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Nature Conservation Saves for Tomorrow

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SUBMISSION to the EPBC ACT REVIEW PANEL

The Blue Mountains Conservation Society (the Society) is a community-based volunteer organisation with over 800 members. Our mission is to help conserve the natural environment of the Greater Blue Mountains and to increase awareness of the natural environment in general.

Three quarters of the Blue Mountains Local Government Area (over 140,377 hectares) is reserved as national park. The City of Blue Mountains is surrounded by Blue Mountains National Park which is in turn within the Greater Blue Mountains World Heritage Area (GBMWA). The GBMWA covers over one million hectares, amalgamates eight conservation reserves including the Blue Mountains National Park, and is largely covered by temperate forest.

Strengthen EPBC Acts' role in protecting biodiversity

The scale and intensity of the 2019-20 fires have been unprecedented. They are the largest fires recorded in temperate Australian forests since European settlement. These fires burnt 21 per cent of Australia's temperate forests. This is a globally unprecedented percentage by area of burning for any continental forest biome around the world Boer et al 2020¹. In the GBMWA, the extent of the fires greatly exceeded that recorded in any previous fire seasons. Over 75% (806,351 ha) of the GBMWA was fully or partly burnt. Areas of adjoining bushland on Crown land or private property were also burnt. An estimated 135 million mammals, birds and reptiles were impacted by the burning². Listed World Heritage values and genetic diversity in the area will consequently be greatly reduced, species may be lost from the area.

The scale of the fires experienced in the Blue Mountains, and across Australia, is very much a consequence of conditions, with preceding extreme drought and high temperatures drying out fuel to an extraordinary degree. Prolonged and extreme high temperatures coupled with

Matthias M. Boer, Víctor Resco de Dios and Ross A. Bradstock, Unprecedented burn area of Australian mega forest fires, *Nature Climate Change*, 24 February, 2020. ² Peter Smith, Impact of the 2019-20 Fires on the Greater Blue Mountains World Heritage Area: Update 7 March 2020.

² Peter Smith, Impact of the 2019-20 Fires on the Greater Blue Mountains World Heritage Area: Update 7 March 2020.

greatly reduced rainfall, extraordinarily low humidity and periods of high winds, have produced fire conditions and behaviours not seen on such a wide scale before in the Blue Mountains or Australia. The prevailing conditions also compromised the usual role played by damp gullies and wetter vegetation types in acting as “fire breaks” and impeding the spread of fire across the landscape³.

Over the last summer we have witnessed (personal observations of many members of Blue Mountains Conservation Society) in the Greater Blue Mountains unprecedented areas of “sudden forest canopy collapse corresponding with extreme drought and heat”, as has been described in southwestern Australia⁴. These extreme conditions exemplify the predictions of climate scientists about the impacts of global warming and rapid climate change. The consequences of rapid climate change are already being experienced in the Greater Blue Mountains.

Extinction of fauna and flora in the GBMWhA

There is an urgent need to address the extinction crisis in Australia⁵. Before the 2019-2020 fires, the increasing need for threatened species protection had already been clearly identified in the GBMWhA. The decline of species due to warming was already being reported in the Greater Blue Mountains as shown by a recent study on the Greater Glider in the area⁶. Other local iconic species in which we have noted marked declines since the implementation of the EPBC Act in 2000 include the Gang-Gang Cockatoo, Flame Robin, Scarlet Robin and Grey Currawong. Many additional species have also declined. Within the GBMWhA, 28 mammal, 34 bird, 4 reptile and 7 frog species are threatened at state or national level⁷. Over 100 species of plants are threatened. Data is not available to reliably tell us how many invertebrate species or ecological communities in the area are threatened. The number of threatened entities continues to increase.

In 2018, Blue Mountains Conservation Society held a public meeting to discuss threatened entities in the GBMWhA. The meeting passed overwhelmingly the following recommendations:

The meeting called on both the Federal and NSW governments

- *To ensure that biodiversity within the GBMWhA is maintained,*
- *To ensure that no threatened species becomes extinct within the GBMWhA and*
- *To ensure that no non-threatened species becomes threatened within the GBMWhA.*

The EPBC Act needs to be strengthened to achieve these three outcomes.

Many species' ranges and populations have been severely impacted by the 2019-20 fires and their status now needs to be assessed. There are likely to be a considerable number of species not previously listed under threatened species legislation which now satisfy listing criteria and need either to be nominated for listing or have relevant Threatened Species Scientific

³ Rachel H Nolan, Mattias M Boer, Luke Collins, Victor Resco de Dias, Hamish Clarke, Meaghan Jenkins and Ross A Bradstock, Causes and Consequences of eastern Australia's 2019-20 season of mega-fires, *Global Change Biology*, 2020.

⁴ Matusick, G., Ruthrof, K.X., Brouwers, N.C., Dell, B. and Hardy, G.E.St.J. (2013) Sudden forest canopy collapse corresponding with extreme drought and heat in a mediterranean-type eucalypt forest in southwestern Australia. *European Journal of Forest Research*, 132 (3). pp. 497-510.

