

## **Submission – proposed changes to conservation planning decisions**

**5 November 2021**

### **About ACF**

ACF is Australia's national environmental organisation. We represent a community of more than 700,000 people who are committed to achieving a healthy environment for all Australians. For more than 50 years ACF has been a strong advocate for Australia's forests, rivers, people and wildlife. ACF is proudly independent, non-partisan and funded by donations from our community.

### **Introduction**

ACF welcomes the opportunity to make this submission in relation to the proposed decisions to abandon the requirement for a recovery plan for 185 threatened species and ecological communities under the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act).

Australia recently signed on to Kunming Declaration which recognises the need for greater effort by the global community in this area. The declaration includes the following commitment:

*Ensure the development, adoption and implementation of an effective post 2020 global biodiversity framework, that includes provision of the necessary means of implementation, in line with the Convention, and appropriate mechanisms for monitoring, reporting and review, to reverse the current loss of biodiversity and ensure that biodiversity is put on a path to recovery by 2030 at the latest, towards the full realization of the 2050 Vision of "Living in Harmony with Nature."*

In our submission, these proposed decisions and the policy that sits behind them represent a step backwards when what is needed is a renewed and increased focus on threatened species recovery efforts. As a wealthy, megadiverse country with a poor record when it comes to preventing extinction it is critical that Australia steps up its ambition and demonstrates through its actions that our international commitments are more than just empty rhetoric.

### **Context for this submission**

Our submission relates to the overall policy informing the proposed decisions but should also be taken as a submission in relation to each of the decisions to be made under s 269AA of the EPBC Act.

At the outset, we wish to point out that although the proposed decisions are said to be implementing recommendations of the Threatened Species Scientific Committee (TSSC), in our view this position misrepresents the role of the Committee and inaccurately characterises what is

actually happening with this round of proposed decisions and the further rounds which we understand are to come. These reforms extend well beyond purely matters informed by the conservation expertise which is the responsibility of the TSSC. Instead, the “reform” of conservation planning underway here represents the adoption and implementation of a policy toward recovery planning for threatened species which actually relates to the administration of the provisions of the EPBC Act which is the responsibility of the Department and ultimately the Minister for the Environment.

We have no argument with the view that conservation planning under the EPBC Act needs to be reformed, and our organisation and many others in the community have made the case for this reform for many years, most recently through our engagement with Professor Samuel’s Independent Review of the EPBC Act.

The current process, however, fails to respond to any of these calls for reform or to the recommendations of the Independent Review. We are deeply concerned that doing away with recovery plans for all, but a small proportion of threatened species and communities is simply rationalising current failings in relation to threatened species recovery, and locking these failings into the future administration of the Act, without any attempt to improve the overall system.

It is disappointing, for example, that these reforms are being pursued without any progress from the government on the development of the suite of new outcomes focused National Environmental Standards in the form recommended by the Independent Review, or any progress on the development of complementary approaches to conventional recovery planning recommended by the Independent Review, such as regional recovery planning.

We wish to make the following four points regarding the list of proposed decisions to no longer require recovery plans as exhibited on the Have Your Say website:

**1. Poor process and lack of consultation indicative of deeper problems with the approach of successive government’s commitment to threatened species recovery.**

In our view, the current process is the culmination of a failure to take the development, implementation and review of recovery plans under the EPBC Act seriously over many years. While the decision to prefer conservation advices over recovery plans may reflect the policy changes that accompanied 2007 amendments to the Act, the fact that it has taken so long to actually implement these amendments is a telling indicator of failure of successive governments in the administration of the provisions of the EPBC Act. Indeed, the fact that the current proposals are presumably driven to a large degree by the impending sunset of recovery plans under the *Legislation Act 2003* indicates a reactive rather than a strategic and principled approach to conservation planning.

One of significant differences between recovery plans and conservation advices which is overlooked or unacknowledged in the TSSC document (“Ongoing modernisation of conservation planning under the EPBC Act”) which accompanies the current consultation is the public process and consultation requirements that apply to recovery plans but not conservation advices (including specific requirements to consult with indigenous communities – see s270(3)(e)).

It is regrettable but unfortunately consistent with the lack of serious commitment to recovery planning that the current consultation disregards the importance of these processes. The sheer number of proposed decisions, and especially the fact that no individual explanation or evidence has been provided in relation to each of the proposed decisions, indicates a lack of appreciation for the value of the contribution by experts, conservationists and the broader public to the protection and recovery of threatened species. These 185 proposed decisions are justified by reference to a generic plan produced by the TSSC which leaves those attempting to engage with no option but to speculate as to the reasons for the TSSC’s recommendations. This is especially unsatisfactory and does not promote optimal final decisions on each of the proposals.

## **2. The proposed decisions understate the important legal differences between conservation advices and recovery plans.**

The policy to prefer conservation advices to recovery plans in most instances is evidently based on a view that in most instances the two are for all intents and purposes interchangeable. In our view, this position understates important legal differences between the two. Although the TSSC document acknowledges different regulatory import of conservation advices and recovery plans in the context of approvals decisions, the full import of this difference does not seem to be fully understood. Although the TSSC document correctly notes that both types of instrument can “inform” approval decisions under the Act, the manner in which each does so is different in critical respects.

Under s139 of the Act the Minister is obliged to act “not inconsistently” with an approved recovery plan. This obligation is particularly significant when considered in the context of the broader framework regulating the exercise of the Minister’s approval powers under the Act which, subject only to the exception in s139, does not contain anything that actually requires the protection of listed threatened species and communities.

