

# Submission in relation to the Environment Protection and Biodiversity Conservation Amendment (Reconsideration of Decisions) Bill 2024

Submission made to the Environment and Communications Legislation Committee

prepared by

Environmental Justice Australia

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# About Environmental Justice Australia

Environmental Justice Australia (**EJA**) is a national public interest legal centre. We use the law to empower communities, to protect and regenerate nature, to safeguard our climate and to achieve social and environmental justice.

We are proudly non-profit, non-government, and funded by donations from the community. Our legal team combines technical expertise and a practical understanding of the legal system to protect communities and our environment.

EJA has a long history in advocating for a just energy transition, and has worked closely with people, communities, and environmental organisations to encourage and compel governments to act, to transform industries, and to ensure justice for the people most affected is at the foundation of all climate solutions, today and tomorrow.

## **Acknowledgement of Country**

We acknowledge the Awabakal, Bunurong, melukerdee, Larrakia, punnilerpanner, Wadawurrung and Wurundjeri peoples, the Traditional Owners of the lands on which our team lives and where the EJA office is located. We pay our respects to Elders past and present and recognise that this land always was and always will be Aboriginal and Torres Strait Islander land because sovereignty has never been ceded.

We acknowledge the role of the legal system in establishing, entrenching and continuing the oppression and injustice experienced by First Nations people. We also acknowledge that the law has been an avenue for resistance and a critical framework of action for First Nations justice. It is an inherently complex space; we seek to contribute to using and developing laws in ways that lay foundations for just outcomes for First Nations people across the continent.

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# 1 Executive Summary

1. We are grateful for the opportunity to make this submission on the Environment Protection and Biodiversity Conservation Amendment (Reconsiderations of Decisions) Bill 2024 (the **Bill**).
2. The amendments proposed by this Bill<sup>1</sup> raise four major issues which Environmental Justice Australia (**EJA**) wishes to draw to the attention of the Committee:
  - i. The reasons provided for the proposed amendments<sup>2</sup> are based on a flawed interpretation of s 78 and s 78A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). Once the operation of these provisions are understood correctly, it is apparent that the proposed amendments set out in this Bill are unnecessary.
  - ii. The reconsideration request submitted in relation to Marine Farming Expansion, Macquarie Harbour, Tasmania (EPBC 2012/6406) (**the reconsideration request**) does not create the “potentially dangerous precedent” which this Bill purports to address. EJA submits that the reconsideration request is an example of the important role that s 78 plays in achieving the objects of the EPBC Act. Any steps taken to fetter the ability to make a request pursuant to s 78, directly undermine the overarching objective of the EPBC Act to “provide for the protection of the environment” and “promote the conservation of biodiversity”.<sup>3</sup>
  - iii. The Bill proposes changes which would limit community participation in environmental decision-making. EJA submits that community participation in environmental decision-making is crucial to a well-functioning system and the avenues for community participation currently contained in the EPBC Act, although insufficient, must at a minimum be preserved.
  - iv. The Bill proposes amendments to a small part of the EPBC Act. The EPBC Act is currently in the process of comprehensive reform. Ambitious, wholesale reform is essential to protect nature, reverse our extinction crisis and ensure a healthy environment for generations of Australians to come. The Bill serves as a dangerous distraction of time and resources from this more essential task.

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<sup>1</sup> Explanatory Memorandum to the Bill, p 2-3.

<sup>2</sup> See Explanatory Memorandum to the Bill and Senator Colbeck’s second reading speech introducing the Bill.

<sup>3</sup> EPBC Act, s 3.

3. EJA submits that the proposed amendments set out in this Bill are unnecessary and regressive and will significantly impede the objective of the EPBC Act to ensure that activities that are likely to have significant impacts on the environment are properly assessed. Accordingly, we recommend that this Bill should not be passed.