⁵ Wintle, B.A. et al. 2019 Spending to save: What will it cost to halt Australia's extinction crisis? *Conservation Letters*;12:e12682.

⁶ Smith, P.J. and J.E. Smith. 2018. Decline of the greater glider (*Petauroides volans*) in the lower Blue Mountains, New South Wales *Australian Journal of Zoology*. <https://doi.org/10.1071/ZO18021>.

⁷ Smith, J., Smith, P. and K. Smith. 2019. *Native Fauna of the Greater Blue Mountains World Heritage Area*. P & J Smith Ecological Consultants, Blaxland.

Committees make an emergency listing. Additionally, many already listed species are likely to have experienced dramatic reductions in geographic range, populations or habitat availability, or been negatively impacted by other ecological factors associated with these widespread fires (e.g. reduction in pollinators or seed dispersers). These species are thus likely to have become more threatened and require upgrading of their listing, e.g. from Endangered to Critically Endangered or Vulnerable to Endangered. It is understood that there have been no new listings of species under the EPBC Act since the bushfire crisis.

While the recent fires and changing climate are obvious factors impacting on our environment and biodiversity, there are many additional factors that are also currently degrading our biodiversity and environment. We believe that our biodiversity and associated environment are currently seriously threatened.

Other issues affecting the GBMWhA

In addition to climate change, some examples of current major issues in regard to the Greater Blue Mountains World Heritage Area that the EPBC Act should be able to address and regulate are:

- coal mining discharges entering the GBMWhA, and reductions in groundwater flows
- the proposal to raise the height of the Warragamba Dam wall
- the operation of the Western Sydney Airport
- low-flying aircraft flights over WHA national parks

The EPBC Act is ill equipped to deal with such issues and the potential impact on the GBMWhA. Changes are needed to the legislation

We thus ask that any changes made to the EPBC Act as a result of this review be designed to enhance the Act's ability to protect biodiversity and the environment. We believe that reducing regulatory burden should not be prioritised at the expense of robust environmental protection.

RESPONSES TO DISCUSSION PAPER QUESTIONS

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?

Question 4: Should the matters of national environmental significance within the EPBC Act be changed? How?

All existing matters of national environmental significance (MNES) need to be retained and, where necessary, strengthened. Existing MNES include:

- nationally listed threatened species and ecological communities ;
- migratory species protected under international agreements;
- World Heritage Properties;
- National Heritage Places;
- wetlands of international significance (Ramsar listed wetlands);
- Great Barrier Reef Marine Park;
- nuclear actions (including uranium mines);
- water resources, in relation to coal seam gas development and large coal mining development ; and
- Commonwealth marine areas

The following additional new MNES should be added into the EPBC Act:

1. Increased greenhouse gas emissions (including all of Scope 1, 2 and 3 emissions), that is Rapid Climate Change. In particular this must include impacts associated with, but not be limited to, new and expanded coal mines and gas developments.
2. Identified significant high conservation value areas including, but not limited to High Conservation Value Vegetation; Key Biodiversity Areas; wetlands of national importance; travelling stock routes supporting remnant native vegetation; wildlife corridors; and wild rivers and their riparian vegetation.
3. The National Reserve System (all Commonwealth, state and local terrestrial and marine protected areas including Indigenous Protected Areas).
4. Vulnerable ecological communities (this is necessary to include if applying the precautionary principle of Ecologically Sustainable Development in accordance with S 3A *Principles of ecologically sustainable development* in the Act). In the statutory review of the EPBC Act in 2009, it was recommended that vulnerable ecological communities be included as MNES, but this has not been implemented.
5. Clearing of native vegetation; (this would also need to be addressed in the significant impact guidelines) Clearing of native vegetation in Australia is a significant factor in increasing greenhouse gas emissions.
6. Current and potential climate refugia. An very important example of a climate refugia is the 21,000 hectare Newnes State Forest, which adjoins two parts of GBMWA (that is, Gardens of Stone National Park and Wollemi National Park). The plateau has elevation of up to 1175 metres so can be a refuge to species which can no longer sustain themselves at lower altitudes because of global warming. The effects of

warming are already seen in the GBMWHA (as noted elsewhere). Newnes State Forest is part of a larger area of high biodiversity value, the Gardens of Stone Stage 2 proposal, which should be a protected area managed under the *National Parks and Wildlife Act*. Its location in the Western coalfields of NSW has prevented this from happening. However, climate change is making protecting this land more pressing. Refugia like Newnes State Forest should be recognised in the *EPBC Act* as part of the Commonwealth government's response to managing climate change.

7. Old growth and long unburnt native vegetation.
8. All surface and ground water resources (expanded beyond only those impacted by coal and gas developments). (eg the Great Artesian Basin?)

