



Statement of Reasons for a Decision to approve the taking of an action under the *Environment Protection and Biodiversity Conservation Act 1999*

I, Andrew McNee, Department of Agriculture, Water and the Environment, delegate for the Minister for the Environment, provide the following statement of reasons for my decision of 15 May 2020, under section 130(1) and section 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) to approve the dispersal and relocation of the Spectacled Flying Fox by Cairns Regional Council subject to conditions.

Legislation

1. Relevant legislation is set out in Annexure A.

Background

2. Cairns Regional Council (**the Council**) proposed to disperse and permanently relocate a population of the endangered Spectacled Flying-fox (*Pteropus conspicillatus*) from a nationally significant flying-fox camp¹ at 155 Abbott Street, Cairns, Queensland (**the Cairns Library site**) to the Cairns Central Swamp. This is referred to below as the **proposed action**.
3. On 8 April 2019, the Council referred the proposed action to the then Department of the Environment and Energy (**the Department**). The Council considered it likely that the proposed action would have a direct or indirect impact on members of a population of Spectacled Flying-foxes, which is listed as an endangered species under the EPBC Act. The referral is publicly available.² One of the attachments was a draft Cairns Flying-fox Relocation Management Plan (**Management Plan**).
4. On 24 May 2019, I determined that the proposed action was a controlled action under section 75 of the EPBC Act, due to the likely significant impacts on listed threatened species and communities. The controlling provisions were sections 18 and 18A of the EPBC Act (listed threatened species and communities). I also determined that the relevant impacts of the proposed action would be assessed by preliminary documentation requiring further information.³
5. On 11 June 2019, the Department requested that the Council provide further information⁴ to allow a full assessment of impacts of the proposed action on listed threatened species and communities.
6. The Council complied with this request on 17 December 2019, including by submitting an updated Management Plan dated 13 December 2019.

¹ Nationally important Spectacled flying-fox camps are camps that have contained $\geq 16,000$ Spectacled flying-fox in more than 1 year in the last 10 years, or have been occupied by Spectacled flying-fox in at least 50% of the surveys over the last 10 years.

² Available at: <http://epbcnotices.environment.gov.au/referralslist/>

³ Under Division 4, Part 8 of Chapter 4 of the EPBC Act, s 95A.

⁴ See section 95A(2).

7. On 18 December 2019, I directed the Council to publish the preliminary information, together with an invitation for anyone to give the Council comments in writing relating to the information or the proposed action.⁵ Given the community interest in the proposed action and the holiday season, I directed the timeframe for publication be longer than the standard 10 days. In accordance with that direction, the Council published the draft preliminary documentation, including an updated Management Plan on 6 January 2020. It was available for public comment between 6 and 31 January 2020.
8. On 9 March 2020, the Council provide a document to the Department summarising the 596 responses received and how those responses had been addressed, as well as a copy of the comments received.⁶
9. On 3 March, the Department advised the Council that a flying-fox relocation and deterrent implementation plan was required prior to commencing the action and that there were two options open to the council: either provide the Department with an implementation plan that I could consider in deciding whether to approve the proposed action, or it would be open to me, were I to approve the proposed action, to impose the preparation of an implementation plan as a condition of approval.
10. On 23 March 2020, under section 95B(4), the Council published the finalised preliminary documentation for information until 17 April 2020, which included updates to the documentation to take into account the public comments received.
11. On 27 March the Council provided a draft 'Cairns Flying-fox Relocation Implementation Plan' (**Implementation Plan**) to inform the recommendation report.
12. On 22 April 2020, I proposed to approve the proposed action subject to conditions. This proposed decision reflected the approach recommended in the recommendation report given to me in accordance with s 95C of the EPBC Act. In accordance with the EPBC Act, I invited comments on my proposed decision to approve the proposed action and the proposed conditions from the Council.⁷ I also invited comments from the Queensland Department of Environment and Science (**DES**).
13. The Council provided comments on the proposed decision on 22 April 2020. The Department met with the Council on 30 April 2020, to discuss their comments on the proposed conditions and the Implementation Plan.
14. On 7 May 2020, the Department received comments from DES.
15. On 11 May 2020, the Department's Post Approval and Policy Branch provided comments on the proposed conditions.
16. On 12 May 2020, the Council provided a final version of the Implementation Plan and accepted the amended proposed conditions.
17. On 15 May 2020, I approved, subject to conditions, the Council taking the proposed action, under section 130(1) and section 133 of the EPBC Act for the purposes of the controlling provisions in paragraph 4 of these reasons.

⁵ Under s 95A(3)

⁶ As required by s 95B(1)(b).

⁷ As required by s 131AA(1).

The proposed action

18. The proposed action is to conduct deterrent activities using non-lethal measures of light and noise (pyrotechnics, high intensity lighting, audio Hyperspike (LRAD) and other audio, visual and olfactory negative reinforcers). Once the original roosting location at the Cairns Library, has been abandoned, passive deterrent works, including tree pruning, will be undertaken to further re-enforce the negative association.
19. The Council states that deterrent activities will be undertaken over a 3 to 5 year period, with continuation governed by the demonstrated achievement of agreed performance outcomes to be determined as part of an ongoing monitoring program. The results of the monitoring program will determine whether the action should continue or cease.
20. The Council has undertaken an assessment of potential suitable relocation sites within 5 km to the west, south and east of the action site and has identified the preferred relocation site as two parcels of land at Cairns Central Swamp.
21. The Cairns Central Swamp is considered by the Council to be the preferred relocation site due to the presence of suitable habitat, location, current and previous land use and zoning (conservation). The site is adjacent to land zoned as low to medium density residential zones and is considered less likely to result in adverse human and bat interactions. In particular, the Cairns Central Swamp site:
 - is a former roost site for Spectacled Flying-fox;
 - recent surveys have confirmed that the site contains approximately 30 hectares of remnant rainforest and paperbarks swamp suitable for Spectacled Flying-fox;
 - is located close to a permanent fresh water source;
 - is within a suitable proximity to the Cairns Library site; and
 - the vegetation has been calculated to have an average tree cover comparable to other sites occupied by Spectacled Flying-fox in the Cairns region.
22. The Department notes that the Cairns Central Swamp site has been surveyed to determine baseline habitat condition and presence of other flora and fauna. The Cairns Central Swamp site will be monitored for the purpose of assessing unintended consequences to other flora and fauna.

