



17 April 2020

EPBC Act Review Secretariat
Department of the Environment and Energy
GPO Box 787
CANBERRA ACT 2601

Mode of delivery

Email to: epbcreview@environment.gov.au

To Whom it May Concern,

Submission to the 10 year review of the *Environment Protection and Biodiversity Conservation Act 1998 (Cth)*

Thank you for the opportunity to provide a submission to the 10 year review of the *Environment Protection and Biodiversity Conservation Act 1998 (Cth)* (EPBC Act Review). The Environment Centre NT (ECNT) is the peak community sector environment organisation in the Northern Territory of Australia, raising awareness amongst community, government, business and industry about environmental issues and assisting people to reduce their environmental impact and supporting community members to participate in decision-making processes and action. Its work has involved the detailed consideration of the EPBC Act in multiple Northern Territory contexts since its enactment over 20 years ago, usually in response to development proposals which have impacted matters of national environmental significance listed under the legislation, and thus invoked the legislation's jurisdiction.

1. Introduction and Northern Territory context

The Northern Territory has some of the most biodiverse and unique landscapes in Australia. These include the savanna grasslands and woodlands of the wet/dry tropics, the vast wetlands and escarpment of Kakadu National Park, the magnificent gorges of Nitmiluk National Park, and the rock faces, mulga woodlands and sandhills of the Great Sandy Desert bioregion within which Uluru-Kata Tjuta National Park is located. Its marine environments are celebrated as the most pristine in Australia. Most land in the Northern Territory is owned and governed by traditional owners, with over 50% of its landmass owned under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, and much of the remainder subject to native title rights and interests under the *Native Title Act 1993 (Cth)*. This Indigenous stewardship is enhanced by a network of Indigenous Protected Areas, jointly-managed parks and reserves, and emerging self-determined governance regimes such as those developed by the Indigenous carbon farming industry. The rich biodiversity of the Northern Territory sustains human and all other life, with our food and water all dependent on healthy, functioning, and resilient ecosystems. It also underpins its economy and social and cultural life through the creation of jobs and sustenance of livelihoods via nature-based tourism and land management, and providing opportunities for camping, bushwalking, cruises, tours, and engagement with Indigenous culture.

Yet protection of the unique environment and biodiversity of the Northern Territory is under threat on multiple fronts. Mammal populations in the Northern Territory are in sharp decline, with many at risk of extinction despite the Northern Territory's large landmass and sparse population (Fitzsimons, Legge, Trill, & Woinarski, 2010; Woinarski, Burbidge, & Harrison, 2015). Land clearing is on the rise, fragmenting and destroying critical habitat and accelerating species decline (Ward et al., 2019). The Northern Territory has just suffered through two very dry years, with aquifers under increasing pressure from extraction (Nikolakis, Nygaard, & Grafton, 2011), some even close to running dry during the 2019 dry season and raising questions about the habitability of parts of the Northern Territory (Allam). Climate change is projected to have significant impacts on the biodiversity of the Northern Territory by as early as 2030, and extreme impacts by 2070, including increased droughts, changes fire regimes, erratic rainfall and extreme temperatures (Webb & Hennessey, 2015).

Yet, the pressure to "develop the north" continues unabated, despite its myriad historic failures (Head, 1999; Howey, 2017). This desire has been most recently articulated in the Commonwealth Government's "White Paper" on developing northern Australia, which conceives of environmental regulation as a barrier to achieving this uncritically accepted and narrowly-conceived goal (Australian Government, 2015). Further, lax regulatory regimes and their poor implementation mean that proponents frequently control the terms upon which development proceeds in the Northern Territory, with significant adverse environmental impacts (Carson, Schmallegger, & Harwood, 2010; Neale & Macdonald, 2019). Many environmentally harmful projects have been approved in the Northern Territory as a consequence, including multiple expansions of McArthur River Mine, the Mount Peake mine in Central Australia, and the Inpex gas development in Darwin Harbour. Groundwater that supplies human and environmental water needs has been contaminated with per- and polyfluoroalkyl substances (PFAS) in Katherine, seeping from Commonwealth land directly under EPBC Act jurisdiction. More recently, the Northern Territory Government has lifted the moratorium on onshore hydraulic fracturing ("fracking"), which will significantly impact the availability of the Northern Territory's scant groundwater resources, raise the risk of contamination of those resources, and increase Australia's greenhouse gas emissions by approximately 5% (*Scientific Inquiry into Hydraulic Fracturing in the Northern Territory: Final Report*, 2018).

