The Leeuwin Group

Biodiversity Conservation in Western Australia

A Critical Issues Paper prepared in response to the *Biodiversity Conservation Bill 2015*

March, 2016

Executive Summary

The Leeuwin Group (LG) is an independent group of eminent scientists in their field who are committed to the conservation and protection of Western Australia's biodiversity and natural environment. Given the critical importance of Western Australia's biodiversity the LG's first project has been to prepare its advice on the *Biodiversity Conservation Bill 2015*. In so doing the LG has brought its scientific and policy experience and expertise together to analyse the Bill and make recommendations.

New biodiversity legislation is urgently needed in Western Australia and the Government is to be commended for introducing the Bill into Parliament. The Bill contains many long awaited features; e.g., statutory recognition for threatened ecological communities and provisions for recovery plans. However, there are areas where best practice in the application of science to biodiversity conservation has not been achieved. It is these areas that are the focus of this paper.

As they stand at present the Objects of the Bill are inconsistent in mandating both conservation and use of biodiversity, without one prevailing over the other. This inconsistency must be removed with two additional Objects added:

- To prepare, promote and regularly report on the effectiveness of a Biodiversity Conservation Strategy; and
- To ensure the progressive undertaking of comprehensive biodiversity surveys across the terrestrial and marine environments of the State.

The LG is particularly concerned that the new Bill allows the Minister to approve "taking" a threatened species even if it becomes extinct or to allow a threatened ecological community to be destroyed. It is essential that these endangered elements of the State's biodiversity have the highest level of protection.

A means to include the latest independent scientific thinking in decision-making about threatened species and communities, and threatening processes is essential. The Bill must include an independent science-based advisory committee to advise the Minister on threatened species, communities and threatening processes. The statutory advisory committee approach is effective in other states and at the Commonwealth Government level. Its adoption in WA would bring us into current best practice.

The Leeuwin Group believes that protection of the State's unique biodiversity must be underpinned by good science. Only by addressing these concerns will such an outcome become possible.

Background

The Leeuwin Group (LG) is an independent group of eminent scientists in their field who are committed to the conservation and protection of Western Australia's biodiversity and natural environment. The LG's purpose is to: *Provide high-level independent scientific commentary and advice on environmental matters to Government, industry, environmental organisations and managers.*

Western Australia lacks an up to date Biodiversity Conservation Act. Currently, a range of Acts containing provisions cobbled together from earlier legislation imperfectly protect species of plants and animals, and in particular rare and threatened species. There is no law operating in Western Australia that has the specific object of protecting the habitat of Western Australian fauna, in contrast with that of declared rare flora (DRF)[1]. This is of great concern, given that the southwest corner of Western Australia has been identified as one of 35 of the world's major biodiversity hotspots that are currently threatened by habitat loss and degradation[2]. Loss of species worldwide is occurring at a much greater rate than in the geological past and many scientists argue that we are now in the midst of the world's 'sixth great mass extinction', and one caused ultimately by humans rather than by climate alone[3].

The LG therefore sees an urgent need to replace the current legislation with a new Act that represents current best practice, and while welcoming the *Biodiversity Conservation Bill 2015* (the Bill) has identified some critical areas where amendment is essential to achieve best practice.

Previous Legislation

All Western Australian fauna are protected from "taking" under the *Wildlife Conservation Act 1950* (WA) (WC Act) unless the Environment Minister specifically gazettes an "open season". To "take" in relation to fauna is defined to include killing, capturing, disturbing or molesting any fauna by any means[4] and could include photography, but does not include damage to the species' habitat. A species that the Minister considers to be "likely to become extinct, rare or in need of special protection" may also be "listed" by a notice published in the Government Gazette[5]. Once listed, a species may be classified according to the International IUCN standards and the maximum fine for "taking" a member of such a species increases from $4,000 to $10,000[6].

