

TRANSCRIPT

LEGISLATIVE COUNCIL ENVIRONMENT AND PLANNING COMMITTEE

Inquiry into Ecosystem Decline in Victoria

Melbourne—Tuesday, 20 April 2021

MEMBERS

Ms Sonja Terpstra—Chair

Mr Clifford Hayes—Deputy Chair

Dr Matthew Bach

Ms Melina Bath

Dr Catherine Cumming

Mr Stuart Grimley

Mr Andy Meddick

Mr Cesar Melhem

Dr Samantha Ratnam

Ms Nina Taylor

PARTICIPATING MEMBERS

Ms Georgie Crozier

Mr David Davis

Dr Tien Kieu

Mrs Beverley McArthur

Mr Tim Quilty

WITNESS

Professor Lee Godden, Director, Centre for Resources, Energy and Environmental Law, University of Melbourne (*via videoconference*).

The CHAIR: I declare open the Legislative Council Environment and Planning Committee public hearing for the Inquiry into Ecosystem Decline in Victoria. Please ensure that mobile phones have been switched to silent and that background noise is minimised.

I would like to begin this hearing by respectfully acknowledging the traditional custodians of the various lands which each of us are gathered on today and pay my respects to their ancestors, elders and families. I particularly welcome any elders or community members who are here today to impart their knowledge of this issue to the committee or who are watching the broadcast of these proceedings. I would also like to welcome any members of the public who may be watching these proceedings via the live broadcast today.

At this juncture I will take the opportunity to introduce committee members to you. I am Sonja Terpstra. I am the Chair of the Environment and Planning Committee. To my left is Mr Clifford Hayes, who is the Deputy Chair. Also in the room is Dr Samantha Ratnam. Joining us via Zoom are Dr Matthew Bach, Ms Nina Taylor and Mr Stuart Grimley. Back in the room we have Mr Andy Meddick, Ms Melina Bath and Mrs Bev McArthur.

All evidence that is taken today is protected by parliamentary privilege as provided by the *Constitution Act 1975* and further subject to the provisions of the Legislative Council standing orders. Therefore the information you provide during the hearing is protected by law. You are protected against any action for what you say during this hearing, but if you go elsewhere and repeat the same things, those comments may not be protected by this privilege. Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament.

All evidence is being recorded, and you will be provided with a proof version of the transcript following the hearing. Transcripts will ultimately be made public and posted on the committee's website.

If I could just get you very briefly for the Hansard record to state your name and your organisation that you are appearing on behalf of today.

Prof. GODDEN: Hello. Professor Lee Godden. I am appearing on behalf of myself in terms of being the Director of the Centre for Resources, Energy and Environmental Law at the University of Melbourne.

The CHAIR: Great, thank you. With that, I welcome you to make your opening comments. If you could keep them to about a maximum of 5 minutes, that will allow plenty of time for committee members to ask you questions. With that, you can get underway.

Visual presentation.

Prof. GODDEN: In terms of commencing my opening address, I would like to acknowledge the traditional owners of the land and waters on which I am situated. I would like to draw attention to the idea that I will be focusing particularly on the legislative and policy reforms as opposed to thinking about the impacts and the reasons for decline. I understand that the committee will be hearing evidence from a wide range of people who are well placed to talk to those issues, but what I would suggest is that the factors related to ecosystem decline are well established. The research is clear. We have a number of indicators globally, nationally and regionally about the impacts of biodiversity loss, not only in relation to the environmental impacts but the widespread social and cultural impacts, so what I would like to do is focus particularly on the legislative and policy reforms and to think about some positive steps that have taken place in Victoria, and I see opportunities to build on those positive steps.

There have been reforms in biodiversity protection most recently, such as the *Flora and Fauna Guarantee Act*, the *Wildlife Act* review and so on. There are significant initiatives in the *Climate Change Act*, particularly in relation to things such as adaptation planning, concerned with looking holistically at those impacts, but there are critical areas of gaps in relation to biodiversity and ecosystem decline, and the need for more robust biological and other protections.

I think there are opportunities not to marginalise ecosystem protections. One of the really important things that I gather from the terms of this inquiry is the centring in relation to activities for restoration as opposed to preservation and conservation. We need to have that spectrum in there very clearly.

