

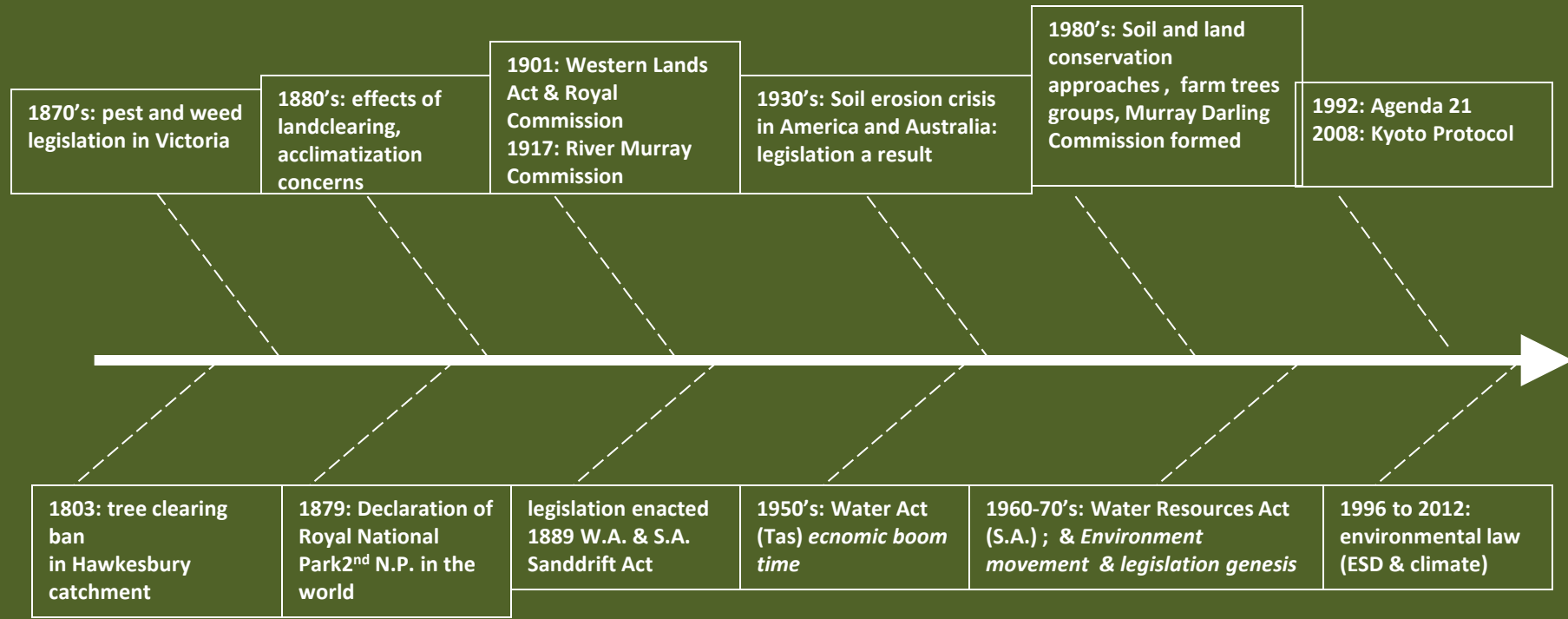
Lost in Translation: Threatened Species Law in Australia

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Overview

- Evolution of Environmental Law in Australia
 - Threatened species legislation
- Context & Background
 - biodiversity & land-use conflicts
- Case study of IUCN red listed species
 - Giant barred frog
- New policy initiatives in Australia
 - COAG Reform
 - Strategic land use
- Recommended law and governance reforms

Environmental law in Australia has evolved since the 1800's from exploitation, obligation, development and conservation model approaches to ESD focused



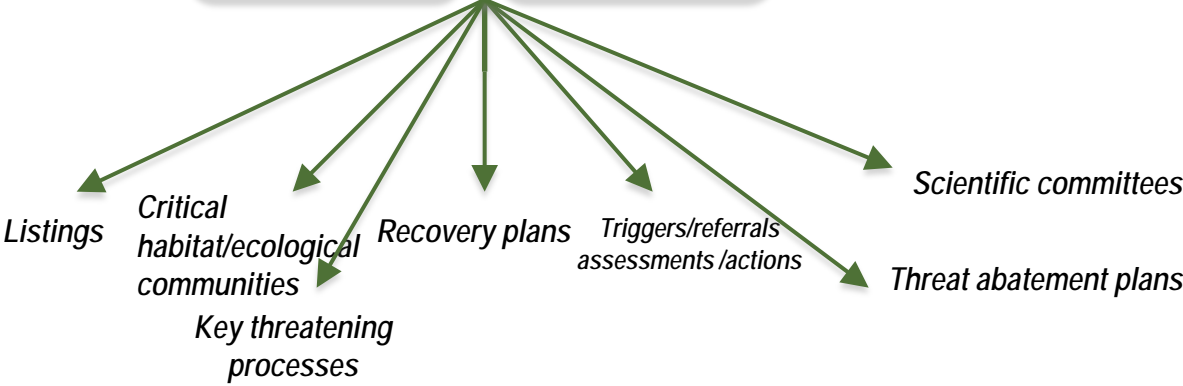
Agenda
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(UN 1992)

