

# Australia's Faunal Extinction Crisis

17 August 2021

## Submission to the Environment and Communications References Committee

Committee Secretary

Senate Standing Committees on Environment and Communications

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The NSW Young Lawyers Environment and Planning Committee and Animal Law Committee (**Committees**) make the following submission in response to the inquiry into Australia's faunal extinction crisis.

## **NSW Young Lawyers**

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world's emissions within its remaining 'carbon budget'.

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO<sub>2</sub> (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

The NSW Young Lawyers Environment and Planning Committee (**EP Committee**) comprises of a group of approximately 250 members interested in our natural and built environment. The EP Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The EP Committee also concentrates on international environment and climate change laws and their impact within Australia.

The NSW Young Lawyers Animal Law Committee (**AL Committee**) comprises a group of over 400 members interested in animal protection laws regulating the treatment of animals. The AL Committee aims to raise awareness and provide education to the legal profession and wider community, while increasing understanding about the importance of protecting animals from abuse and neglect. A common theme amongst AL Committee members is a passion and desire to use their legal skills and the law to improve protections for animals.

## Summary of recommendations

1. The EPBC Act be reformed in line with Recommendation 25 of the Independent Review to provide a statutory framework for strategic national plans, regional recovery plans and ecologically sustainable development plans. The amendments should include provisions to ensure that plans are required to be implemented, monitored and reported on. In line with Independent Review Recommendation 26, the Commonwealth should establish a dedicated and adequately funded program to develop and implement these plans.
2. Existing frameworks for private sector investment in habitat protection be reconsidered with a view to increasing incentives, allocating greater government funding and improving appeal to private investors.
3. The mechanisms providing for biodiversity offsets under the EPBC Act be reformed to ensure that the conservation of fauna (and biodiversity more broadly) is better served and remains the firm focus.
4. The Department of Agriculture, Water and the Environment utilise the mechanism to list critical habitat under section 207A of the EPBC Act to its fullest extent and adopt a tenure-blind approach to listing. Where critical habitat occurs on privately-owned land, consideration should be given to cooperative management options in line with recommendation 2.
5. The EPBC Act be reformed to make the designation of critical habitat faster in times of crisis.
6. Proposed National Environmental Standards contain requirements to partner with First Nations communities in environmental decision-making, (including recovery and threat abatement planning). A best practice guide should be developed to support these requirements.
7. In accordance with Recommendation 34 of the Independent Review, a monitoring and evaluation framework be created, and that it:
  - a. be mandatory, comprehensive, coherent, transparent and ongoing,
  - b. result in comprehensive publicly available information,
  - c. be used to evaluate and appropriately update current and future processes, policies and goals, and
  - d. include the requirement that an annual statement is prepared by the Ecologically Sustainable Development Committee to the Environment Minister and the Environment Assurance Commissioner.
8. An independent Commonwealth environmental regulator be established.
9. To the extent enforcement and compliance activities remain the responsibility of the Department of Agriculture, Water and the Environment, ensure that adequate funding and resources are provided to the Department.

## Introduction

1. The Committees welcome the opportunity to make a submission in response to the inquiry into Australia's faunal extinction crisis.
2. Despite more than twenty years of national environmental regulation under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), Australia continues to have one of the world's worst records for the extinction and lack of protection for threatened fauna. Australia is ranked second (after Indonesia) in the world for ongoing biodiversity loss.<sup>1</sup> As highlighted in the 2016 State of the Environment Report, 'Australia's biodiversity is under increased threat and has, overall continued to decline. Most jurisdictions consider the status of threatened species to be poor and the trend to be declining'.<sup>2</sup> The devastating effects of the 2019-2020 bushfire season, affecting an estimated 3 billion native vertebrates,<sup>3</sup> have called attention to the extreme vulnerability of native species in the face of changing fire regimes and compounding threats such as land clearing.
3. The Committees consider that the most recent second independent review of the EPBC Act dated October 2020 (**Independent Review**) presents an opportunity to implement a fundamental shift in our approach to protecting the nation's biodiversity. In this respect, the Senate Committee's findings in relation to this inquiry should complement and build on the recommendations of the Independent Review.
4. This submission responds to the following terms of reference:
  - **D.** The adequacy of Commonwealth environment laws, including, but not limited to the Environment Protection and Biodiversity Conservation Act 1999, in providing sufficient protections for threatened fauna and against key threatening processes.
  - **E.** The adequacy and effectiveness of protections for critical habitat for threatened fauna under the Environment Protection and Biodiversity Conservation Act 1999.
  - **G.** The use of traditional knowledge and management for threatened species recovery and other outcomes as well as opportunities to expand the use of traditional knowledge and management for conservation.
  - **K.** The adequacy of existing compliance mechanisms for enforcing Commonwealth environment law.

