

The 10 Lords of the Universe respond to Lim

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LIM (1997) has recently presented a critique of aspects of the New South Wales Threatened Species Conservation Act (TSCA), and in particular of the role of the Scientific Committee established by the Act.

The TSCA was a major initiative of the New South Wales government to address the needs for biodiversity conservation in the state. Various aspects of the Act could be the subject of debate, but our purpose here is to address certain specific matters raised by Lim.

The most serious issue is the questioning of the constitutional validity of all or part of the TSCA. Whether or not this argument has substance would be a matter for Parliament and/or the courts to determine. However, we would point out that those aspects of the Act which give rise to Lim's question are not in some obscurely written clause buried in a backwater of the legislation. They are a central part of the Act and the provisions which give rise to them occupy a substantial part of the Act. The Bill which was the prelude to the Act went through the normal parliamentary process and was debated, amended and passed by both houses of the New South Wales legislature. If there were serious doubts about the constitutionality of aspects of the Act then it is probable they would have been revealed and addressed during the parliamentary process.

The major concern raised by Lim is that the Scientific Committee, established by the Act, has the role of determining which species, populations, communities and threatening processes are to be listed on the schedules of the Act. Lim questions whether Parliament can or should abrogate this function to a committee rather than the decisions being made in the name of the Minister for the Environment.

Lim implies that the normal approach to such matters would be for suggested changes to schedules to be formulated (by bureaucrats or an advisory committee) as advice to the Minister and for the Minister to be final arbiter but subject to intervention by Parliament. This is indeed the model in many pieces of legislation and to that extent the approach in the TSCA is unusual. Whether or not the TSCA should therefore be amended is a matter for Parliament, which will, through a Joint Select Committee, carry out a review of the legislation before the end of 1997.

However, while the provisions of the TSC Act are unusual they are not unique. Under Commonwealth legislation inclusion of sites on the Register of the National Estate is determined by the Australian Heritage Commission. This process, on face value at least, would appear to raise the same issues as concern Lim in regard to the TSCA, but has recently been upheld by the High Court of Australia. (The Australian Heritage Commission v Mount Isa Mines Limited — judgement made 18 March 1997.)

Without presuming the outcome of the parliamentary review of the Act, we, as the Scientific Committee, would argue that the process of the TSCA may offer advantages over the more conventional approach to implementation of legislation.

Decision making by Ministers is subject to review, by the people's representatives, in Parliament. However, it would be idealistic to expect that all, or even many ministerial decisions would be subject to scrutiny. Necessarily, many decisions taken by bureaucrats and ministers provide little opportunity for public involvement or parliamentary questioning. The TSCA, however, provides for considerable public involvement with the work of the Scientific Committee.

Firstly, any person may make nominations for additions, deletions or amendments to the Schedules of the Act. The Committee is obliged to deal promptly with all valid nominations. Information on the numbers of nominations to April 1997 is provided by Dickman (1997).

Preliminary determinations by the Scientific Committee are to be notified by the Committee through advertisement in a newspaper circulating widely in the State (in practice the *Sydney Morning Herald*) and relevant local newspapers. Determinations are available for public inspection at District Offices of the National Parks and Wildlife Service. Submissions on preliminary determinations have to be considered by the Scientific Committee before a final determination can be made.

If, after a final determination has been made, a person is of the opinion that it is not correctly founded then further nomination for addition, amendment or deletion from the Schedules can be made. The Scientific Committee would consider any such nomination and its supporting evidence. If a person considers that the Committee has acted in error in making a determination then action can be taken in the Land and Environment Court.

Finally, the Act contains provisions for the removal of members of the Committee from office.

The process thus provides for public involvement and decisions are made by an identifiable group (the Scientific Committee) rather than by unidentified public officials.

While Lim's views are reiterated by Cardew (1997), Smith (1997) has emphasized the opportunities for public involvement in the nomination process. Brebach (1997) expressed strong

support for the Scientific Committee and its mode of operation, and his views were endorsed by many other participants at the "On the brink" conference.

The nature of the decisions taken by the Scientific Committee also needs to be considered. The Committee cannot make any changes to the Act, a task which is solely the prerogative of Parliament, nor does it make Regulations. The Committee's responsibilities are to maintain the Schedules of the Act. The Act provides criteria for inclusion on Schedules, and it is the Committee's task to carry out reviews and to assess nominations in the light of those criteria.