## 2 The reasoning underpinning the proposed amendments is flawed

4. The sole purpose of the Bill is to amend ss 78 and 78A of the EPBC Act and impose limitations on the timeframe that is permissible to make a request for reconsideration pursuant to s 78 and 78A of the EPBC Act.
5. As outlined in the Explanatory Memorandum, these amendments are said to “strengthen” the EPBC Act by limiting the timeframe for a person (other than a Minister of a State or self-governing Territory) to make a reconsideration request to the Minister, to a period of 36 months starting on the day that the relevant decision under s 75 of the EPBC Act, is made. After the 36 months has elapsed, the ability to make a reconsideration request becomes exclusive to the Minister of a State or self-governing Territory in which the action is proposed to be taken.
6. The bases underpinning the proposed amendments, as outlined in the Explanatory Memorandum and Senator Colbeck’s second reading speech, are said to be as follows:
  - i. The precedent created by the reconsideration request submitted in relation to Marine Farming Expansion, Macquarie Harbour, Tasmania (EPBC 2012/6406), “casts doubt over the certainty of every approval granted under the EPBC Act.”<sup>4</sup>
  - ii. There are no limitations or restrictions on the timeframes to make a request for the reconsideration of a decision under s 78A of the EPBC Act.<sup>5</sup>
  - iii. The lack of limitations and restrictions within the EPBC Act means that there is “diminished certainty” for project proponents who require an EPBC approval.<sup>6</sup>
  - iv. Without clear time limits and cut-off periods for decisions to be reconsidered and limits imposed on who is permitted to request such a reconsideration to the

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<sup>4</sup> Explanatory Memorandum to the Bill, p 2.

<sup>5</sup> Ibid, p 2.

<sup>6</sup> Ibid, p 3.

Minister, there is “diminished certainty” for project proponents who require an EPBC approval.<sup>7</sup>

7. For the reasons outlined below, EJA considers that the reasoning underpinning the proposed amendments are based on a flawed interpretation of the operation of s 78 and s 78A of the EPBC Act. EJA submits that once the operation of these provisions is correctly understood, it will become apparent that the Bill’s proposed amendments are unnecessary.

## 2.1 Relevant legislative provisions

8. Sections 78 and 78A are contained within Part 6 of the EPBC Act which deals with assessment and approval of actions that Part 3 of the EPBC Act prohibits without an environmental approval. To understand how these provisions operate within the EPBC Act, it is important to understand, more broadly, the assessment and approval process that they sit within under the EPBC Act. An explanation of the relevant legislative provisions is set out below.
9. Part 3 of the EPBC Act sets out requirements for environmental approvals and protects matters of national environmental significance (or MNES). It does that by several provisions, each of which imposes:
  - i. a civil penalty on a person who takes an action that has, will have, or is likely to have, a significant impact on a particular MNES; or
  - ii. a criminal penalty on a person who takes an action that has or will have a significant impact on that particular MNES.
10. The MNES under Part 3 are world heritage properties (ss 12–15A), national heritage places (ss 15B–15C), Ramsar wetlands (ss 16–17B), listed threatened species and ecological communities (ss 18–19), listed migratory species (ss 20– 20B), nuclear actions (ss 21–22A), Commonwealth marine areas (ss 23–24A), the Great Barrier Reef Marine Park (ss 24B–24C) and a water resource in relation to coal seam gas development and large coal mining development (ss 24D–24E).
11. The relevant regulatory scheme of the Act can be found in Parts 7 to 9. Part 7 requires that certain proposed actions<sup>8</sup> be referred to the Minister and provides for the Minister to decide whether a proposed action is a controlled action that requires approval.

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<sup>7</sup> Ibid, p 3.

<sup>8</sup> “Action” is defined in s 523 of the EPBC Act. It includes a project, development or activity or series of activities.

