Threatened flora and 'the law' in South Australia: more issues than tissues?

Tim Jury

Nature Conservation Society of South Australia, Adelaide. Email: tim.jury@ncssa.asn.au

Introduction

Despite enacting early legislation on national parks and native vegetation, South Australia continues to lose indigenous species much like other states. There are currently two principal State Acts that relate directly to the protection and conservation of threatened plant species and communities in South Australia, namely the *National Parks and Wildlife Act 1972* and the *Native Vegetation Act 1991*. The former has become somewhat antiquated as a piece of conservation legislation, in that it fails to reflect current types or levels of threat, while the latter has been systematically weakened by a sprawling litany of exemptions, lack of directional powers and problems with administration and implementation.

As a consequence, South Australia's threatened plant species and communities have inadequate legal protection. Such sentiments have gained increasing recognition by conservationists and at a State Government policy level, with the recently adopted Nature Conservation Strategy stating that 'the current suite of legislative instruments is not delivering our aspirations and stopping the biodiversity decline' (DEH 2007).

This article provides a brief critique, from the perspective of a plant conservation practitioner, on the current situation regarding State laws and threatened flora protection in South Australia.

Current Laws for Plant Species Protection

The *National Parks and Wildlife Act 1972* (NPW Act) is the Act under which indigenous plant species can be listed as Endangered, Vulnerable or Rare in South Australia. There is no provision for listing threatened ecological communities under this Act or any other State legislation.

The Act prescribes modest financial penalties for the 'unlawful taking' of 'native' plants on public land, with 'take' being defined as the manual removal of a plant or part of the plant from the place in which it is growing, or the damage of a plant. This 'protection' fails in two main ways. The first is that threats other than those that directly damage a plant, such as population or habitat destruction, aren't currently addressed by this legislation (Reynolds 2007; Parnell 1999). The second is that there is no protection for native plants on private land unless the species is 'prescribed' under the Act and currently no plant species are so prescribed.

There are further issues relating to penalties and enforcement of this legislation. Low probabilities of detection or proof, lack of resources and political will, and the risk of having damages awarded against unsuccessful complainants are all barriers to successful enforcement. There are also no mechanisms to actuate reparations, such as requiring offenders to 'make good' damages or destructive activities through ameliorative measures.

Protection of Threatened Plant Habitats and Communities

The *Native Vegetation Act 1991* (NV Act) contains provisions for protecting habitat for threatened plant species as well as threatened vegetation communities through its 'Principles of Clearance', a set of criteria against which vegetation clearance applications are intended to be assessed. Rigorous assessment against these principles increasingly is being by-passed through exemptions (via the regulations) for particular circumstances, management guidelines and types of clearance, and so the strength of the principles is diluted in implementation.

Development approvals obtained under South Australia's development legislation override the NV Act. The Native Vegetation Council, the statutory body set up by, and which administers, this Act, has no powers of direction on development and land use matters dealt with under the *Development Act 1993*. This means that there is no strict mechanism to ensure legal compliance with any advice on a development provided by the Council.

There has recently (2004) been further relaxing of the NV Act's protective strength through introduction of 'offset' provisions, where proposed remnant vegetation destruction can arguably be compensated for. This involves the provision of what is termed in the legislation a 'Significant Environmental Benefit' (SEB), typically revegetation or payment into the Native Vegetation Fund. There are serious issues with this concept and despite agency stated intent, offset provisions were adopted without the support of the State's non-government conservation sector.

The SEB concept is scientifically questionable, as no hard evidence exists that the manifold ecological functions of remnant vegetation can actually be reconstructed through revegetated 'analogues', and that clearance can be adequately compensated for in this way. Major concerns with the 'offsets' concept are that despite the inadequate understanding of the impact of clearance at all scales, or

Threatened Plant Action Group members at work in the Adelaide Hills. Photo: Tim Jury

the efficacy of revegetated areas to act as analogues, it sets up a false sense of security with the public that remnant vegetation clearance can be readily compensated for.

State Development Law

A particular concern with the application of the South Australian *Development Act 1993*, is its intersection with other Acts, notably the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). A highly unsatisfactory arrangement has recently been established for Major Developments whereby the Development Act now also serves the purpose of the EPBC Act via an Australian Government–SA Government Bilateral Agreement.