Examples of how existing MNES need to be strengthened include:

(a) World Heritage Areas

A provision requiring consideration of the use of airspace over World Heritage Areas (**WHAs**) should be included within this MNES. Such use can directly and indirectly affect the land under that airspace. Under the current *EPBC Act*, the effects of such use are not being effectively addressed. Noise, pollution and other risks are associated with flight paths over WHAs, particularly shortly after take-off and prior to landing. While under s 12 of the *EPBC Act*, a person must not take an action as described in respect of a WHA, the onus of proof lies on the party bringing the action, usually an environmental body, placing an undue burden on the organization.

The Society proposes that permission to fly over WHAs below a certain altitude should be assessed using a reverse onus of proof. The onus should be reversed to reflect a presumption that commercial flights will have or are likely to have a significant effect on the value of declared World Heritage Property.

New provision to be added to Part 9 of the *EPBC Act*:

The Minister must not grant consent for flight paths proposed over listed World Heritage Areas unless the Minister:

(1) has considered the impact of the proposal on the World Heritage values and visitor experience, and is satisfied that the proposal will have no adverse impacts on the World Heritage values or visitor experience, and

(2) has considered advice on the proposal from the relevant World Heritage Advisory Committee.

It is appreciated that the scope of such a provision may need to be limited to flights below a certain height.

(b) Threatened Species and Communities

In addition, in assessments of impacts on **threatened species** (vulnerable, endangered and critically endangered) the criteria for assessment of the significance of an impact on each category of species should be identical. At present only "important populations" of vulnerable species (as opposed to "populations" of endangered or critically endangered species) need to be considered. (Department of the Environment (Australia) (2013)⁸.

⁸ Matters of national environmental significance significant impact guidelines 1.1. Retrieved from https://www.environment.gov.au/system/files/resources/42f84df4-720b-4dcf-b262-48679a3aba58/files/nes-guide_lines_1.pdf.)

Failure to include vulnerable ecological communities as a MNES i does not comply with the Precautionary Principle. Since 2000, over 40 vulnerable species have been uplisted from vulnerable to endangered or critically endangered species. The Precautionary Principle dictates that identified vulnerable ecological communities, as well as species, should be fully protected given current trends in loss of biodiversity.

The Blue Mountains Conservation Society supports the following recommendations of Simmonds et al. (2019)⁹ in regard to the assessment of vulnerable species and communities:

1. *Vulnerable species and communities should be afforded the same consideration to those that are endangered or critically endangered in terms of how they are assessed in regulatory frameworks. This would entail increasing the extent to which vulnerable species and communities are considered in the assessment process, not reducing (the currently higher) requirements for endangered and critically endangered species/communities (e.g., in the EPBC Act). A single assessment standard should apply regardless of threat status.*
2. *The assessment of impacts to threatened species should be strengthened to be less subjective, and underpinned by robust, and wherever possible, quantitative criteria (e.g., thresholds, as per the case in PS6 for determining what constitutes “Critical Habitat”), to reduce reliance on relative judgments that are often based on limited information.*
3. *Any policies or guidelines that assist with application of environmental laws (e.g., the EPBC Act Significant Impact Guidelines) should be consistent with the aims of the legislation. In Australia, a lower standard for the assessment of vulnerable species and ecological communities, and the potential for these to receive less scrutiny (or in the case of communities, no current assessment), does not accord with the EPBC Act’s aim of protecting Australia’s environment (nor the nation’s international obligations under the Convention on Biological Diversity).*

We conclude that all species/ecosystems that have been deemed, by a rigorous and standardized framework (e.g., IUCN, 2019)¹⁰, to be at elevated risk of extinction, be considered equally in impact assessment. Policies and standards for assessing impacts should reflect this, especially given that the current situation is not helping to arrest ongoing declines. Why wait until species and communities are at the brink before we act? Without more focus and action in environmental impact assessment and regulation, vulnerable species, and communities will likely continue their slide toward endangerment.

Key Threatening Processes (KTPs)

More weight needs to be given to KTPs for all major threats to biodiversity. Threat Abatement Plans and implementation commitments need to be developed for all KTPs. These threats need to be addressed more adequately when assessments of ‘significance’ are made.

(c) Significant Impact Guidelines

The **Significant Impact Guidelines** pertaining to Matters of National Environmental Significance should be retained, strengthened and amended. It needs to address cumulative impact more adequately

⁹ Simmonds, J.S., Reside, A.E., Stone, Z., Walsh J.C., Ward, M.S. and Maron, M. 2019. Vulnerable species and ecosystems are falling through the cracks of environmental assessments. *Conservation Letters*. e12694. <https://doi.org/10.1111/conl.12694>

¹⁰ IUCN. (2019). The IUCN red list of threatened species. Version 2019-2. Retrieved from <http://www.iucnredlist.org>.

Question 2: How could the principle of 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?

The principle of “ESD” requires careful definition in the Act. ESD takes account of environmental, economic, social and equitable considerations but it needs to be made clear in the Act that the overriding consideration is the environment.

