



Environmental
Defenders Office

**Submission to the inquiry into the *Environment
Protection and Biodiversity Conservation Amendment
(Save the Koala) Bill 2021***

8 April 2021

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

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INTRODUCTION

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the *Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021* (**EPBC Amendment (Save the Koala) Bill**).

The EPBC Amendment (Save the Koala) Bill aims to insert new provisions into the EPBC Act to protect koalas and koala habitat. The key elements of the Bill are as follows:

- It will introduce a statutory test for determining whether an action has or will have significant impact on koalas for the purpose of section 18 and 18A of the EPBC Act.
- It will remove the 'RFA exemption' which removes the requirement for approval under the EPBC Act in circumstances where forestry operations have, will have, or are likely to have a significant impact on koalas.
- It will prevent the Minister from granting approval to an action consisting of or involving the clearing of koala habitat.
- It will introduce definitions for 'koala habitat' and 'koala habitat tree'.

EDO strongly supports increased legal protections for koalas, including in national environmental laws. While at-risk koala populations were listed as a vulnerable species under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) in 2012, the Commonwealth can and should play a stronger role in the protection of this iconic species. This is vital given the ongoing decline of at-risk koala populations and in light of the devastating impacts of the 2019-2020 bushfire season on koalas and koala habitat.

The plight of the koala highlights the important role of the Commonwealth in protecting nationally significant species, particularly where inadequate protections are provided by state and territory planning laws.

While the EPBC Amendment (Save the Koala) Bill makes a number of amendments that would strengthen koala protections in the EPBC Act, proposed amendments must be considered in the context of the recent 10 year review of the EPBC Act undertaken by Professor Graeme Samuel (**EPBC Act Review**). The EPBC Act Review proposed a comprehensive package of reforms, including a first tranche of recommendations that would establish a full suite of legally enforceable national environmental standards; an Environmental Assurance Commissioner; oversight committees; strong compliance and enforcement; bilateral agreement amendments; an Indigenous participation and engagement standard and process for reform, and a revised offset policy, amongst other recommendations.¹

Improved protections for koalas should be considered as part of these broader reforms. For example, a national environmental standard for koalas, developed in consultation with scientific experts and based on best available information about koalas and koala habitat, would be consistent with this approach. However, until such time that effective overarching reforms to the EPBC Act are delivered, the amendments proposed by the EPBC Amendment (Save the Koala) Bill should be implemented to provide important protections for koalas and koala habitat.

¹ Samuel, G, *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment, Canberra, October 2020, available at <https://epbcactreview.environment.gov.au/resources/final-report>

SUMMARY OF PROPOSED AMENDMENTS

Statutory test for determining whether an action has or will have a significant impact on koalas

Sections 18 and 18A of the EPBC Act provide that actions that have or will have a significant impact on listed threatened species or endangered community are prohibited without approval. *Significant impact guidelines*² have been published to assist in determining whether a proposed impact will have a significant impact on listed threatened species and therefore whether assessment and approval is required under the EPBC Act.

The EPBC Amendment (Save the Koala) Bill will introduce new provisions into the EPBC Act establishing a statutory test for determining whether an action has or will have a significant impact on koalas. These provisions are:

- Proposed section 18B into the EPBC:

18B Significant impact in relation to koalas

For the purposes of a subsection of section 18 or 18A that applies in relation to koalas, significant impact has a meaning affected by section 527G.

- Proposed section 527G:

527G Significant impact on koalas

- 1) *This section applies in relation to any listed threatened species that are koalas.*
- 2) *For the purposes of a subsection of section 18 or 18A that applies in relation to koalas, paragraph 42(ba) and any other provision of this Act that applies in relation to koalas, a significant impact on koalas includes any substantial loss of genetic diversity, or any loss of connectivity or available koala habitat, of any population of koalas such that the population is placed at greater risk of extinction.*

Therefore, in addition to relying on the *Significant impact guidelines* for determining whether an action has or will have a significant impact on listed threatened species and communities, the test in s527G must also be applied to determine whether an action has or will have a significant impact on koalas.