### **D. The adequacy of Commonwealth environment laws, including, but not limited to the *Environment Protection and Biodiversity Conservation Act 1999*, in providing sufficient protections for threatened fauna and against key threatening processes.**

5. The EPBC Act is the main Commonwealth legislation that aims to protect threatened fauna. Section 3(2)(e)(i) provides that 'in order to achieve its objects, the Act enhances Australia's capacity to ensure

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<sup>1</sup> Anthony Waldron et al, 'Reductions in global biodiversity loss predicted from conservation spending' (2017) *Nature* 551:364–367

<sup>2</sup> Ian Cresswell and Helen Murphy, *Australia State of the Environment 2016: Biodiversity* (Report, 2017), v

<sup>3</sup> LM van Eeden et al, *Impacts of the unprecedented 2019-2020 bushfires on Australian animals* (Report prepared for WWF Australia, November 2020)

the conservation of its biodiversity by including provisions to protect native species (and in particular prevent the extinction and promote the recovery of threatened species).<sup>7</sup>

6. However, the Independent Review found that the Act has been largely ineffective at achieving this object. In particular, the Independent Review found that the threat status of species during the lifetime of the Act had generally deteriorated, with approximately four times more vulnerable-listed species showing declines in their threat status than those that have shown an improvement.<sup>4</sup>
7. One of the main deficiencies of the EPBC Act in regards to the protection of threatened species is the often piecemeal, remedial approach that fails to take consistent and proactive action to protect vulnerable fauna from emerging threats.
8. Apart from environmental assessments, the main mechanism under the EPBC Act for the protection of threatened species are recovery plans and conservation advices. The Act requires the Minister to ensure there is an approved conservation advice for all listed threatened species and ecological communities.<sup>5</sup> However, conservation advices are only required to set out information about possible recovery actions, without any particular plan for implementation.<sup>6</sup>
9. The Minister *may* make, adopt and implement a recovery plan for listed threatened fauna or flora. These plans set out the research and management actions necessary to prevent further decline of the relevant species and are required to be reviewed every five years.<sup>7</sup> Recovery plans are considered to be ineffective due to lack of scientific rigour, vagueness and limited responses to abate threats.<sup>8</sup> Rather than firm plans of action with reportable outcomes, recovery plans are treated as "guidance documents" without clear responsibility for implementation.<sup>9</sup> Commitment to utilising this mechanism is also patchy, with 170 recovery plans being overdue according to the timeframe set by the Act.<sup>10</sup> While there are funding sources such as the National Landcare Program or Threatened Species Recovery Fund that can be used to implement recovery plans, funding is often unreliable and short-term.<sup>11</sup>
10. Recovery plans and conservation advices only focus on one species, and have been criticised on the basis that conservation action does not consider the ecosystem and ecological processes as a whole.<sup>12</sup> The approach of listing a threatened species and making a recovery plan (which can be a very drawn out process) is reactive, and misses opportunities to address landscape-scale threats to the environment such as land-clearing and climate change.<sup>13</sup>

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<sup>4</sup> Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) 40.

<sup>5</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), s 266B(1)

<sup>6</sup> *EPBC Act*, s266B(2) only requires the conservation advice to set out "information about what could appropriately be done to stop the decline of, or support the recovery of, the species or community"

<sup>7</sup> *EPBC Act*, s 170 and s 179(2)

<sup>8</sup> Alejandro Ortego-Argueta, 'Evaluating recovery planning for threatened species in Australia', (PhD Thesis, University of Queensland, 2008) 28

<sup>9</sup> Evidence to Senate Environment and Communications Legislation Committee, Parliament of Australia, Canberra, 19 October 2020, 108 (Emma Campbell, First Assistant Secretary, Biodiversity Conservation Division, Department of Agriculture, Water and the Environment)

<sup>10</sup> Senate Standing Committee on Environment and Communications Legislation, Parliament of Australia, *2020-2021 Budget Estimates Hearing 19 October 2020*, Answers to Questions on Notice 57 - Obligations in relation to Recovery Plans (Department of Agriculture, Water and Environment, 13 December 2020)

<https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId8-EstimatesRoundId9-PortfolioId32-QuestionNumber57>

<sup>11</sup> Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) 128.

<sup>12</sup> Alejandro Ortego-Argueta, 'Evaluating recovery planning for threatened species in Australia', (PhD Thesis, University of Queensland, 2008) 3

<sup>13</sup> Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) 17.