At present, in the EPBC Act the first principle of ecologically sustainable development in s 3A (a) states:

decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

This should be replaced by a simple statement of the priority of environmental considerations. Significant environmental detriment should not be able to be counter weighed by economic gain. Section 3A(d) does not provide sufficient protection. Where it is identified that biological diversity and ecological integrity are threatened, their protection and preservation should be pursued to the exclusion of other economic, social and equitable considerations to the extent that they conflict with that aim.

All considerations should be undertaken using the best available scientific information. If adequate scientific knowledge is lacking then the Precautionary Principle should be invoked. Given the current dire state of the Australian natural environment, any approved development should contribute to restoration of the natural environment rather than maintenance or further degradation of the natural environment. Given that this Act is aimed at maintaining the natural environment, and that for future generations a functioning, healthy natural environment will be a priceless asset, it is not appropriate to make decisions on the basis of cost-benefit analysis.

Humans are capable of innovation. There are almost always alternatives or different ways of tackling a problem. The environment has no alternatives where change is occurring faster than adaption allows. Strengthening protection under the EPBC Act will not stifle economic growth, it will simply change the way in which outcomes are pursued, generating new and different commercial approaches and opportunities. Greater environmental protections should be recognised as a source of Australia’s future strength, prosperity and wealth.

Example of Failure under Current EPBC Act

In 2005 the Blue Mountains Conservation Society experienced a case where the EPBC Act was not activated because of a failure to act on the Precautionary Principle. Environment Australia (Commonwealth Department name at the time) did not consider the EPBC Act required intervention to prevent the proposed extraction of groundwater for a commercial water bottling development in Wentworth Falls in the Blue Mountains NSW.

These Blue Mountains Swamps were already listed as an Endangered Ecological Community, included in ‘Temperate Highland Peat Swamps on Sandstone’. Whilst no clear reasons were given as to why the activity was not deemed a “controlled” action, departmental officers indicated that there was a lack of scientific evidence to “prove” that the loss of groundwater would have an adverse impact on adjacent swamps.

Cumulative impact also needs to be assessed specifically with each event/action. This was identified in the 2016 Australian State of the Environment Report as one of the six key barriers to effective national management of the environment.

Question 3: Should the objects of the EPBC Act be more specific?

Yes. At present it is unclear which, if any, of the eight objects of the Act take precedence if there is a conflict between achievement of objectives. The objects should be prioritised and further defined to guide legal interpretation.

It should be very clear in the Act that the primary object of the Act is to restore, conserve and protect Australia's natural heritage and biodiversity (including, but not limited to, matters of national environmental significance). This should be listed in the Act as the primary object. The other objects should be listed in the Act as secondary objects and should be clear that these secondary objects cannot override the primary objective.

This same recommendation was made by the Report of the Independent Review of the EPBC Act 1999 (2009) (Hawke Review), at 1.49-1.50, namely:

“The Act should include a primary object to the following effect:

The primary aim of this Act is to conserve and protect Australia's environment, its natural heritage and biological diversity including genes, species and ecosystems, its land and waters, and the life-supporting functions they provide.

Question 5: Which elements of the EPBC Act should be prioritised 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?

This is a scheduled 10 year review of the entire EPBC Act and so all elements of the Act should be reviewed. The Act should be able to effectively deal with impacts of individual developments or activities on MNES, the contribution of individual developments or activities to cumulative impacts on MNES, and the protection of the environment on a landscape or regional scale, as well as providing a regulatory framework to ensure honest monitoring, audit, compliance and enforcement of required conditions attached to developments and activities.

In this question, “proactive mechanisms” and “right circumstances” need to be defined. Assessments of developments that may impact the natural environment must be undertaken by persons who are not landholders or stakeholders in the proposed development, or who have been selected by the landholder or proponent. The Act should ensure that assessment of impacts is done in an independent, transparent and rigorous manner.

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 review of the EPBC Act should focus on how the Act can be improved, to achieve better real and effective restoration, conservation and protection of Australia's natural environment and biodiversity in the short, medium and long terms. To date, as indicated by State of the Environment Report 2016, since 2000 environmental values in Australia have declined abysmally. The Review Panel needs to consider carefully whether such decline is a consequence of inadequacies within the Act, or a lack of political will to enforce the tenets of the Act, or both.

Of course the Act should include clear environmental standards. It should be made very clear in the Act that not all proposed developments, regardless of modifications or "offsets", will be allowed to proceed.

This question implies that the objectives "to protect the environment" and "to promote ecologically sustainable development" should carry equal weight. As noted above, the Act should make it clear that its primary objective is protection of the environment.

Over the last 10 years, the effectiveness of the EPBC Act has been extremely disappointing. The following trends clearly demonstrate that current environmental protections are either inadequate, or are not being adequately implemented, or most likely both:

- the on-going and increasing impacts of greenhouse gas emissions and consequent natural disasters such as the 2019-2020 bushfires;
- large and ever increasing numbers of threatened species and ecological communities and existing threatened species being moved into higher categories of risk, eg vulnerable to endangered, the on-going reduction in the area and quality of native vegetation across Australia;
- diminishing availabilities of surface and ground water with concurrent reductions in water quality;
- inadequate resources to manage and monitor the natural environment across Australia;

There is currently inadequate compliance monitoring and enforcement of permitted activities.