Removal of the 'RFA exemption' in circumstances where forestry operations have, will have, or are likely to have a significant impact on koalas.

Part 4, Division 4, Subdivisions A and B of the EPBC Act relate to the interaction between the EPBC Act and Regional Forest Agreements (**RFAs**) established under the *Regional Forest Agreements Act 2002* (**RFA Act**). These provisions provide that Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

However, pursuant to section 42 of the EPBC Act, these provisions do not apply to RFA forestry operations, or to forestry operations, that are:

² *Matters of National Environmental Significance - Significant impact guidelines 1.1 - Environment Protection and Biodiversity Conservation Act 1999*, available at <https://www.environment.gov.au/epbc/publications/significant-impact-guidelines-11-matters-national-environmental-significance>

- a. in a property included in the World Heritage List; or
- b. in a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention; or
- c. incidental to another action whose primary purpose does not relate to forestry.

The EPBC Amendment (Save the Koala) Bill proposes to amend section 42 of the EPBC Act by introducing a new 42(ba) which will provide that Part 4, Division 4, Subdivisions A and B (including the RFA exemption) will not apply to operations that have, will have, or are likely to have a significant impact on koalas.

This would mean that any forestry operation that will have a significant impact on koalas will require approval as an action under the EPBC Act. Significant impact will be determined with reference to proposed s527G (see above). Additionally, proposed s139(3) (see below) would prevent the Minister from granting approval if that forestry operation action would consist of or involve the clearing of koala habitat.

Moratorium on clearing koala habitat

The EPBC Amendment (Save the Koala) Bill proposes to prevent the Minister from approving an action that will involve clearing of koala habitat. It will do this by introducing a new subsection 139(3) into the EPBC Act that will provide that “(d)espite subsections (1) and (2), the Minister must not approve an action consisting of or involving the clearing of koala habitat”.

Definitions for ‘koala habitat’ and ‘koala habitat tree’

The EPBC Amendment (Save the Koala) Bill will introduce new definitions for ‘koala habitat’ and ‘koala habitat tree’. This is needed to define terms used in the proposed amendments discussed above.

ANALYSIS

There is a strong evidence to support strengthening protections for koalas and koala habitat, and for the Commonwealth to play a stronger role in the protection of this iconic species given the inadequate protections provided by state and territory planning laws. For example, EDO’s submission to the Upper House Inquiry into koala populations and habitat in New South Wales highlights that there are significant deficiencies in NSW laws relating to the protection of koala populations and habitat.³ That Inquiry found that koala “will become extinct by 2050” if action is not taken to protect the species – including law reform.⁴ Similarly, EDO’s submission to the draft Koala Conservation Strategy in Queensland recognises that the decline, and potential future extinction, of koala populations in Queensland is a matter of state and national concern and that

³ Environmental Defenders Office, Submission to the Inquiry into koala populations and habitat in New South Wales, 9 August 2019, available at https://www.edo.org.au/wp-content/uploads/2019/12/190814_NSW_Koala_Inquiry_-_EDO_NSW_Submission_-_Edited.pdf

⁴ NSW Parliament, Portfolio Committee No. 7 – Planning and Environment, Koala populations and habitat in New South Wales Report no. 3, June 2020, available at <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2536#tab-reportsandgovernmentresponses>

strong action is needed to ensure koala populations thrive in sustainable, healthy numbers.⁵ The decline in biodiversity is also under examination as part of the ongoing inquiry into Australia's Faunal extinction crisis.⁶

The approach adopted in the EPBC Amendment (Save the Koala) Bill is explicitly directed at legislating protections for a specific species, and has utility in terms of highlighting the inadequacy of existing law to reverse trajectories of decline for iconic species. However, there may be some issues with implementation of provisions as drafted. For example, the blanket moratorium on approving clearing of koala habitat and the significant impact test are broadly drafted and may be difficult to implement if the definition is not sufficiently specific in terms of relevant trees, and there are some inconsistencies with definitions in comparison to state and territory laws.⁷ Minor amendments to some of the proposed provisions could provide greater certainty and strengthen how they operate in practice.⁸

The intent of the proposed amendments is broadly consistent with the overall findings of the Final Report of the EPBC Act Review which found that Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat and that the EPBC Act is outdated and requires fundamental reform. However, as noted, the specific recommendations of the Final Report focus on developing legal architecture based on national environmental standards, assurance improved information and data, compliance and enforcement and a range of other measures.