National Strategy for Ecologically Sustainable Development (1992)
Intergovernmental Agreement on the Environment (1992)
National Strategy for the Conservation of Australia's Biological Diversity (1996)

Government translation

Environmental Protection Biodiversity Conservation Act 1999

NSW Threatened Species Conservation Act 1995



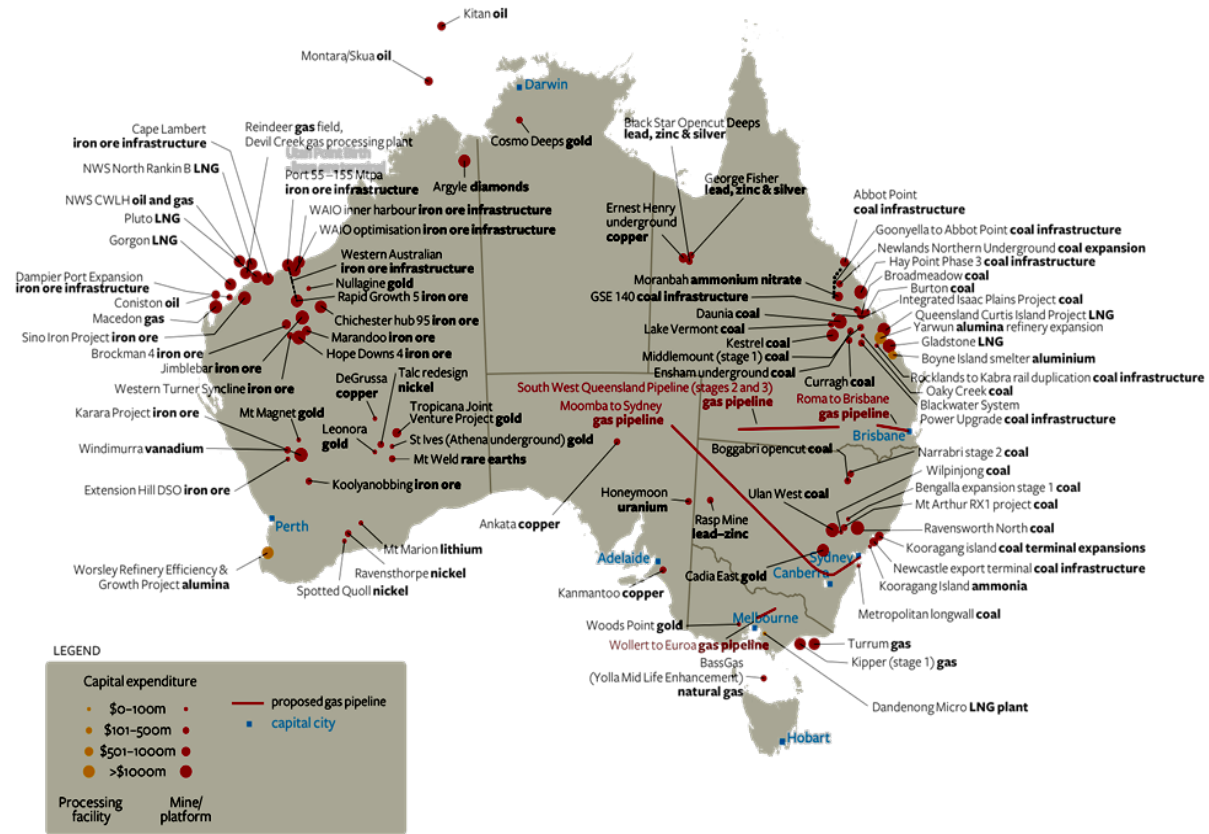
Trends in Australia

- *“Despite promising investment by all jurisdictions in addressing the main pressures on biodiversity, pressures are not being substantially reduced, nor is the decline in biodiversity being arrested or reversed”*
(Australia State of the Environment 2011)
- Populations of 72% of nationally threatened terrestrial species in Australia are in decline
(Taylor et al 2011)