Western Australian fauna may also be listed at a national level under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). Species listed under the EPBC Act are protected from being "taken" in Commonwealth areas[7] and Ministerial approval is required for actions anywhere in Australia that are likely to have a "significant impact" on a listed threatened species[8]. Approximately sixty WA fauna species are currently listed under the EPBC Act, compared with 145 under the WC Act. The Commonwealth Environment Minister may identify and keep a Register of habitat critical to the survival of a listed threatened species or ecological community[9] and, if the critical

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[1] 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.

[2] Myers, N., Mittermeier, R.A., Mittermeier, C.G., de Fonseca, G.A.B., and Kent, J. (2000). Biodiversity Hotspots for Conservation Priorities. *Nature:* **403**, 853-858. Mittermeier, R.A., Robles-Gil, P., Hoffmann, M., Pilgrim, J.D., Brooks, T.M., Mittermeier, C.G., . . . Fonseca, G., eds (2004). *Hotspots Revisited: Earth's Biologically Richest and Most Endangered Ecoregions*. Cemex.

[3] Wake, D.B. and Vredenburg, V.T. (2008). Are we in the midst of the sixth mass extinction? A view from the world of amphibians. *Proceedings of the National Academy of Science of the United States of America:* **105**, 11466-11473.

[4] Section 6, WCA

[5] Section 14(2)(ba), WCA

[6] Sections 26(1) and 14(ba)(ii), WCA

[7] Sections 195-196c, EPBC Act

[8] Section 18, EPBC Act

[9] Section 207A, EPBC Act

habitat is located in a Commonwealth area, it is an offence to damage this habitat[10]. There are currently only four areas of critical habitat listed under the EPBC Act, none of which is in Western Australia[11].

Protection of the habitat of fauna in WA, whether listed or unlisted, is incidental and primarily occurs a result of the creation of national parks, nature reserves and conservation parks and their marine alternatives. Other legislation may be of relevance to the extent that it relates to the clearing of native vegetation and environmental impact assessments. Land clearing on private and Crown land in WA has been predominantly controlled by the *Soil and Land Conservation Act 1945* (WA) (SLC Act), *Soil and Land Conservation Regulations 1991* (WA) (SLC Regulations) and, more recently, the *Environmental Protection Act 1986* (WA*)* (EP Act) and *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA) (EP Regulations).

Under the earlier legislative framework, the owner or occupier of any land in the State on which more than one hectare is to be cleared, where the clearing will result in a change of the use of the land, must give notice to the Commissioner for Soil and Land Conservation at least 90 days before the commencement of clearing[12]. If, in the Commissioner's opinion, the clearing is likely to lead to land degradation, a "soil conservation notice" may be issued prohibiting the clearing with a penalty for default of $3,000[13]. However, a soil conservation notice could not be issued solely for the purpose of habitat protection, as this would be outside the scope of the Act.

The *Environmental Protection Amendment Bill 2003* (WA) (EP Bill) repealed the existing scheme under the SLC Act and SLC Regulations and replaced this with a general offence of clearing native vegetation without a "clearing permit". Unlike the earlier system, there is no specified minimum area of clearing before the clearing permit system is triggered. Applications for clearing permits are made to the Executive Director of the Department of Environmental Regulation who must have regard to the "clearing principles" set out under Schedule 5 of the EP Act[14]. One of these clearing principles is that native vegetation should not be cleared if it comprises the whole of or part of, or is necessary for the maintenance of a "significant habitat" for fauna indigenous to Western Australia[15]. However, there is nothing to suggest how "significant habitat" will be determined. There are also numerous exemptions available.

Authorisations for urban clearing for development, both residential and commercial, are dealt with under the *Planning and Development Act (2005)* (WA) (PD Act), which does, however, refer to:

> *"The conservation of the natural environment of the scheme area including the protection of natural resources, the preservation of trees, vegetation and other flora and fauna, and the maintenance of ecological processes and genetic diversity"*[16]

Provisions for the protection of flora, and its habitat were added to the WC Act in 1976. Under these provisions certain flora can be declared to be rare or otherwise in need of special protection (DRF)[17].