The EPBC Act has done little to modify or prevent these impacts. The legislation has failed to slow the decline of critical habitats for threatened species in the Northern Territory and across Australia, which are the primary focus of its jurisdiction. It has facilitated environmentally destructive projects in the Northern Territory such as those listed above, often with little or no meaningful oversight. Indeed, via its bilateral agreement with the Northern Territory Government entered into under the EPBC Act, the Commonwealth accredited one of the weakest environmental assessment regimes in the country which has left numerous legacy mines and other environmental issues in its wake (Howey, 2017).¹

The EPBC Act is currently best characterised as legislation to facilitate development. It is an approval scheme for certain (limited) actions, which are likely to have a significant impacted on a list of prescribed nationally significant matters. Many actions which should fall within its narrow ambit have not been referred at all, particularly in relation to land clearing (Ward et al., 2019). To the extent that its jurisdiction is invoked, the legislation has been reduced to a box ticking exercise, making it exceedingly unlikely that any individual approval will contravene the Act. It is failing as a measure to protect biodiversity or the environment in the Northern Territory, and Australia more broadly. While it is important that duplication of state/territory and Commonwealth processes is avoided, and the constitutional distribution of heads of

¹ The Northern Territory Government recently passed new environmental assessment legislation, which will replace the *Environmental Assessment Act 1982 (NT)*. The date of commencement of this legislation has not yet been confirmed.

legislative power are respected, the EPBC Act could and should be doing far more, particularly in the context of the current ecological crisis.

Of note, the United Nations *Convention on Biological Diversity*, that to a large extent underpins the EPBC Act under the external affairs power of the Australian Constitution, includes a far wider definition of biodiversity than the listed matters of national environmental significance that are within the current jurisdictional remit of the EPBC Act. In particular, biological diversity is defined as:

The variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems (Article 2).

Instead of this holistic ecosystem or landscape approach to biodiversity, the EPBC Act focuses attention on particular points in time and space (when and where projects are proposed), and limits its consideration to the impacts of these projects on individually listed species and ecological communities.² This fragmented binarised approach can skew development and conservation outcomes. For example, it can lead to illogical outcomes that development with small ecosystem or landscape impacts might be curtailed by a listed species, but developments with significant biodiversity impacts broadly-construed can proceed with no mitigation measures (Possingham et al., 2002). There is evidence that the listing of vulnerable species may actually increase the destruction of habitat critical for those species (O'Malley, 2020). Further, this approach ignores the cumulative manner in which biodiversity degradation and destruction actually takes place across Australia. As environmental law academic Rebecca Nelson has pointed out “many of the most important environmental problems in Australia are brought about by the aggregate effect of interacting activities, many of them relatively small, and some unregulated” (Nelson, 2019, p. 1185).

ECNT’s recommendations aimed at shifting the focus of the EPBC Act from a reactive piece of legislation focused on facilitating or assessing individual “significant” projects by reference to lists of species, to legislation that takes a holistic approach to conserving biodiversity and protecting the environment, that recognises that cumulative effects are at the “centre of the current generation of ecological problems” (Nelson, 2019).

ECNT’s recommendations are bolded in the body of this submission, with Northern Territory case studies provided by way of illustration of the point where possible. This submission is drawn from ECNT’s expertise over many decades, and is also informed by the submission of the Environmental Defenders Office of Australia (EDO) to this review, and the Australian Panel of Experts on Environmental Law’s “Blueprint for the Next Generation of Australian Environmental Law”.

2. Objects of the EPBC Act

The EPBC Act’s objects should be redrafted to better reflect its primary purpose of conserving biodiversity and ecological integrity.

Recommendation 1: ECNT endorses EDOA’s proposed reformulation of the primary object of the EPBC Act’s as follows:

² While a number of matters of national environmental significance are “landscape-based” (namely, the Commonwealth marine environment, World Heritage Properties, National Heritage Places, Nuclear actions, the Great Barrier Reef Marine Park, and water resources in the context of coal seam gas and large coal mining development), empirical data shows the vast majority of referrals under the EPBC Act are triggered by impacts on listed threatened species and ecological communities, and migratory species.

The primary object of this Act is to 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.