The Final Report does not recommend species-specific amendments in the Act, but in the course of the 12-month review, Professor Graeme Samuel consistently spoke of the need for clear granular standards to be applied. Professor Graeme Samuel recommended granular standards be developed that could include create no-go areas and thresholds for impacts for threatened

⁵ Environmental Defenders Office, Submission to the draft Koala Conservation Strategy, February 2020, available at <https://www.edo.org.au/publication/koala-conservation-strategy-submission/>

⁶ See Parliament of Australia, Senate Standing Committees on Environment and Communications, An inquiry into Australia's Faunal extinction crisis including the wider ecological impact of faunal extinction, the adequacy of Commonwealth environment laws, the adequacy of existing monitoring practices, assessment process and compliance mechanisms for enforcing Commonwealth environmental law, and a range of other matters, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Faunalextinction2019

⁷ We note that there are differences between the proposed definitions in the EPBC Amendment (Save the Koala) Bill and similar terms in state and territory legislation – for example, in the (now repealed) NSW *State Environmental Planning Policy (Koala Habitat Protection) 2019* (Koala SEPP 2019). The latter included a significant list of relevant tree species for different areas. The definitions of 'koala habitat' and 'koala habitat tree' are integral to the operation of the new provisions seeking to save koalas. Therefore, any definitions aimed at strengthening koalas must be based on the best-available science on koalas.

⁸ For example:

- Proposed section 527G could be strengthened by inserting the following underlined text: "significant impacts on koalas includes, but is not limited to, any substantial loss of genetic diversity, or any loss of connectivity or available koala habitat, of any population of koalas such that the population is placed at greater risk of extinction". Additionally, the *Significant impacts guidelines* could be amended to provide further guidance on assessing significant impacts on koalas.
- Section 139, subsections (1) and (2) outline the requirements for decisions about threatened species and endangered communities. While we believe that the amendment to s139 will achieve the required outcome of preventing the approval, it may be better for the proposed amendment to be inserted as a stand-alone provision preventing the approval of certain actions, rather than as part of s139, which sets out matters for consideration.

species and ecological communities (see Appendix to the Final Report that includes an interim threatened species and ecological communities standard as a starting point).⁹

In implementing the recommendations of the Final Report, it would be appropriate for standards for both protections for threatened species to be strengthened overall and for standards to include specific requirements for protecting individual species as required, including for example, restrictions on clearing koala habitat. Development of a national environmental standard for koalas would be consistent with this approach. This should be developed by scientific experts and based on best available information about koalas and koala habitat.

CONCLUSION AND RECOMMENDATIONS

The EPBC Amendment (Save the Koala) Bill was introduced to insert specific koala protections into the EPBC Act, based on evidence of the increasing vulnerability of koala populations.

EDO strongly supports increased legal protections for koalas. While the EPBC Amendment (Save the Koala) Bill proposes a number of amendments that would strengthen koala protections in the EPBC Act, proposed amendments must be considered in the context of the recent 10 year review of the EPBC Act undertaken by Professor Graeme Samuel. Improved protections for koalas should be considered as part of these broader reforms.

Professor Graeme Samuel recommended legally enforceable granular standards be developed that could include create no-go areas and thresholds for impacts for threatened species and ecological communities (see Appendix to the Final Report as a starting point). Development of a legal enforceable national environmental standard for koalas, developed in consultation with scientific experts and based on best available information about koalas and koala habitat, would be consistent with this approach.

Therefore, EDO recommends that until such time that effective overarching reforms to the EPBC Act are introduced, including a full suite of legally enforceable national environmental standards that protect threatened species, including koalas and koala habitat, the amendments proposed by the EPBC Amendment (Save the Koala) Bill should be implemented to provide important protections for koalas and koala habitat.

⁹ See: [Appendix B - Recommended National Environmental Standards | Independent review of the EPBC Act](#)