



**Law Council**  
OF AUSTRALIA

*Legal Practice Section*

# Australia's Faunal Extinction Crisis

**Parliamentary Senate Standing Committees on Environment and  
Communications**

**10 September 2018**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities.
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Mr Philip Jackson SC, Chair
- Ms Maureen Peatman, Deputy Chair
- Mr Michael James, Treasurer
- Ms Tanya Berlis
- Mr Dennis Bluth
- Mr Mark Cerche
- Dr Leonie Kelleher OAM
- Mr Geoff Provis

## Acknowledgement

The Law Council is grateful for the assistance of the Australian Environmental Planning Law Group of the Legal Practice Section in the preparation of this submission.

## Executive Summary

1. The Law Council represents the Australian legal profession on national and international issues, the operation of federal courts and tribunals, and on improvements to the law and the administration of justice. The Environment and Planning Law Committee of the Law Council's Legal Practice Section (**the Committee**)<sup>1</sup> works to address these issues in respect of Australia's environment. The Committee's primary objectives include to:
  - be a national focus group for environmental and planning law;
  - represent members of the profession working in the areas of environmental and planning law;
  - advise the Law Council on issues of environmental and planning law; and
  - to lobby Federal and State Government to implement 'best practice' in environmental and planning law.
2. The *Australia State of the Environment 2016 (SoE 2016)* report concluded that 'Australia's biodiversity is under increased threat and has, overall, continued to decline'.<sup>2</sup> The Committee is concerned that the current range of laws and policies designed to address biodiversity loss, conservation and protection have not been adequate to prevent significant detrimental impacts on Australia's fauna.
3. The Committee notes that the next statutory 10-year review of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)* is due. That review provides an opportunity to improve the overarching environmental law framework and its capacity to reverse species decline and habitat loss.
4. The Committee welcomes the opportunity to address the terms of reference for this Inquiry as a prelude to more comprehensive analysis as part of the EPBC Act review.
5. Many submissions to the Inquiry will provide evidence of population decline amongst threatened species and broader ecological impacts, and we do not seek to provide further evidence of those issues. The Committee's brief comments primarily address terms of reference (**ToR**) (c) – (f), (h), (j) and (k).

## ToR (c) – International and Domestic obligations

### Biodiversity

6. Australia's obligations in relation to preventing faunal extinction arise principally from being a signatory to the Convention on Biological Diversity (**CBD**). As a party to the CBD, Australia has obligations to, among other things:
  - establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity (Article 8(a));
  - promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings (Article 8(d));

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<sup>1</sup> The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

<sup>2</sup> Ian Cresswell and Helen Murphy, *Australia State of the Environment 2016: Biodiversity* (Independent report to the Australian Government Minister for the Environment and Energy, 2017).

- promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies (Article 8(f)); and
  - develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations (Article 8(k)).
7. At the Conference of the Parties to the CBD in 2010, the Commonwealth Government committed to global targets and the *United Nations Strategic Plan for Biodiversity 2011-2020* (the **Aichi Targets**). Significantly, these targets include:
- ... by 2020 the extinction of known threatened species has been prevented and their conservation status, particularly of those most in decline, has been improved and sustained.*
8. The CBD promotes development of National Biodiversity Strategies and Action Plans to implement CBD obligations. Decision X/2 of the Conference encouraged parties to adopt measurable performance targets relating to these biodiversity outcomes.
9. The Commonwealth Government is responsible for ensuring that Australia's international legal obligations are effectively implemented and delivered through domestic law. The EPBC Act is the principal tool used to achieve this and requires the Minister to not act inconsistently with the CBD in exercising her or his powers under the Act.
10. Key mechanisms for addressing CBD obligations include identification of threatened species (Part 13, Div 1), restrictions on actions that will have a significant impact on listed species without approval (ss 18 and 18A), and preparation of recovery and conservation plans (Part 13, Div 5).
11. *Australia's Biodiversity Conservation Strategy 2010–2030* also provides an overarching framework for policy decisions in relation to biodiversity conservation.