Recommendation 2: ECNT endorses EDOA's proposed formulation of the secondary objects of the EPBC Act as follows:

- (a) to provide national leadership and partnership on the environment and sustainability, and to achieve ecologically sustainable development;*
- (b) to recover and prevent the extinction or further endangerment of Australian plants, animals and their habitats, and to increase the resilience of native species and ecosystems to key threatening processes;*
- (c) to ensure fair and efficient decision-making; government accountability; early and ongoing community participation in decisions that affect the environment and future generations; and improved public transparency, understanding and oversight of such decisions and their outcomes;*
- (d) to recognise Aboriginal and Torres Strait Islander peoples' knowledge of Country, and stewardship of its landscapes, ecosystems, plants and animals; to foster the involvement of these First Australians in land management; and expand the ongoing and consensual use of traditional ecological knowledge across Australia's landscapes;*
- (e) 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;*
 - the Convention on Biological Diversity;*
 - the Ramsar Convention on Wetlands of International Importance;*
 - the Bonn Convention on the Conservation of Migratory Species of Wild Animals*
 - the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);*
 - the United Nations Declaration on the Rights of Indigenous Peoples;*
 - the United Nations Framework Convention on Climate Change (as applicable to emissions reduction and carbon management under the Act); and*
 - special bilateral or multilateral conservation agreements (including agreements with Japan, China and the Republic of Korea to protect migratory birds in danger of extinction).*
- (f) to recognise and promote the intrinsic importance of the environment and the value of ecosystem services to human society, individual health and wellbeing.*

3. Expansion of matters of national environmental significance

(a) Shale gas water trigger/water resources trigger

The development of an onshore unconventional shale gas industry utilising hydraulic fracturing techniques ("fracking") is the most polarising environmental issue in the Northern Territory today. The Scientific Inquiry into Hydraulic Fracturing in the Northern Territory chaired by Justice Rachel Pepper (Pepper Inquiry) investigated the risks posed by the proposed onshore fracking industry in the Northern Territory, and recommended a number of measures to mitigate these risks to an acceptable level. The moratorium imposed by the Northern Territory Government when it came to power in 2016 was lifted in April 2018, on the basis that all 135 recommendations of the Pepper Inquiry would be implemented.

Water-related risks were the central concern raised by the community and in submissions to the Pepper Inquiry (p 102). Groundwater in particular is critically important to the Northern Territory, with 90% of water for human purposes (including drinking water) drawn from aquifers, a much higher proportion than any other Australian jurisdiction. Any impact on potable water, whether in terms of quality (via contamination) or quantity (via extraction and drawdown) was, during the Inquiry, universally seen as unacceptable. If anything, these concerns have been amplified since the Pepper Inquiry. The Northern Territory has just suffered through two of its hottest and driest wet seasons on record, with aquifers running close to dry in some areas. A number of remote Indigenous communities have experienced water contamination, or water supply, problems with increasing frequency in recent years. These impacts are likely to be exacerbated as temperatures rise and rainfall patterns become more erratic. The Pepper Inquiry noted, in this context, that evapotranspiration (water use by vegetation) will increase by 2050 as a consequence of climate change, although the magnitude of the change is unclear. It also noted that “the implications of climate change for groundwater processes and recharge rates are ... unclear at this stage” (p 103). Onshore gas exploration and production involves the extraction of large quantities of groundwater from already stressed, interconnected, systems, which are likely to come under more pressure with the impacts of climate change.

In 2013, a limited “water trigger” was added to the EPBC Act. Water resources are a matter of national environmental significance where a large coal mining or coal seam gas project would have a significant impact on a water resource. A core recommendation of the Pepper Inquiry to mitigate against the risk to water resources posed by fracking was to expand this water trigger to include shale gas (recommendation 7.3). The Pepper Inquiry noted that there is no rationale to apply the water trigger to CSG and large coal mines but not to shale gas. ECNT notes that the recommendations in the Pepper Inquiry cannot be fully implemented, and risks posed by fracking acceptably mitigated, unless this amendment is made. Yet it remains unimplemented.

ECNT suggest that the water trigger be expanded further, to apply to all mining activities that may have a significant impact on water resources. This would ensure appropriate assessment of cumulative impacts and restore confidence in how water resources are managed in Australia.

Recommendation 3: The water trigger should be urgently expanded to include shale gas, consistent with the recommendations of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory.

Recommendation 4: The water trigger should be expanded to apply to all mining activities that have a significant impact on water resources.