11. The Act provides for listing Key Threatening Processes and developing corresponding Threat Abatement Plans.<sup>14</sup> However, this mechanism has failed to achieve a strategic and coordinated approach to managing threats to biodiversity. The most recently listed Key Threatening Process dates to 2014,<sup>15</sup> and somewhat unfortunately, the nomination for “Fire regimes that cause biodiversity decline” has remained “under assessment” since 2008.<sup>16</sup> There is also no requirement for developing or implementing a Threat Abatement Plan once a Key Threatening Process has been listed. Of twenty-one listed Key Threatening Processes, only six have an up-to-date Threat Abatement Plan.<sup>17</sup>
12. Recommendations 25 and 26 of the Independent Review are fundamental reforms aimed at providing a framework for planning and intervention at multiple levels. Recommendation 25 suggests that the EPBC Act should be amended to provide a statutory basis for:
  - Strategic national plans: to set out a coordinated response to nationally pervasive issues and support preparedness for emerging or acute threats like the bushfires.
  - Regional recovery plans: to support the management of threats and address cumulative impacts at the landscape scale. This recognises that a more integrated approach to recovery planning is warranted, since many listed species and communities in a region rely on the same habitat and suffer from the same threats.
  - Ecologically sustainable development plans: to set clear rules to manage competing land uses and address environmental, economic, Indigenous and social priorities.<sup>18</sup>
13. All plans would be required to be consistent with the National Environmental Standards, (also proposed by the Independent Review). As an important corollary, Recommendation 26 proposes that the Commonwealth establish a dedicated program for developing and implementing these plans.<sup>19</sup>
14. The Committees support the recommendations of the Independent Review, as it is clear that the current approach to recovery planning is too ad hoc and there is no mechanism to ensure that plans are implemented, monitored and reported on. In addition to EPBC Act amendments, dedicated funding and a clear mechanism for cooperation with States and Territories will be crucial to ensure that plans are implemented and achieve their objectives.

**Recommendation 1: that the EPBC Act be reformed in line with Recommendation 25 of the Independent Review to provide a statutory framework for strategic national plans, regional recovery plans and ecologically sustainable development plans. The amendments should include provisions to ensure that plans are required to be implemented, monitored and reported on. In line with Recommendation 26, the Commonwealth should establish a dedicated and adequately funded program to develop and implement these plans.**

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<sup>14</sup> EPBC Act, s 183 (listing of Key Threatening Processes) and ss 270A-271 (Threat Abatement Plans).

<sup>15</sup> Australian Government, Department of Agriculture, Water and Environment, ‘Listed Key Threatening Processes’, *Species Profile and Threats* (Database) <https://www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl>

<sup>16</sup> Australian Government, Department of Agriculture, Water and Environment, ‘Items currently under assessment’, *Species Profile and Threats* (Database) <https://www.environment.gov.au/sprat-public/action/report-fpal>

<sup>17</sup> Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) 128.

<sup>18</sup> *Ibid* 129-134.

<sup>19</sup> *Ibid* 137.

## Private sector investment

15. The Committees support the observations made in the Final Report of the Independent Review (**Final Report**) that the current overall level and targeting of investment using public funds has been insufficient to deliver the broad restoration required to address habitat loss.<sup>20</sup> The predicted shortfall in restoration funding in Australia is \$10 billion annually, and it is unrealistic to expect public funding on its own to fund this level of investment.<sup>21</sup>
16. The Committees recommend that the government utilise and expand existing habitat conservation incentives to improve the protection of habitats for threatened fauna in several ways:
  - The government should expand existing options to landowners interested in being involved in conservation. For example, the Conservation Partners Program supports NSW landholders in voluntarily protecting and managing habitat for native plants and animals on their properties.<sup>22</sup> The Program includes conservation agreements, wildlife refuges, and other options that support conservation on private and public land.
  - Private conservation initiatives should be encouraged and expanded in Australia, as they can both alleviate some of the cost burden on the public sector and contribute to improved conservation outcomes. For example, the Australian Wildlife Conservancy has established a private sanctuary, Paruna Sanctuary, that connects two Western Australian national parks. Paruna Sanctuary acts as an ecological corridor and allows the movement of wildlife between the parks.<sup>23</sup>
  - The government should provide funding and support to private, not-for-profit organisations, clubs and societies that have both public and private characteristics. For example, BirdLife Australia is a private, not-for-profit organisation that owns and manages several conservation reserves and is dedicated to protecting birds and their habitats.<sup>24</sup> A membership fee provides members with unlimited access rights to the reserves and the opportunity to experience a range of conservation values.<sup>25</sup>
17. Accordingly, the Committees submit that governments should dedicate funding to stimulate the private supply of conservation services. Private sector participation can bring in additional resources (including capital), additional expertise (including innovations in management) and may also be more cost-effective than public sector provision. The private sector can also display a greater willingness to take risks and it has a general ability to make decisions and therefore take action more quickly than the public sector.
18. Competition can assist conservation by providing downward pressure on private sector costs and the prices paid by consumers — for example, through improved labour management, more disciplined use of capital and more focused conservation efforts.<sup>26</sup>

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<sup>20</sup> Graeme Samuel AC, *Independent Review of the EPBC Act* (Final Report, October 2020) 20.