If I could move to the next slide, thanks. In the slide there I have noted a couple of areas that I think are very important in relation to protection of ecosystems and to alerting us to areas where we need to direct attention. Firstly I think that some of the principles that govern our legislation, such as ecologically sustainable development, are no longer fit for purpose. I think we might look to other principles, such as the duty of care reforms that have taken place in relation to the *Environment Protection Act* here in Victoria. I think there are emergent areas that we do not often think of in the environmental arena that are very important to bring into scope, such as the emergency management framework, such as fire regimes, such as air and water quality. I am happy to talk to those in question time.

If I could have the next slide. I have also on this slide identified some areas that I think we need to draw attention to in terms of the effectiveness and adequacy of government programs. I think we see core underfunding in areas such as national parks. That is in relation to not just personnel and so on, but in relation to very significant aspects such as monitoring and follow-up, and indeed in areas such as ensuring that there is enforcement of our ecosystem protections in those areas. I think we can see investment in green infrastructure that is needed, and support in our legislative and policy frameworks there.

One of the big gaps, and this is acknowledged in research more widely, is the lack of adequate monitoring and compliance in environmental areas. It is always an underfunded area. We need to think more innovatively about our enforcement measures to align both to funding but also new ways of thinking about how we enforce in this area. I also think that there is an opportunity to review key habitat-related policies in relation particularly to how we deal with cumulative effects on ecosystems across sectors and regions, and I have identified there for you a number of those areas.

Next slide, please. Very importantly, and this comes from the work that I have done over some 30 years in working with traditional owners, I think there are significant opportunities to continue the pathway that Victoria has already embarked on in particular ways to realise partnerships with First Nations and to really draw positive opportunities from Indigenous governance in relation not only to connection to country but more holistically but also in respect of traditional ecological knowledge. I think there are major synergies that could be developed between Aboriginal cultural heritage protections and ecosystem protections. We need to think about establishing areas of engagement with traditional owners on a legislative footing. I have worked on pathways to develop both short-term and longer term representational models for engagement with First Nations in water governance—I am happy to share further aspects of that—as well as thinking more widely about pathways for co-management agreements. I have just given a couple of links to some of the research that is proceeding at my centre in relation to those. Next slide, please.

The CHAIR: You have got 1 minute.

Prof. GODDEN: Opportunities—I have just outlined some of those there, but I think we are really at the point of thinking about triage for many species. It is not simply conservation or preservation; we need to think about what happens, for example, when we have disaster and what that has implications for in terms of management. I have put some opportunities there, including developing synergies if, for example, there are changes at the commonwealth level to EPBC legislation. I would also see that we need to embrace ideas around all-of-community responsibility and not just see ecosystem preservation and so on as the realm of landholders. Thank you for the opportunity to appear.

The CHAIR: Great. Thanks very much. We will open it up to questions. Ms Bath.

Ms BATH: Thank you. Thank you, Professor. I am very interested in your commentary, and I have taken a few notes. You mentioned EMV fire regimes, but also then at the other side you talked about Indigenous governance, heritage and ecosystem restoration. Now, I would like to think that there could be some synergies, to use your term. Could you expand on that? And I guess I am also using the knowledge that I have in relation to firestick practices and a particular person who we are seeing next week called Victor Steffensen. What is your knowledge around that?

Prof. GODDEN: Thank you. In fact I have undertaken quite extensive research over a four-year Australian Research Council-funded project on traditional burning as part of climate change mitigation efforts across the world. There are significant opportunities, I think, for Victoria to work with First Nations, with traditional burning, in relation not only to its capacity for generation of less emissions when we do have burning, but also in terms of a much more nuanced approach to the way in which ecosystem management occurs. So I would be happy again to draw on some of that research and make it available to the committee. I carried out case studies in Malaysia around burning issues there and in Pacific nations, and we have looked at the human rights dimensions also with respect to some of these areas.

Ms BATH: Thank you. If you could certainly provide that to the committee, that would be most beneficial. And I guess the other thing that comes from that, from your legal perspective, is that traditional burns are out in country, they are out in small mosaic burns. This is way too short a snapshot of them, but I am interested too about protections for Indigenous people who are conducting them. We cannot be so frightened if it goes a little bit wrong, not necessarily catastrophically wrong, so I am interested from your legal perspective about supporting that framework.