(b) Climate change

As discussed in the introduction, climate change poses perhaps the greatest threat to the biodiversity of the Northern Territory, and Australia. It is critical that Australia urgently mitigate its carbon emissions to avoid the projected extreme impacts in the Northern Territory highlighted above, including possible ecological collapse. While the Northern Territory’s current emissions are small, the Pepper Inquiry found that life cycle greenhouse gas emissions from any new onshore gas field in the Northern Territory across a range of production scenarios would contribute between 4.5% and 6.6% of Australia’s annual emissions. If the industry proceeds, the possibility of Australia meeting its targets under the Paris Agreement will be

seriously compromised, and perhaps scuppered altogether. Australia must rapidly increase its efforts to meet the Paris Agreement with an economy wide legal framework and carbon budget consistent with limiting warming to 1.5 degrees.

While ECNT supports the need for stand-alone national climate legislation in Australia, the EPBC Act must urgently address this issue by assessing and regulating risks to biodiversity caused by climate change. A national trigger to ensure greenhouse gas emitting projects are appropriately assessed, regulated and monitored should be implemented as a matter of urgency. Northern Territory laws do not currently impose conditions to minimize climate impacts, plan for adaptation or set cumulative carbon budgets. An effective climate change response needs national leadership.

Recommendation 5: “Significant greenhouse gas emissions” should be a matter of national environmental significance. Further:

- any greenhouse gas emission trigger should recognise any development that produced over 100,000 tonnes of CO₂ equivalent per year (including downstream emissions) as a matter of national environmental significance;
- high emission projects should be prohibited where they are in exceedance of Australia’s carbon budget;
- scope 3 emissions should be a mandatory consideration in any environmental impact assessment.

(c) Ecosystems of National Importance

In recognition of the need to shift the balance of the EPBC Act towards preventative ecosystem, or landscape, based protection, ECNT supports EDOA’s recommendation that “ecosystems of national importance” should be included as a matter of national environmental significance. These ecosystems need not be under threat – the aim would be to prevent them from becoming so.

Recommendation 6: “Ecosystems of National Importance” should be a matter of national environmental significance, including the following examples taken from EDOA’s submission:

- Areas with high concentrations of biodiversity;
- High conservation-value vegetation;
- Nationally important wetlands;
- Travelling stock routes;
- Significant wildlife corridors;
- Wild rivers;
- Outstanding representations of particular Australian landscapes or seascapes;
- Climate refugia.

(d) National reserve system

As indicated in the introduction, the Northern Territory has a number of areas of land within the national reserve system, which are a safety net against our biggest environmental challenges and a key way in which Australia’s biodiversity is conserved. These include jointly-managed national parks and reserves, as well as Indigenous Protected Areas, areas of land and sea managed by Indigenous groups as protected areas for biodiversity conservation through voluntary agreements with the Australian Government. IPAs

deliver more than environmental outcomes, protecting cultural values and resulting in health, education, economic and social benefits for Indigenous groups. Despite its critical importance to the maintenance of the nation's biodiversity, the national reserve system is not currently recognized as a matter of national environmental significance.

Recommendation 7: The “National Reserve System” should be a matter of national environmental significance.

(e) Land clearing

The EPBC Act is currently failing to prevent one of the most significant threats to biodiversity, which also entails the significant release of carbon emissions. A recent study found that over 7.7 million ha of potential habitat and communities were cleared in the period 2000-2017. Of this, over 93% was not referred to the Commonwealth under the EPBC Act, completely escaping regulatory scrutiny (Ward et al., 2019). To provide a local case study, in 2019, the Northern Territory Supreme Court revoked a permit to clear more than 20,000 hectares of native vegetation at Maryfield Station. This was the largest land-clearing permit ever to be issued in the Northern Territory, and was granted without a requirement for the proponent to prepare an environmental impact assessment under the NT's laws. The estimated greenhouse gas emissions from the proposal were 2-3 million tonnes, equivalent to approximately 18.5% of the Northern Territory's entire annual emissions. The proponent has subsequently applied for, and received approval to clear 5000 ha at Maryfield Station (again, without any proper environmental impact assessment). Extraordinarily, no referral was made under the EPBC Act, despite the existence of several listed threatened species within the area to be cleared.

Recommendation 8: “Significant land clearing” should be a matter of national environmental significance.

(f) Critical habitat

Currently, habitat identified on the Register of Critical Habitat is only protected if that habitat is on Commonwealth land or sea. While threatened species recovery plans are required to identify “habitat critical to survival”, there are no systematic approaches to achieve this and no protections are mandated for critical habitats. Protections for critical habitat under the EPBC Act in recognition of their importance must be improved. This would significantly reduce the risk of extinction for threatened species.