<sup>21</sup> Graeme Samuel AC, *Independent Review of the EPBC Act* (Final Report, October 2020) 142.

<sup>22</sup> NSW Department of Planning, Industry and Environment, 'Conservation Partners Program' <<https://www.environment.nsw.gov.au/cpp/conservationpartners.htm>>.

<sup>23</sup> Productivity Commission, 'Harnessing Private Sector Conservation of Biodiversity' (Commission Research Paper 2001) 14.

<sup>24</sup> BirdLife Australia, 'Who We Are' <<https://birdlife.org.au/who-we-are>>.

<sup>25</sup> Productivity Commission, 'Harnessing Private Sector Conservation of Biodiversity' (Commission Research Paper 2001) 10.

<sup>26</sup> Productivity Commission, 'Harnessing Private Sector Conservation of Biodiversity' (Commission Research Paper 2001) 15.

**Recommendation 2: That existing frameworks for private sector investment in habitat protection be reconsidered with a view to increasing incentives, allocating greater government funding and improving appeal to private investors.**

## Biodiversity offsets

19. The Committees submit that Recommendation 27 of the Final Report be followed and the biodiversity regime under the EPBC Act be improved. This can be achieved by way of amendment or standalone legislation.
20. While offsets are intended to be available as a last resort for reducing environmental impacts (including impacts on fauna),<sup>27</sup> this is not the case in practice. Instead, as the Final Report outlines, it is being used as a negotiable, flexible tool rather than a clear, committed mechanism for avoiding adverse project impacts.
21. More concerning, though, is the lack of suitability displayed in the offsetting process. While a like-for-like approach is suggested by that process, there is a lack of scientific veracity and legislative specificity in the way in which certain areas are considered to be offsets for others.<sup>28</sup> Not only this, but the *quality* of offsets is often also lacking; low quality habitat or habitat that is at no risk of being developed is an ill-fitting substitute for high quality habitat in a sought-after area.<sup>29</sup>
22. The Committees submit that a stronger demonstration of biodiversity value and offset suitability ought to be demonstrated by proponents, including at the development application stage if an offset is contemplated. This would represent a shift away from some of the concerning themes in the existing regime geared at ‘streamlining’ offsets or increasing ease for developers seeking to expedite project approvals – see, for example, the availability of the option to draw on existing, adjoining offsets to improve the asserted biodiversity value of a new one by focusing on the expanded, consolidated area or the extent of a newly formed corridor rather than the integrity of the new offset itself.<sup>30</sup>
23. The Committees also echo a point previously made by the Environmental Defenders Office on the issue – that “no biodiversity offsets should be available for critical habitat **due to its essential role in preventing extinction**” (emphasis added).<sup>31</sup>
24. Longer-term consideration and management of offsets, where adopted, is also required. Perpetual protection<sup>32</sup> of an offset is necessary in order for the offsets program to have any meaningful impact. Further, ‘offsetting an offset’ – that is, seeking to develop an area already used as an offset and

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<sup>27</sup> Environmental Defenders Office, *The Independent Review of the EPBC Act – Response to Discussion Paper: A summary for the community* (February 2020) p 29 <<https://www.edo.org.au/wp-content/uploads/2020/02/200221-EPBC-Act-Review-Discussion-Paper-Responses-EDO-Community-Guide.pdf>>.

<sup>28</sup> Ibid.

<sup>29</sup> Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) ch 8.3.1.

<sup>30</sup> Commonwealth Department of the Environment and Energy, *Policy statement: Advanced environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999* (September 2017) p2 <<https://www.environment.gov.au/system/files/resources/4f43c926-4b92-4e87-99ce-e44dbe132f6b/files/advanced-offsets-policy-statement.pdf>>.

<sup>31</sup> Environmental Defenders Office, *The Independent Review of the EPBC Act – Response to Discussion Paper: A summary for the community* (February 2020) p 16 <<https://www.edo.org.au/wp-content/uploads/2020/02/200221-EPBC-Act-Review-Discussion-Paper-Responses-EDO-Community-Guide.pdf>>.

<sup>32</sup> Ibid at 29.

proposing a further offset in substitute – ought to be explicitly prohibited. Offsetting an offset is simply depleting habitat.