This question should be asked "what will be the costs to future generations if we do not now adequately work to restore, conserve and protect the natural environment and biodiversity"? Such costs will be immeasurable.

Impacts of coal mining on world heritage areas – a high level concern

Mining is a high level concern in relation to protection of world heritage areas. The International Union for Conservation of Nature (IUCN)'s policy that "... mineral and oil and gas exploration and exploitation (including associated infrastructure and activities) is incompatible with the Outstanding Universal Value of World Heritage Sites and should not be permitted within these sites. If it is outside the boundaries of World Heritage sites, it should not, under any circumstances, have negative impacts on their Outstanding Universal Value"¹¹

¹¹ <https://www.iucn.org/theme/world-heritage/resources/iucn-policies-world-heritage/mining-oil-and-gas> accessed 12.4.2020

In July 2019 UNESCO at its annual meeting to review World Heritage listed properties resolved as follows regarding mining in or near GBMWHA:

“5. (UNESCO) Also notes with concern that several mining projects exist in the vicinity of or adjacent to the property (GBMWHA), and that some mining activities have resulted in impacts on the property, as evidenced by the incident at the Clarence Colliery, and also requests the State Party to undertake an assessment of potential cumulative impacts of all existing and planned mining projects in the vicinity of the property through a Strategic Environmental Assessment (SEA) or a similar mechanism;

6. Reiterates its position that mineral exploration or exploitation is incompatible with World Heritage status, which is supported by the International Council of Mining and Metals (ICMM) Position Statement to not undertake such activities within World Heritage properties; “

9. Finally requests the State Party to submit to the World Heritage Centre, by 1 December 2020, an updated report on the state of conservation of the property and the implementation of its Strategic Management Framework for examination by the World Heritage Committee at its 45th session in 2021. “

While the Society is aware of examples where the *EPBC Act* approval has strengthened conditions of consent in relation to mine expansion proposals, however, it has not been able to thoroughly prevent the adverse impacts of coal mining on WHA areas such as the GBMWHA.

In July 2015 Centennial Coal’s Clarence Colliery, a coal mine operating just outside the GBMWHA, negligently allowed tonnes of coal fines to slip into the Wollangambe river, which runs through the GBMWHA. There the coal waste fines turned into a black sticky sludge extending down the river and smothering its banks for 10 kms. 214 tonnes of coal fines had to be removed from the river and its banks by hand. It is likely to have caused significant damage to aquatic life in the river.

The NSW Environment Protection Authority (EPA) successfully prosecuted the Colliery owners, Centennial Coal, under the highest level of offence and Centennial coal was fined over \$1 m in 2017.¹² However, the commonwealth government decided not prosecute Centennial Coal. The Society does not know the reason for their decision but it may well relate to the narrow focus of offences in the *EPBC Act*. Hence, there was no public demonstration of the value of a world heritage area (WHA) and the importance of protecting it. The Land and Environment Court judgment contained only one cursory reference to WHA status of the land which the coal fines damaged. There was no statement of the relevance of this status, presumably because it was not relevant to the state jurisdiction and not recognised in NSW laws. However, WHA listing is additional to the national parks classification and only bestowed on areas of particular environmental value. With that should come a specific and additional duty on the Commonwealth government to protect the area.

The Federal government has in the past claimed that WHAs are protected adequately by state laws and yet the state government has no obligation to use or refer to WHA status in a state prosecution. Nor has the commonwealth-state agreement been adequate to represent all of the Commonwealth’s responsibilities (in this case, implementing its international obligations as a signatory to the World Heritage Convention). This is a good example of how the *EPBC*

¹² Environment Protection Authority v Clarence Colliery Pty Ltd; Chief Executive, Office of Environment and Heritage v Clarence Colliery Pty Ltd [2017] NSWLEC 82

Act has not been effective in achieving its statutory objectives of protecting the environment and biodiversity conservation.

A solution to this inadequacy would be to add to the EPBC Act a duty to fully observe the WHA international convention. The Environmental Defenders' Office submission recommended this as a secondary object. "... to fulfil Australia's international environmental obligations and responsibilities; in particular to take all steps necessary and appropriate to achieve the purposes of the following international agreements (among others): • the World Heritage Convention;..." They also recommended that Ministers and agencies should be required to exercise their powers and functions under the *EPBC Act* to achieve the Act's objects. ¹³

The *EPBC Act* could also be amended to require the Federal Department of Environment to record on their publicly accessible register any state level prosecutions against project proponents where a world heritage area is found to have adversely impacted. This would be a type of publication order or have the same function as one and demonstrate that the commonwealth is at least aware of these occurrences.

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

This review of the Act should take account of, and be informed by, the peer reviewed work of climate scientists around the world, particularly the likely impacts of rapid climate change on the natural environment and biodiversity.