History of Proposals for a new Biodiversity Conservation Act

An article entitled "A Nature Conservation Strategy for Western Australia" was aired in a broadsheet published by the Department of Conservation and Land Management (CALM) in 1992[18]. Under the "aims of the new strategy" were listed: "*To review the conservation objectives of CALM",* and *"to ensure that strategies for the maintenance of the*

[10] Section 207B, EPBC Act
[11] See http://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl
[12] Regulations 4(1) and 4(3), SLC Regulations
[13] Section 35(2a), SLC Act
[14] Sections 51A-51T and Schedule 5, EP Act
[15] Schedule 5 Clause 1(b), EP Act
[16] Schedule 7, PD Act
[17] Section 23F(2), WC Act
[18] CALM News, January 1992.

State's biological diversity are in place". It further noted that *"In the past, the greatest threat to biological diversity in our State has probably been land clearing. Now that development of land has almost ceased, the greatest threats are from land degradation, inappropriate fire regimes, and some of the exotic species of animals, plants and diseases that have become established after settlement."*

A draft of a new Act was released for public comment in 1992, but following an election that resulted in a change of Government no progress was made until a workshop of interested parties was held in 1998. This workshop led to a public forum being held on July 31, 1999 and the release of a document entitled: "*Taking Biodiversity Conservation into the New Millennium: A new Biodiversity Conservation Act for Western Australia*"[19].

The Gallop Labor Government released a consultation paper on the need for a Biodiversity Conservation Act in December 2002[20] and this was followed in 2004 by a further Discussion Paper that was released for public comment[21].

Following the release by the Minister for the Environment of a draft Biodiversity Conservation Strategy for WA entitled "*100-year Biodiversity Conservation Strategy for Western Australia: Blueprint to the Bicentenary in 2029 (Draft)"* in 2006, the Conservation Council convened another public forum on February 26, 2007[22].

In 2012 the Barnett Liberal Government commissioned a consultant's report on the extent of current knowledge of WA's terrestrial biodiversity[23] and promised a Biodiversity Conservation Act to replace the *WC Act* in its platform for re-election in 2013[24]. As promised in this document, the Department of Environment and Conservation (DEC) was split into two separate departments: the Department of Parks and Wildlife (DPaW) and the Department of Environment Regulation (DER). DER has statutory responsibility for the regulation of land clearing.

The Leeuwin Group is concerned that there has not been sufficient scientific input into the drafting of the present *Biodiversity Conservation Bill 2015* (WA). This Issues Paper presents our views on the Bill and our concerns. The expertise of the LG has led to a focus on the science of biodiversity conservation and policy and how best to reflect this science in legislation. Our views are informed by both biodiversity science and biodiversity policy research.

Analysis of *Biodiversity Conservation Bill 2015* (WA)

There are some major improvements in the Bill compared with the *Wildlife Conservation Act 1950* (WA). The Bill provides an explicit Object Clause (Section 3) following current best practice and also binds the Crown (Section 11). The WC Act bound the Crown only in relation to threatened flora. It is acknowledged that this extended provision is included in the Bill. However, this provision is weakened by the provision that the Crown and its employees cannot be prosecuted. Impacts on biodiversity caused by unlawful acts do not differ between public and private actions and the new Act must reflect this reality.

Recommendation 1

The Leeuwin Group recommends that the scope of prosecutions be increased to clearly include Government entities.

It is noted that the Bill raises the existing inadequate penalties considerably.

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[19] Discussion Paper prepared by the Steering Committee for the Public Forum held on 31 July 1999 (ISBN 0 9585917 17).

[20] "*A Biodiversity Conservation Act for Western Australia. Consultation Paper*" released by Dr Judy Edwards, Minister for the Environment and Heritage, Dec 2002.

[21] "*Towards a Biodiversity Conservation Strategy for Western Australia. Discussion Paper*" released by Dr Judy Edwards, Minister for the Environment, December 2004.

