

# SUBMISSION TO THE EPBC ACT REVIEW

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## Name

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## Organisation

## State or Territory

New South Wales

## Attachment provided?

Not Answered

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Yes - with my name and/or organisation (if included)

## SUBMISSION RESPONSES

**QUESTION 1: Some have argued that past changes to the EPBC Act to add new matters of national environmental significance did not go far enough. Others have argued it has extended the regulatory reach of the Commonwealth too far. What do you think?**

Overall, the EPBC Act has failed to prevent species extinction. Australia continues to have one of the highest rates of species extinction of any country so the flagship EPBC Act is ineffective at protecting potential habitat for terrestrial threatened species, terrestrial migratory species, or threatened ecological communities.

**QUESTION 2: How could the principle of Ecologically Sustainable Development (ESD) be better reflected in the EPBC Act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision making?**

A paper written by Ward et al. (2019) in the journal *The Society for Conservation Biology* describes the EPBC Act as lacking the regulations to apply proper scrutiny. The paper reviews remotely sensed forest and woodland data with the distributions of 1,638 terrestrial threatened species, terrestrial migratory species, and threatened ecological communities, we quantified the loss of potential habitat and communities since the EPBC Act came into force in 2000. The authors found that over 7.7 million ha of potential habitat and communities were cleared in the period 2000–2017. Of this clearing, over 93% was not referred to the Federal Government for assessment, meaning the loss was not scrutinized under the EPBC Act. While 1,390 (84%) species suffered loss, Mount Cooper striped skink, Keighery's macarthuria, and Southern black-throated finch lost 25, 23, and 10% of potential habitat, respectively. Iconic Australian species, such as koala, also lost ~1 million ha (2.3%) of potential habitat. Analysis showed that the EPBC Act is ineffective at protecting potential habitat for terrestrial threatened species, terrestrial migratory species, or threatened ecological

communities. The scientists recommend that when scientifically determinable, critical habitat is demarcated for listed species and communities, which provides absolute protection that is enforced, monitored, and investigated by the regulator. Without a fundamental change in how environmental law is enforced, Australia faces an increasing extinction rate.

Yes, ESD principles should be core components in the EPBC Act. The Act has failed to both protect threatened species AND for large scale projects without sufficient economic outcomes or analysis to be approved.

**QUESTION 5: Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?**

Enforcement is one issue. Since the inauguration of the EPBC Act, there have been 18 successful court cases, whereby companies or people have not referred their actions that resulted in habitat loss, and have been penalized under the Federal Government legal system for noncompliance (see Supplementary Information for all cases). The 18 case judgements incurred a total of AUD 3.9 million in fines from the clearing of a total of 340 ha. Of these, 62% of cases have been for the removal of threatened ecological communities listed as endangered or critically endangered. The size of the ecological community loss that incurred a fine ranged from 0.54 to 13 ha. This threshold may imply that over 7.1 million ha of non-compliant habitat loss could warrant investigation or could have been ignored by the regulator responsible for the enforcement of the EPBC Act.

**QUESTION 6: What high level concerns should the review focus on? For example, should there be greater focus on better guidance on the EPBC Act, including clear environmental standards? How effective has the EPBC Act been in achieving its statutory objectives to protect the environment and promote ecologically sustainable development and biodiversity conservation? What have been the economic costs associated with the operation and administration of the EPBC Act?**

The EPBC Act has so far been ineffective for preventing habitat loss for three matters of national environmental significance. To increase effectiveness, the EPBC Act should recommend the inclusion of (a) when scientifically-determinable, critical habitat is demarcated for threatened species, migratory species, and threatened ecological communities, which provides absolute protection (i.e., no activities that adversely modify the habitat and/or demographic processes) that is enforced, monitored, and investigated by the regulator. Critical habitat maps and plans should be publicly available to all landholders; (b) explicit, quantitative guidelines for what constitutes a significant impact, including, for example, habitat amount thresholds, should be determined and provided to inform the referral and assessment process under the EPBC Act; (c) unreferral habitat loss must be monitored and investigated, and appropriate enforcement action taken; (d) clear language and definitions used throughout the EPBC Act and guidelines; (e) documentation and assessment of cumulative impacts of all developments, including the trajectory of threatened species habitats. This may be done through effective utilization of bio-regional planning.