Recommendation 9: “Habitats critical to the survival of threatened species and ecological communities” should be a matter of national environmental significance.

4. Nuclear considerations

The EPBC Act incorporates consideration of “nuclear” actions in two ways: first, by prohibiting nuclear power generation in Australia under s140; and secondly, by designating defined “nuclear actions” as matters of national environmental significance.

ECNT strongly urges the retention of these matters in the EPBC Act, and for detailed consideration of the rationale for this position refers to the joint submission which it has signed onto entitled “Nuclear Submission to the Environmental Protection and Biodiversity Conservation Act Review” authored by Mia Pepper, Jim Green, Dave Sweeny, David Noonan, and Annica Schoo.

ECNT also wishes to make a number of additional comments in relation to this matter. The Northern Territory, in many ways, has been a testing ground for Australia's nuclear ambitions, with still unresolved toxic legacies. The Rum Jungle uranium mine supplied the raw material for Great Britain and the USA's nuclear weaponry from the 1950s to the 1970s, and today traditional owners and the public are still contending with its legacy as contaminants continue to leach into land and waterways, with the Commonwealth bearing the growing financial liability for its disastrous impacts. The Ranger Uranium Mine was forced through by the Commonwealth against the wishes of Mirarr traditional Aboriginal owners as a compromise for the enactment of land rights in the 1970s, with serious questions being raised currently about whether it is possible to rehabilitate the mine after its closure in 2021. The stand Mirarr traditional owners took against uranium mining at Jabiluka in the 1990s was perhaps the defining environmental movement of its generation. The Muckaty nuclear waste dump proposal divided communities demonstrated again the sentiment of the Northern Territory public about nuclear actions. The risks posed by nuclear actions are too great to risk watering down of the current safeguards in the EPBC Act.

Recommendation 10: The prohibition on nuclear power generation and the listing of "nuclear actions" should remain in the EPBC Act.

5. Bioregional planning, strategic assessment and cumulative impacts

As mentioned in the summary, cumulative impacts are at heart of the current ecological crisis. Frequently, it is the aggregate of a number of impacts over time that collectively affect biodiversity, rather than a single development on its own. However, cumulative impacts are notoriously difficult to identify, assess and appropriately regulate.

Bioregional planning has been recognised as a key tool for landscape planning to address cumulative impacts, foster climate resilience and guide sustainable natural resource management. The Australian Panel of Experts on Environmental Law recommends a system of cross-sectoral, ecosystem-based planning and management in terrestrial, marine and coastal areas ("bioregional planning"). A bioregional planning approach would provide greater certainty for resource users as well as for conservation, while ensuring integrated management. Plans would not only be concerned with conserving nature, but also with reconciling competing development demands. Further, they offer a viable response to the management of cumulative impacts.

ECNT notes similarities between the concept of bioregional planning, and the proposal for a "prospectus" for development on Aboriginal land in the Northern Territory suggested by former NLC CEO Dr Joe Morrison (Morrison, 2015). Per Morrison's formulation, any prospectus should be designed and developed by Indigenous people (and specifically traditional owners) themselves. ECNT believes that, on Aboriginal land, land subject to exclusive native title interests (and possibly non-exclusive native title interests, such as on pastoral leases), and in Indigenous protected areas, Indigenous people should take a leading and indeed controlling role in bioregional planning.

Strategic assessment processes should be strengthened as a key tool for enshrining future-oriented strategic land use planning. Strategic assessment can be used to assess multiple future activities or projects up front, displacing the current focus on project-specific approvals and ensuring cumulative impacts in a region are appropriately addressed. Strategic assessments should not replace project-level assessments, however. Rather, they should be used as a land use planning tool to create a good knowledge base about the environment of a region, identify acceptable thresholds of impact and create clear rules for project-level assessment. This would streamline, rather than replace, project level assessments.

Finally, the EPBC Act should embed assessment of cumulative impacts as a requirement of all environmental assessments, whether strategic or project-based. Currently, the requirement to consider

cumulative impacts is only legislatively embedded in relation to the water trigger for coal seam gas and significant coal mining developments. However, ECNT notes this appears to have been interpreted very narrowly to only require cumulative assessment of the impacts of other coal seam gas/coal mining developments, rather than the effect of other users on water resources, meaning that the cumulative impacts are routinely underestimated (Nelson, 2019). Further, scant guidance is provided in Commonwealth policy for how cumulative impacts are to be assessed, including how temporal and spatial scales are to be determined (Nelson, 2019). Cumulative impacts should include past and future impacts (with carefully decided temporal scales or boundaries) for all impacts in the specified area including (but not limited to) the pastoral industry, agriculture and urban development, and the impacts of climate change on water resources, biodiversity, health and other parameters. While cumulative impact assessment is frequently complex including due to the difficulties in determining baselines and modelling ecological systems, the requirement for bioregional plans (and, where necessary, strategic assessments) would make this requirement far easier to implement.