25. The Final Report has suggested, and the Committees support, the use of time-bounded milestones on offsets as a means of helping to ensure that offset commitments do not simply fade away, particularly in the case of restoration offsets. This is also a tool for avoiding practically unrealistic long-term rehabilitative and/or restorative offset proposals, which are a particular concern in relation to mining projects.<sup>33</sup>
26. As an aside, the Committees also note that the above issues are not likely to be addressed by delegation to the states, where offsetting problems have also prevailed.<sup>34</sup>

**Recommendation 3: That the mechanisms providing for biodiversity offsets under the EPBC Act be reformed to ensure that the conservation of fauna (and biodiversity more broadly) is better served and remains the firm focus.**

## **E. The adequacy and effectiveness of protections for critical habitat for threatened fauna under the Environment Protection and Biodiversity Conservation Act 1999.**

### **Critical habitat provisions in the EPBC Act must be reformed to have a wider and simpler application.**

27. Habitat loss is a key concern when considering the protection of threatened species and is only exacerbated by pressures such as climate change.<sup>35</sup> Considering the importance of habitat preservation, it is integral that the legal framework which supports such preservation is effective and adequate for its purposes, taking into account imminent threats to threatened species.
28. “Critical habitat” is defined as “[h]abitat listed in the register in relation to a species of ecological community is **critical habitat** for the species or ecological community’.<sup>36</sup>
29. As at the date of this submission, only five areas are identified on the Register of Critical Habitat<sup>37</sup> which suggests that the relevant provisions of the EPBC Act are under-utilised.<sup>38</sup>

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<sup>33</sup> Walmsley, Rachel, Environmental Defenders Office, *Endorsing extinction is not a ‘minor’ admin task* (14 November 2019) <<https://www.edo.org.au/publication/endorsing-extinction-is-not-a-minor-admin-task/>>.

<sup>34</sup> see, for example, in NSW - Cox, Lisa, “We need to change the scheme’: calls for multiple investigations into \$40m gain from NSW environmental offsets’ *The Guardian (online)* (17 April 2021) <<https://www.theguardian.com/environment/2021/apr/17/we-need-to-change-the-scheme-calls-for-multiple-investigations-into-40m-gain-from-nsw-environmental-offsets>> and Nature Conservation Council, *Government must refer biodiversity offsets scandal to ICAC and review the whole system* (Media release, 16 April 2021) <<https://www.nature.org.au/media-releases/2021/04/government-must-refer-biodiversity-offsets-scandal-to-icac-and-review-the-whole-system/>>.

<sup>35</sup> Phillipa McCormack, ‘Biodiversity Conservation Law and Climate Change Adaptation’ (2018) 92 *Australian Law Journal* 841, 841; Graeme Samuel AC, *Independent Review of the EPBC Act* (Final Report, October 2020) 41.

<sup>36</sup> *EPBC Act* s 207A(4).

<sup>37</sup> Department of Agriculture, Water and the Environment, ‘Register of Critical Habitat’, *Species Profile and Threats Database* (Register) <<https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl>>.

<sup>38</sup> Environment and Communications References Committee, Parliament of Australia, *Effectiveness of Threatened Species and Ecological Communities’ Protection in Australia* (Report, August 2013) 5.3.

30. Similarly, in New South Wales, only four areas have been declared<sup>39</sup> as “Areas of Outstanding Biodiversity Value”.<sup>40</sup> State and Territory legislation has the opportunity to protect habitats that do not fall within Commonwealth land, however it seems that such legislation has made little progress in doing so.<sup>41</sup>
31. The under-utilisation of critical habitat registers on both the State and Federal levels signifies that the current legislation is not effectively protecting critical habitat or preventing its loss.
32. Under the EPBC Act, it is possible to register areas of critical habitat on land held by private landowners as well as on Commonwealth land.<sup>42</sup> However, a person only commits an offence for destruction of

**Recommendation 4: That the Department of Agriculture, Water and the Environment utilise the mechanism to list critical habitat under s 207A of the EPBC Act to its fullest extent and adopt a tenure-blind approach to listing. Where critical habitat occurs on privately-owned land, consideration should be given to cooperative management options in line with recommendation 2.**

critical habitat if that destruction occurs on Commonwealth land.<sup>43</sup> There are no provisions in the EPBC Act that provide protection or trigger management activities in respect of critical habitat on land not owned by the Commonwealth. In turn, the perceived lack of conservation benefit may be influencing decisions not to list critical habitat occurring on private land.<sup>44</sup> The Committees consider this application to be too restrictive and ineffective. Ideally, critical habitat provisions would apply across all types of land, regardless of ownership<sup>45</sup> in order to ensure the protection of threatened species. At a minimum, a tenure-blind approach to registering critical habitat needs to be adopted to allow the register to show a complete picture and ensure that this can be considered effectively in decision-making. Reforms could also be considered to set out the consequences where critical habitat is declared on private land. For example, the EPBC Act could be amended such that listing critical habitat on private land would trigger obligations on the Commonwealth to cooperate with landholders in line with Recommendation 2 of this submission. This will clearly require the coordination of States and Territories and also consideration of how this will affect private landowners.