[22] "*Biodiversity Conservation Strategy for Western Australia*" Conservation Council, February 26, 2007.

[23] "*Pathway to an Enhanced Western Australian Terrestrial Biodiversity Knowledge System: Preliminary Assessment of Issues, Challenges, Capabilities and Key Design Considerations*." Russell Barnett and Larry Lopez, Australian Venture Consultants Pty Ltd, August 2012.

[24] "*The Liberals' Conservation & Biodiversity Policy: Protecting and Investing in Western Australia's Unique, Vibrant Environment to Enhance our Local and Regional Communities*" Election material, B. Morton, 2013.

Turning to the Objects of Act (Section 3), it is important that these enacted objects are not contradictory, nor risk inconsistent outcomes in particular situations. To that end Section 3 should be amended to delete paragraph (b) referring to the use of biodiversity components in the State.

The first object will need to be supported by a set of scientifically valid and detailed considerations that reflect the scale of biodiversity from genetic to ecosystem level. Models exist with the native vegetation clearing controls principles, and the Administrative Procedures for Environmental Impact Assessment under the EP Act[25].

Two additional science-based objects should be included to ensure current best practice. It is suggested that these additions should be along the lines of:

- To prepare, promote and regularly report on the effectiveness of a Biodiversity Conservation Strategy; and
- To ensure the progressive undertaking of comprehensive biodiversity surveys across the terrestrial and marine environments of the State.

The first of these objects would extend the management effectiveness provisions under the *Conservation and Land Management Act 1984* (WA) (CALM Act) that focus on the management of protected areas. The reporting process would need to include the actions of all Government entities that impact upon biodiversity (both positively and negatively), as well as monitoring progress towards a Comprehensive, Adequate and Representative reserve system.

The second suggested object will, as a necessary pre-condition, require the development and maintenance of sufficient taxonomic expertise, and the storage and maintenance of biological collections in the State

Recommendation 2

The Leeuwin Group recommends that the Objects of the Biodiversity Conservation Act be restricted to conserve and protect biodiversity and biodiversity components in the State. It further recommends that detailed provisions to interpret these Objects be prepared and included in guidelines mandated under the Act as a matter of urgency. These provisions should make it clear that to conserve and protect biodiversity includes the restoration of Threatened Species and Ecological Communities (with the goal of reducing the assigned threat category within a reasonable timeframe), as well as preventing more common species and communities from becoming threatened.

The Leeuwin Group further recommends the addition of two additional objects:

- **To prepare, promote and regularly report on the effectiveness of a Biodiversity Conservation Strategy; and**
- **To ensure the progressive undertaking of comprehensive biodiversity surveys across the terrestrial and marine environments of the State.**

Underpinning the Objects of the Act are Sections 3 and 4 that provide for five principles of Ecologically Sustainable Development to be had regard to. These principles are similar to those added to the EP Act in 2003. While they are appropriate for that Act with its environmental impact assessment and environmental regulation provisions they are not appropriate for a Biodiversity Conservation Act. Specifically, the first principle that includes long-term and short-term economic, environmental, social and equitable considerations is too broad in its context. The trade-offs implied are amply provided for through the EP Act, and resource development legislation, they are not appropriate here. Thus, the words economic, social and equitable should be removed.

[25] Schedule 5, EP Act and the *Environmental Impact Assessment Administrative Procedures 2012,* EP Act

The second (precautionary) principle is critical given the state of our scientific understanding and would benefit from detailed guidance regarding its implementation as noted above in another context. This principle has a long history dating back to the Rio Declaration and in best practice environmental legislation its application is required[26].