Evidence or other material on which my findings were based

23. My decision to approve the proposed action was based on consideration of the final approval decision brief prepared by the Assessments and Support Branch, Environment Approvals Division of the Department dated 14 May 2020.
24. This brief contained the following attachments:
 - A. Proposed approval decision briefing package, which in turn comprised the proposed approval decision brief and attached:
 - AA. Recommendation report
 - AB. Preliminary Documentation and additional documents provided during the assessment, comprising:

- Referral, attaching a Cairns City Library Map and Corporate Plan
- Management Plan
- Implementation Plan
- Public Comments received by the Council
- Public comments analysis

AC. Decision notice

AD. Letters to the Council and DES inviting comments on proposed decision

AE. Statutory documents report identifying relevant conservation advices, recovery plans and threat abatement plans

AF. Conservation Advice and National Recovery Plan for the Spectacled Flying-fox

AG. Environment Reporting Tool report dated 16 April 2020

- B. Council's responses of 22 April 2020 and 12 May 2020 to invitation to comment on the proposed decision
- C. DES response to invitation to comment on proposed decision
- D. Comments from Post Approvals and Policy Branch of the Department on the proposed conditions
- E. Notice of decision showing track changes from proposed approval decision
- F. Notice of decision
- G. Letters to relevant parties advising of decision

Findings on material questions of fact

Listed threatened species and ecological communities (sections 18 and 18A)

25. The Department's Environmental Reporting Tool indicates that a total of 48 listed threatened species and two ecological communities may occur within five kilometres of the proposed action. Based on the nature and location of the action, the Department's advice, which I accept, was that the proposed action is likely to impact on the endangered Spectacled Flying-fox (*Pteropus conspicillatus*). The Spectacled Flying-fox is listed as an endangered species under the EPBC Act.
26. Based on information available to the Department, it considered that significant impacts to other threatened species and communities within 5 kilometres of the project site to be unlikely.

Spectacled Flying-fox (*Pteropus conspicillatus*) – Endangered

27. All data on the Spectacled Flying-fox has been sourced from the Department's Species Profile and Threats database (**SPRAT**), unless otherwise stated. The information in SPRAT includes conservation advice, a recovery plan and policy advice.

Description of the Spectacled Flying-fox

28. The Spectacled Flying-fox is black over most of its body, generally with a prominent yellow neck ruff and straw-coloured fur on its muzzle and around its eyes. Spectacled Flying-fox primarily eats fruit and, to a lesser extent, nectar and pollen. They source their food in a broad range of habitats including from fruit trees in suburban backyards and orchards.
29. The peak mating season is between March and May with most pups born between October and December. Mature females devote most of their time to various stages of reproduction and juveniles are nursed for 3-5 months. From 3-5 months, they begin to become independent of their mothers; however, they receive some parental care for a number of months afterward.
30. The species has experienced continuing decline which recently accelerated with the unprecedented November 2018 heat stress event which resulted in the loss of approximately 32% of the national population.

Presence

31. The site is an established, nationally-important camp for the endangered Spectacled Flying-fox containing between 3,000-8,000 individuals, depending on seasonal variation. Works are proposed to be undertaken at the end of the 2019-2020 breeding season. The preliminary documentation states that the Spectacled Flying-fox has a high fidelity to the Cairns City Library camp and contains, on average, approximately 12 percent of the total population of Spectacled Flying-fox.
32. The preliminary documentation notes that high rates of pup mortality have been recorded at the Cairns City Library site over each breeding seasons since 2014-2015. The reasons for the high rates of pup mortality are unknown, however the preliminary documentation concludes that this may be in part due to the diminishing quality of the roost site, construction activities in the immediate surrounds and, more recently, heat stress events.
33. The Department notes that the Spectacled Flying-fox population at the Cairns Library site is monitored on a quarterly basis as part of the National Flying-fox Monitoring Program. The results of this program, which commenced in late 2012, are made available on the Department's website.⁸ The National Flying-fox Monitoring Program's counts for the Cairns City Library site in May 2019 (3,200 individuals) and November 2019 (3,300 individuals) indicate that the numbers of Spectacled flying-foxes are returning to previously recorded levels.

Habitat assessment

34. The Cairns City Library site is 4000 m² and is on the fringe of the Cairns Central Business District. The site has landscaped gardens with five large trees (*Ficus elastic*, *F. benjamina*, *Xanthostemon chrysanthus*) used by the Spectacled Flying-fox for roosting. The trees are protected under the State Heritage listing of the Cairns City Library property. Removal of the trees is not permitted under the heritage status of the site.
35. The preliminary documentation states that the progressive loss of roost trees from surrounding areas of the Cairns CBD has increased reliance on a small number of roost

⁸ Available at: <http://www.environment.gov.au/webgis-framework/apps/ffc-wide/ffc-wide.jsf>

trees around the Cairns City Library site. The more intensive and persistent use of the roost trees surrounding the library is causing more frequent and sustained damage to the trees, reducing the health of the trees, causing further loss of roosts and increasing the potential for falling branches.