This review should also take account of the impacts of the recent 2019-2020 bushfires on the natural environment and biodiversity. An unprecedented 21% of Australia's temperate forests was impacted by fire in 2019-2020¹⁴. Within the Greater Blue Mountains World Heritage Area, an estimated 75% of the total area was impacted by the recent 2019-2020 bushfires¹⁵.

The Review needs to take account of likely trends in the national and global economies following the current coronavirus pandemic. Trends of increased economic growth, as forecast in the Panel's Discussion Paper, are now unlikely. The consequences for the environment in the face of a likely economic downturn should be considered.

The Act needs to be amended so that it can properly deal with such events which are likely to be repeated in the near future. At present it should be within the power of the Act to place moratoriums on activities such as clearing and degradation of native vegetation when required (as is the case now in Australia's temperate forests).

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

Yes. The current system only manages processes. This has not given adequate results.

¹³ EDO Discussion paper on EPBC Act Review 2020, p.7

¹⁴ Matthias M. Boer, Víctor Resco de Dios and Ross A. Bradstock, Unprecedented burn area of Australian mega forest fires, *Nature Climate Change*, 24 February, 2020.

¹⁵ Peter Smith, Impact of the 2019-20 Fires on the Greater Blue Mountains World Heritage Area: Update 7 March 2020

There is a need for this national legislation to regulate outcomes.

Specific climate change outcomes need to be achieved, viz:

- clean energy targets replacing fossil fuel
- net zero carbon emissions
- renewable energy investment

Australia is facing an unequalled ecological crisis. Australia has 1890 taxa listed as extinct or threatened with extinction under the EPBC Act. Of these, the majority (1,373) are plants, followed by birds (156), mammals (134), invertebrates (66), reptiles (63), fishes (59), and amphibians (41). Most of the Australian listed threatened species are endemic, and hence their survival is entirely dependent on the extent and success of conservation actions taken in Australia¹⁶.

This summer a million fish died in the Murray Darling Basin, and there have been repeated bleaching of the Great Barrier Reef. Here in the Blue Mountains, the impacts of rapid climate change on native plants and animals are happening now. Recent research in the Blue Mountains on the iconic Greater Glider concluded that their numbers have decreased significantly at lower elevations because of the increase in temperature that has already occurred in the area¹⁷. What has happened to the Greater Glider is also likely to be happening to other animals and plants.

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?

Yes, the Commonwealth needs to undertake a stronger role. It is imperative that the Commonwealth set stringent environmental standards. It is not acceptable if certain states choose to set and accept lower standards.

In order to know if outcomes are being achieved we need to undertake comprehensive, independent, transparent and long term monitoring of environmental values across Australia. Such monitoring needs to be devised taking account of the best scientific knowledge and should be adequately funded by the Commonwealth Government. In order to facilitate such monitoring an effort will also be needed to adequately train sufficient future scientists to undertake such monitoring and the required reporting of monitoring.

The EPBC Act should include a strict requirement for monitoring of long term impacts on the environment, mechanisms to halt or reduce developments if monitoring indicates unacceptable environmental impacts, and effective mechanisms to achieve compliance in regard to protection of the environment in the long term.

***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?***

¹⁶ Wintle, B.A. et al. 2019 Spending to save: What will it cost to halt Australia's extinction crisis? *Conservation Letters*;12:e12682

¹⁷ Smith, P.J. and J.E. Smith. 2018. Decline of the greater glider (*Petauroides volans*) in the lower Blue Mountains, New South Wales *Australian Journal of Zoology*. <https://doi.org/10.1071/ZO18021>.

- 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?**
-

Strong, consistent and clear environmental standards should be applied across Australia. The standards should be devised to restore biodiversity values as well as to achieve a “no net loss” outcome. Given the chronic lack of effective long term monitoring of biodiversity values across Australia, we do not currently have sufficient information to always determine if we are maintaining or improving biodiversity. This should not preclude implementation of standards. The lack of such long term monitoring should be rectified. In the meantime, the precautionary principle should be invoked.

The Blue Mountains Conservation Society includes the Greater Blue Mountains World Heritage Area in its particular area of interest. We have been unable to find any reliable information (the information provided in the NSW Bionet database is inaccurate) to tell us how many nationally and state listed threatened ecological communities occur within the World Heritage Area, let alone the condition and trends in the condition of such communities in the World Heritage Area. This example illustrates the extent of the lack of baseline and monitoring data.

Question 11: How can environmental protection and environmental restoration be best achieved together?

- Should the EPBC Act have a greater focus on restoration?**
- Should the Act include incentives for proactive environmental protection?**
- How will we know if we're successful?**
- How should Indigenous land management practices be incorporated?**

Question 25: How could private sector and philanthropic investment in the environment be best supported by the EPBC Act?

- Could public sector financing be used to increase these investments?**
 - What are the benefits, costs or risks with the Commonwealth developing a public investment vehicle to coordinate EPBC Act offset funds?**
-

The Act should focus on prevention of further degradation of the environment. Restoration of the environment should be only a very secondary focus.

