



## **Submission for the Independent Review of the *Environmental Protection and Biodiversity Conservation Act (1999)***

TO: **EPBC Act Review Secretariat**  
Department of Environment & Energy  
GPO BOX 787  
CANBERRA ACT 2601

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The **Conservation Council ACT Region** is the peak non-government environment organisation for the Canberra region. We have been the community's voice for the environment in the Canberra region since 1981. Our mission is to achieve the highest quality environment for Canberra and its region, and an ecologically sustainable and zero net carbon society.

We represent more than 45 member groups who in turn represent over 20,000 supporters. We harness the collective expertise and experience of our member groups and networks. We work through advocacy, education, research, and engagement with the community, business and governments.

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## Introduction

The Conservation Council ACT Region welcomes the opportunity to comment on Australia's primary national environmental law and contribute to the *Independent Review of the Environmental Protection and Biodiversity Conservation (EPBC) Act 1999*. As the peak environment body in the ACT, our focus is on environment issues within the ACT and surrounding region. We are a member of the Places You Love (PYL) Alliance and support the call for a new generation of environmental laws to protect Australia's nature.

We share the widespread concern that the current EPBC Act is complex, and at its heart is failing to protect Australia's natural environment. In addition, we are concerned that it fails to respond to the significant environmental challenge of climate change, with regard to both curbing Australia greenhouse emissions and protecting our nature from the impacts of climate change, nor manage the cumulative impacts of land-clearing and urbanisation on environmental values.

Globally we are facing a biodiversity crisis, and Australia is not immune.<sup>1</sup> With one of the worst extinction rates in the world, Australia is experiencing an ongoing decline in species and habitats that is not expected to slow in the foreseeable future.<sup>2</sup> Population growth, urban sprawl and unsustainable production and consumption practices underpin the environmental challenges of climate change, land clearing, habitat fragmentation and invasive species. The 2019 ACT State of Environment (SOE) Report<sup>3</sup> found that climate change is already impacting the ACT with reduced inflows to water storages, drought, increased tree mortality, greater fire danger (with two significant fire events in less than a 20 year period), and more algae blooms in Canberra's lakes. Since 2013, every year has been among the eleven warmest years on record for daytime temperatures in the ACT (p.104). Recent climate-fuelled events have further exacerbated biodiversity and habitat loss, including the 2019/20 bushfires in which it was estimated that nationally up to one billion animals were killed. In March, the NSW Rural Fire Service reported that these bushfire events had burnt more than 5.5 million hectares of land across NSW<sup>4</sup>, whilst 78% of the ACT's Namadgi National Park and 22% Tidbinbilla Nature Reserve were also burnt.<sup>5</sup> The SE region of NSW was affected significantly, with the far south coast estimated to have lost approximately two-thirds of its total land mass.<sup>6</sup>

The 2016 Australian State of the Environment Report clearly emphasised that all key environmental indicators have continued to decline since the commencement of the EPBC

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<sup>1</sup> John C. Z. Woinarski, Andrew A. Burbidge, and Peter L. Harrison (2015) Ongoing unraveling of a continental fauna: Decline and extinction of Australian mammals since European settlement, <https://www.pnas.org/content/112/15/4531>

<sup>2</sup> Australian State of Environment Report, 2016,p.17, <https://soe.environment.gov.au/download>

<sup>3</sup>ACT State of the Environment Report 2019, Commissioner for Sustainability and the Environment, [ACT State of the Environment - 2019 Report](#)

<sup>4</sup> <https://www.rfs.nsw.gov.au/news-and-media/media-releases/fire-season-comes-to-a-close-in-nsw>

<sup>5</sup>Orroral Valley Fire Rapid Risk Assessment Namadgi National Park, ACT Government, 2020, [Orroral Valley Rapid Risk Assessment](#)

<sup>6</sup> [Bushfire damage count: two-thirds of Far South Coast burnt, eight lives lost](#), Albert McKnight, Illawarra Mercury, 29 February 2020

Act in 1999, indicating a repeated failure of national environmental legislation to account for and effectively respond to these challenges. If environmental resources and natural ecosystems are not protected, conserved and managed effectively by national legislation, there is a risk that many more of Australia's iconic landscapes and unique species and habitats will be lost.