Assessing impact of proposed action on Spectacled Flying-fox

36. The EPBC Act *Referral guideline for management actions in grey-headed and spectacled flying-fox camps* (September 2015)⁹ (**Referral Guideline**) recognises that dispersals to manage flying-foxes which are proposed during times of significant population stress have a higher risk of having a significant impact, even if mitigation measures are in place.
37. A time of significant population stress is considered to be more likely when an event/s has in the year prior to the proposed date of the action taking place, resulted in the mortality of 1.5 percent or more of the national population of Spectacled flying-fox.
38. It is noted that, prior to submission of the referral, high numbers of Spectacled Flying-fox pups had been found abandoned at the camp following heat stress events in November 2018 and March 2019 which were estimated to have caused the death of over 23,000 (approximately 32 percent) Spectacled Flying-fox nationally.
39. It is further noted that, while proposed deterrent measures are non-lethal, the impact of the proposed use of pyrotechnics, high intensity lighting, audio Hyperspike and other audio, visual and olfactory negative reinforcers on the species have the potential to cause further and ongoing stress which may impact on the breeding success of the Spectacled Flying-fox.
40. Experience with other flying-camps has shown a low likelihood of successful dispersal,¹⁰ involving continual disturbance of the animals to keep them out of the current location or other undesired sites. This continued disturbance may reduce the likelihood of successful breeding and recruitment to the Spectacled Flying-fox population.
41. On the basis of the above, I found that the proposed dispersal is to be taken following a period of significant population stress and is likely to have a significant impact on the Spectacled Flying-fox.

Proposed avoidance and mitigation measures

42. The Referral Guideline advises that the adoption of certain mitigation standards will assist in avoiding or reducing significant impacts on Spectacled Flying-fox arising from management actions at their camps. Proponents should either implement the relevant standards in the Referral Guideline or an equivalent state or territory standard. The Referral Guideline provides that the Queensland Code of Practice: Ecologically sustainable management of flying-fox roosts (2013) is considered to achieve a similar outcome to the mitigation standards it sets out.
43. Where dispersal is planned during a time of significant population stress, the Referral Guideline states that a more detailed level of assessing risks and planning the action

⁹ Available at: <https://www.environment.gov.au/biodiversity/threatened/species/flying-fox-policy-statement>

¹⁰ Available at <http://www.environment.gov.au/system/files/resources/6d4f8ebc-f6a0-49e6-a6b6-82e9c8d55768/files/referral-guideline-flying-fox-camps.pdf>

should be undertaken. It recommends that a dispersal management plan, meeting specific requirements, be submitted to the Department for consideration.

44. The Council has prepared a Management Plan¹¹ and an Implementation Plan¹² to inform implementation and management of the proposed action. The Implementation Plan includes measures to minimise impacts to the Spectacled Flying-fox during relocation and deterrent activities. The proposed action:
 - is time limited and continuation is to be determined by the demonstrated achievement of objectives and performance criteria;
 - will occur between May and September, outside the pup rearing season;
 - will cease if heavily pregnant females and dependent pups are found to be present or if a flying-fox death is recorded due to the action.
45. The Implementation Plan also includes a monitoring and reporting program that will be undertaken to assess success against the objectives of the proposed action and performance criteria.
46. Monitoring is proposed at both the Cairns City Library and the Cairns Central Swamp sites. The monitoring will be undertaken by a suitably qualified expert and include:
 - pre-relocation monitoring – to determine the baseline biocondition of the Cairns Central Swamp, and preliminary counts of Spectacled Flying-fox at known roost sites at the Cairns City Library and within the Cairns region;
 - during relocation – daily monitoring will be undertaken at both sites and any intermediate sites;
 - following relocation (and to continue for the period of the approval) – annual monitoring of the Spectacled Flying-fox habitat condition at Cairns Central Swamp and Cairns City Library to evaluate the tree health; and
 - regular monitoring of Spectacled Flying-fox (monthly counts) at known roost sites in the Cairns region including but not limited to Cairns City Library and the Cairns Central Swamp sites.
47. The preliminary documentation states that monitoring is required to validate success and allow timely intervention to avoid adverse impacts. The performance criteria for the action, as set out in the preliminary documentation is:
 - no Spectacled Flying-fox deaths as a result of the deterrent activities;
 - no Spectacled Flying-fox deaths as a result of the relocation;
 - no increasing trend in pup mortality at the relocation site, as measured against data available for the Cairns City Library site, due to the action.
 - no significant impacts to non-target environmental values.

¹¹ Available at: <https://www.cairns.qld.gov.au/council/have-say/closed/flying-fox-relocation-plan>

¹² Available at https://www.cairns.qld.gov.au/data/assets/pdf_file/0010/341587/CRC-Flying-fox-Relocation-Implementation-Plan-R04.pdf.

Management of impact by conditions of approval

48. To manage impacts to the Spectacled Flying-fox, the Department has recommended the inclusion of conditions that:
- restrict the timeframe, duration and location in which the relocation activities can be undertaken (Final conditions 1 and 2)
 - include specific performance criteria and stop work measures related to meeting performance criteria (Final conditions 6 and 9-11)
 - require monitoring of the Spectacled Flying-fox at regular intervals during deterrent and dispersal activities, for the life of the proposed action (Final condition 6)
 - require the implementation of a Dispersal and Relocation Implementation Plan and regular review and update of the plan (Final conditions 3, 5-8); and
 - restrict the action from occurring if the population becomes stressed as defined in the Referral Guideline (Final condition 2).
49. The Department has advised that the recommended proposed conditions will assist in ensuring that the proposed action is undertaken in a manner that reduces the risk of impacts to the Spectacled Flying-fox and includes appropriate time frames and measures to discontinue the action in the event that objectives and performance criteria are not met.
50. The preliminary documentation notes that the proposed action will be undertaken in accordance with the Code of Practice - Ecologically Sustainable management of flying-fox roosts (2020) (**Code of Practice**) under the *Nature Conservation Act 1992* (Qld). The Department has considered the Code in preparing the proposed conditions.
51. In formulating its recommended conditions, the Department had regard to its *EPBC Act Condition-setting Policy* (2016) (**Condition-setting Policy**).
52. Having considered the scope and severity of the proposed action and the proposed mitigation and management measures, I found that the potential impacts associated with the proposed action can be reduced to an acceptable level by applying the conditions proposed by the Department.

Conclusion

53. Based on the information available to me, the proposed measures to mitigate and manage impacts, and assuming compliance with the proposed conditions of approval, I considered that the proposed action will not have an unacceptable impact on the Spectacled Flying-fox.