**QUESTION 7: What additional future trends or supporting evidence should be drawn on to inform the review?**

The Act is only as good as the data that inform it. Chronic under-funding of critical science institutions such as State and Territory herbaria and museums, and associated departmental science means that we often lack information needed to inform nominations of threatened biota, and information about listed entities can be outdated (as above). I understand that a small number of confirmed or putative new plant taxa can't get formally described because the NSW Herbarium lacks the staff or budget. It is effectively impossible to nominate these plants as threatened until they are published or at least until an article about them has been approved for publication. But to even get that far, a botanist needs to do the work required for them to be accepted as valid species. Under the current regime, botanists can't even get to first base with such things, meaning that there are credible new species that remain undescribed, and that should be listed as threatened but can't even be nominated as such. The EPBC Act should include arrangements with States and Territories that ensure critical science is appropriately funded. Where a subordinate jurisdiction can be shown to be not funding such functions to an appropriate standard, the Act should include punitive measures or some kind of resource sharing arrangement. Were the Wollemi Pine found today, there is a real chance that its specimens could indefinitely sit in an herbarium box with an interim identification that is never published, and the species never listed as CE, and not afforded management protection. We are genuinely at risk of losing species before they are described. One of these prospective new species is directly threatened by the proposed raising of Warragamba Dam, which would wipe out >90% of what remains of it, were the dam to then flood to the higher level and remain there for long enough to kill the plants. Little wonder the NSW Govt doesn't want to resource taxonomy - it can lead to new threatened species that 'get in the way' of 'development'. Clear case of a conflict of interest. The EPBC Act should provide some sort of buffer against this, even if it just ensures adequate resourcing of the National Herbarium to cover things when the State or Territory won't.

**QUESTION 8: Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?**

What is broadly problematic is that under the EPBC Act, the TSSC's decisions are subject to Ministerial discretion. Politics should have no role in scientific decisions such as whether an entity is listed as threatened, at what level, and how it is defined. The NSW model is better. There, the TSSC's decisions are not subject to Ministerial discretion.

**QUESTION 9: Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system? Who should articulate outcomes? Who should provide oversight of the outcomes? How do we know if outcomes are being achieved?**

Australia requires a new generation of environment laws that genuinely protect nature and restore our threatened species. It will require the establishment of independent institutions free from political interference, and improved accountability towards meeting our international commitments to biodiversity conservation.

Many argue that the EPBC Act should be thrown out completely and a new Federal Government Biodiversity Conservation Act be drafted with clear objectives, targets and a simplified approach to prevent further extinctions. I support the view of the Australian Conservation Foundation (ACF) who stated "that the EPBC Act has mostly failed to protect threatened species and pointed to a range of

issues, including: the extent of ministerial discretion; the focus on a narrow set of environment issues; the lack of third party enforcement; the lack of provisions for emergency listing of threatened species; and insufficient monitoring requirements. Mr James Trezise, a Policy Analyst for the ACF, argued that the EPBC Act was so flawed that a new approach to environmental management and protection was needed."

**QUESTION 10: Should there be a greater role for national environmental standards in achieving the outcomes the EPBC Act seeks to achieve? In our federated system should they be prescribed through:**

- **Non-binding policy and strategies?**
- **Expansion of targeted standards, similar to the approach to site contamination under the National Environment Protection Council, or water quality in the Great Barrier Reef catchments?**
- **The development of broad environmental standards with the Commonwealth taking a monitoring and assurance role? Does the information exist to do this?**

Cumulative losses are critical for assessing significant impact, yet currently, actions referred under the EPBC Act are individually assessed. The EPBC Act does not require the regulator to address the cumulative impact multiple actions can have at the landscape, ecosystem, or species' scale. While small amounts of habitat loss may not seem significant; the successive, incremental, and combined removal of habitat over time can lead to "death by a thousand cuts". In the current statutory framework, regulators are unable to reject actions based on the likelihood of this cumulative significant impact. As such, previous reviews of the EPBC Act have highlighted this as a major issue and have recommended provisions for accounting for this pitfall.

**QUESTION 21: What is the priority for reform to governance arrangements? The decision-making structures or the transparency of decisions? Should the decision makers under the EPBC Act be supported by different governance arrangements?**

The EPBC Act gives the Environment Minister too much discretion in making key decisions affecting species. These include:

deciding whether to take protective actions, such as eg listing a species that is threatened with extinction;

determining whether an activity will have a 'significant' impact on a species; and

'taking into account' the presence of a listed species when deciding to approve an action that may have a significant impact on the species.