The EPBC Bilateral Agreement came into force in July 2008, and aims to simplify the application assessment process, by avoiding the need for discrete but concurrent assessments under both State and National legislation. However, the objects of the EPBC Act and the SA *Development Act 1993* are clearly not identical or necessarily complementary. For example, the EPBC Act deals with 'Matters of National Environmental Significance', and therefore requires specialised assessment and compliance mechanisms.

Through a series of planning reviews and amendments, third party appeal rights have been eroded. In any case, third party appeals are plagued by issues such as scientific uncertainty and the burden of proof typically falling on concerned yet under-equipped and under-resourced community groups.

Land Management Practices

A significant limitation with legislative approaches is that usually they aren't retrospective, meaning that threats and degradation from existing land use and management practices remain unaddressed, as oft-exempted 'current activities'. Unless threatening processes arising from existing land use and associated management can be stopped, abated or reversed, affected threatened plant populations or communities will undergo further decline and eventual extirpation.

Problems also exist with the management of public land and protected areas containing threatened flora. Legal requirements for management plans don't necessarily translate into sound implementation of management actions to protect and restore native flora, and the management of these reserved natural areas does not always reflect their conservation values. This is particularly so due to the 'dual mandate' of the NPW Act: 'to provide for the establishment and management of reserves for public benefit and enjoyment; to provide for the preservation of wildlife in a natural environment'.

While there is generally the perception that threatened flora are secure in reserves this is not always the case, particularly for species sensitive to recreation impacts, park management activities, or requiring particular successional habitats to maintain populations. Increasing fuel reduction burns to protect neighbouring residences around reserves near Adelaide, without scientific monitoring and subsequent amelioration of ecological impacts such as biological invasions, is a case in point. An additional and increasingly concerning issue is that training and support for reserve management staff and contractors is often inadequate, increasing the risk that significant flora is managed inappropriately or at worst, inadvertently destroyed.

The control of prescribed weed species in native vegetation, which is required under law (*Natural Resources Management Act 2004*), also poses problems. Land managers without adequate biodiversity knowledge and management training, compelled by their legal obligations, frequently employ non-selective methods such as broadacre spraying which tends to destroy indigenous plants intermingled with or adjacent to infestations. Eyewitnesses have observed threatened plants on public land being killed in this way (Bates *pers. comm.* 2006, Hands *pers. comm.* 2000).

Conclusion & Recommendations

Current South Australian laws have become too antiquated and weak to provide for adequate protection of the State's threatened flora, and do not set a framework that aids recovery. They don't reflect the parlous state of many threatened species populations and vegetation communities nor the range and impact of attendant threats. Additionally, the anthropogenic origin of many threatening process (e.g. livestock grazing) means that human land-uses tend to subordinate plant conservation concerns due to economic factors. This overlooks the true value of ecosystem functions, species existence rights, and our stewardship responsibilities for indigenous flora.

Of course it's easier to criticise than come up with constructive recommendations for improving the current scenario. Notwithstanding the inherent risks of legislative review in opening them up to intense lobbying pressure

for further concessions (e.g. in the form of exemptions), some suggestions for improving the state's current NPW Act could include:

- changing 'unlawful taking' to 'unlawful removal' (to address non-collection offences and unauthorised destruction)
- adequate enforcement provisions (and resources);
- broadening 'specified areas' to include all land tenures within South Australia;
- activating the current 'prescribed species' provision by prescribing threatened and other significant plant species (e.g. threatened ecological community dominants);
- adding a critical habitat register with strong protective provisions for scheduled species in reserves and on crown land (to trigger controls in public land planning and management);
- introducing schedules for threatened ecological communities and key threatening processes;
- providing for a scientific committee with criteria to review scheduled species; and
- more incisive use of existing powers by the state government, as advocated for other jurisdictions elsewhere (see Kennedy & Fry 1986).

The principles of the NV Act must be given due consideration in all aspects of the Act's implementation, and in particular it must be ensured that SEB offsets demonstrate a significant, tangible conservation gain and do not act as perverse incentives.

Laws in themselves won't recover threatened flora. Laws are essentially governance instruments, enacted and utilised to restrict or influence social behaviour and establish punitive deterrents. They do however have the potential to limit the inimical impacts of developments and some land management practices on threatened flora, provided there are workable arrangements for administration and enforcement. And therein lies the trick and an increasingly pressing challenge for conservationists and legislators concerned about sustaining indigenous plant diversity into the future.

Acknowledgements

Thanks to Annie Bond, Nicole Lewis, Vicki-Jo Russell and Tim Milne for providing comment.

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