As succinctly explained by counsel for the Environment Minister representatives in submissions in the appeal in *Sharma v Minister for the Environment*:

*The EPBC Act does not dictate the outcome (except where it does so explicitly [ie ss 37-140A]), or give any preference to particular considerations. It proceeds on the implicit basis that, except in the case of particular actions that it expressly provides cannot be approved, an action which*

*has a significant impact on matters protected by Pt 3 may nevertheless be allowed to proceed, if the Minister decides that is appropriate.*<sup>1</sup>

In other words, for approval decisions under the Act, the only way in which listed threatened species and communities can receive actual protection that is not dependent on the favourable exercise of broad discretionary powers by the Minister in particular instances is through the inclusion of limits, constraints or protections in some form in a Recovery Plan.

If such provisions are included in a Recovery Plan, the Minister must not act inconsistently with them. Conservation advices, by contrast, fall into the category of those considerations not requiring any particular preference - so while it is clear that the Minister must have regard to a Conservation Advice and a decision will be invalid if the Minister does not do so, she is free to make a decision contrary to that Advice.

We believe it is also important to recognise that the difference in regulatory effect is not limited to approval decisions but also applies in other contexts - such as decisions to enter bilateral approval agreements or to endorse a plan, policy or program under a strategic assessment.<sup>2</sup>

As noted above, there are also important procedural differences that apply to the development of recovery plans that mean that they have involve more consultation and scrutiny the conservation advices. These features, in combination with the statutory review requirement that apply to recovery plans (both under the EPBC Act and the *Legislation Act 2003*), ought to in principle ensure more rigour and accountability when it comes to recovery plans, even if this has not been demonstrated in practice.

### **3. Funding and other effectiveness issues need to be addressed rather than abandoning recovery planning.**

The delays in preparation and lack of flexibility in preparation of recovery plans that these reforms are said to address are to a large degree not problems inherent in the recovery planning provisions of the Act, but rather a reflection of inadequate funding. The failure to fund the development and implementation of recovery plans is in our view the biggest failure in the administration of the recovery planning provisions of the Act. Addressing this rather than abandoning recovery plans ought to be a priority.

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<sup>1</sup> Para 38 in the Environment Minister's Outline of Submissions, filed 13 September 2021.  
<https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/minister-for-the-environment-v-sharma>

<sup>2</sup> See s53, s146K of the Act.

Better resourcing could also be accompanied by other reforms within the current framework of the Act (such as greater utilisation of multi-species recovery plans) or if necessary legislative amendments to enable more rapid development and amendment of recovery plans.

In so far as delay in the finalisation of recovery plans is put forward as a reason to favour conservation advices, no explanation has been offered for the real reasons for this delay. Accordingly, there is no assurance that conservation advices that go beyond the bare minimum required at time of listing will not be subject to similar delays. Whether recovery plans (or conservation advices that contain recovery plan like detail) advices are preferred, the resourcing, bureaucratic and political reasons that obstruct effective conservation planning must be addressed. We hope that the current audit of Listing and Management of Threatened Species under the EPBC Act by the Australian National Audit Office will assist in identifying the underlying reasons for the delays in conservation planning. We urge the government to ensure that the findings and recommendations of this audit are responded to in the broader conservation planning reforms which need to occur.

#### **4. Interaction with state and territory government recovery planning, and the need for Commonwealth government leadership.**

Although the data are difficult to obtain, it seems that many of the recovery plans that are to be dispensed with are recovery plans prepared by a state or territory that have been adopted by the Commonwealth under the EPBC Act. This certainly seems to be the case with many of the recovery plans which have been foreshadowed as sunseting in April 2022 which we presume will be the subject of further imminent consultations on proposed decisions to no longer require a recovery plan.<sup>3</sup>

That many of the proposed abandoned recovery plans fall into this category speaks to a longstanding failure by the Commonwealth to play a leadership role when it comes to conservation planning - this leadership role was clearly envisaged by the EPBC Act and the international commitments which form its constitutional foundation.

This needs to be addressed by the Federal government using the powers available to it under the EPBC Act to encourage, develop and adopt nationally coordinated approaches to recovery planning, supported by the allocation of resources to state and territory governments to facilitate their cooperation. This utilisation of the existing provisions of the Act should also be complemented and extended by the adoption of key reforms recommended by the Independent Review of the EPBC Act, particularly the outcome focused National Environmental Standards recommended by the review.

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<sup>3</sup> 1 April 2022 list of Sunsetting Legislative Instruments - <https://www.legislation.gov.au/Content/SunsettingLists>

Once again, these administrative and legislative reforms should precede dispensing current requirements for recovery plans under the EPBC Act.

## **Recommendations**

Rather than abandoning the requirement for recovery plans for the current 185 species and communities and rather than pursuing further rounds of such decisions, the Government should instead:

1. Adopt the recommendations of the Independent Review of the EPBC Act, including the development of National Environmental Standards for Matters of National Environmental Significance and other important recommendations such as the development of regional recovery planning. *Current obligations in relation to recovery plans for threatened species should only be revisited once a better alternative is in place.*
2. Commit to conservation planning, funding and recovery for all listed threatened species and communities, in accordance with the intent of the EPBC Act and the ambition of the emerging Global Biodiversity Framework. This will necessitate significantly increased funding for threatened species recovery, and an approach that goes beyond the limitations of the focus on 100 priority species under the Threatened Species Strategy.

### **For more information:**

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