Prof. GODDEN: Yes, look, I think that is one of the particular barriers, but I would agree that there are opportunities that need to be balanced. One of the questions there is, I think sorting out a framework where First Nations are supported to carry out controlled burns and mosaic burning. Ultimately I think this goes to the questions of governance, and I was identifying some of these issues in relation to emergency management and our structures around fire regimes and how we might integrate a governance regime that is receptive to traditional burning. Clearly there are issues around potential liability, and I think this is in terms of working out the authority structure in terms of where the responsibility sits, for example, if there is the potential for damage to third parties as a result of controlled burning. But I think those barriers are overstated in particular ways and they can be overcome.

Ms BATH: Any additional information on that would be really appreciated, Professor. Thank you.

The CHAIR: Yes, thank you. I might go to someone on Zoom. Mr Grimley.

Mr GRIMLEY: Thank you, Chair, and thank you, Professor, for your submission. You mentioned your 30 years of working with traditional owners, and I admire that greatly. I think it is tremendous. Part of the terms of reference makes note of the opportunities to restore Victoria's ecosystems, the environments, while upholding the First Peoples connection to country. Given that, in your view, how can the recognition and empowerment of traditional owners be better incorporated into Victorian environmental laws?

Prof. GODDEN: Well, at the moment we have serious gaps. Often where we have environmental law—let us take the *Planning and Environment Act* as an example—basically where First Nations and Indigenous peoples are consulted they are consulted in terms of the impacts upon them. I think that we need to have principles and requirements that do not just see our environmental laws as impacting on First Nations but that there are opportunities for proactive involvement and engagement. Working in the water space over the last five years I have developed in association with colleagues a range of models, from representational models—where, for example, First Nations are sitting on committees—to a pathway to longer term engagement in decision-making, and I think that that is where we need to be integrating those types of models into our environmental laws, because they just really do not exist at the moment.

Mr GRIMLEY: Thanks, Professor. Just on that one—one more question, if I can, please, Chair—in relation to those models, have they been based upon any other countries or any other jurisdictions at all that you can tell us about?

Prof. GODDEN: Yes, certainly. As part of that work that I did, I was involved in the Agreements, Treaties and Negotiated Settlements project at the University of Melbourne, led by Professor Marcia Langton. As part of that, we looked at models of agreement making and the engagement of Indigenous peoples in environmental co-management and so on in jurisdictions as far-flung as Canada, New Zealand, South Africa, the Pacific. So some of those agreement-based models and governance models have come from that long trajectory of looking at the experience of other jurisdictions.

Mr GRIMLEY: Wonderful. Thanks, Professor. Thank you, Chair.

The CHAIR: Thank you. Ms Taylor.

Ms TAYLOR: Thank you for your presentation today. On that issue of fires and liability and controlled burns et cetera, arguably with increasing climate change it is making it increasingly tenuous in terms of decision-making around when to do the controlled burning and for what length of time et cetera. So how do you see that intersection of increasing climate instability probably is the word and the interplay of liability and that decision-making from a legal perspective into the future? Because arguably, with the best will and intention in the world, it is going to be quite onerous upon—it is part of life, but quite onerous for any particular authority having to manage that situation.

Prof. GODDEN: Well, I guess I would say that it is quite onerous now four authorities to manage that situation.

Ms TAYLOR: Oh, yes, absolutely, without question.

Prof. GODDEN: So I would actually say that this is part of the repercussions, this is part of what we need to adapt to. I know Victoria has engaged under the *Climate Change Act* in a great deal of very detailed planning, but I think that bringing together adaptation planning with areas such as fire controls and thinking about where the responsibility sits, and ultimately I would say that responsibility sits with the state in right of Victoria, that this is a Crown responsibility, but the Crown can work in partnership with Aboriginal peoples—for example, in conducting traditional burning—so overarching responsibility for adaptation to climate change and, as a part of the component of that, traditional burning, but it should be seen as not isolated to a particular incidence of burning and potential liability. I think we need to develop frameworks. That is what I was pointing to in some of those slides about where those gaps are at the moment.