Economic and social matters

54. The Council has noted that if no action is undertaken it is likely to result in the loss of roost trees at the Cairns City Library site, reducing the aesthetic qualities of the area, and potential for injury associated with the health of the trees (e.g. falling limbs). It may also result in perpetuating the human health risk (i.e. spread of diseases) associated with flying foxes, and further harm to the species due to the likely further decline in the quality of roost habitat at the Cairns Library site.

55. The aim of the proposed action is to relocate the Spectacled Flying-fox population from its current site to a preferred site outside the Cairns CBD. In selecting a suitable relocation site, the Council has taken into consideration potential conflicts with the community, business and residential areas.
56. The preliminary documentation states that the Council has considered the cost associated with the deterrence methods, and this cost has been accommodated in Council budgets.
57. The cost of ongoing management actions was raised in the public submissions on the draft preliminary documentation. The Council noted that further studies will be undertaken to explore approaches to flying-fox deterrents and management with the aim of reducing the future financial cost. These further studies are not a component of the proposed action.

Additional considerations

Principles of ecologically sustainable development and the precautionary principle

58. The principles of ecologically sustainable development, as defined in Part 1, section 3A of the EPBC Act, are:
 - (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
 - (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
 - (c) the principle of inter-generational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
 - (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
 - (e) improved valuation, pricing and incentive mechanisms should be promoted.
59. I have considered the recommendation report and the preliminary documentation, which contain information on the long-term and short-term economic, environmental, social and equitable considerations that are relevant to the decision.
60. I have considered the biodiversity principle and ecological integrity in relation to the Spectacled Flying-fox. Noting the Council's commitments to mitigate the impacts of the proposed action, particularly the implementation of management plans and the recommended proposed conditions of approval, the Department advised that the proposed action would not have serious or irreversible impacts on biological diversity and ecological integrity.
61. The Department also advised that the costs of mitigation measures for any relevant impacts provide appropriate pricing and incentive mechanisms for the protection of MNES.
62. In addition, section 391 of the EPBC Act provides that I must take into account the precautionary principle in deciding whether or not to approve the taking of an action.

The precautionary principle requires that, if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

63. Based on the information available to me, I considered that there is sufficient information to conclude the proposed action is unlikely to have unacceptable impacts on the Spectacled Flying-fox if it is undertaken in accordance with the Council's commitments to mitigate the impacts of the proposed action and the proposed conditions of approval.

Section 95B(1) document and recommendation report – section 136(2)(bc)

64. As will be apparent from this statement of reasons, I have had regard to the recommendation report provided under s 95C of the Act.
65. I have also considered the document provided by the Council under section 95B(1) on 9 March 2020. I note that a total of 596 individual comments were received during the public comment period on the preliminary documentation. According to the document provided by the Council under section 95B(1), the comments expressed a range of sentiments, from supportive to unsupportive as well as non-committal or equivocal. The submissions raised the following key issues:
- the proposed relocation will remove an important roost site from the overall roosting habitat for the species;
 - there has been little or no consideration of alternatives, particularly given the high likelihood of failure to relocate the camp;
 - potential for aviation strike due to the proximity to Cairns Airport and associated flight path;
 - cost of the proposal to rate payers and impact to tourism in the Cairns region;
 - the lack of clear, consistent information and evidence-based reasons for undertaking the proposed action;
 - insufficient details on the proposed method including monitoring, success and contingency plans;
 - risk of harm to Spectacled Flying-fox and humans as a result of the proposed relocation activities.

66. I also note that 12 public submissions were received by the Department during the draft preliminary documentation public comment period, which were provided to the Council and formed part of its consideration. The Council provided a consolidated and detailed response to the comments received

67. The Department considered matters raised in the public comments in drafting the recommended decision and proposed conditions of approval.

Other information I have on the relevant impacts of the decision – section 136(2)(e)

68. DES was invited to provide comments on my proposed decision to approve the proposed action subject to conditions. On 6 May 2020, DES advised the Department that Queensland had reviewed its Queensland flying-fox management framework and that the new framework had been released on 14 February 2020 and permit roost management to

occur, provided that the measures used are consistent with the revised Code of Practice – Ecologically sustainable management of flying-fox roosts.¹³ DES also noted that in January 2020 a panel was convened, at the request of the DES Director General, to seek expert advice on best practice in establishing alternative flying fox roost sites and the potential impacts of the proposed dispersal in Cairns on the Spectacled Flying-fox, as a species. The overall advice of relevant experts was that the proposed dispersal and relocation from the Cairns Library site would not pose a threat to the conservation of the Spectacled Flying-fox as a species.

Comments given in accordance with an invitation under section 131AA – section 131AA(6)

69. The Council was invited to provide comments on my proposed decision to approve the proposed action subject to conditions. I have had regard to those comments.

Australia's obligations under the Biodiversity Convention, Apia Convention and CITES – section 139

Biodiversity Convention

70. The objectives of the Biodiversity Convention,¹⁴ to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.
71. The proposed action was assessed by preliminary documentation which included a process for public review and comment on the draft preliminary documentation. The finalised preliminary documentation was also published by the Council for information.
72. The preliminary documentation identified the impacts of the proposed action on the Spectacled Flying-fox and included commitments to mitigate and manage those impacts. In addition to the commitments proposed by the Council, the Department has recommended proposed conditions of approval which require further mitigation and management measures. The proposed conditions of approval require information related to the proposed action to be publicly available to ensure equitable sharing of information and improved knowledge relating to biodiversity.
73. The Department considered that the Biodiversity Convention's ultimate aim of conservation of listed threatened species and communities in the wild when recommending the proposed conditions of approval.
74. The Department considers that, taking into account the information in the preliminary documentation, the Council's avoidance, mitigation and management measures, and the proposed conditions of approval, the proposed action will not have an unacceptable impact on listed threatened species and communities.
75. As such, the Department was satisfied that the approval of the proposed action, and the proposed conditions of approval, are not inconsistent with Australia's obligations under the Biodiversity Convention. I agreed with this conclusion.