This should not be restoration of proposed new degradation, but of landscapes degraded prior to this Act. In Australia, environmental values were certainly degraded prior to the implementation of the EPBC Act in 1999. However, since the implementation of the EPBC Act environmental degradation has continued at an alarming rate. It is not acceptable to blame past generations for the environmental mess that Australia now finds itself in.

As above, success needs to be measured through comprehensive long term monitoring of biodiversity and the environment.

While mitigating and offsetting requirements could be better directed towards areas of the most beneficial protection and restoration, it would be far better if, under the Act, developments and activities that impact negatively on the environment are **simply not allowed**. At present, the practice of offsetting impacts is leading to a marked net loss of environmental values. It should not be presumed that “offsetting” and hence offset funds are desirable. The Act should

consider that certain environmental and biodiversity values are already degraded and cannot afford to be further diminished, that is, they are clearly beyond offsetting.

Question 13: Should the EPBC Act require the use of strategic assessments to replace case-by-case assessments? Who should lead or participate in strategic assessments?

Question 16: Should the Commonwealth's regulatory role under the EPBC Act focus on habitat management at a landscape-scale rather than species-specific protections?

Strategic assessments should be required by the Act. They should complement but not replace case-by-case assessment which should also continue to be undertaken.

The Commonwealth's regulatory role should focus on habitat management at a landscape-scale and species-specific protections. It is unclear why only one approach can be employed. The Government should see proper funding of environmental and biodiversity values as a priority.

Reducing regulatory costs and complexity should not be undertaken at the expense of environmental outcomes.

The Panel's Discussion Paper (page 19) notes that "The requirement for proponents to self-assess the significance of their development against the range of matters of national environmental significance can be challenging, particularly for smaller organisations and individual land holders. This can impose unnecessary costs as it's often difficult to be certain if actions are significant early in the process, even for relatively low-risk actions that end up not requiring approval under the Act."

If this is the case, then the Federal Government should be providing increased funding and resourcing to its Environment Department so that it can provide better assistance to smaller organisations and individual land owners on this matter. If this is the case, then further guidance around referrals made under the EPBC Act should be made available. If smaller organisations and individual landholders are not able to properly complete their referral, then agency staff should be available to complete the referral on their behalf. If there is doubt as to the likely impacts of developments then there should be an expectation that the matter is automatically referred to the Commonwealth for its consideration.

Question 14: Should the matters of national significance be refined to remove duplication of responsibilities between different levels of government? Should states be delegated to deliver EPBC Act outcomes subject to national standards?

Question 17: Should the EPBC Act be amended to enable broader accreditation of state and territory, local and other processes?

No and No. Current state and territory laws do not always meet all national standards. Some impacts occur across state and territory jurisdictions. Strong national standards are required.

The Society opposes any attempt to 'increase efficiencies' by abrogating responsibilities to state governments. When state government environment laws are weak or the current state government fails to implement them, the community should be able to seek action from the Commonwealth.

In 2005, the Society attempted to take legal action under EPBC because the NSW government had no legislation that would address groundwater extraction as a likely threat for a groundwater dependant ecosystem. This was in spite of the fact that Blue Mountain swamps were listed in state legislation. As the swamps were also listed under the EPBC there is the need for a national assessment to protect a nationally recognised endangered ecological community. (ref to example under qu 2 above)

Question 15: Should low-risk projects receive automatic approval or be exempt in some way?

- **How could data help support this approach?**
 - **Should a national environmental database be developed?**
 - **Should all data from environmental impact assessments be made publically available?**
-

Low-risk projects should not receive automatic approval or be exempt in any way when there is no satisfactory definition of what is meant by “low-risk” or requirement as to who makes the assessment of “low-risk”.

We are uncertain as to what is meant by a “national environmental database”.

All data from environmental impact assessments should be made publicly available and in a timely manner. Community members should be allowed to review and provide public comments on such data. Such comments should then be required to be taken account of during the decision making process.

Question 16: Should the Commonwealth’s regulatory role under the EPBC Act focus on habitat management at a landscape-scale rather than species-specific protections?

The EPBC Act is best known for project assessments, decisions and site-based conditions of approval. Operating at this level remains important to address local impacts on important national environmental features and attributes. Biodiversity laws also need to expand beyond individual projects to a landscape-scale approach. Biodiversity laws need to be able to effectively take account of the cumulative impacts of existing and new developments on the environment.

Landscape-scale approaches allow for holistic planning for ecosystem health, connectivity and climate change readiness. This approach includes identifying and protecting **Ecosystems of National Importance** (whether or not they are threatened), such as climate refugia, Key Biodiversity Areas and High Conservation Value Vegetation.

It should be possible for the Commonwealth’s regulatory role under the EPBC Act to consider both habitat management at a landscape scale and species –specific protection as appropriate to each situation requiring regulation.

Question 18: Are there adequate incentives to give the community confidence in self-regulation?

No.