### Climate change

12. Australia is also a signatory to the *United Nations Framework Convention on Climate Change* and has made emissions reductions commitments consistent with the Paris Agreement. Meeting and exceeding these commitments will be critical to managing the impacts of climate change on habitat for threatened species in both terrestrial and marine environments.

## **ToR (d) – Adequacy of Commonwealth environment laws and policies in protecting threatened fauna and against key threatening processes**

13. Australia's most recent report on CBD implementation stated:

*Recent reports on the state of Australia's environment have found that, in general, population size, geographic range and genetic diversity are decreasing in a wide range of species across all groups of plants, animals and other forms of life. Case studies include reports of a major decline in mammals in northern Australia, changes in species composition and loss of*

*ecological integrity across a range of threatened ecological communities, and degradation in native vegetation.*<sup>3</sup>

14. The SoE 2016 report confirmed that biodiversity indicators show continuing decline across the country.<sup>4</sup>

15. The Committee is concerned that the design and implementation of the current regulatory framework is inadequate to meet Australia's international obligations to manage and reduce threats to biodiversity. The Committee's submission on the *Draft Revision of Australia's Biodiversity Conservation Strategy – Australia's Strategy for Nature 2018–30 (attached)* outlined some of these concerns.

16. Key areas for reform include:

- Better alignment of federal and state impact assessment processes to ensure that state approvals, particularly relating to forestry and planning and development, do not undermine protections offered under the EPBC Act.

At a minimum, the Commonwealth should use forums such as the Council of Australian Governments (**COAG**) and the Meetings of Environment Ministers to progress the adoption of best practice laws to protect threatened species and ensure that these are adequately reflected in planning instruments.

- Requiring consideration of both indirect and cumulative impacts when assessing likely impacts of a proposal on threatened species.
- Ensuring industries currently regulated outside the EPBC Act, such as offshore petroleum activities and forestry operations, are subject to equivalent assessment of impacts on threatened species.
- Increasing the use of strategic and regional planning tools to more proactively assess and manage impacts on threatened species.<sup>5</sup>

The SoE 2016 Report confirms that Australia's biodiversity decline is largely due to the cumulative impacts of multiple pressures. Well-implemented bioregional planning would protect ecological integrity at a landscape scale, whilst ensuring that economic uses are located in the most appropriate places.

Consistent with the recommendations of the *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (the Hawke Review)*, comprehensive regional and multi-species recovery plans for ecological communities can be an effective use of resources, recognising the clear link between habitat protection and improved prospects of survival for threatened species.<sup>6</sup>

- Stricter regulation of biodiversity offsets to secure 'net gains' and critically analyse the performance of offset projects.

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<sup>3</sup> Department of the Environment (Cth), *Fifth National Report to the Convention on Biological Diversity* (2014) 3.

<sup>4</sup> Ian Cresswell and Helen Murphy, *Australia State of the Environment 2016: Biodiversity* (Independent report to the Australian Government Minister for the Environment and Energy, 2017).

<sup>5</sup> Allan Hawke, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, 2009).

<sup>6</sup> Ibid [5.20].



- More rigorous identification, protection and restoration of critical habitat, including climate refugia.
- Strengthening obligations to implement recovery plans and threat abatement plans, and to embed adaptive management practices to respond to the changing needs of, and risks to, threatened species.
- More rigorous requirements for baseline data, monitoring, reporting and evaluation of management and recovery actions.<sup>7</sup> For example, recovery plans should include measurable recovery actions and outcomes, and the Minister required to regularly report against those outcomes.

17. The Committee acknowledges the work done by the Australian Panel of Experts on Environmental Law in developing the Blueprint for the *Next Generation of Environmental Laws* and commends that work to the Senate.