**QUESTION 22: What innovative approaches could the review consider that could efficiently and effectively deliver the intended outcomes of the EPBC Act? What safeguards would be needed?**

More government funding is needed - not innovative approaches. The DoEE is woefully under-resourced as is evident just from how outdated and often inaccurate many of the SPRAT profiles are for listed entities. DoEE publishes information online that is too often wrong, outdated, or missing key information. It is supposed to be an authoritative source for matters under the Act, but it isn't

due to under-funding. NSW has similar problems with threatened biota profiles managed by DPIE and by the NSW Herbarium. Same problem - too few staff and not enough money to outsource this sort of work. It means that these agencies are potentially misinforming consultants, communities and decision-makers by providing such deficient data. This undermines the integrity and functionality of their respective Acts.

**QUESTION 24: What do you see are the key opportunities to improve the current system of environmental offsetting under the EPBC Act?**

Environmental offsetting has no scientific basis. Many people have written about the many weaknesses of the NSW BC Act and how it handles 'biobanking'. That method is endorsed under the bilateral agreement under the EPBC Act. It has been widely condemned by scientists as a smoke & mirrors process that claims to generate no net loss but almost always causes exactly that. It also provides increasingly large exemptions from biobanking requirements for proposals that are deemed to be of greater economic value to the State. At its worst, a proponent of a State Significant Development who can't generate the required offsets through normal means, can just fund one or more nominated research projects instead, even though those projects are things that the State should fund as part of its core responsibilities. Those projects are a selection of 'get out of gaol less expensively' cards. Shouldn't be endorsed by the EPBC Act, which should function as a foil against weak methodologies used in subordinate jurisdictions.

**QUESTION 26: Do you have suggested improvements to the above principles? How should they be applied during the Review and in future reform?**

The process for making 'minor amendments' to threatened biota listings under the EPBC Act requires improvement and better resourcing. When new information indicates that a threatened entity's profile needs to be updated, this should be a quick and simple process that need not be referred to the TSSC unless the change is substantive. In one example, the understanding of a TEC has changed as a result of research that post-dates its listing. This would remove some vegetation communities that are incorrectly associated with this TEC, and would add or clarify the relevance of others. It would also provide a new map of the modelled original extent of the community, and updated maps of later distributions, along with detailed information about its fragmentation. This should be easily processed, but my understanding is that such changes have to be approved by the TSSC and the Minister. This can take years. It needn't.

**QUESTION 27: Is the EPBC Act delivering what was intended in an efficient and effective manner? - Is the EPBC Act delivering what was intended in an efficient and effective manner?**

Threatened Species Scientific Committees aren't as accountable as they should be, including to scientific peers. There's a delicate balance to be struck between TSSCs being independent, and their being accountable to science. At present, there isn't sufficient accountability, and TSSCs have too much discretion to make decisions as they see fit without having to justify this at a level that would stand up to credible peer review. Were the TSSCs better resourced, they'd probably like to provide more substantial explanations for their decisions. As it stands, they struggle to deal with the workload, so tend to provide minimal justification for decisions. There's a somewhat related problem with how TSSC members are appointed and how the Committees operate. Because they have to deal with a wide range of nominations, and membership has to turn over at the prescribed

interval, they can get into situations where they don't have sufficient internal knowledge for some matters. They can obtain outside expertise but this is less likely to occur when they are under-resourced relative their workload. The NSW TSSC used to be fairly consultative beyond its membership when it accepted that it didn't know enough about an issue. These days, it is very different. The Federal TSSC appears to not consult externally at all. Generally, it is the Dept that does the consultation, whereas in NSW, the Committee used to engage with external experts directly, and tends to be much less reliant on its Dept.

**QUESTION 28: How well is the EPBC Act being administered? - How well is the EPBC Act being administered?**

The need to standardise listing processes and categories nationally is important. For example, for nominations in NSW, the current arrangement is that entities endemic to NSW and nominated under the EPBC Act can be dealt with by the NSW Threatened Species Scientific Committee. This is an improvement on the earlier regime in which each jurisdiction had to deal with essentially the same nomination in slightly different forms. Use of IUCN listing criteria and categories seems to be appropriate, including the Near Threatened category.