I also think, as I said, there is a huge issue around what happens in disasters to biodiversity protections. I have got a PhD working on what happens to the legal status of animals in a disaster and where is the responsibility, what are the civic responsibilities and so on. So these are areas that we have not canvassed but they are ones that are vital if we are really to expand our scope of adaptation beyond what are the fairly conventional environmental areas. Thank you.

The CHAIR: Dr Bach.

Dr BACH: Thanks very much, Chair, and thank you, Professor Godden. Professor Godden, I represent a metropolitan area, the Eastern Metropolitan Region, which actually takes in parts of the inner north-east and then down to Mount Waverley in the south, all the way up past Croydon and into the start of the Yarra Valley, so I am particularly concerned, from a self-interested point of view, with some metropolitan ecosystems. We have some beautiful spaces, like the Banyule Flats and Blackburn Lake. I wonder, would you mind talking to us in a specific sense about some of the ways that you see some of the gaps that you have talked about in the law, intersecting particularly with issues that we see in metropolitan Melbourne? We have had a focus as a committee on regional and rural areas in particular, and I do think that is entirely appropriate, but I wonder nonetheless if you might make some comments about metropolitan matters.

Prof. GODDEN: Thank you. That is what I meant by an all-of-community responsibility in these areas. I think that while historically we have had a focus on rural and regional areas as the locus, if you like, of our environmental protections, and in a way there was a focus on things like the *Catchment and Land Protection Act*—really important engagement there—but we need to think about the expansion. For example, that is occurring in our metropolitan areas and in our peri-urban areas, and really direct our attention there in terms of climate change adaptation; about dealing with fire risk and about the ecosystem decline factors that are sitting there in our urban and peri-urban areas. I grew up in that area of south-eastern and north-eastern Melbourne and when I grew up it was sort of farming country, so I am very well aware of the loss of open space but also the critical need to protect our existing green spaces. I think that some of the protections that we have seen for green spaces need to be strengthened.

Also, for example, in thinking about something like the review of the *Wildlife Act*, wildlife occurs in urban areas and that responsibility to think about how we arrest species decline has to be one that engages the urban community and the suburban areas as well. I have had quite a lot of thought—when I was doing some work on climate change adaptation, working actually with the Victorian government some time ago, one of the things that I was very keen to emphasise was that this is, an urban phenomenon. And particularly as we see the spread

into regional areas and, following COVID, the regionalisation that is occurring in Victoria, it is important that we also have a focus on our towns and our cities.

Dr BACH: Thank you very much. Chair, I dare say my time has expired, and I do not want to monopolise the professor's time. I might ask Professor Godden, with the leave of the Chair, perhaps on notice, if it is all right with you, to provide us with just a couple more specifics. I was fascinated that you said we could do better to protect green spaces. Again, I dare say my time has expired, but if it would be all right with you to have something on notice about that, that would be just wonderful. Thank you.

The CHAIR: And anything you feel you can provide the committee on notice today would be very welcome. I might just ask a question if I can. What is your view, from a legislative basis, on the powers of the Office of the Conservation Regulator? Have you got a particular view about that?

Prof. GODDEN: Yes, I do, actually. I think that this is a very welcome institutional initiative, and I would argue it needs to be expanded to other areas of environmental law. I think that it starts to address that gap that I identified in monitoring, compliance and enforcement. I think the research here in Australia and internationally has pointed to the deficit in these particular areas, so I think it is a welcome initiative in relation to Victoria strengthening its profile in relation to compliance. But I think there is also scope for us to think beyond institutional ways of compliance so we might think about citizen enforcement. For example, we have seen a strong movement into citizen science and so on in environmental areas. I think there is room for various other mechanisms beyond this very important regulatory initiative. And we might want to think about—this is a very tricky thing—moving perhaps beyond a public land focus.

The CHAIR: Yes, I was going to say one of the tensions, I guess, that is emerging throughout this hearing is that the government has control over public lands and then there are people who own a lot of private land, and there is always tension between how the government can regulate and what they can regulate and those sorts of things, so it always causes tensions. But one other very quick question if I might: are you aware of the Victorian government's *Biodiversity 2037* plan, which was released in 2017, and what are your views about that from a policy perspective?

