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. Select conferences and publications relevant to this submission include:

2014
- 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.

2013
- Sophie, Riley, Submission to the Australian Senate on the draft exposure of Australia’s Biosecurity Bill.

2012

1 Other research interests include pedagogy for widening participation in higher education, particularly with respect to improving learning outcomes for international students.
1.2 Scope of Submission

The inquiry is very broad-ranging and accordingly, this document focuses 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 DEVELOPMENT, 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 competing 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.


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.”

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.” 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. 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.

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. 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.

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. Furthermore, his honour noted that the economic

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

8 Ibid, paragraph 173.

9 Ibid, paragraph 177.


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. Warkworth appealed, but this was dismissed, the Court of Appeal affirming the decision of the LEC.

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.

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, 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.
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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