ENVIRONMENTAL JUSTICE AUSTRALIA

9 April 2024

Committee Secretary
Senate Standing Committees on Environment and Communications
Parliament House
Canberra ACT 2600

By email only: ec.sen@aph.gov.au

Dear Secretary

Submission to Inquiry into Australia's extinction crisis

Environmental Justice Australia welcomes the continuation of the inquiry into Australia's extinction crisis, and the opportunity to provide a further submission.

Since the commencement of the inquiry, many more species have been formally listed as on the path to extinction under Australia's national environment laws, and many species already listed have declined further to higher threat categories. Australia has the world's highest rate of mammal extinction, and already faces disproportionate impacts of climate change. Increasingly severe and frequent fire, flooding and marine heatwaves are adding catastrophic pressure to many species' plight for survival. Australia is also a deforestation hotspot alongside Brazil and Borneo. Yet, this key driver of species decline in Australia is almost entirely unregulated by Federal law. That failure sits at odds with Australia's welcome international commitments to halt deforestation and forest degradation by 2030, in the COP28 Global Stocktake and the Glasgow Leaders' Declaration on Forests and Land Use.

This context imbues the Federal government's commitment to reform Australia's national environmental laws with urgency.

About Environmental Justice Australia

Environmental Justice Australia is a public interest environmental law practice, based in Melbourne and undertaking work across our areas of expertise throughout Australia. We provide legal advice and support to the community on public interest environmental issues, advocate for better environmental laws, and provide legal education to the community on environment matters. We act primarily for community organisations, Traditional Owners groups and NGOs on matters concerning environment and natural resources law and policy.

Our involvement and key concerns with Australia's new national environment laws

Environmental Justice Australia has participated in consultation sessions to view and provide comment on the draft laws. We encourage government to meet its commitment to complete reform this term, given the urgency of the extinction crisis we face. Critically – we encourage

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government to ensure the reforms achieve the objective of halting and reversing Australia's trajectories of species decline, and ending extinction in Australia.

While parts of the government's proposed new laws are a very welcome step forward, Environmental Justice Australia has six key concerns with the reforms proposed to date. Each have simple, but crucial, solutions that are needed to ensure the reforms actually deliver on addressing Australia's extinction crisis.

Deforestation - native forest logging and land-clearing

To meet the federal government's commitment to end deforestation by 2030, the new national environment laws must clearly apply to, and provide strong protection for, native forests – particularly those home to listed threatened species. The government is yet to make clear how the new scheme will apply to native forest logging. The government's commitment to apply the new National Standards to native forest logging is welcome. However, the draft National Standard for Matters of National Environmental Significance has hollowed out to set a high-level principles, rather than clear requirements and standards, for example, as proposed by the Samuel's Review.

Land clearing currently escapes the operation of the EPBC Act, despite occurring in areas where threatened species are mapped as likely to occur. Land clearing must be clearly brought within the text and enforcement of new laws. We need a strong deforestation or land-clearing regulatory hook – either in the new Act or in the new National Standard for Matters of National Environmental Significance (MNES). This should explicitly compel all proponents to refer instances of planned deforestation if it is to occur on federally-mapped threatened species habitat, migratory species habitat, in a threatened ecological community or in a Great Barrier Reef catchment area. This could be implemented via either a specific deforestation or land clearing trigger, or embedded elsewhere in the Nature Positive Bill or National Standard for MNES, using specific reference to deforestation as a part of the existing threatened species trigger.

Habitat protection

The federal government has promised to turn around the extinction crisis and protect critical habitat, but the draft laws fall short of this ambition.

In the draft laws, habitat protection areas are discretionary, and the concept of critical habitat has been abandoned.

The vital legal concept of 'critical habit' has been abandoned, along with available legal protections for it. Critical habitat has clear legal meaning, has been applied on the ground, and is identified in recovery plans or draft plans for many species. It includes vital habitat for threatened species like areas necessary for breeding, maintaining genetic diversity and long-term evolutionary development, and species recovery. It has the best potential to protect important threatened species habitat on the ground, where it counts. Protecting critical habitat needs to become mandatory, not be abandoned.

‘Critical habitat’ has been replaced with a new, vague definition: habitat that is both ‘irreplaceable’ and ‘necessary for survival in the wild’. These terms are ambiguous, with no known meaning, and have not been applied in practice. The Department has made clear that these new terms are intended together to capture less than habitat critical to the survival of species.

The proposed introduction of ‘unacceptable impacts’ that will not be permitted under the new laws is a welcome improvement with potential to deliver transformational change for our threatened species. It could deliver real on-ground protections for threatened species and their habitat from damaging projects. But right now, the proposed definitions outlining unacceptable impacts are too narrow and ambiguous to deliver on the ground improvements for threatened plants and animals.

The proposal for the new Critical Protection Areas to be discretionary risks failing the plethora of threatened species – like the Koala - on the path to extinction because of continued habitat destruction.

Halt decline in threatened species populations

To deliver on its promise of no new extinctions, the new laws must rule out impacts that reduce the population numbers of species that are already on the path to extinction.

A centrepiece of the new National Standard for Matters of National Environmental Significance must be that actions comply with a requirement to maintain and improve population numbers of threatened species.

Clearer and more ambitious objectives are needed - halting and reversing threatened species decline should become a stated purpose of the new Act.

Put climate damage front and centre

Climate change threatens every ecosystem across the continent and widespread and severe effects are already being felt by threatened and iconic wildlife.

Yet right now, the draft laws do not require decision makers to properly scrutinise the climate risk of proposed projects.

Our new laws must include a new climate ‘trigger’ to specifically require proper assessment of projects that will create significant carbon emissions (100,000 tonnes of CO2 equivalent), and ensure projects with unacceptable climate risks cannot proceed. This climate trigger must include emissions resulting from Australian gas and coal being burnt overseas (scope 3 emissions).