**The Conservation Council supports the need for strong national environmental laws that deliver on environmental outcomes, and have the trust of the community through independent decision-making that includes a meaningful role for communities.**

### Increasing Indigenous involvement, knowledge and rights

The Conservation Council ACT Region supports calls for stronger engagement about Australia's environment laws with First Nations people. The current EPBC Act fails to recognise Indigenous knowledge, and does not enshrine free, prior and informed consent of First Nations people. In addition, First Nations people have much to offer with regard to the management of our natural places, and should be specifically consulted about the outcomes that they wish to see from national environment laws, and about what their ongoing participation, rights and roles in environmental regulation will be going forward.

### Effectiveness of the EPBC Act in protecting the ACT's environment

Biodiversity decline has been evident in the ACT over the past twenty years, despite the expansion of the ACT reserve system. The ongoing threats of invasive pest animals and plants, the impact of urban development on natural grasslands and woodlands, and the loss of connected habitats as a result of urbanisation have led to a steady decline in biodiversity indicators. The EPBC Act list, published by the Australian Government demonstrates that there have been 639 threatened species and 69 threatened communities listings added to the EPBC since the commencement of the EPBC Act<sup>7</sup>. Within the ACT, there are 52 threatened species and three ecological communities that are protected by the EPBC Act.<sup>8</sup> Between 2015 and 2019, the ACT added 17 additional species to their threatened list, as well as transferring 7 species to critically endangered to align with their Commonwealth status (ACT 2019 SOE Report, pg. 208). Three ecological communities are listed as endangered within the ACT, with High Country Bogs and Associated Fens added to the endangered category in 2019. In addition, threatened ecosystems such as Natural Temperate Grasslands (NTG) have diminished across the Territory over the past 20 years, despite being identified as nationally significant (and less than 10% of the grasslands in SE Australia in good condition). The national listing for the NTG of the South East Highlands was updated to critically endangered in 2016, consistent with the Threatened Species Scientific Committee findings that demonstrated the geographic distribution of NTG had reduced by at least 90%.<sup>9</sup>

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<sup>7</sup> Australian State of Environment Report, 2016,p.17, <https://soe.environment.gov.au/download>

<sup>8</sup> Connors, B, (2019) A review of biodiversity offsets implemented in the Australian Capital Territory under the *Environment Protection and Biodiversity Conservation Act 1999*, Honours Thesis, [A review of biodiversity offsets implemented in the Australian Capital Territory under the Environment Protection and Biodiversity Conservation Act 1999](#), page 16

<sup>9</sup> Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) (s266B) Approved Conservation Advice (including listing advice) for the Natural Temperate Grassland of the South Eastern Highlands (EC 152), <http://www.environment.gov.au/biodiversity/threatened/communities/pubs/152-conservation-advice.pdf> at page 18

Where Strategic Environmental Assessment (SEA) processes have been used, the outcomes have been better than perhaps they would have been without them. In the Molonglo Valley development (2008) and new urban areas of Gungahlin (2012) the SEA process was utilised by the ACT Government to undertake long-term planning for substantial new urban areas. The long-term planning undertaken clearly delivered benefits of habitat protection and the identification of areas that could be put aside for protection under offset schemes, such as at Gorooyaroo, Mulligan's Flat and Kinleyside. While the SEA process was a clear improvement on the piecemeal approach of the earlier development in Gungahlin, there were some concerns raised with the time taken to complete Environmental Impact Assessment, and the duration for which EIS and other environmental data remained relevant.

### **Role for the Commonwealth**

The Conservation Council ACT Region supports a strong role for the Commonwealth government in environmental regulation, monitoring and reporting. The Commonwealth has the role of ensuring that Australia meets its international obligations under environmental treaties across biodiversity, marine, climate and wetlands, amongst others, and is well-placed to set consistent national standards.

The ongoing degradation of our environment is underpinned by state and territory governments facilitating and supporting projects that deliver on economic objectives above environmental objectives. This tension has existed for many decades in Australia where state / territory governments are either driving forward projects or are the proponent of projects, and are therefore not in a good position to also be the regulatory body that oversee environmental legislative requirements. This is the case in the ACT, where the Territory Government is a primary land developer via Suburban Land Agency (SLA). There is an obvious tension between the objectives of planning and land development arms of government, and biodiversity arms of government. In making referrals to the EPBC Act to utilise an SEA for urban developments at Gungahlin and Molonglo Valley, the ACT Government as the proponent was not additionally filling the role of environmental regulator. This improved aspects of both developments and delivered positive environmental outcomes as Commonwealth listed species and habitats were protected in advance.

### **What should national environment laws achieve?**

The Conservation Council ACT Region supports calls for national environmental laws to set binding national standards and objectives to ensure a consistent level of environmental protection and outcomes across all states and territories.