New land-use conflicts in Australia

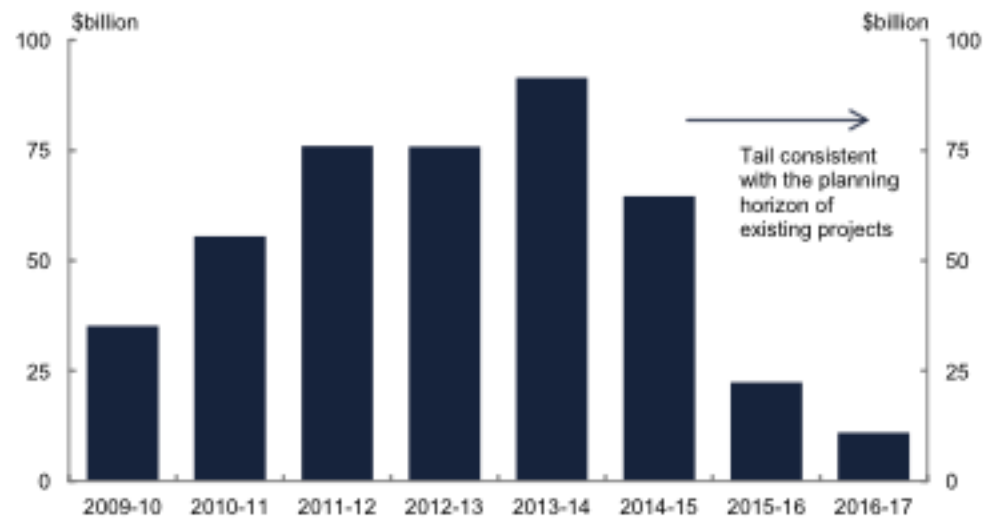


Advanced minerals and energy projects April 2011



Source: ABARES 2011

Indicative profile of mining projects (planned or under construction)



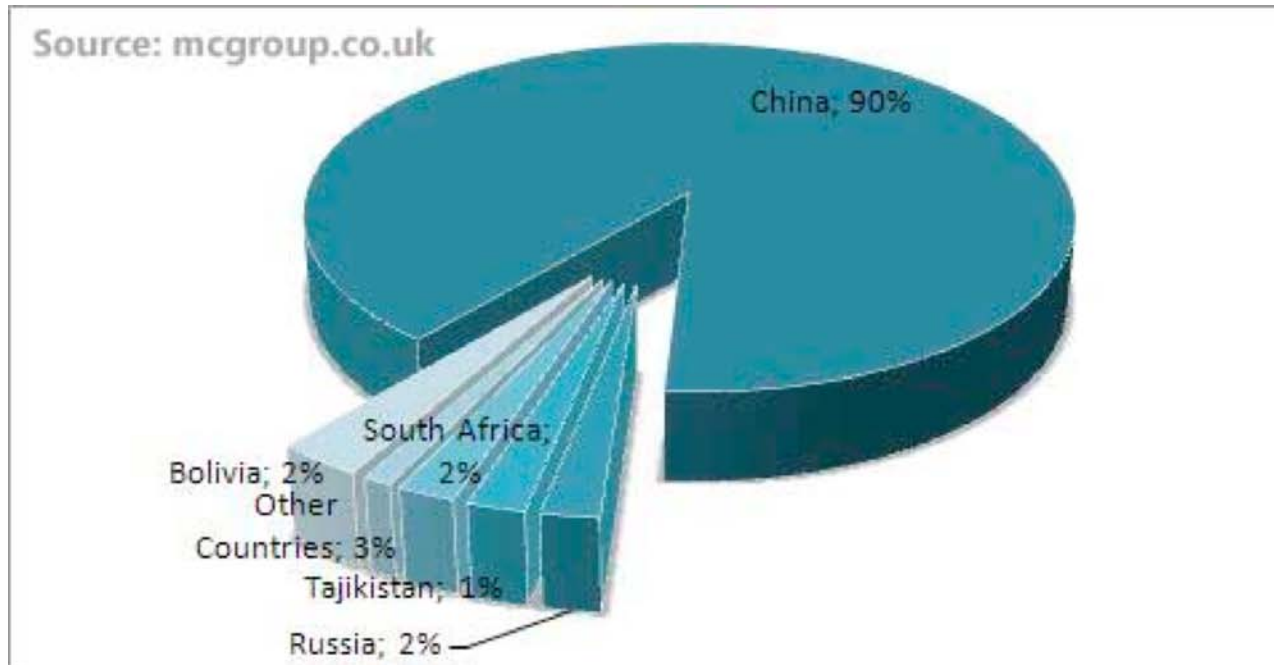
Source: Australian Government 2012

Case study location



Giant barred frog *Mixophyes iteratus*

World Production of Antimony



Price increase \$4K to \$16K in 2 years!