12. Section 67 in Part 7 defines the concepts of a “controlled action” and a “controlling provision”. A controlled action is an action that, if taken without relevant approval under Part 9, would be prohibited by a provision of Part 3. Such a provision is a “controlling provision” for the action.
13. A person who proposes to take action that the person thinks may be, or is, a controlled action must refer the proposal to the Minister.<sup>9</sup>
14. After the Minister receives the referral, the Minister is then required to determine whether the action is or is not a controlled action. In making that determination, the Minister must consider all adverse impacts the action has or will have or is likely to have on the matters protected by each provision of Part 3, and must not consider any beneficial impacts.<sup>10</sup>
15. Once the Minister has determined whether an action is a controlled action, for the purposes of the Act, this is considered to be a “controlled action decision” made pursuant to s 75 of the EPBC Act.
16. Following a controlled action decision, s 78A(1) allows a person to request that the Minister reconsider a controlled action decision made under s 75(1) about an action. A person must make the request on the basis of a matter referred to in s 78(1)(a) to (ca) of the Act. Importantly, **s 78(3) of the EPBC Act prohibits the reconsideration of controlled action decisions made under s 75 “the Minister has granted or refused an approval of the taking of the action” or where an action has been “taken.”**
17. In circumstances where a reconsideration request is made, the Minister is required, as soon as practicable after the end of the time within which comments may be received under s 78B, to reconsider the decision and either confirm it or revoke it and substitute a new decision for it.<sup>11</sup>
18. A controlled action is then assessed under Part 8, or under a bilateral agreement where one applies. Part 9 sets out the circumstances in which the Minister may approve for the purposes of a controlling provision the taking of a proposed action by a person.<sup>12</sup> It is unlawful to take a controlled action without an approval under Part 9 of the Act.<sup>13</sup>

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<sup>9</sup> EPBC Act, s 68.

<sup>10</sup> EPBC Act, s 75(2).

<sup>11</sup> EPBC Act, s 78C(1).

<sup>12</sup> EPBC Act, ss 130 and 133.

<sup>13</sup> EPBC Act, s 67A. This is also the effect of the controlling provisions.

## 2.2 The correct understanding of the operation of the EPBC Act

The EPBC Act already contains sufficient safeguards which limit the ability of a person to make a reconsideration request under s 78A of the Act

19. Senator Colbeck, in the second reading speech to this Bill, stated that the reconsideration request casts doubt over the certainty of every approval granted under the EPBC Act.<sup>14</sup> This is not accurate.
20. The power to vary or substitute a decision under s 78 is limited only to decisions made pursuant to s 75 as to whether the action is a controlled action or not. It does not extend, as the Explanatory Memorandum seems to allude, to every “approval” decision made under the EPBC Act.
21. Importantly, s 78(3) of the EPBC Act prohibits the reconsideration of a controlled action decision made under s 75 once “the Minister has granted or refused an approval of the taking of the action” or where an action has been “taken.” In effect, this means that once action has been taken in reliance upon a controlled action decision— this being the granting or refusing of an approval, or the taking of the action in question – there is no scope for a controlled action decision to be reconsidered.
22. The Minister may only reconsider their decision as to whether an action is a controlled action in strictly limited circumstances. These circumstances act to limit when a reconsideration request may be made by a person and requires the person requesting the reconsideration to provide information to establish the basis for which the Minister should reconsider.
23. In that regard, the Minister may remake a decision under s 75 only if the Minister is satisfied that the remaking of the decision is warranted where there is:
  - i. substantial new information that has become available or there has been a substantial change in circumstances not foreseen at the time of the original decision about the impacts that the action has or will have or is likely to have on a matter protected by Part 3;

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<sup>14</sup> Explanatory Memorandum to the Bill, p 3.

- ii. the Minister originally decided that the action was not a controlled action because it was to be taken in a particular manner specified in the notice under s 77 and the Minister is now satisfied that the action is not being, or will not be, taken in the particular manner; or
- iii. the Minister originally decided that the action was not a controlled action because of provisions in a bilateral agreement or a declaration under s 33 and the relevant provisions are no longer in effect; or
- iv. a State or Territory Minister requests that the first decision be reconsidered under s 79.