33. The Committees also consider that the criteria and process for declaring critical habitat is too complex. It does not allow for rapid designation in times of crisis<sup>46</sup> when the protection of habitat is at its most vital.

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<sup>39</sup> Department of Planning, Industry and Environment, ‘Area of Outstanding Biodiversity Value Declarations in New South Wales’, *Area of Outstanding Biodiversity Value Register* (Register, 23 June 2020)

<<https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/areas-of-outstanding-biodiversity-value/area-of-outstanding-biodiversity-value-register>>.

<sup>40</sup> See *Biodiversity Conservation Act 2016* (NSW), Part 3; *Biodiversity Conservation Regulation 2017* (NSW), Part 3.

<sup>41</sup> Environment and Communications References Committee (n 4) 5.3; James A Fitzsimmons, ‘Urgent Need to Use and Reform Critical Habitat Listing in Australian Legislation in Response to the Extensive 2019-2020 Bushfires’ (2020) 37 *Environmental Planning and Law Journal* 143, 149.

<sup>42</sup> *EPBC Act* s 207A. *Environment Protection and Biodiversity Conservation Regulations 2000*, s 7.09(3)(b) requires the Minister to be satisfied that reasonable steps have been taken to consult with the owner of the property.

<sup>43</sup> *EPBC Act* s 207B(1)(c); Environment and Communications References Committee, Parliament of Australia, *Effectiveness of Threatened Species and Ecological Communities’ Protection in Australia* (Report, August 2013) 5.3.

<sup>44</sup> James A Fitzsimmons, ‘Urgent Need to Use and Reform Critical Habitat Listing in Australian Legislation in Response to the Extensive 2019-2020 Bushfires’ (2020) 37 *Environmental Planning and Law Journal* 143, 150. Conservation benefit is a mandatory consideration in the decision to list critical habitat under *EPBC Act* s 207A(1A).

<sup>45</sup> James A Fitzsimmons, ‘Urgent Need to Use and Reform Critical Habitat Listing in Australian Legislation in Response to the Extensive 2019-2020 Bushfires’ (2020) 37 *Environmental Planning and Law Journal* 143, 151.

<sup>46</sup> See *Ibid*.

34. The EPBC Act should be reformed to include a “fast-track” designation process in an emergency so that habitat of threatened species is not destroyed due to bureaucracy.
35. By way of example, the Commonwealth and NSW public health legislation contains provisions that grant powers to make regulations and orders in times of crisis. Commonwealth regulations in relation to the Covid-19 crisis, such as the overseas travel ban and enforced quarantine for returned travelers, is facilitated under the *Biosecurity Act 2015* (Cth). Section 475 of the *Biosecurity Act* allows the Governor-General to declare that a “human biosecurity emergency exists”. Further, s 477 provides that the health minister may “determine emergency requirements during a human biosecurity emergency period”.
36. Similarly in NSW, The *Public Health Act 2010*, affords the health minister the power to enforce regulations including mandatory mask-wearing, restrictions on public gatherings and the closure of businesses. Under s 7 of the *Public Health Act*, if the health minister “considers on reasonable grounds” that a situation is likely to risk public health, the minister may “declare any part of the State to be a public health risk area and, in that event, enforce orders the Minister considers necessary to reduce or remove the risk, segregate or isolate inhabitants of the area, and conditionally permit, or prevent access to the area.”
37. The Committees submit that the devastating impacts of the 2019-2020 NSW bushfire season on native species highlight that it is essential for Australia’s primary environmental statute to include a similar mechanism that provides for swift responses in environmental emergencies – including for the designation of critical habitat - to mitigate harm on the habitat of threatened species.

**Recommendation 5: that the EPBC Act be reformed to make the designation of critical habitat faster in times of crisis.**

38. The recommendations above may increase the use of the critical habitat register which could have the effect of improving threatened species.<sup>47</sup> The Committees believe that the critical habitat register can allow for the effective protection of critical habitat, however its under-utilisation signifies that reform of the EPBC Act is required for it to reach its full potential.