Dorrigo Plateau

Giant Barred Frog EPBC listed as Endangered:

- Broad threats identified, threat abatement project related only, no threat class summary
- Recovery plans only for South East Queensland
- No critical habitat identified
- Survey guidelines

Giant Barred Frog NSW TSC listed as Endangered:

- Threats broad & unclear
- Threat abatement unclear
- No critical habitat identified
- Recovery plans only for South East Queensland



Wild Cattle Creek

- Exploration Licence approved without EIA
- Disputes with landholder: arbitration
- Community referral EPBC controlled action
- Fine/infringement & order to rehabilitate
- Community referral: breach of Native Vegetation Law & EPBC



Issues with Threatened Species Law

- Inconsistencies in scientific assessment & listing processes
- Lacks jurisdictional communication and coordination
- Inconsistency in offsetting/bio-banking
- Objects of the Act need to be operationalised through clarity of ESD
- Critical habitat register under utilized
- Clarity required in interaction with Planning legislation at the state level (triggers and strength)

The Government – Mining relationship

“But Australia’s fair go is today under threat from a new source. To be blunt, the rising power of vested interests is undermining our equality and threatening our democracy.”

Wayne Swan
March 2012

“Even in a system with laws regulating the use and exploitation of the environment, the leverage inherent in consuming users of the environment mean that they can continue until they are sued and restrained by court order”

Justice B J Preston
Chief Judge, Land and Environment Court NSW
Sept 2011

New Policy Initiatives in Australia

COAG 2012:

Major reforms of environmental laws

- Accelerated accreditation of state processes
- Fast tracking of approval of major developments in each State
- Rationalizing/removing energy efficiency and climate change schemes in each State
- Removing other environmental laws seen as ‘unnecessary’ and ‘costly for business’.

Issues with COAG reforms

- The Commonwealth will no longer have a role in assessing the environmental impacts of State developments on nationally significant environmental matters
- The Hawke review of the EPBC Act proposed a reform package to streamline development balanced by better environmental provisions and increased transparency, oversight and public participation.
- Government has rejected most of the balancing reforms (checks and balances required) and opted for fast track removal of red tape for environmental assessments & approvals to cater for business outcomes rather than environmental outcomes

NSW Strategic Regional Land use Policy (SRLUP)

- Election platform: establish a balanced land use policy to better protect high value agricultural lands & their water resources from mining and CSG
- 5 year regional plans which maps: strategic agricultural lands, biodiversity, minerals/CSG, cultural heritage, priority offset landscapes
- Gateway process: independent experts assess mining & CSG proposals against criteria, does not pass this stage cannot proceed to development application
- Plan also supports sustainable growth & certainty for mining industry subject to rigorous planning processes

Issues with SRLUP

- Fails to protect high value agricultural lands: regional plans approach does not provide any prohibitive zones for mining
- Independence of gateway panel questioned & unknown criteria for assessment
- Does not apply to all mining and CSG activities: only if on or within 2 kms of mapped strategic agricultural land
- Biodiversity data incomplete & plan relies heavily on biodiversity offsetting
- No specific actions for comprehensive assessment of cumulative impacts
- Exceptional circumstances (subject resource of state significance) exception to gateway: Cabinet can approve
- Lacks engagement with indigenous communities on cultural heritage

What is wrong with Environmental Law?

- Statutory objects vague
- Relevant considerations vague
- Burden of proof silent; non consuming users are plaintiffs
- Substantive rights are conditional, not absolute and barely burdened by duties and obligations
- Implementation and enforcement needs strengthening
- Not outcomes focused: sustainability not operationalised
- Lack of open standing and adequate access to justice

Reforms needed

- Nature-centred (away from commodity approach)
- Operationalising sustainability: outcomes focused
- Social justice for communities

Legislative reforms:

- **Operationalize sustainability** through relevant matters & object clauses in statutes
- **Burden of proof:**
 - Allocate the burden of proof to those who propose to use, exploit or harm the environment
- **Substantive rights, duties and obligations:**
 - The legislature to enunciate in the statute some absolute rule
 - Positive obligations need to be more frequently adopted
 - Statutes need to recognize the intrinsic value of the environment and afford its rights
- **Good Governance**
- **Adequate resourcing**
- **Open standing**
- **Access to justice**

Institutional reforms:

Lost in translation.....intent of operationalising
sustainability and actual outcome:

- Harmonization
- Stream lining
- Consistency/ equivalence
- Red tape

Thank you

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Australian Centre for Agriculture and Law