Prof. GODDEN: Look, certainly I think it is quite an ambitious program, and the strategy there I think is one that is consistent with meeting overall biodiversity targets and so on. But this morning I was in an environmental law class where we were talking about biodiversity targets and the problems of meeting targets and the difficulty of interpreting targets and what they might mean, because we have not got baselines that are adequate. I think that one of the critical needs is to invest in the information basis that will allow those strategies to be effectively implemented. And we also need to have, I would argue, third-party evaluation—some way of ensuring that strategies and targets are not just aspirational, that they actually are meaningful in the sense that there is follow-up and that there is review and evaluation of strategies and targets.

The CHAIR: All right, thank you. Mr Meddick.

Mr MEDDICK: Thank you, Chair, and thank you, Professor. I just want to revisit the Office of the Conservation Regulator, if I may. There is a perception at least out in the community that the role of the regulator and of the office of the regulator are somewhat constrained because they sit under the Department of Environment, Land, Water and Planning, and so quite often the aims of that department and the aims of the regulator are at odds with each other and as a result we do not get the results that we are looking for for species and environment from the regulator. So it has been suggested a complete separation is in order to set up the regulator as an independent authority. From a legal perspective then, does it also follow that if we were to do that then both a compliance and enforcement authority would need to accompany the regulator to ensure that the directives of the regulator are actually met and not constrained by another department being responsible for going out there and enforcing directives of the regulator?

Prof. GODDEN: Okay, yes, thank you. I was part of an environmental law group that looked at the possibilities of establishing an independent agency in relation to environmental regulations, so I would be happy to make some of that information available, but I would certainly strongly support an independent agency and I think, as I said, if the regulator is an institutional first step I see that there is a need for further pathways. In terms of thinking about whether you would need compliance and enforcement, I think these would be things that would need to be worked out in terms of the powers that are accorded to the regulator or

indeed to any independent agency. You also have to have safeguards. You have to ensure that there is the accountability and the transparency around those positions if you are going to give, for example, compliance powers to any independent agency, and also again to ensure accountability through reporting networks and so on. So the idea perhaps is not complete independence from your government department but certainly a degree of independence in relation to, for example, achieving outcomes, so there might be a designated set of outcomes that could be ascribed to the regulator and there would be independence in the way in which those were achieved. That is one model we could think of.

Mr MEDDICK: Thank you very much. Cheers.

The CHAIR: Dr Ratnam.

Dr RATNAM: Thank you, Professor Godden, for your evidence today and the work that you do. It has been really insightful. I just want to take up a couple of points that you have mentioned and connect to the previous conversation. You talked about the need, in your presentation and your slides, for an independent agency to coordinate ecosystem protections and restoration. My understanding from that previous conversation is that that is an agency that is beyond the regulation function, and so I wondered if you could expand on why you are suggesting that and what barriers you think it will overcome in the current context that we are facing.

My second question was: you presented a really good overview of all the legislation that governs our biodiversity and the need to protect it and some of the interactions between those pieces of legislation. We have been looking at legislation as one of the tools that we can look at for biodiversity conservation and restoration. My question was: is there a problem with the amount of legislation we have, or is it the interaction of them that is making this hard? So, I guess, thinking about solutions as a committee, should we be saying, 'We need less legislation that is more streamlined' or just that the coordination of them should be done better? What is the solution do you think?

Prof. GODDEN: Okay. If I can take that second question first.

Dr RATNAM: Sure.

Prof. GODDEN: This is one of the perennial issues that arise in relation to what is sometimes called 'green tape'—so the question of: do you simply bring more regulation? I would argue that we have an awful lot of environmental law and regulation. It is compounded by our federal structures here in Australia, but that is a fact of life; I do not think federalism is going away anytime soon. But I think that there are opportunities, for example, if there is a move to national standards, to think about how those standards might work to streamline and to join up some of the areas of environmental law. I think we have got the classic silo problem, and if you think, for example, of the development approval context, there is just an immense layering of different sorts of requirements. Now, those are valid areas that need to be taken into account—so, for example, cultural heritage protections need to be in the mix when we are thinking about development approvals and so on—but I think it is fair to say that moves to more strategic environmental assessment and broader bioregional planning could underpin some of those movements to streamline. I know Victoria some years ago invested considerable attention in thinking about bioregional planning. I would suggest that perhaps there should be some reversion to thinking about that as, if you like, the baseline on which decision-making occurs, so that therefore your decision-makers are much better placed to think about things like cumulative impacts, because that is one of the things that typically falls through the cracks when you are making decisions on a project-by-project basis. I think that probably picks up that first question, but if you would just like to remind me what the second one was.