There is no evidence that self-regulation ensures compliance or addresses cumulative impacts.

QUESTION 20: How should community involvement in decision making under the EPBC Act be improved? For example, should community representation in environmental advisory and decision-making bodies be increased?

The Act should ensure public participation, transparency, accountability and access to justice. In particular:

- community referrals for assessment of projects
- strong public participation provisions;
- merit review for key decisions;
- easily accessible, timely public information on actions and decisions;
- open standing to review legal errors and prosecute breaches; and
- protective costs orders.

Merit review for key decisions

The Act must provide standing for interested parties to seek merits review of key decisions that impact biodiversity in an arms-length court or tribunal. The Society questions the reasoning as to why this should be limited only to some key decisions. This anti-corruption and accountability measure is in keeping with various expert reviews and recommendations.

In particular, merit review of decisions should be available on the following matters

- whether a proposed activity or development is a 'controlled action', and if so, the assessment method required.
- the adequacy of a recovery plan made for a species or ecological community;
- advice about whether an action would breach a conservation order.
- decision whether or not to list (or uplist) a nominated species, ecological community, national heritage area, critical habitat, or protected area.

Community representation in environmental advisory and decision-making bodies should be increased provided that the appointment of such community representatives is done in a transparent manner and that selected community representatives have appropriate expertise in relation to their role. It is imperative that all people, including government employees, be allowed to speak freely in regard to their assessment of the likely short and long term impacts on the environment of proposed developments and activities.

We agree with the Panel's Discussion paper (page 23):

"Greater transparency of decision making could be achieved by requiring automatic publication of greater information about decisions including for example, decision-making materials, external advice and offset agreements. This would also reduce the risk of administrative delays arising from the diversion of resources to respond to individual requests for information".

The Referral Process

During the Society's has attempts to use this process to prevent environmental harm to a listed EEC, we found the following problems with the process:

- reliance on the proponent of the action to refer details of the proposal to the Minister.... This is akin to self-regulation. There is no clear pathway for community groups or members to seek the assessment / intervention by the Minister. It is very convoluted, and requires monitoring websites whilst waiting on the proponents 'referral'.

- Lack of transparency in the decision by the Department to not pursue the assessment. Whilst this particular case occurred some years ago in 2005/6, we understand the process hasn't changed.

Application of the Act needs to be more rigorous, transparent and reflective of the current state of Australia's ecosystems and flora/fauna. To achieve this, **decisions under the Act should provide better rights of appeal, and decisions made by Government in relation to the Act and its functions should be transparently audited and reported upon.**

The current generous discretionary powers granted under the Act should be reviewed.

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?

The review should consider how assessment of impacts of developments and activities can be made more transparent. The Act could allow for the appointment of an independent, government funded body to undertake such impact assessments.

Question 23: Should the Commonwealth establish new environmental markets? Should the Commonwealth implement a trust fund for environmental outcomes?

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

We can find **no evidence** to indicate that the Department of the Environment and Energy's adoption in 2012 of a formal offsets policy in environmental impact assessment decisions has resulted in the maintenance or improvement of environmental values.

Under the present system of offsetting, a net loss of environmental assets and values has been allowed and promoted. It should be within the power of the EPBC Act to impose a moratorium on offsetting. Before any further offsetting is allowed, it must be clearly documented and proven how past offsetting has "maintained or improved" existing environmental values.

The National Offsets Policy and standards must:

- be based on the knowledge that not all impacts can be offset ie the development or activity must be refused on the basis of likely environmental impact
- not permit monetary contributions in lieu of real "on the ground" offsets
- require that offsets are a last resort, after all efforts are made to avoid and minimise impacts;
- meet strict scientific like-for-like biodiversity principles and adopt a 'maintain or improve' standard to measure outcomes;
- ensure offsets are protected in perpetuity (offsets cannot be offset as is currently permitted);
- ensure that a funding mechanism exists in order to maintain biodiversity offsets in perpetuity
- be consistent with a precautionary approach;

- make clear that no offsets should be available for future mine remediation due to lack of evidence of success; and
- ensure that offsetting is consistent with recovery goals in recovery plans.

It is likely that such standards will be very difficult to comply with. Here in the Blue Mountains, given the recent prolonged drought and extraordinarily high temperatures, and then the unprecedented scale and intensity of the 2019-20 wildfires, it should be blatantly clear that our local environmental values are now at a stage well beyond “offsetting”.

Business outcomes should not take precedence over environmental outcomes.

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

Future reform should be guided by a chief principle, viz.:

Protecting Australia’s unique environment and heritage through effective, clear and focussed protections for the benefit of current and future generations.

All other secondary principles should be focussed on the restoration, protection and conservation of the environment, including biodiversity. “Supporting investment”, “creating new jobs”, “achieving efficiency” etc are laudable outcomes but should not be allowed to take precedence over the “restoration, protection and conservation of the environment”.

If you have queries in regard to the issue raised in this letter please contact me mobile 0419 824 974 or email taracameron4@gmail.com

Yours sincerely



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