Given the role of states and territories as proponents, and that they often have conflicting interests when it comes to environmental regulation, approval powers should not be delegated to states and territories, other than for assessments of environmental impacts. In the ACT, where the Territory Government is a frequent proponent of significant development proposals, it would be untenable for approvals for MNES to be delegated to a Territory

Authority, particularly considering the small size of the administration, and that significant overlaps exist in people's roles and activities.

The Commonwealth should retain the powers and assume responsibility for reversing the decline in Australia's environment, and we endorse the list of environmental objectives outlined by the *Place You Love Alliance* that national environmental laws should:

- End destruction of primary, remnant, old-growth or high-conservation value forests and bushland;
- Prevent the extinction of native fauna and flora;
- Protect and recover key biodiversity areas, threatened ecological communities and threatened species including strict protection for their critical habitats;
- Substantially reduce Australia's greenhouse gas pollution and increase carbon sequestration in biodiverse landscapes;
- Safeguard freshwater ecosystems, including from extractive and industrial processes;
- Reduce, to as close to zero as possible, air pollution, plastic pollution and chemical pollution across Australia;
- Maintain and strengthen the prohibition on domestic nuclear power, enrichment and reprocessing whilst advancing responsible domestic radioactive waste management.
- Safeguard the natural and Indigenous cultural values of Australia's protected areas, heritage places, and other conservation tenures;
- Prevent the introduction of, and reduce the current extent, spread and population size of invasive species that are threatening biodiversity;
- Effectively protect Australia's wildlife from commercial exploitation including illegal wildlife trade and unsustainable fishing.

### Matters of national environmental significance

The Conservation Council ACT Region supports retaining the existing Matters of National Environmental Significance (MNES) and recommends that consideration should also be given to:

- Including projects that create significant **greenhouse gas emissions** - climate change is the single most significant environmental challenge facing our global environment, and yet Australia continues to facilitate and support the development of coal and gas extraction projects without triggering national environmental legislation through an assessment of the contribution emissions would make to the global climate.
- **Widening the scope of protected ecosystems and ecological communities** - currently only threatened ecological communities (those at risk in the next 10 or 20 years) trigger the Act whereas vulnerable ecological communities are not (those that might be at risk in 50 years). In addition the species listing approach ignores the landscape approach that could protect entire ecosystems, which would, for example, do more to build resilience in the face of climate impacts, through improved

connectivity and representation of habitats. Wildlife corridors and buffers around identified areas of significance have an important role to play in supporting biodiversity resilience.

- **Preventing land-clearing** across Australia due to impacts on biodiversity (via habitat destruction), the health of our waterways, and Australia's climate objectives.
- Protecting against **invasive pest animals and plant species** - invasive species have contributed to species decline and habitat destruction in Australia, and with the impacts of climate change and increased bushfires, invasive species have even better opportunities to become established. Invasive species do not respect jurisdictional boundaries, and as a small island of land within NSW, the ACT is especially vulnerable to the impacts of poor management that might occur in other jurisdictions. A national, or even bioregional response, to invasive species would strengthen environmental outcomes.
- **National reserve system** - Australia's parks and reserves are intended to be where best practice environmental management is occurring, and protection levels are the highest. Yet state governments are not necessarily ensuring this protection is maintained, for example through inappropriate development proposals, or management decisions such as allowing feral species to roam unchecked. Our national reserve system is for the benefit of all Australians, and deserves national protection.
- **Water resources** - As a "river city" that sits on the Murray-Darling system, Canberrans are highly attuned to the importance of strong national protection of our water resources. Water is integral to our quality of life, but must also support environmental outcomes. Large projects in other jurisdictions can have powerful impacts downstream for environments and the communities that rely on those environments.

### Use of Strategic Environmental Assessment processes

Better environmental outcomes have been achieved in the ACT where the Strategic Environmental Assessment (SEA) process has been used. In the Molonglo Valley development (2008) and new urban areas of Gungahlin (2012) the SEA process was utilised by the ACT Government to undertake long-term planning for substantial new urban areas. The long-term planning undertaken clearly delivered benefits of habitat protection and the identification of areas that could be put aside for protection under offset schemes. While the SEA process was a clear improvement on the piecemeal approach of the earlier development in Gungahlin, there have been concerns with the time taken to complete Environmental Impact Assessment, and the duration for which EIS and other environmental data remained relevant. For example, EIS exemptions have been sought and granted, and then development has proceeded years (or a decade) later on the basis of data that has either been inadequate or out of date. We agree that the SEA process can mean that individual projects that meet the conditions of the strategic assessment do not have to be individually assessed and approved, even if they occur many years later and environmental conditions have changed significantly.