Recommendation 11: ECNT endorses the Australian Panel of Experts on Environmental Law's and EDOA's recommendation for a system of cross-sectoral, ecosystem-based planning and management in terrestrial, marine and coastal areas (bioregional planning).

Recommendation 12: In the Northern Territory, on areas of land owned by traditional owners under the *Land Rights Act*, subject to exclusive native title rights and interests under the *Native Title Act*, or part of an Indigenous Protected Area, bioregional planning processes should be led and directed by Indigenous landholders.

Recommendation 13: All conditions, prohibitions and restrictions in bioregional plans should be binding on Commonwealth Ministers and agencies, state and local governments, and the private sector, including for statutory planning and development decisions.

Recommendation 14: The EPBC Act should embed best practice strategic assessment by specifying:

- strong legislated standards, decision-making criteria and science-based methods, including a 'maintain or improve' environmental outcomes test and requirements to be consistent with recovery plans and threat abatement plans;
- cumulative impact assessment requirements, taking account of past, present and likely (approved) future activities at the relevant scale;
- guidelines to support integration of federal strategic assessment with state and local planning processes at the earliest possible stage;
- comprehensive and accurate mapping and baseline environmental data;
- mandating transparency and public participation at all phases of the process, including to verify post-approval compliance, to ensure community confidence and acceptable outcomes;
- requiring alternative scenarios to be considered, including for climate change adaptation, to enable long-term planning for realistic worst-case scenarios;
- ground-truthing of landscape-scale assessment via local studies and input;
- adaptive management and review once a program is accredited to respond to new discoveries, correct unsuccessful trajectories or implement best available technology;
- strategic assessment may complement site-level assessment where appropriate, not necessarily replace it; and

- **robust oversight, including via legislated, independent performance audit requirements, transparent verification of compliance, and ‘call-in’ powers for higher-risk actions.**

Recommendation 15: A requirement to consider cumulative impacts should be embedded in decision-making under the EPBC Act (including in respect of controlled actions).

6. Threatened species recovery plans

Threatened species recovery plans are, currently, a key modality by which the Commonwealth can stop the decline, and support the recovery of, listed threatened species and ecological communities. Recovery plans outline a species’ population and distribution, threats to its survival (including habitat loss, fire, disease, development, and predators), and say what actions should be taken to avoid extinctions. They are vital for stemming the current extinction crisis in Australia. However, there are a number of problems with recovery plans as currently formulated under the EPBC Act. First, they are no longer mandatory. Since 2006 amendments to the EPBC Act, it is no longer compulsory for the Minister to make recovery plans for each threatened species and ecological community. Instead, an approved (shorter, and less costly) “conservation advice” must be in place. This has meant that recovery plans do not exist for many listed threatened species and ecological communities. Further, there is inadequate monitoring of those plans that do exist due to funding cuts. In addition, research has shown that considerable biases (for example, in favour of “charismatic” species such as mammals) influence whether threatened species recovery plans are prepared (and indeed, whether certain species are even listed in the first place) {Walsh, 2013 #508}.

Finally, threatened species recovery plans are not enforceable. While they bind Commonwealth agencies (the Commonwealth must implement a recovery plan to the extent to which it applies in Commonwealth areas and Commonwealth agencies must not contravene recovery plans), they only need to be taken into account or considered by decision-makers in other contexts, including for decisions about controlled actions. However, they should be made enforceable across all habitats, and be required to be applied/implemented in all decisions (including controlled actions).

Recommendation 16: threatened species recovery plans should be made mandatory for all threatened species and ecological communities, and should be produced within a specified time after listing (for example 2 years).

Recommendation 17: adequate funding must be provided for preparation and monitoring of threatened species recovery plans.

Recommendation 18: Decision makers should be required to implement and ensure compliance with threatened species recovery plans.

Recommendation 19: the EPBC Act should be amended to require an inquiry following any extinctions, designed to identify the factors that contributed to that loss, and to recommend policy and legislation changes that might reduce the likelihood of future loss.