### **ToR (e) – Adequacy and effectiveness of protections for critical habitat for threatened fauna**

18. Recovery plans should identify habitat that is considered critical to the survival of the listed species (including foraging, breeding, roosting habitat, connectivity, and refugia), though the EPBC Act only requires identification of such habitat 'to the extent to which it is practicable to do so'. Identifying critical habitat is important for prioritising recovery efforts and assessing the significance of impacts, particularly for endangered and critically endangered species.
19. The Minister is required to maintain a register of Critical Habitat on Commonwealth land under section 207A of the EPBC Act but has discretion as to whether critical habitat identified in a recovery plan is included on the register. The Committee supports all critical habitat identified in a recovery plan being registered and subject to the protection of section 207B (which makes it an offence to take an action that will significantly damage registered critical habitat).
20. The Committee supports the extension of these offence provisions and government protection obligations to include registered critical habitat on any public land, including land owned or managed by a State or local government.

### **ToR (f) – Adequacy of the management and extent of the National Reserve System, stewardship arrangements, covenants and connectivity through wildlife corridors**

21. The National Reserve System (**NRS**) is a crucial component of Australia's overall framework for nature conservation and is critical to meeting CBD commitments. The NRS currently covers approximately 17 per cent of Australia's landmass, with a significant proportion of that attributable to Indigenous Protected Areas. Despite the increased coverage, the NRS is far from complete, with under-representation of bioregions in parts of central and western NSW, and significant gaps at the sub-bioregional level across the country.

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<sup>7</sup> The importance of monitoring performance was recognised in: Biodiversity Working Group (convened under the Meeting of Environment Ministers), *Report on the Review of the first five years of Australia's Biodiversity Conservation Strategy 2010–2030* (2016) 2, 14–15.



22. Given inadequacies in the legislative and policy framework for protection of threatened species on land outside the NRS, there is a strong case for expansion of the NRS to provide protection for a comprehensive, adequate and representative network of bioregions.<sup>8</sup> Key actions include:

- A nationally coordinated framework for terrestrial and marine bioregional planning.
- Expansion of the NRS, including appropriately secure private conservation initiatives, to ensure that all bioregions are adequately represented and sites of known endangered species are included.
- Consideration of the projected impacts of climate change when selecting and managing NRS sites, and identification of climate refugia.
- Adopting and implementing a successor to the *National Wildlife Corridors Plan* to enhance habitat connectivity.

## ToR (h) – Adequacy of existing funding streams ()

23. The Committee is concerned that Commonwealth funding for environmental programs, monitoring and departmental staff has been significantly reduced, both in real terms and as a proportion of government spending.<sup>9</sup>

24. Funding is critical to implement effective environmental stewardship, achieve biodiversity conservation goals, and reverse species decline. Lack of access to adequate resources continues to hamper recovery efforts, with many conservation initiatives having to crowd-source funds for ad hoc projects (see, for example, the [Difficult Bird Research Group](#)).

25. The SoE 2016 report suggested that ‘major reinvestments across long timeframes [are needed] to reverse deteriorating trends’.<sup>10</sup> Currently, there are no clear, measurable, scientifically-based targets to guide decision making and the investment of resources and ensure that limited resources are directed to the most effective actions.<sup>11</sup>

26. The Committee believes that more funding, and a more strategic allocation of funding, is essential to support recovery planning and implementation, private land conservation, management of the NRS, and investigation of rehabilitation and translocation opportunities.

27. This could be achieved through a National Biodiversity Conservation and Investment Strategy that pools resources and acts as a broker for national, state and regional conservation goals and efforts on public and private land.<sup>12</sup>

<sup>8</sup> Australian Panel of Experts on Environmental Law, *Terrestrial Biodiversity Conservation and Natural Resources Management Governance* (Technical Paper 3, 2017).

<sup>9</sup> Adam Morton, ‘Environment funding slashed by third since Coalition took office’, *The Guardian* (online), 13 December 2017 <<https://www.theguardian.com/australia-news/2017/dec/13/environment-funding-slashed-by-third-since-coalition-took-office>>.