Recommendation 3

The Leeuwin Group recommends that Sections 3 and 4 be amended:

- **So that the principles of ecologically sustainable development should be complied with;**
- **To reword principle (a) to limit the considerations to environmental; and**
- **To provide for detailed statutory guidance to be prepared and included in guidelines mandated under the Act as a matter of urgency for all principles and especially principle (b) – the precautionary principle.**

The adoption of **Recommendation 3** needs to be supported by a further requirement for all significant decisions (to be defined along the lines of the Administrative Procedures for Environmental Impact Assessment prepared under the EP Act[27]) made under the Act to be accompanied with a Reason for Decision Statement in which it is made clear what considerations were relevant and influenced the final decision. One of the strengths of science is that it is a transparent process. For decision-making to be scientific it too needs to be transparent.

In this regard the LG is concerned that the use of offsets (Section 41(3)) is inappropriate. Under the mitigation hierarchy developed by the Environmental Protection Authority offsets are a last resort[28]. The LG supports the use of offsets only as a last resort and not for endangered or critically endangered species or the equivalent ecological communities.

Recommendation 4

The Leeuwin Group recommends that significant decisions made under the Biodiversity Conservation Act be accompanied by a Reason for Decision Statement to be publicly accessible; for example on a website.

The Leeuwin Group further recommends that the use of offsets be prohibited other than as a measure of last resort and not in the case of endangered or critically endangered species or the equivalent ecological communities.

On a related matter, ineffective and inefficient implementation of legislation has been found through policy research to often be due to inconsistencies between Acts that have an overlapping scope, subject matter and purpose. This needs to be addressed directly. For example, the management of protected areas remains under the CALM Act and native vegetation clearing controls remain under the EP Act. This risks inconsistent administration between the three key biodiversity statutes.

Recommendation 5

The Leeuwin Group recommends that the relationship between the new Biodiversity Conservation Act and the CALM Act and EP Act be explicitly provided for under all three Acts. At the very least the Objects of the latter two Acts should be expanded to reflect and be consistent with the (final) Objects of the Biodiversity Conservation Act.

Historically, environmental legislation in most jurisdictions, within and outside of Australia, has suffered from inadequate baseline data and ongoing monitoring, and excessive, unfettered and unreported discretion provided to those charged with decision-making under the legislation. Taken together these produce a high risk of unscientific decisions being made either due to lack of information, or extant information being too readily overlooked.

The first of these weaknesses has been addressed through Recommendation 2. It is critical that every effort must be made to harness existing public and private environmental databases and to provide for long-term biodiversity and

[26] Principle 15, *Rio Declaration on Environment and Development* 1992
[27] *Environmental Impact Assessment Administrative Procedures 2012,* EP Act
[28] *WA Environmental Offsets Guidelines* 2014, WA Government

environmental monitoring at key sites. The second requires a reduction in the quantum of Ministerial discretion provided under the legislation coupled with the recommended Reason for Decision Statement.

Recommendation 6

The Leeuwin Group recommends that the Objects of the Biodiversity Conservation Act be supported by a scheme to enhance the availability of existing and the production of further biodiversity and environmental monitoring data. The resultant (virtual) depository should be publicly accessible.

Recommendation 7

The Leeuwin Group recommends that the Biodiversity Conservation Bill be amended to restrict the extent of Ministerial discretion to only essential circumstances.

The definitions of "taking" for both fauna and flora are too narrow and should include indirect and incidental taking. In this way the conservation and protection of habitat can be provided for more comprehensively. The provisions in the EP Act for native vegetation clearing controls provide a good model.

Recommendation 8

The Leeuwin Group recommends that the definitions of "take" be expanded to include indirect and incidental taking and thereby habitat protection.

Prosecutions under environmental legislation suffer from particular evidentiary hurdles with the data required to prove that an offence has been committed in short supply. These data can be inadequate to meet the standard of beyond reasonable doubt required for a criminal prosecution to succeed. The creation of civil offences is one solution to this problem. Civil offences, established under legislation, explicitly provide for a lower standard of proof; that is, on the balance of probabilities. These should be considered.

Recommendation 9

The Leeuwin Group recommends creating civil offences under the Biodiversity Conservation Act.