The Act provides for the maintenance of the Schedules to be separated from the operational decisions which follow from the inclusion of items in Schedules. The Act, properly, provides for consideration of social and economic matters in its operation. However, the question of whether or not a particular species, population, community or process meets the criteria for listing is a technical one, and the Act provides a mechanism for making decisions on purely technical grounds, free from other considerations. Feedback from the public, for example at the recent Nature Conservation Council conference (Webb 1997) suggests that this mechanism increases confidence in the integrity of the listing process.

The Scientific Committee comprises ten members, with a membership specified by Section 129 of the TSCA. Lim (1997) suggests that "The question as to who these nominees represent is a vexed one". However, in our view this is an irrelevant question. The members of the committee are appointed by the Minister, and are required to have appropriate expertise. The task of the members is to use their knowledge and expertise in the exercise of the functions of the Committee and not to act as the representatives of any particular sectoral interest. [Lim, however, questions the inclusion of a nominee of the Ecological Society of Australia, suggesting that it can "hardly be considered to represent a significant proportion of ecologists in Australia". We are unsure as to what Lim would consider a significant proportion of Australian ecologists, but the current membership of the Ecological Society is about 1 000. Neither the Ecological

Society nor the Entomological Society sought membership, rather the requirement to nominate was imposed on them by the New South Wales Parliament. Lim also suggests that the nominee of the Australian Museum Trust (Dr Hutchings) has expertise specifically excluded from the Act. This view arises from the exclusion from consideration under the TSCA of "fish", as defined in the Fisheries Management Act 1994. The definition of fish is very broad and includes a wide range of organisms other than true fish. However, Dr Hutchings clearly meets at least two of the criteria specified in Section 129(3) of the TSCA, being an acknowledged expert in the areas of invertebrate biology and marine ecology.]

Implicitly Lim is critical of the non-inclusion on the Committee of nominees from local government, manufacturing and mining industries, and the union movement (curiously he does not add agricultural interests, forest industries and land developers to the list). Changes to the composition of the committee are the responsibility of Parliament, but the role of the committee under the present Act is to exercise judgement based on scientific knowledge. Wider membership outside the range of expertise currently specified in Section 129(3) would not necessarily enhance the Committee's capability to address its functions.

Lim expresses particular concern about the implications of listing to the implementation of the 8-point test required under the Environmental Planning and Assessment Act (as amended in January 1996). The integration of the TSCA into the planning process is a very important feature of the legislation. Nevertheless listing has other important implications not considered by Lim. Listing obliges the National Parks and Wildlife Service to produce Recovery Plans (or Threat Abatement Plans in the case of the Threatening Processes). The successful implementation of these plans will be the key to the overall success of the legislation. Listing also provides the opportunity for declaration of critical habitat. The role of providing advice on 8-point tests to consultants and landholders is one for the National Parks and Wildlife Service (Section 110 (5) of the TSCA). The Scientific Committee provides relevant information to the NPWS and the Service is also able to provide

additional information from its own sources (see Ewin 1997, and as an example of a particular data source see Ayers *et al.* 1996).

Lim (1997) provided a review of determinations by the Scientific Committee (up to 30 November 1996). The Committee makes three types of determination:

- Provisional (or emergency) determinations. These apply only to species newly discovered or rediscovered in New South Wales. Provisional listing results in immediate addition to Schedule 1; this listing lasts for up to one year only, during which time a preliminary determination must be made and advertised.
- Preliminary determinations. These do not amend the schedules, and public submissions are sought. Preliminary determinations do not necessarily result in final determinations which require amendment to the schedules; neither of the preliminary determinations for communities mentioned by Lim were supported (although subsequently revised preliminary determinations were made).
- Final determinations — determinations made after consideration of submissions to preliminary determinations. Final determinations result, where appropriate, in changes to the Schedules.