<sup>10</sup> *Australia State of the Environment 2016* (Independent report to the Australian Government Minister for the Environment and Energy, 2017) <[www.environment.gov.au/science/soe](http://www.environment.gov.au/science/soe)>.

<sup>11</sup> Biodiversity Working Group (convened under the Meeting of Environment Ministers), *Report on the Review of the first five years of Australia's Biodiversity Conservation Strategy 2010–2030* (2016) 2, 46.

<sup>12</sup> For an example of such an investment strategy, see Office of Environment and Heritage (NSW), *Draft Biodiversity Conservation Investment Strategy 2017-2037: A strategy to guide investment in private land conservation* (2017) <<https://www.environment.nsw.gov.au/resources/biodiversity/strategy/draft-biodiversity-conservation-investment-strategy-170450.pdf>>.

28. The Committee commends the Government for its Threatened Species Prospectus initiative, seeking to leverage private funds to support recovery efforts. However, it is critical that these funds complement, rather than replace, meaningful Commonwealth investment. The Committee also draws the Senate Committee's attention to concerns raised by the Australian National Audit Office (**ANAO**) that the:

- Prospectus lacks a fit-for-purpose performance framework; and
- Department of the Environment and Energy is 'not well-placed to monitor and report on the effectiveness of the Prospectus in attracting additional funding' and measuring its contribution to threatened species recovery goals.<sup>13</sup>

## **ToR (j) – Adequacy of existing assessment processes for identifying threatened fauna conservation status**

29. Given the resource intensity of species assessments, the Committee strongly supports efforts to streamline and synchronise assessment criteria in across jurisdictions to allow for cross-border collaboration and reciprocal recognition.

30. The Committee also notes that a number of decisions regarding the listing (or uplisting) of fauna species or ecological communities that provide fauna habitat have been repeatedly deferred,<sup>14</sup> despite unequivocal recommendations from the Threatened Species Scientific Committee. The Committee recommend that decisions consistent with the Threatened Species Scientific Committee's recommendations be made as a matter of urgency.

## **ToR (k) – Adequacy of existing compliance mechanisms**

31. The Committee notes previous ANAO audits have been critical of the Department of Environment's compliance monitoring and 'generally passive approach to managing non-compliance'.<sup>15</sup> The follow-up audit concluded:

*Environment has made progress in addressing the five recommendations made in ANAO Report No. 43 2013–14, Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval. ... To date, limited progress has been made in relation to the implementation of broader initiatives to strengthen the department's regulatory performance.*

32. Lack of enforcement undermines biodiversity conservation efforts. Further resources should be allocated to enable the Department to fulfil their monitoring and enforcement obligations.

33. Allowing interested third parties to challenge decisions made under the EPBC Act and to seek injunctions to prevent non-compliance is also important to Australia's transparency and accountability for meeting CBD obligations. The Committee strongly supports the maintenance of third-party review provisions and the extended standing

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<sup>13</sup> Australian National Audit Office, *Performance Audit: Funding Models for Threatened Species Management* (19 March 2018).

<sup>14</sup> The full list of extensions is available at

<<http://www.environment.gov.au/biodiversity/threatened/nominations/extensions>>.

<sup>15</sup> See Australian National Audit Office, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval* (Audit Report No 43, 2013–14); and Australian National Audit Office, *Managing Compliance with the Wildlife Trade Provisions of the Environment Protection and Biodiversity Conservation Act 1999* (Audit Report No 7, 2015–16).

under sections 475 and 487 of the EPBC Act (see previous submission in relation to that provision **attached**).<sup>16</sup>

## Contact

34. The AEPLG would welcome the opportunity to discuss the submission further. Please contact John Farrell, Policy Lawyer, at \_\_\_\_\_ or \_\_\_\_\_, in the first instance if you would like further information or clarification.

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<sup>16</sup> See also Rachel Pepper and Rachael Chick, 'Ms Onus and Mr Neal: Agitators in an Age of Green Lawfare' (2018) 35 *Environmental and Planning Law Journal* 177.