Australia’s new laws should clearly mandate scrutiny of the climate risk of proposed projects (including all new coal and gas projects) and have the power to reject them due to their likely impacts.

Project assessment should have to consider the total, cumulative climate impacts of a project (or group of related projects), including emissions resulting from Australian gas and coal being burnt overseas (scope 3 emissions).

If our laws ignore the climate pollution from the coal and gas we export, this means Australia is not taking responsibility for the devastating climate impact these downstream emissions will have globally and right across the Australian environment.

Our new laws should respond to escalating climate impacts and protect ecosystems that absorb carbon.

End political interference, unchecked discretion or god-like powers

Environmental decision making must be based on the best available science and clear rules, and our new laws must remove excessive decision-maker discretion.

The current draft laws embed decision-maker discretion and subjectivity, leaving too much space for political interference and arbitrary decisions. This kind of language needs to be removed to deliver on the promise to move from a discretionary system to a rules-based system.

Instead of requiring all decisions about whether environmental impacts are unacceptable and comply with the Standards to be grounded in facts and the best-available science, the draft laws make these subjective decisions that "satisfy" the EPA's CEO. This enables poor decision-making, with decisions based on what the EPA's CEO 'thinks' about impacts on the environment – rather than what the science says.

This kind of decision-maker discretion has been a key failure of our current environmental laws, allowing approvals of projects with unacceptable environmental impacts at odds with what the science says is required to protect threatened species.

To improve outcomes for threatened species decisions about whether an action will have unacceptable impacts and comply with the new Standards and Recovery Strategies, must be objective, based on the best available science, to ensure rigorous decision-making. If the science shows impacts are likely to be unacceptable for the environment, or that a project is likely to break National Environmental Standards, the project should not be permitted. Legal loopholes, like whether the decision-maker is 'satisfied', need to be removed throughout the draft laws.

The proposed reforms require decisions or projects to be 'not inconsistent with' the National Environmental Stands, Recovery Strategies and Threat Abatement Strategies. This framing weakens the obligation to actually deliver projects that comply with these critical document. Our laws must go further and require *compliance with* each of these documents, in full.

There should be no Ministerial call-in powers that allow the Minister of the day to override the EPA with unchecked power to approve any environmental destruction.

And, we need an EPA set up to succeed. To genuinely safeguard this powerful new decision-making body from vested interests, the EPA CEO must be accountable to an independent board with qualified members. This is key to delivering the integrity and trust in the new system that the government promised.

Australia's new environment laws should give communities legal rights to seek independent review of the merits of decisions. When decisions cannot be reviewed, it risks creating a decision-making culture of impunity with poor decisions for our threatened species. Merits reviews will ensure the EPA rigorously and fearlessly assesses and decides on applications, based on the best available science. In doing so, it creates a culture of scientifically sound, well-bounded and justifiable decision making at the EPA.

Limit the use of offsets and don't introduce payments for destruction

Too often, offsets look good on paper, but in practice let companies off the hook for destroying and polluting our environment. Too few gains are made on the ground from planned offset activities, which are supposed to make up for real-world losses suffered by species from destructive practices.

The proposed reforms could see project proponents able to make payments instead of project-specific offsets – meaning they could buy their way out of protecting the environment. These are termed 'restoration contributions'.

If allowed, these payments are likely contribute to the extinction of some threatened species, ecological communities and migratory species. In NSW, the Independent Pricing and Regulatory Tribunal recently recommended that the option of payment into a Fund should be phased out of the NSW Biodiversity Offsets Scheme (December 2023).

The reform proposal for "Restoration Contributions" is a clear backwards step from the current EPBC Offsets Policy, that is likely, if adopted, to facilitate the ongoing decline of some threatened species, ecological communities and migratory species.

It will mean destruction of habitat and death of threatened species can be approved on the basis proponents pay money – with no requirements to make sure it's even possible to deliver offsets with on-ground benefits for the same species using that money, and nothing that requires benefits to commence before damage occurs.

The proposal for restoration contributions should not proceed.

The reforms cannot take us backwards by weakening limitations on the use of offsets from how they are applied under the current Act. Instead, use of offsets needs to be minimised further, with strict rules applied to their use.

Other forms of offsetting should only be allowed in limited circumstances, in line with the best available science. The proposed reforms feature some improvements to offsetting as it currently occurs under the EPBC Act. These include requirements for like-for-like direct offsets, reducing use of averted loss offsets, making sure that offsets are deliverable, requiring offset actions to have demonstrably commenced prior to the impact occurring, are significant improvements over current offsets under the Act.

Further improvements to offsetting under new laws should limit time lag to benefits from the offset; require the end condition or quality of the offset site to be at least as high as the impact site; and require offsets to be in biologically meaningful areas and delivered in biologically meaningful timeframes. Our new laws must include strict rules on offset activities to make sure they actually deliver on-ground results for the same species in meaningful time frames.

But our new laws must recognise not everything can be offset – some of our plants and animals are simply too precious and rare to be traded-off. This includes critical habitat for all threatened species, all World Heritage places and National Heritage places.

First nations rights

Our new nature laws should truly value the rights, knowledge and culture of First Nations people. First Nations people should have a key role in decision making, with guaranteed free, prior and informed consent. They should have legal rights to protect, care for and manage Country and culture, rights outlined by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). First Nations aspirations to protect and manage culturally significant species must be delivered in the reforms.

In summary, the commitment to deliver strong new environment laws is crucial to reversing Australia's extinction crisis. The ambition of the Nature Positive Plan should be delivered in bold new national environment laws, with haste.

Prepared by

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