In making determinations, the Scientific Committee must have regard to the requirements of the Act. The frame of reference for the Act is New South Wales, so status in other states does not necessarily affect eligibility for listing on New South Wales schedules. The definitions of species, population and ecological community provided by the Act are not those of ecological textbooks but are very broad. In the light of Lim's comments on the preliminary determination on the Manly colony of *Eudyptula minor* it should be emphasized that the requirements for listing of endangered populations specifically exclude listing of populations of any endangered (Schedule 1) species — endangered populations may only be identified for vulnerable species (Schedule 2) or species not included on Schedule 2.

Lim criticizes the absence of maps for the two populations. The advice received by the Committee was that the description of the area in which the

populations occurred was appropriate to meet the requirements of the Act.

In the case of the Bathurst Copper Butterfly, Lim queries the listing of the species, suggesting that the butterfly-ant-host-plant association could have been listed as a community. This was a matter which was vigorously debated by the Committee, and Lim's argument has merit. However, it is questionable whether the three species association could meet the definition of ecological community, whereas a listing of the species was free from such complications. In addition, listing of a community requires that the area in which the community occurs be specified. Listing of species is state wide and hence should that species be subsequently found in additional sites the consequences of listing automatically apply.

In his discussion section Lim raises a number of other matters, in some cases making unfounded assumptions about the workings of the Committee. In considering nominations the Committee may seek additional information from the nominator or from other persons. Despite Lim's suggestion that the Committee should seek additional information (with the implication that it has not), the practice of the Committee has been to approach a wide range of parties for information, comment and advice. For the majority of nominations advice has been sought from at least two sources, and in a small number of instances the process of seeking extra information or advice has involved lengthy exchanges of correspondence.

The Act permits species (or communities) which may be common in other states to be listed on Schedule 1. It will be for Parliament to consider whether this should be changed, but in our view it is appropriate. Species and communities should be conserved across their range, and at the limits of geographical distribution may be particularly sensitive to change (and in the case of species may represent distinct genotypes).

Under the provisions of section 17(2) of the TSCA the Scientific Committee is obliged to keep the Schedules "under review" and "must at least bi-annually determine whether any changes to the lists are necessary". Lim queries whether this has occurred; we reject his assertion that "no review of the listings

have (sic) been undertaken since the Committee was formed over six months ago". The phrase "under review" does not imply a complete examination of the entire Schedules, but rather indicates an ongoing continuous process. The Scientific Committee has made, through the nomination process, a number of changes to the Schedules. In addition we have spent a considerable time addressing errors and inconsistencies in the original schedules to the Act. The Statute Law (Miscellaneous Provisions) Act 1997 has given effect to these corrections.

The Act does not require that the review be published, other than in the form of specific preliminary determinations for which the Act provides a process of notification and public submission.

We would agree with Lim that, in the long term, the success of the Act will be measured not merely by the addition of items to the Schedules but by the success of the Act in achieving improved conservation. However, given that the Act extends the scope for conservation in New South Wales to allow for the listing of invertebrates, plants, populations and ecological communities it is likely that, at least in the short term, considerable additions to the Schedules will occur. Nevertheless the Committee would be glad to consider evidence for delisting arising either from nominations or from its own reviews. Given that the identity of nominators is not revealed (except where agreed to) we feel that negative peer group pressures need not arise. In any case, if a nomination for delisting is justified by the evidence this should be cause for celebration and not give rise to negative pressures.

There are constraints on the activities of the Scientific Committee posed by the definition of species which excludes "fish", but fish are so broadly defined as to include most aquatic fauna. However, inclusion on Schedules of marine mammals and oceanic birds is allowed. This raises a number of issues, as suggested by Lim, and the Committee has already decided to engage consultants to provide advice on the applicability of the Act to marine mammals.

As previously noted the TSCA provides considerable opportunity for public input. The Scientific Committee

would welcome input from the wider scientific community, in the form of nominations or as submissions following preliminary determinations. We recognize that there are within the scientific community, a great wealth of knowledge on the biodiversity of New South Wales upon which we would hope to draw.

Successful implementation of the Act will require the willing co-operation of a number of State government agencies, and local government. It will also depend on public support, both from landholders and the broader community. The mechanism for implementation of the Act are still evolving; the Scientific Committee is but one part of the implementation. The Committee will carry out its functions to the best of its abilities, subject both to technical and legal advice, and to any changes to the TSCA determined by Parliament.

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