## **G. The use of traditional knowledge and management for threatened species recovery and other outcomes as well as opportunities to expand the use of traditional knowledge and management for conservation.**

### **The value of traditional knowledge in environmental conservation**

39. Traditional knowledge and management play a vital role in effective threatened species recovery and environmental conservation. Better outcomes are achieved when Indigenous traditional knowledge is valued. Research has found that lands managed by First Nations peoples have higher levels of

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<sup>47</sup> Ibid 150.

biodiversity<sup>48</sup> and noticeably less biodiversity loss.<sup>49</sup> Indigenous led or co-led conservation approaches also result in better environmental and social outcomes<sup>50</sup> as Indigenous traditional knowledge takes a holistic view of the interconnected nature of ecosystems and includes generations of complex, detailed and longitudinal ecological knowledge.<sup>51</sup> It is highly valuable in understanding long term trends.<sup>52</sup> The inclusion of this knowledge enables more comprehensive insights to build adaptive solutions and would greatly improve threatened species recovery and conservation outcomes.

## **Opportunities to expand the use of traditional knowledge and management for conservation**

### *Integrate Indigenous knowledge as a core component of National Environmental Standards*

40. Partnership with Indigenous communities to incorporate traditional knowledge should be a mandatory component of National Environmental Standards. A best practice guide should be published on partnering with Indigenous communities to incorporate traditional knowledge in environmental decision making.

### *Include Indigenous representatives on the Threatened Species Scientific Committee and traditional knowledge in threatened species listings*

41. There should be a requirement that at least one member of the Threatened Species Scientific Committee (**TSSC**) is an Indigenous expert in traditional knowledge and the TSSC should be advised by an Indigenous advisory group specialising in traditional knowledge. In addition, there should be a requirement that all threatened flora and fauna listings under s 178 of the EPBC Act require consideration of the best available Indigenous traditional knowledge. This would ensure appropriate integration of traditional knowledge in threatened species assessments and plans.

42. This can be modelled on Canada where a National Aboriginal Council on Species at Risk advises the Minister of the Environment on the administration of the Species at Risk Act<sup>53</sup> and provides recommendations to the Canadian Endangered Species Conservation Council. The Aboriginal Traditional Knowledge Subcommittee on Species at Risk also advises the Committee on the Status of Endangered Wildlife in Canada on all species status assessments and classifications.<sup>54</sup>

### *Expand Indigenous ownership and leadership in environmental projects*

43. There should be Indigenous ownership of land and Indigenous co-leadership of conservation strategies and joint management rather than passive consultation with Indigenous peoples. This should be based on a genuine partnership based on mutual trust, respect and collective decision making.

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<sup>48</sup> Schuster et al, 'Vertebrate biodiversity on indigenous-managed lands in Australia, Brazil, and Canada equals that in protected areas' (2019) 101 *Environmental Science & Policy* 1

<sup>49</sup> John Vidal, 'Why indigenous peoples and traditional knowledge are vital to protecting future global biodiversity', *Enasia* (Article) < <https://ensia.com/features/indigenous-knowledge-biodiversity/>>

<sup>50</sup> Aisling Rayne, Channell Thoms and Levi Collier-Robinson, 'When rehoming wildlife, Indigenous leadership delivers the best results', *The Conversation* (Article, 5 August 2020) <<https://theconversation.com/when-rehoming-wildlife-indigenous-leadership-delivers-the-best-results-143890>>

<sup>51</sup> Samantha Chisholm Hatfield, 'The Importance of Traditional Ecological Knowledge (TEK) When Examining Climate Change', *Union of Concerned Scientists* (Article, 18 January 2017) <<https://blog.ucsusa.org/science-blogger/the-importance-of-traditional-ecological-knowledge-tek-when-examining-climate-change>>

<sup>52</sup> Rayne et al, 'Centering Indigenous knowledge systems to re-imagine conservation translocations' (2020) 2(3) *People and Nature* 512

<sup>53</sup> *Species at Risk Act*, SC 2002, c 29.

<sup>54</sup> Assembly of First Nations, *Species at Risk Act Survival Guide* (Guide, March 2009)

44. To this end there should be a formal partnership with First Nations controlled organisations for government-wide use of traditional knowledge. Indigenous ownership over lands should also be increased and Indigenous partnership should be mandated in all recovery and threat abatement planning. This includes Indigenous partnership and co-design throughout the entirety of a project including on objectives and success indicators, strategies, implementation and long-term monitoring and iterative management.<sup>55</sup>
45. There are many successful examples of this in other jurisdictions. The Marine Plan Partnership for the North Pacific Coast brings together the government of British Columbia and 17 First Nations to design and execute plans for use of marine resources.<sup>56</sup> In Aotearoa New Zealand, Maori and non-Maori practitioners are working together using Maori knowledge systems and genomic data to restore populations of native fish and indicators such as the Cultural Health Index are used.<sup>57</sup>

**Recommendation 6: National Environmental Standards should contain requirements to partner with First Nations communities in environmental decision-making (including recovery and threat abatement planning). A best practice guide should be developed to support these requirements.**