¹³ Available at: <https://environment.des.qld.gov.au/wildlife/animals/living-with/bats/flying-foxes/roost-management>

¹⁴ Available at: <http://www.austlii.edu.au/au/other/dfat/treaties/ATS/1993/32.html>

CITES

76. CITES¹⁵ is an international agreement between governments. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival.
77. The Department was satisfied that the approval of the proposed action, and the proposed conditions of approval, are not inconsistent with CITES as the proposed action does not involve international trade in fauna or flora. I agreed with this conclusion.

Apia Convention

78. The Apia Convention¹⁶ encourages the creation of protected areas which, together with existing protected areas, will safeguard representative samples of the natural ecosystems occurring therein (particular attention being given to endangered species), as well as superlative scenery, striking geological formations, and regions and objects of aesthetic interest or historic, cultural or scientific value.
79. The Apia Convention was suspended with effect from 13 September 2006. While this Convention has been suspended, Australia's obligations under the Convention have been taken into consideration.
80. The Department was satisfied that the approval of the proposed action, and the proposed conditions of approval, are not inconsistent with Australia's obligations under the Apia Convention. I agreed with this conclusion.

Relevant Conservation Advice and Recovery Plans – section 139

81. In considering whether or not to approve for the purposes of a subsection of section 18 or 18A the taking of an action, and what conditions to attach to such an approval, I must not act inconsistently with any relevant recovery plan or threat abatement plan. There is no relevant threat abatement plan.
82. I must also have regard to any approved conservation advice for a species or community that is likely to be significantly impacted by the proposed action.

Recovery Plan

83. The *National recovery plan for the spectacled flying fox Pteropus conspicillatus (2010)*¹⁷ (**Recovery Plan**) states that the key threats to the species are loss of habitat, illegal killing and incidental mortality, harassment by humans, natural events and increased incidence of tick paralysis. Many threats are localised, for example, tick paralysis tends to be a major issue in the Atherton Tablelands and disturbance of camps is an issue around residential areas.
84. The Recovery Plan states that the overall objectives of recovery are to secure the long-term protection of the species through a reduction in the impact of threats to species' survival and to improve the standard of information to guide recovery.

¹⁵ Available at: www.austlii.edu.au/au/other/dfat/treaties/ATS/1976/29.html

¹⁶ Available at: <http://www.austlii.edu.au/au/other/dfat/treaties/ATS/1990/41.html>

¹⁷ Available at: <https://www.environment.gov.au/system/files/resources/99449a95-4a42-4a68-8735-303408b8470f/files/pteropus-conspicillatus-recovery-plan.pdf>

85. Relevant to the Recovery Plan, the Council considers that the proposed action will aid recovery through relocation of a nationally significant flying-fox colony from a site where the viability of the colony is diminishing to a more suitable relocation site.
86. Based on the information available to me, I also consider that the proposed action will assist in recovery of the species:
- through monitoring of the current camp site and relocation site to assess the short and long term population size and trends of the Spectacled Flying-fox in the Cairns CBD area; and
 - through the proposed monitoring program, will increase knowledge of Spectacled Flying-fox roosting requirements.
87. Based on the information available, I found that the proposed action to undertake dispersal and deterrent activities, would not be inconsistent with the recovery objectives of the Recovery Plan.

Conservation Advice

88. The *Conservation Advice* *Pteropus conspicillatus spectacled flying-fox* (**Conservation Advice**) outlines the primary conservation and management actions to support the recovery of the Spectacled Flying-fox.¹⁸
89. The Conservation Advice states that the primary conservation actions are to:
- protect habitat, including important roost and foraging sites from clearing and fragmentation; and
 - engage with the public to resolve conflicts between humans and flying foxes in ways which do not harm the species.
90. The preliminary documentation states that if the current situation prevails, there is a real risk that roosting habitat will be lost. In addition, there is the potential to perpetuate the conflict surrounding the risk of flying-foxes to human health. The Council notes that education officers will liaise with the community prior to and during the implementation of the proposed action.

The Council's environmental history – section 136(4)

91. The Department has conducted a search of its compliance database to determine whether the Council has an adverse compliance history in respect of the EPBC Act. No adverse environmental history for Cairns Regional Council was found, and no compliance action has been taken against the Cairns Regional Council in relation to the EPBC Act.
92. I am aware that the Council disclosed that it had been found guilty of offences under the Queensland Nature Conservation Act and Heritage Act. However, I note that the Council has in this instance sought approval under the EPBC Act to undertake the proposed action and has engaged appropriately with the Department through the assessment process.

¹⁸ Available at: http://www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id=185

93. Having regard to the above, I considered, on balance, that the Council is a suitable person to be granted an approval.

Considerations in deciding on conditions – section 134

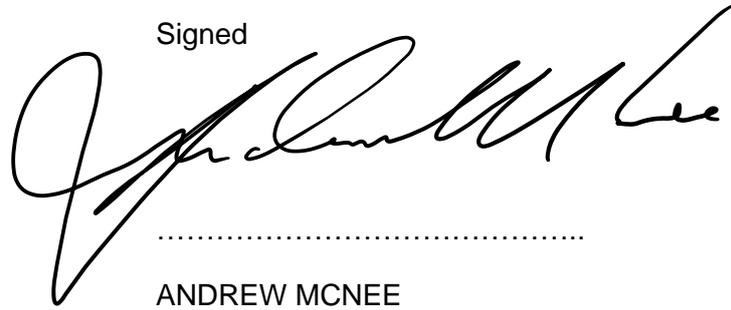
94. In deciding whether to attach conditions to the approval, I considered that the conditions recommended by the Department are necessary or convenient to protect, repair and / or mitigate impacts on a matter protected by provision of Part 3 for which the approval has effect.
95. I have considered conditions that have been imposed, or are likely to be imposed, under the law of Queensland.
96. The Spectacled Flying-fox is listed as vulnerable under the *Nature Conservation Act 1992* (Qld). The preliminary documentation notes that the proposed action will be undertaken in accordance with the relevant Code of Practice. The Department has considered the Code of Practice in preparing the proposed conditions.
97. The Code of Practice 'Ecologically sustainable management of flying fox roosts', updated in February 2020, sets out how local governments may undertake management actions which may destroy a flying-fox roost, drive away or attempt to drive away a flying-fox from a roost or disturb a flying-fox in a flying-fox roost. The Department notes that all management actions must immediately cease, and DES be notified, if a flying-fox is killed, injured, or found on the ground. Management actions may only recommence after receiving expert advice that resuming management actions poses no risk to other flying-foxes at or near the roost.
98. Council has informed the DES Wildlife Management Branch of their intention to undertake roost disturbance 'management actions' which will include deterrent activities to be undertaken at the fly in times when individuals are returning to roost. If management actions directed at Spectacled Flying-fox for roost relocation are not consistent with the Code of Practice, the Council will seek to conduct works under a flying-fox roost management permit.
99. I have further considered the Council's comments on the proposed conditions. There were no substantial changes resulting from those comments to the conditions attaching to the proposed decision, other than to improve consistency and clarity.
100. Finally, the Department considers the proposed conditions of approval will be cost effective for both the Council and Commonwealth and will ensure that the Spectacled Flying-fox is protected over time. I agree with this conclusion.