7. Duties on decision-makers and third party review rights

Currently, decision-makers enjoy wide discretion under the EPBC Act. This is a serious impediment to the effective operation of the legislation.

Recommendation 20: Duties should be imposed on Ministers, agencies and delegates to:

- **exercise their powers, functions and decisions under the Act to achieve the Act’s (redrafted) objects;**

- **maintain or improve the environmental values and ecological character of protected matters under the Act;**
- **make decisions in accordance with the principles of ecologically sustainable development;**
- **ensure that threatened species recovery and abatement plans are mandatory and established within specified timeframes, maintained in force and up to date;**
- **to ensure that threatened species recovery and abatement plans are complied with in decisions (including about controlled actions);**
- **to ensure that lists of threatened species and ecological communities are kept up to date;**
- **to publish statements of reasons for decisions.**

Recommendation 21: To enhance accountability and transparency, and to improve the outcome of decision-making under the EPBC Act, third party merits review and judicial review with open standing should be enshrined in the EPBC Act.

Recommendation 22: protective costs orders in merits review and judicial review cases should be included as a safeguard to ensure public participation, transparency, accountability and access to justice.

8. A Commonwealth environmental regulator

Until approximately 2011, the Department of Defence used firefighting foams containing toxic PFAS at its RAAF Base at Tindal, near the town of Katherine. These foams eventually entered regional groundwater aquifers, which supplied drinking water to the Katherine population. Katherine drinking water supply now must be treated to remove PFAS. A class action recently resulted in a \$92.5million settlement paid by the Commonwealth to Katherine residents. A Senate report highlighted a number of issues regarding the Commonwealth's management of Defence land including under the EPBC Act. The Northern Territory EPA highlighted the lack of national laws to address "off-site impacts" from activities emanating from Commonwealth land, describing the lack of an environmental regulator at the national level as the "missing link in environmental regulation in Australia":

This national regulator would have an overarching environmental regulatory role over activities on Commonwealth land amongst other functions such as coordination of major issues such as PFAS rather than the current approach of dealing with it in an ad hoc way by a variety of agencies.

Further, several participants in the inquiry expressed concern that, due to deficiencies in the environmental regulation of Commonwealth land, the Department of Defence was effectively 'self-regulating' or 'investigating itself' (Joint Standing Committee on Foreign Affairs, 2018). This environmental disaster highlights serious deficiencies with respect to the lack of a Commonwealth environmental regulator (in this case in relation to Commonwealth land).

Recommendation 23: A national Environment Protection Authority should be established at arms-length from the Department with the following functions:

- **Undertake environmental impact assessment of projects and planning proposals that affect matters of national environmental significance (including those that occur on Commonwealth land undertaken by other Commonwealth agencies and departments);**
- **Include a separate unit responsible for compliance, audits, monitoring and reporting.**

9. Bilateral agreements and state/territory accreditation processes

The EPBC Act accreditation of state/territory environmental assessment processes must be redesigned. In ECNT's view, however, this should not entail the creation of a "one stop shop" for environmental approvals, which is currently Commonwealth policy.

In a Northern Territory context, the Commonwealth accredited the *Environmental Assessment Act 1982*, which is only 6 pages long, lacking an environmental approval power, among numerous other deficiencies (Howey, 2017; Howey & Duggin, 2019). These inadequate Northern Territory processes facilitated the open cut conversion of McArthur River Mine, entailing the diversion of a major tropical river for some 6km, despite a finding by the Northern Territory Environment Minister that the project would have "unacceptable environmental impacts". The disastrous environmental impacts from the mine are only just now unfolding and will be felt for millennia (Howey & Duggin, 2019; Mudd, 2016). The case of McArthur River Mine stands as a cautionary tale for why states and territories should not be left to their own devices to regulate large scale projects.

Recommendation 24: The proposal for a "onestop shop" policy for environmental approvals should be abandoned.

Recommendation 25: the bilateral agreement between the Commonwealth and the Northern Territory should be renegotiated according to strict nationally-applied criteria, including a clear process for accreditation of assessment processes that meet national standards (eg biodiversity offsets), with retention of Commonwealth approval and call-in powers.

If you have any questions in relation to ECNT's submission, please contact Shar Molloy on shar.molloy@ecnt.org.