Turning now to a further consideration of threatened species and communities, and threatening processes - the Bill provides a welcome and more comprehensive scheme that the current WC Act. It is appropriate that Threatened Species should be listed according to the IUCN Red List categories and criteria (this applies now in practice, but is not a statutory requirement of the WC Act), and it also provides for listing of Threatened Ecological Communities (TECs) and Key Threatening Processes. The IUCN framework contains a more extensive list of categories than those proposed in the Bill for adoption in WA. The LG recommends that all categories be included and that all higher-level taxa be assigned to one of these categories to ensure ready access to the conservation status of species potentially affected by Government decisions.

Recommendation 10

The Leeuwin Group recommends that all IUCN Red List categories be included in the Bill, and that all higher-level taxa be assigned to one of these categories.

There is no mention in the Bill of a Threatened Species Scientific Committee (TSSC). This makes the Bill inconsistent with the EPBC Act, which provides for a statutory TSSC that reports directly to the Minister and for the advice of the TSSC to be made public once the Minister makes a decision as to whether to list or not. The Bill continues with the current non-statutory advisory committees (one for species, one for threatened ecological communities) that report via the Department and the Conservation Commission. Not only is this unwieldy and slow, but it means that the TSSC's advice can be altered prior to reaching the Minister. Further, there is no provision for the advice to be made public, so the public has no way of knowing what the advice was, or whether it was altered by the Department. It is noted though

that Section 39 requires the Minister to advise a nominator of his decision to list, and if the decision is not to list, his reasons. This is a good start to be built on through Recommendation 4. The recent Intergovernmental MOU[29] on a common assessment method for listing threatened species and ecological communities (recently signed by the WA Minister) provides that WA will be "predominantly" responsible for assessing and listing species and ecological communities endemic to WA, so the absence of a statutory TSSC means that WA will assess species and ecological communities through a different process from the Commonwealth and some other jurisdictions. Indeed there is nothing in the Bill that provides for any proper scientifically-based assessment. Schedule 1 of the MOU, which defines the Common Assessment Method, includes a description of "Standard of scientific evidence" but makes no mention of how this will be applied or who applies it.

Sections 34 and 35 provide for the Minister to list Key Threatening Processes. This inclusion is a step forward, but under Section 37 the Minister **may** [our emphasis] obtain advice **from any person considered by the Minister to have relevant expertise** [our emphasis] on a listing decision (species, threatened ecological communities, Key Threatening Processes), but is not bound to accept that advice. The EPBC Act provides for public review of nominations for listing; the Biodiversity Conservation Bill does not.

The only method of combatting Key Threatening Processes in the Bill seems to be via a Recovery Plan; i.e., there is no provision for Threat Abatement Plans as provided for in the EPBC Act. There is, however, a provision for regulations for "The prevention, eradication, reduction and containment of key threatening processes" (Schedule 1, No. 9). Consideration of including Threat Abatement Plans in the Act should occur, although it is acknowledged that their success elsewhere has not been great.

It is noted that Section 260 provides for guidelines for listing that **may** [our emphasis] be made by the Minister. We have already commented on the importance of statutory guidelines. Experience suggests that guidelines such as these may be a long time in gestation. Statutory timelines should be included here.

Recommendation 11

The Leeuwin Group recommends that a statutory Ministerial advisory committee be established: a Threatened Species Scientific Committee that is responsible for evaluating the status of both species and ecological communities and making consistent recommendations concerning the listing of both to the Minister. There may also be merit in a Key Threatening Processes Scientific Committee, but this responsibility could also be allocated to the TSSC. The recommendations of this/these Committee(s) should be publicly available once the Minister has made a decision as an attachment to the Reasons for Decision Statement (Recommendation 5).

Section 40 onwards covers authorising the taking of Threatened Species. Section 42(1) provides that the Minister, after obtaining the approval of the Governor (i.e. the Governor-in-Council, which takes the advice of cabinet) may authorise the taking even if the species may become extinct. In such cases a copy of the authorisation must be tabled in Parliament. This was not provided for in the WC Act. Section 47 is a similar provision relating to the destruction of a Threatened Ecological Community. In our view these sections are inconsistent with the preamble to the Bill (An Act to provide for … the conservation and protection of biodiversity and biodiversity components in Western Australia) and the Objects of the Bill (to conserve and protect biodiversity and biodiversity components in the State). These provisions should be removed.