Reasons for decision

101. In light of my findings in paragraphs 25 to 100, I decided to approve, subject to conditions, the taking of the proposed action for the purposes of sections 18 and 18A of the EPBC Act.

102. My approval will remain valid until 1 October 2024. This is to allow sufficient time to undertake the deterrent and relocation activities and determine if the actions have been effective in meeting the objective of permanently relocating the Spectacled Flying-fox population from the Cairns City Library.

Signed

A handwritten signature in black ink, appearing to read 'Andrew Mcnee', written in a cursive style. The signature is positioned above a dotted line.

ANDREW MCNEE

25 JUNE 2020

Annexure A – Relevant Legislation

3A Principles of ecologically sustainable development

The following principles are *principles of ecologically sustainable development*:

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) improved valuation, pricing and incentive mechanisms should be promoted.

18 Actions with significant impact on listed threatened species or endangered community prohibited without approval

Species that are extinct in the wild

- (1) A person must not take an action that:
 - (a) has or will have a significant impact on a listed threatened species included in the extinct in the wild category; or
 - (b) is likely to have a significant impact on a listed threatened species included in the extinct in the wild category.

Civil penalty:

- (a) for an individual—5,000 penalty units;
- (b) for a body corporate—50,000 penalty units.

Critically endangered species

- (2) A person must not take an action that:
 - (a) has or will have a significant impact on a listed threatened species included in the critically endangered category; or
 - (b) is likely to have a significant impact on a listed threatened species included in the critically endangered category.

Civil penalty:

- (a) for an individual—5,000 penalty units;
- (b) for a body corporate—50,000 penalty units.

Endangered species

- (3) A person must not take an action that:
- (a) has or will have a significant impact on a listed threatened species included in the endangered category; or
 - (b) is likely to have a significant impact on a listed threatened species included in the endangered category.

Civil penalty:

- (a) for an individual—5,000 penalty units;
- (b) for a body corporate—50,000 penalty units.

Vulnerable species

- (4) A person must not take an action that:
- (a) has or will have a significant impact on a listed threatened species included in the vulnerable category; or
 - (b) is likely to have a significant impact on a listed threatened species included in the vulnerable category.

Civil penalty:

- (a) for an individual—5,000 penalty units;
- (b) for a body corporate—50,000 penalty units.

Critically endangered communities

- (5) A person must not take an action that:
- (a) has or will have a significant impact on a listed threatened ecological community included in the critically endangered category; or
 - (b) is likely to have a significant impact on a listed threatened ecological community included in the critically endangered category.

Civil penalty:

- (a) for an individual—5,000 penalty units;
- (b) for a body corporate—50,000 penalty units.

Endangered communities

- (6) A person must not take an action that:
- (a) has or will have a significant impact on a listed threatened ecological community included in the endangered category; or
 - (b) is likely to have a significant impact on a listed threatened ecological community included in the endangered category.

Civil penalty:

- (a) for an individual—5,000 penalty units;
- (b) for a body corporate—50,000 penalty units.

18A Offences relating to threatened species etc.

- (1) A person commits an offence if:
 - (a) the person takes an action; and
 - (b) the action results or will result in a significant impact on:
 - (i) a species; or
 - (ii) an ecological community; and
 - (c) the species is a listed threatened species, or

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (1A) Strict liability applies to paragraph (1)(c).

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (2) A person commits an offence if:
 - (a) the person takes an action; and
 - (b) the action is likely to have a significant impact on:
 - (i) a species; or
 - (ii) an ecological community; and
 - (c) the species is a listed threatened species, or the community is a listed threatened ecological community.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (2A) Strict liability applies to paragraph (2)(c).

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (3) An offence against subsection (1) or (2) is punishable on conviction by imprisonment for a term not more than 7 years, a fine not more than 420 penalty units, or both.

Note 1: Subsection 4B(3) of the *Crimes Act 1914* lets a court fine a body corporate up to 5 times the maximum amount the court could fine a person under this subsection.

Note 2: An executive officer of a body corporate convicted of an offence against this section may also commit an offence against section 495.

Note 3: If a person takes an action on land that contravenes this section, a landholder may commit an offence against section 496C.

- (4) Subsections (1) and (2) do not apply to an action if:

- (a) the listed threatened species subject to the significant impact (or likely to be subject to the significant impact) is:
 - (i) a species included in the extinct category of the list under section 178; or
 - (ii) a conservation dependent species; or
- (b) the listed threatened ecological community subject to the significant impact (or likely to be subject to the significant impact) is an ecological community included in the vulnerable category of the list under section 181.

Note 1: The defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

Note 2: Section 19 sets out other defences. The defendant bears an evidential burden in relation to the matters in that section too. See subsection 13.3(3) of the *Criminal Code*.