Dr RATNAM: Yes, the second one was about the independent agency to coordinate ecosystem protections and restoration—that is, beyond just the regulation function. Why are you suggesting that? What will it help overcome?

Prof. GODDEN: Okay. It helps with that cumulative impacts problem. Because your regulation or your regulator is typically geared to enforcing your existing laws and compliance and so on on an incident or a project-by-project basis. When we are thinking about climate change impacts, when we are thinking about the loss of biodiversity due to bushfires, we are thinking of broadscale effects that add up over a wide scale, over time, and our current processes do not capture that very well. Therefore I am suggesting an independent agency—and there would need to be significant resourcing of such an agency—would be better placed to deal

with those cumulative impacts. Then there would need to be investment in research, around establishing baselines and so on. But we already have considerable work in Victoria around climate change impacts and effects. Much of that work just, I feel, needs a coordinating focus as it is then translated into decision-making around environmental protection and redressing decline. Why am I suggesting restoration? Because much of our existing environmental law does not really have a restoration focus. We are looking at legislation that was often put in place initially in the 1970s. It has obviously been updated, but much of the fundamental orientation is towards conservation and preservation, not the fact that we are going to be hands-on restoring where we can, given the immense loss that has occurred through bushfires and floods, extreme events and climate change.

Mr HAYES: Thanks very much, Professor Godden. It is music to my ears when you are talking about species decline in urban areas and the need for bioregional planning. I have just got two questions: one is about ESD and the other one is about ecological restoration. You talk about ecologically sustainable development and call that into question, and I just wonder if you could expand on that, particularly in the light of government plans for an exponentially growing human population at the same time as we are witnessing exponentially falling numbers in other species. That is my first question to have a look at, and the other one is, talking about ecological restoration, do you see great opportunities for employment growth or industry in this area?

Prof. GODDEN: Yes, thank you. Look, why I am suggesting that ESD—ecologically sustainable development—probably is no longer fit for purpose, relates to some of those previous questions that I was addressing. The formulation of ESD, is itself different to sustainable development, and it was meant to prioritise ecological outcomes. What we see in the way it has been interpreted, both in terms of the courts and also particularly in relation to the operation and implementation of legislation, is the balance model, and I think that that implicit idea of a socio-economic environment balance is not a good model for decision-making and informing decision-making in these critical areas, given that I think we are moving into a very different phase of environmental protection and restoration. So that is one of my reasons for suggesting that we need to rethink that model, because having on the one hand environment, on the one hand economy I think has led to some very divergent outcomes. It leaves a gap in terms of thinking about those things that your second question is bringing to the fore. We have a nexus potentially between restoration, investment in green jobs and developing that area. Also I think, as much of the thinking around things like planetary boundaries now suggests, that if you take away your environmental protections and your ecosystems decline, then the overall health of your community also declines, and that is both its economic and social factors.

I can expand a little bit more on why I think ESD should be actually oriented much more strongly in terms of intergenerational equity and also in relation to ecological restoration. As I said, I do not think our legislation at the moment is particularly geared towards restoration. I think in a post-COVID world, where there will be differences in the way in which our economy is functioning and there are structural changes, there is a window of opportunity for us to think about investments in very different ways, and one of those investments is in ecological restoration. We already see areas such as offsets as an industry area. I think some of our offsets policy needs to be tweaked. But that is one of the areas in which you actually see a developing economy. A lot of this has been done in community and in voluntary schemes, and I think we need to support and encourage those. But there are also opportunities for green jobs, very clearly, as we turn to think about investment in our own state very directly. Does that answer your second one? I am happy to have another go at your first question.

The CHAIR: We are almost out of time. We have got 30 seconds left. But what I was going to suggest was if any other committee members have other questions that they would like to submit to you, perhaps they can do that and you can provide some answers to us on notice as well.

Prof. GODDEN: Yes.

The CHAIR: All right. With that I would like to thank you very much for your contribution today, and with that, all broadcast and Hansard equipment must now be turned off.

Prof. GODDEN: Thank you.

Witness withdrew.