Recommendation 12

The Leeuwin Group recommends Sections 42 and 47 be removed from the Bill.

[29] Intergovernmental Memorandum of Understanding. *Agreement on a Common Assessment Method for Listing of Threatened Species and Threatened Ecological Communities*, Undated

The Bill includes provision for the Minister to list Critical Habitat - a step forward; however, (a) The Minister for Fisheries can veto the declaration of critical habitat in WA waters and (b) it allows consultation where the proposed listing affects private property, but it is unclear whether it makes it an offence for anyone to destroy that habitat during the consultation process. Section 59 allows the CEO to issue a Habitat Conservation Notice to prevent habitat damage, so presumably this can be used in conjunction with the consultation process? In the event that Critical Habitat is lost or degraded, provision for restoration with full cost recovery should be included in the Act.

Recommendation 13

The Leeuwin Group recommends that in the event that Critical Habitat is lost or degraded, provision for restoration with full cost recovery should be included in the Act.

While Section 12 provides for the *Fish Resources Management Act (1994)* to prevail, and if the same will hold for the new fisheries legislation, this should not apply to Threatened Species and when "Fisheries decisions impact upon Threatened Ecological Communities.

Recommendation 14

The Leeuwin Group recommends that Section 12 be amended to ensure that the Biodiversity Conservation Act prevails over present and future fisheries legislation for not only Environmental Pests but also for Threatened Species and Threatened Ecological Communities.

Section 43 covers the duty of certain persons to report the discovery of Threatened Species; however, no time frame is stipulated for the report – there should be a reasonable time frame stipulated; e.g. one month. Also Section 43(3) allows the report to be oral. This provision is fraught with uncertainty and all reports should be in writing. Section 49 has similar provisions in relation to Threatened Ecological Communities.

Sections 50 onwards cover the Minister giving notice to an owner that a Threatened Species or Threatened Ecological Community is present on their land. It further provides that the Minister **may** [our emphasis] issue a notice. There should be a requirement on the Minister to do so.

Section 132 provides for the declaration of environmental pests, but effectively allows a veto by Ministers for Agriculture and Fisheries. There seem to be several loopholes in this Part of the Bill (Part 9) that restrict effective action on environmental pests. These need to be removed, with consequential amendments made to other relevant legislation to achieve consistency.

Recommendation 15

The Leeuwin Group recommends that Sections 43, 49, 50 and 132 be amended as described above.

Section 83 allows the CEO to decide not to prepare a Recovery Plan if s/he considers it too expensive. This is dissimilar to the EPBC Act, which requires recovery plans for listed species, but does not require their implementation. It also appears that there is no provision for recovery plans to bind the Crown. There should be; especially noting that there is such a provision in the EPBC Act. The role of recovery plans and the resources required to implement them needs further attention and resources.

It is noted that the Commonwealth use Conservation Advices when a recovery plan is not feasible, or has expired and there is insufficient time to prepare a new recovery plan. When appropriate and in concert with Commonwealth guidelines, Conservation Advices provide a useful stop gap measure when a Recovery Plan is not available.

In several places (e.g., Sections 80 and 103) it is provided that a public authority "must have regard to the (biodiversity management programme/recovery plan) when performing ...functions". This provision is insufficient. Biodiversity conservation requires an integrated response from many Government entities even though there will be a principal

agency (DPaW) with overall responsibility for the new Act's administration. These provisions should be strengthened to require public authorities to at least perform their functions so as not to derogate from the Objects of the Act nor the provisions of individual programmes and plans.

Recommendation 16

The Leeuwin Group recommends that Sections 80, 103 and 113 be amended as described above.