95A Direction to publish referral information and invitation to comment—further information required

- (1) This section applies if the Minister was not satisfied, at the time of making the decision (the assessment approach decision) under section 87, that the Minister had enough information in relation to the action to allow the Minister to assess the relevant impacts of the action.
- (2) Within 10 business days after the Minister gives notice of the assessment approach decision to the designated proponent of the action under paragraph 91(1)(a), the Minister must request the designated proponent to give the Minister specified information relevant to assessing the relevant impacts of the action, including information about strategies for mitigating any adverse impacts.
- (3) Within 10 business days after receiving the information requested under subsection (2), the Minister must give the designated proponent a written direction to publish, within the period specified in the direction (not being less than 10 business days), in accordance with the regulations:
 - (a) specified information included in the referral to the Minister of the proposal to take the action; and
 - (b) specified information relating to the action that was given to the Minister after the referral but before the Minister made the assessment approach decision; and
 - (c) specified information relating to the action that was received in response to the Minister's request under subsection (2); and
 - (d) an invitation for anyone to give the designated proponent, within the period specified in the direction, comments in writing relating to the information or the action.
- (4) The designated proponent must comply with the direction.

Note: If the designated proponent does not comply with the direction, the Minister may take action under section 155.

- (5) A direction given under subsection (3) is not a legislative instrument.

95B Procedure after end of period for comment

Procedure if comments are received

- (1) If comments are received by the designated proponent within the period for comment, the designated proponent must, as soon as practicable after the end of that period:
 - (a) prepare a document that:
 - (i) sets out the information given to the Minister previously in relation to the action, with any changes or additions needed to take account of the comments; and
 - (ii) contains a summary of the comments received and how those comments have been addressed; and
 - (b) give the Minister:
 - (i) a copy of the document prepared under paragraph (a); and
 - (ii) a copy of the comments received.
- (1A) The designated proponent is taken not to have given the Minister the documents referred to in paragraph (1)(b) if the required fee has not been paid.
- (2) Within 10 business days after the designated proponent has given the Minister the documents referred to in paragraph (1)(b), the designated proponent must publish, in accordance with the regulations, a copy of the document prepared under paragraph (1)(a).

Procedure if no comments are received

- (3) If no comments are received by the designated proponent within the period for comment, the designated proponent must, as soon as practicable after the end of that period, give the Minister a written statement to that effect.
- (3A) The designated proponent is taken not to have given the Minister the statement referred to in subsection (3) if the required fee has not been paid.
- (4) Within 10 business days after the designated proponent has given the Minister the statement referred to in subsection (3), the designated proponent must publish, in accordance with the regulations, a copy of the information referred to in paragraphs 95(2)(a) and (b) or 95A(3)(a), (b) and (c), as the case requires.

Definition

- (5) In this section:

period for comment means the period within which comments may be given under 95(2)(c) or 95A(3)(d), as the case requires.

95C Recommendation report

- (1) The Secretary must prepare, and give to the Minister, a recommendation report relating to the action. The report must include recommendations on:

- (a) whether the taking of the action should be approved under Part 9; and
 - (b) if approval is recommended, any conditions that should be attached to the approval.
- (2) The recommendation report must be given to the Minister after the Minister receives the documents under subsection 95B(1) or the statement under subsection 95B(3), as the case requires, and before the end of the period applicable under paragraph 130(1B)(c) in relation to the action.

Note: This is the period within which the Minister must decide whether or not to approve the taking of the action.

130 Timing of decision on approval

Basic rule

- (1) The Minister must decide whether or not to approve, for the purposes of each controlling provision for a controlled action, the taking of the action.
- (1A) The Minister must make the decision within the relevant period specified in subsection (1B) that relates to the controlled action, or such longer period as the Minister specifies in writing.

...

131 Inviting comments from other Ministers before decision

- (1) Before the Minister (the **Environment Minister**) decides whether or not to approve, for the purposes of a controlling provision, the taking of an action, and what conditions (if any) to attach to an approval, he or she must:
 - (a) inform any other Minister whom the Environment Minister believes has administrative responsibilities relating to the action of the decision the Environment Minister proposes to make; and
 - (b) invite the other Minister to give the Environment Minister comments on the proposed decision within 10 business days.
- (2) A Minister invited to comment may make comments that:
 - (a) relate to economic and social matters relating to the action; and
 - (b) may be considered by the Environment Minister consistently with the principles of ecologically sustainable development.

This does not limit the comments such a Minister may give.

131AA Inviting comments before decision from person proposing to take action and designated proponent

- (1) Before the Minister decides whether or not to approve, for the purposes of a controlling provision, the taking of an action, and what conditions (if any) to attach to an approval, he or she must:

- (a) inform the person proposing to take the action, and the designated Proponent of the action (if the designated Proponent is not the person proposing to take the action), of:
 - (i) the decision the Minister proposes to make; and
 - (ii) if the Minister proposes to approve the taking of the action-any conditions the Minister proposes to attach to the approval; and
- (b) invite each person informed under paragraph (a) to give the Minister, within 10 business days (measured in Canberra), comments in writing on the proposed decision and any conditions.

...

- (6) In deciding whether or not to approve, for the purposes of a controlling provision, the taking of the action, the Minister must take into account any relevant comments given to the Minister in response to an invitation given under paragraph (1)(b).

131A Inviting public comment before decision

Before the Minister decides whether or not to approve, for the purposes of a controlling provision, the taking of an action, and what conditions (if any) to attach to an approval, he or she may publish on the internet:

- (a) the proposed decision and, if the proposed decision is to approve the taking of the action, any conditions that the Minister proposes to attach to the approval; and
- (b) an invitation for anyone to give the Minister, within 10 business days (measured in Canberra), comments in writing on the proposed decision and any conditions.

133 Grant of approval

Approval

- (1) After receiving the assessment documentation relating to a controlled action, or the report of a commission that has conducted an inquiry relating to a controlled action, the Minister may approve for the purposes of a controlling provision the taking of the action by a person.
- (1A) If the referral of the proposal to take the action included alternative proposals relating to any of the matters referred to in subsection 72(3), the Minister may approve, for the purposes of subsection (1), one or more of the alternative proposals in relation to the taking of the action.