The Conservation Councils also supports use of Conservation agreements or covenants that have a binding effect into perpetuity. These could be utilised in the ACT to enable protection of rural leasehold lands that have threatened species and endangered communities, as well as vulnerable ecological communities to ensure protection into the future.

### Data and reporting

The 2019 ACT State of the Environment Report states that there is also a lack of general knowledge about land health within and beyond the ACT including data on long-term landscape changes and its overall current condition. This lack of information does not enable sufficient assessments of land or soil health, creating gaps in our understanding of the environment's condition.<sup>10</sup> This lack of data, and consistency in data across jurisdictions, makes planning and decision-making under the EPBC Act more difficult.

The Conservation Council supports a system of National Environment Accounts administered by the National Environment Commission, which would track key environmental indicators over time, and provide clearer accountability about Australia's environment outcomes that could be reported on annually.

### Independent decision-making and resourced regulatory authorities

There is a lack of public trust in the decision-making processes of the Commonwealth, and concern that there is a lack of resourcing for national regulatory authorities to fully undertake approvals, compliance and monitoring of environmental protection standards. The Hawke review of the EPBC Act Review recommended the establishment of an Independent National Environmental Commission "to improve transparency in administration of the Act and the quality of the decision-making under the Act."<sup>11</sup>

The Conservation Council supports the establishment of a **National Environment Commission** independent of departmental or ministerial direction, to develop and oversee national environmental goals, strategies and plans.

In addition, a **National Environment Protection Authority** that operates at arm's length from the Government should be established to undertake Commonwealth assessment, approval and enforcement. An adequately resourced independent national environment protection authority is crucial to restore confidence in the decision-making processes, and to ensure ongoing compliance and enforcement is undertaken.

### Biodiversity Offsets

The 2019 ACT State of Environment Report states that environmental offsets contribute to around 16% of the urban reserve areas within the ACT.<sup>12</sup> A recent review of the

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<sup>10</sup> ACT State of the Environment Report 2019, Commissioner for Sustainability and the Environment, [ACT State of the Environment - 2019 Report](#), page 203

<sup>11</sup> The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999, Final report Department of the Environment, Water, Heritage and the Arts, October 2009, page 329

<sup>12</sup> ACT State of the Environment Report 2019, Commissioner for Sustainability and the Environment, page 225. [https://www.envcomm.act.gov.au/\\_data/assets/pdf\\_file/0009/1483569/SQEFfull.pdf](https://www.envcomm.act.gov.au/_data/assets/pdf_file/0009/1483569/SQEFfull.pdf)

implementation of offsets approved in the ACT between 2010 and 2014, illustrated that offsets are unlikely to achieve no net loss of biodiversity, and strong, long-term evidence-based assessments of offsets will take many years before their true impacts are understood.<sup>13</sup> While there have been some benefits in terms of the quantity of land and intactness of offset areas as compared to development areas in the ACT, it was hard to establish that 'like-for-like' offsetting and 'additionality' was achieved.

Until there is better understanding about the long term benefits of offsets and assurances that they will produce outcomes consistent with their purpose, relying on their use risks facilitating biodiversity losses. The Conservation Council does not support the use of offsets except as a last resort, after all efforts are taken to avoid impacts, and that they shouldn't be used to offset impacts on critical habitat, endangered or critically endangered species and ecological communities. Any use of offsets must be consistent with a precautionary approach and achieve an outcome of 'no net loss and preferably net gain', and be protected in perpetuity.

### Community participation in decision-making

It is vital that the community have confidence in decision-making processes under national environmental law, and this can be supported by establishing processes and mechanisms that the public can easily engage in, as well as ensuring legal frameworks that support meaningful engagement and access to justice. While arguments against standing have often been made by proponents indicating that there will be a rush on legal action taken by the community, this has in fact been shown to not be true.

The Conservation Council supports:

- Open standing for any person to seek review of government decisions or to enforce a breach or anticipated breach through third party enforcement.
- Extending legal standing to merits review of approval and permitting decisions.
- A statutory right for citizens to ask the court to require performance of mandatory duties by the Minister or other decision-makers under the Act.
- Protection for costs for public interest legal proceedings, for example limiting upfront cost orders that deter the community from exercising legal rights.

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<sup>13</sup> Connors, B, (2019) A review of biodiversity offsets implemented in the Australian Capital Territory under the *Environment Protection and Biodiversity Conservation Act 1999*, Honours Thesis. <https://openresearch-repository.anu.edu.au/handle/1885/201706>