the same time, provisions relating to ESD are not found in an operational part of the *Threatened Species Conservation Act 1995* or the EPAA. In particular, with respect to the latter, objects extend across a range of aims that have the potential to conflict with principles of ESD. Preston CJ has noted that this arena of conflict provides decision-makers with many challenges and the need to balance completing claims.[4] Moreover, the EPAA gives decision-makers much discretion. Although regulators must consider principles of ESD, the weight that is given to those principles is not specified. Therefore, the word "implement" in section 6 of the *Protection of the Environment Administration Act* is not regarded as making ESD operational in the sense of giving its principles priority over other interests. Rather, it means that ESD is one of many considerations, and it can be trumped by economic interests.

In the context of threatened species, it is uncommon for projects to be refused on the basis of principles of ESD. The Australian Network of Environmental Defender's Offices Inc has noted that "No State or Territory planning laws meet best practice standards for environmental assessment. Project refusals on the basis of threatened species are extremely rare…or are the result of third party litigation… [These failings are] most apparent in relation

[2] See also, section 3 of the *Native Vegetation Act 2003* that similarly notes that the management of native vegetation, particularly vegetation of high conservation value, should be consistent with principles of ESD.

[3] Section 6 of the *Protection of the Environment Administration Act 1991* (NSW) contains four principles, and the Rio Declaration on Environment and Development contains 27 principles, including Principles 22 and 20 on the important role of Indigenous peoples, women respectively; and Principle 8 relating to reduction of unsustainable patterns of production and consumption. 1992 Rio Declaration on Environment and Development (1992) 31 *ILM* 874.

[4] *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59, paragraph 80.

to provisions for the fast-tracking of environmental impact assessment for major projects." [5] Elsewhere, Professor Gerry Bates notes that common criticisms of the EIA process include the fact that the environmental impact statement is prepared by a nominee of the developer, that "economic and technical feasibility" studies are undertaken first, with environmental matters often seen as an obstacle to be overcome and that there is "a lack of post-decision monitoring to assess whether controls are adequate, or predictions correct." [6] All of these critiques go to the heart of ESD.

Part of the problem stems from lack of legislative guidelines as to the weight to be given to ESD. In *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197 (*Barrington-Gloucester*), the court noted that its role was to consider principles of ESD, including the precautionary principle, at a high level of generality.[7] In order for the decision-maker to be bound to consider ESD and its principles at a more specific level, the legislation must expressly or impliedly oblige this action.[8] In the case before the court, there was nothing that would derogate from this view, as it was up to the decision-maker to determine the extent of scientific uncertainty, and the proportionate response. [9] Clearly, the court's approach is that the question of what weight should be given to principles of ESD requires legislative attention. The EDO has cogently pointed out that it is crucial that…a decision-maker should be required not just to *consider* ESD, but be required to protect the environment and act consistently with ESD principles in approving a development.[10]

The problem, from the point of view of environmental protection, however, is that legislation and policy in New South Wales are eroding environmental protection and appear to be following a trajectory that will further weaken environmental laws and their enforceability. Ultimately, this will lead to less effective conservation of biodiversity and put further stress on threatened species.

The litigation surrounding the Warkworth mine is a case in point. In *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 the Land and Environment Court (LEC) refused an application to expand the Warkworth mine. Preston CJ noted that there were significant adverse impacts relating to "biological diversity, noise and dust, and social impacts" that were inadequately addressed by the Minister's approval.[11] Furthermore, his honour noted that the economic

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[5] Australian Network of Environmental Defender's Offices Inc (ANEDO), *An Assessment of the Adequacy of Threatened Species & Planning Laws in all Jurisdictions of Australia*, December 2012, 4. Available from <https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/ANEDO_adequacy_threatened_species_laws_report.pdf> (last visited September 2014).

[6] Gerry Bates, *Environmental Law in Australia* 8th edition LexisNiexis Butterworths, (2008) parags 10.141-10.152.

[7] *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* paragraph 171.

[8] Ibid, paragraph 173.

[9] Ibid, paragraph 177.

[10] Environmental Defenders Office, *Weekly Bulletin*, August 31, 2012, number 775. Available from <http://www.edo.org.au/edonsw/site/bulletin/bulletin775.php#01> (last visited September 2014).