Content of approval

- (2) An approval must:
 - (a) be in writing; and
 - (b) specify the action (including any alternative proposals approved under subsection (1A)) that may be taken; and
 - (c) name the person to whom the approval is granted; and

- (d) specify each provision of Part 3 for which the approval has effect; and
- (e) specify the period for which the approval has effect; and
- (f) set out the conditions attached to the approval.

Note: The period for which the approval has effect may be extended. See Division 5.

Persons who may take action covered by approval

- (2A) An approval granted under this section is an approval of the taking of the action specified in the approval by any of the following persons:
- (a) the holder of the approval;
 - (b) a person who is authorised, permitted or requested by the holder of the approval, or by another person with the consent or agreement of the holder of the approval, to take the action.

Notice of approval

- (3) The Minister must:
- (a) give a copy of the approval to the person named in the approval under paragraph 133(2)(c); and
 - (b) provide a copy of the approval to a person who asks for it (either free or for a reasonable charge determined by the Minister).

...

Notice of refusal of approval

- (7) If the Minister refuses to approve for the purposes of a controlling provision the taking of an action by the person who proposed to take the action, the Minister must give the person notice of the refusal.

Note: Under section 13 of the Administrative Decisions (Judicial Review) Act 1977, the person may request reasons for the refusal, and the Minister must give them.

...

134 Conditions of approval

Condition to inform persons taking action of conditions attached to approval

- (1A) An approval of the taking of an action by a person (the first person) is subject to the condition that, if the first person authorises, permits or requests another person to undertake any part of the action, the first person must take all reasonable steps to ensure:
- (a) that the other person is informed of any condition attached to the approval that restricts or regulates the way in which that part of the action may be taken; and
 - (b) that the other person complies with any such condition.

For the purposes of this Chapter, the condition imposed by this subsection is attached to the approval.

136 General considerations

Mandatory considerations

- (1) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must consider the following, so far as they are not inconsistent with any other requirement of this Subdivision:
 - (a) matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action;
 - (b) economic and social matters.

Factors to be taken into account

- (2) In considering those matters, the Minister must take into account:
 - (a) the principles of ecologically sustainable development; and
 - (b) the assessment report (if any) relating to the action; and
 - (ba) if Division 3A of Part 8 (assessment on referral information) applies to the action—the finalised recommendation report relating to the action given to the Minister under subsection 93(5); and
 - (bc) if Division 4 of Part 8 (assessment on preliminary documentation) applies to the action:
 - (i) the documents given to the Minister under subsection 95B(1), or the statement given to the Minister under subsection 95B(3), as the case requires, relating to the action; and
 - (ii) the recommendation report relating to the action given to the Minister under section 95C; and
 - (c) if Division 5 (public environment reports) of Part 8 applies to the action:
 - (i) the finalised public environment report relating to the action given to the Minister under section 99; and
 - (ii) the recommendation report relating to the action given to the Minister under section 100; and
 - (ca) if Division 6 (environmental impact statements) of Part 8 applies to the action:
 - (i) the finalised environmental impact statement relating to the action given to the Minister under section 104; and
 - (ii) the recommendation report relating to the action given to the Minister under section 105; and
 - (d) if an inquiry was conducted under Division 7 of Part 8 in relation to the action—the report of the commissioners; and

- (e) any other information the Minister has on the relevant impacts of the action (including information in a report on the impacts of actions taken under a policy, plan or program under which the action is to be taken that was given to the Minister under an agreement under Part 10 (about strategic assessments)); and
- (f) any relevant comments given to the Minister in accordance with an invitation under section 131 or 131A; and
- (fa) any relevant advice obtained by the Minister from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development in accordance with section 131AB; and
- (g) if a notice relating to the action was given to the Minister under subsection 132A(3)—the information in the notice.

Note: The Minister must also take into account any relevant comments given to the Minister in response to an invitation under paragraph 131AA(1)(b). See subsection 131AA(6).

Person's environmental history

- (4) In deciding whether or not to approve the taking of an action by a person, and what conditions to attach to an approval, the Minister may consider whether the person is a suitable person to be granted an approval, having regard to:
 - (a) the person's history in relation to environmental matters; and
 - (b) if the person is a body corporate—the history of its executive officers in relation to environmental matters; and
 - (c) if the person is a body corporate that is a subsidiary of another body or company (the parent body)—the history in relation to environmental matters of the parent body and its executive officers.

Minister not to consider other matters

- (5) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must not consider any matters that the Minister is not required or permitted by this Division to consider.

139 Requirements for decisions about threatened species and endangered communities

- (1) In deciding whether or not to approve for the purposes of a subsection of section 18 or section 18A the taking of an action, and what conditions to attach to such an approval, the Minister must not act inconsistently with:
 - (a) Australia's obligations under:
 - (i) the Biodiversity Convention; or
 - (ii) the Apia Convention; or
 - (iii) CITES; or
 - (b) a recovery plan or threat abatement plan.
- (2) If:

- (a) the Minister is considering whether to approve, for the purposes of a subsection of section 18 or section 18A, the taking of an action; and
- (b) the action has or will have, or is likely to have, a significant impact on a particular listed threatened species or a particular listed threatened ecological community;

the Minister must, in deciding whether to so approve the taking of the action, have regard to any approved conservation advice for the species or community.

391 Minister must consider precautionary principle in making decisions

Taking account of precautionary principle

- (1) The Minister must take account of the precautionary principle in making a decision listed in the table in subsection (3), to the extent he or she can do so consistently with the other provisions of this Act.

Precautionary principle

- (2) The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.

Decisions in which precautionary principle must be considered

- (3) The decisions are:

Decisions in which precautionary principle must be considered		
Item	Section decision is made under	Nature of decision
1	75	whether an action is a controlled action
2	133	whether or not to approve the taking of an action

...