Yours faithfully,



Shar Molloy

Director

References

- Allam, L. (18 December 2019). Too hot for humans? First Nations people fear becoming Australia's first climate refugees. *The Guardian*. Retrieved from <https://www.theguardian.com/australia-news/2019/dec/18/too-hot-for-humans-first-nations-people-fear-becoming-australias-first-climate-refugees>
- Australian Government. (2015). *Our North, Our Future: White Paper on Developing Northern Australia*. Canberra
- Carson, D., Schmallegger, D., & Harwood, S. (2010). A City for the Temporary? Political Economy and Urban Planning in Darwin, Australia. *Urban Policy and Research*, 28(3), 293-310. doi:10.1080/08111146.2010.509886
- Fitzsimons, J., Legge, S., Traill, B., & Woinarski, J. (2010). *Into Oblivion? The disappearing native mammals of northern Australia*. Retrieved from <https://www.natureaustralia.org.au/content/dam/tnc/nature/en/documents/australia/Into-Oblivion.pdf>
- Head, L. (1999). The Northern Myth Revisited? Aborigines, environment and agriculture in the Ord River Irrigation Scheme, Stages One and Two. *Australian Geographer*, 30(2), 141-158. doi:10.1080/00049189993684
- Howey, K. (2017). The Northern Territory's environmental assessment laws - development, land rights, and the entanglements of history. *Australian Environment Review*, 32(1), 9-14.
- Howey, K., & Duggin, G. (2019). A mine that can't be closed? The McArthur River Mine and regulatory failure in the Northern Territory. *Australian Environment Review*, 34(1).
- Joint Standing Committee on Foreign Affairs, D. a. T. (2018). *Inquiry into the management of PFAS contamination in and around Defence bases*. Retrieved from Parliament of Australia:
- Morrison, J. (2015). Address to National Press Club. Retrieved from http://www.nlc.org.au/files/various/2015-NLC_JM_NPC_Address.pdf
- Mudd, G. (2016). *The McArthur River Project: The Environmental Case for Complete Pit Backfill*. Retrieved from <https://www.mpi.org.au/2016/08/the-mcarthur-river-project-the-environmental-case-for-complete-pit-backfill/>
- Neale, T., & Macdonald, J. M. (2019). Permits to burn: weeds, slow violence, and the extractive future of northern Australia. *Australian Geographer*, 50(4), 417-433. doi:10.1080/00049182.2019.1686731
- Nelson, R. (2019). BREAKING BACKS AND BOILING FROGS: WARNINGS FROM A DIALOGUE BETWEEN FEDERAL WATER LAW AND ENVIRONMENTAL LAW.(Australia). *University of New South Wales Law Journal*, 42(4), 1214.
- Nikolakis, W., Nygaard, A., & Grafton, Q. (2011). *Adapting to climate change for water resource management: Issues for northern Australia*. Retrieved from https://crawford.anu.edu.au/research_units/eeerh/pdf/EERH_RR108.pdf
- O'Malley, N. (2020, 13 April 2020). Destruction of habitat sped up after koalas were listed as vulnerable. *Sydney Morning Herald*. Retrieved from <https://www.smh.com.au/environment/conservation/destruction-of-habitat-spiced-up-after-koalas-were-listed-as-vulnerable-20200412-p54j6p.html>
- Possingham, H. P., Andelman, S. J., Burgman, M. A., Medellin, R. A., Master, L. L., & Keith, D. A. (2002). Limits to the use of threatened species lists. *Trends in Ecology & Evolution*, 17(11), 503-507. doi:10.1016/S0169-5347(02)02614-9
- Scientific Inquiry into Hydraulic Fracturing in the Northern Territory: Final Report*. (2018). Retrieved from Darwin, Australia:
- Ward, M. S., Simmonds, J. S., Reside, A. E., Watson, J. E. M., Rhodes, J. R., Possingham, H. P., . . . Taylor, M. (2019). Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia. *Conservation Science and Practice*, 1(11), n/a-n/a. doi:10.1111/csp2.117
- Webb, L., & Hennessey, K. (2015). *Projections for selected Australian cities*. Retrieved from Australia: https://www.climatechangeinaustralia.gov.au/media/ccia/2.1.6/cms_page_media/176/CCIA_Australian_cities_1.pdf

Woinarski, J. C. Z., Burbidge, A. A., & Harrison, P. L. (2015). Ongoing unraveling of a continental fauna: decline and extinction of Australian mammals since European settlement. *Proceedings of the National Academy of Sciences of the United States of America*, 112(15), 4531.
doi:10.1073/pnas.1417301112