[11] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48, paragraph 14.

evaluations provided by Warkworth did not address these issues appropriately. [12] Warkworth appealed, but this was dismissed, the Court of Appeal affirming the decision of the LEC.[13]

Notwithstanding this litigation, the New South Wales Government introduced the Environmental Planning Policy (mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013 (Resource Significant Amendments), that will likely prioritise mining projects above environmental and social matters. Clause 12AA(4), for example, sets out that the significance of the resource is to be the decision-maker's "principal consideration". As such it creates a test of proportionality, pitting environmental and societal concerns against economic ones, but also raising economic issues to a level that arguably conflicts with principles of ecologically sustainable development.[14]

At a time when the impacts of co-stressors to biodiversity, such as climate change call for tighter environmental controls, the signals are that the State of New South Wales is poised to move in the opposite direction. The effect is to erode the notion of "sustainability" from the concept of sustainable development. The Issues Paper refers to "ways to incorporate environmental, social and economic considerations (i.e. triple the bottom line) into decision-making frameworks". Hopefully, this does not indicate the weakening of environmental protection in favour of economic interests. Environmental protection requires robust regulation, and what is more, regulation found in operative and enforceable parts of legislation. Yet Theme 3 of the Issues Paper appears to pre-empt this by referring to streamlining regulatory processes, supporting greater certainty for developers and the community, and in the same breath referring to "how development and conservation objectives will be balanced".

Given the decision in *Barrington-Gloucester* and the Resource Significant Amendments, it is trusted that this review will not tilt the balance in favour of development and economics. The guiding principles should be those of ESD. The danger, however, is that a pattern exemplified by the Planning Bill 2013 will be set and followed. Clause 1.3 of the bill sets out the objects to include: "sustainable development"; the promotion of the growth of the State's economy; increased productivity; and, the promotion of efficient and timely development assessment that is proportionate to the likely impacts of proposed development. Clause 1.2(2) describes sustainable development briefly in terms that are consistent with the Brundtland report,[15] but does not enumerate other important notions such as the precautionary principle. It is also noteworthy that word "ecologically" has been omitted from the phrase "sustainable development". This forewarns that ecological concerns have been put on the backburner and represents a disturbing trend that the subordination of environmental matters may potentially extend beyond the Resource Significant Amendments.

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[12] Ibid, paragraphs 14-20.
[13] *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105.
[14] The Law Society of New South Wales, Young Lawyers, Environment and Planning Law Committee, *Submission on the State Environmental Planning Policy (mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013* NSW Young Lawyers, (2013) at 5. Available from http://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/763290.pdf (last visited September 2014).
[15] Gro Brundtland, Report of the World Commission on Environment and Development: Our Common Future. Transmitted to the General Assembly as an Annex to UN General Assembly document A/42/427. Part 2.1 (1987).

The latest *New South Wales State of the Environment* report notes that

> [t]he overall diversity and richness of native species in New South Wales remain under threat of further decline. Thirty-five additional species have been listed as threatened under NSW legislation since 2009."[16]

Considering this continual decline in biodiversity now is the time to be winding back environmental protection. Indeed, at a time when the impacts of co-stressors to biodiversity such as climate change call for tighter environmental controls, the signs are that the opposite is about to happen. What is needed are the following:

- Objects of legislation should include *ecologically* sustainable development;
- The phrase, *ecologically* sustainable development, should be defined to include the implementation of commonly accepted core principles, such as, the precautionary principle, notions of intergenerational equity, conservation of biodiversity and improved valuation, pricing and incentive mechanisms;
- Legislative recognition that the protection of biodiversity is a component of ESD and relates to all species, not just threatened ones. Moreover this fact needs to be reflected in management and planning regulation;
- Threatened species need to be recovered, with the implementation of recovery plans and appropriate threat abatement plans;
- Objects need to be made operational within legislation as well as being included in non-operational parts of legislation and policy instruments;
- Where competing interests need to be balanced, legislative guidelines should be provided that give environmental protection equal if not greater weight than economic interests.

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[16] NSW Environment Protection Authority, *New South Wales State of the Environment 2012*, NSW Environment Protection Authority (2012), paragraph 5.1.