## **K. the adequacy of existing compliance mechanisms for enforcing Commonwealth environment law**

46. As it is currently drafted, the EPBC Act does not provide adequate compliance or enforcement mechanisms for the protection of Australia's fauna or their habitats. Notably, the Final Report found existing compliance and enforcement mechanisms to be 'ineffective', lacking in transparency and under-resourced.<sup>58</sup>
47. As highlighted in the Final Report, the current reporting requirements do not cover all aspects of the Act and "resourcing constraints mean that the focus is on reporting to meet the bare minimum requirements, rather than monitoring and evaluation driving adaptive improvements over time." Concerns have also been raised in relation to the discretionary nature of some reporting provisions; s 171(1) provides that the "Minister 'may [...] co-operate with, and give financial or other assistance to, any person for the purpose of identifying and monitoring components of biodiversity."
48. The cumulative effect of these limited and discretionary reporting provisions is significant. For example, Part 13 Division 5 of the EPBC Act provides for Recovery Plans for threatened species and ecological communities. There is no mandatory monitoring or reporting. As the April 2019 Interim Report highlighted, since the inception of the EPBC Act, "only 13 animal species have been removed from the Act's threatened species lists." As there is no formal process for determining whether Recovery Plans

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<sup>55</sup> Rayne et al, 'Centering Indigenous knowledge systems to re-imagine conservation translocations' (2020) 2(3) *People and Nature* 512

<sup>56</sup> Victoria Rawn Wyllie de Echeverria and Thomas F Thornton, 'Using traditional ecological knowledge to understand and adapt to climate and biodiversity change on the Pacific coast of North America' (2019) 48 *Ambio* 1447

<sup>57</sup> Rayne et al, 'Centering Indigenous knowledge systems to re-imagine conservation translocations' (2020) 2(3) *People and Nature* 512

<sup>58</sup> Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) 147.

are sufficient or effective, there is limited capacity to adapt and update Plans which are failing to protect these species and communities.

49. Limited reporting requirements also restrict the development of a bigger-picture, cumulative understanding of biodiversity loss. The NSW Young Lawyers 2019 *Climate Change and the Law Policy Statement* declared a climate emergency and accepted the wide-ranging effects of climate change. The true extent and impact of these changes on biodiversity cannot be understood without detailed and extensive data. Effective monitoring and analysis would enable more accurate prediction and early-responses to emerging problems. It is also crucial for the creation of proactive, instead of only reactive, mechanisms.

**Recommendation 7: That in accordance with Recommendation 34 of the Independent Review, a monitoring and evaluation framework be created, and that it:**

- 1) be mandatory, comprehensive, coherent, transparent and ongoing,**
- 2) result in comprehensive publicly available information,**
- 3) be used to evaluate and appropriately update current and future processes, policies and goals, and**
- 4) Include the requirement that an annual statement is prepared by the Ecologically Sustainable Development Committee to the Environment Minister and the Environment Assurance Commissioner.**

50. Enforcement under the EPBC Act is currently administered by the Department of Agriculture, Water and the Environment (**DAWE**). This is problematic, as enforcement of the EPBC Act lacks political independence from Ministers.
51. Further, enforcement by DAWE is significantly under-resourced.<sup>59</sup> In Senate Estimates on 22 March 2021, officials from DAWE confirmed that there had been significant delays in EPBC Act assessments (some taking up to 3.5 years from referral to approval).<sup>60</sup> However, the introduction of 86 contractors to DAWE significantly assisted in reducing these timeframes.<sup>61</sup> While this may have been effective for clearing the backlog of assessments, it does not adequately address the problem of departmental funding and resourcing in the long-term.
52. Due to the lack of resourcing and transparency currently associated with enforcement of the EPBC Act, the Independent Review recommended that an Independent Office of Compliance and Enforcement be established.<sup>62</sup>
53. On 22 March 2021, independent MP Andrew Wilkie introduced the *Commonwealth Environment Protection Authority Bill 2021*, which seeks to establish such an authority. The Committees support the Independent Review's recommendation and the Bill as mechanisms towards better enforcement of Commonwealth environment law.

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<sup>59</sup> Ibid 149.

<sup>60</sup> Commonwealth, *Senate Estimates*, Senate, 22 March 2021, 75.

<sup>61</sup> Ibid 59.

<sup>62</sup> Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) 153.

54. Lack of funding for Commonwealth enforcement measures could also be addressed by cost recovery arrangements.

**Recommendation 8: that an independent Commonwealth environmental regulator be established.**

**Recommendation 9: to the extent enforcement and compliance activities remain the responsibility of the Department of Agriculture, Water and the Environment, ensure that adequate funding and resources are provided to the Department.**

## Concluding Comments

NSW Young Lawyers and the Committees thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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