24. The EPBC Act confers public powers, for the advancement of the public interests set out in the Act and the EPBC Act was designed to protect Australia’s environment through the protection of the identified MNES, by controlling (including prohibiting) actions that have been assessed as affecting those matters.<sup>15</sup> The ability to make a reconsideration request which addresses the abovementioned matters, as and when this information becomes apparent, represents an essential part of the functioning of the reconsideration request power under s 78A and plays a role in ensuring that the Minister is exercising their decision-making power as required under the EPBC Act.

25. As was recently highlighted by the Full Federal Court in *Environment Council of Central Queensland Inc v Minister for the Environment and Water*,<sup>16</sup> s 78A reconsideration requests are a “good example” of a way that the EPBC Act can be utilised to hold “the repositories reviewing the exercise of public power to account” in their environmental decision making.<sup>17</sup> In that regard, Chief Justice Mortimer noted that

*“community organisations...[play] a legitimate public interest role in holding the repositories of significant public powers to account, in presenting competing views about what the appropriate exercise of power might be, and then in seeking to test the lawfulness of the exercise of those public powers.”*

26. The imposition of time frames and restrictions which limit the ability of a person to make a request for reconsideration would fundamentally undermine the important function that ss 78 and 78A of the Act play in advancing the public interests set out in the Act and would

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<sup>15</sup> *Wilderness Society (Tasmania) Inc v Minister for the Environment* [2019] FCA 1842; 275 FCR 287 at [125].

<sup>16</sup> *Environment Council of Central Queensland Inc v Minister for the Environment and Water* (No 2) [2024] FCAFC 97.

<sup>17</sup> *Ibid*, [54]-[56].



adversely affect the ability of the Minister to potentially correct mistakes made in the s 75 process.

27. In EJA's submission, the limited circumstances in which a Minister may reconsider their controlled action decision under s 75 coupled with the existing prohibition under s 78(3) both act as sufficient limitations on the ability of a person to make a reconsideration request under s 78A of the Act. Anything further is unnecessary.

## 2.3 The Reconsideration Request

### Background to the Reconsideration Request

28. The "Background" to this Bill, as set out in the Explanatory Memorandum, suggests that the catalyst for the proposed amendments was the submission of a request to the Minister for Environment and Water to reconsider a controlled action decision that was made in 2012 in relation to the Marine Farming Expansion, Macquarie Harbour, Tasmania (EPBC 2012/6406) (the **project**).

29. The reconsideration request, made pursuant to s 78A of the EPBC Act, was submitted to the Minister in November 2023, some 11 years after the original controlled action decision was made, and requested that the Minister reconsider, pursuant to s 78 of the EPBC Act, the original controlled action decision<sup>18</sup> which determined that the project was not a controlled action decision.

30. In making the original controlled action decision in 2012, the Department had indicated that its determination that the project was not a controlled action was made on the basis that the project would be carried out in a particular manner. The Particular Manner Notice, attached to the controlled action decision, outlined a set of measures that the proponents were required to take in order to "ensure there are no significant impacts" arising from the project on the Maugean Skate and Tasmanian Wilderness World Heritage Area (**TWWHA**).

31. It is important to note that an offence to fail to comply with the requirements set out in a Particular Manner Notice.<sup>19</sup> A failure to comply with a Particular Manner Notice also exposes the person undertaking the action to the possibility of committing civil or criminal

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<sup>18</sup> Made pursuant to s 75 of the EPBC Act.

<sup>19</sup> EPBC Act, s 77A.

offences if their action is having or is likely to have a significant impact on a MNES, like a threatened species or World Heritage values.<sup>20</sup>

32. The reconsideration request drew the Minister's attention to a series of expert reports which had been prepared in 2022 and 2023 by the Institute of Marine and Antarctic Studies, and indicated that if all of the scientific information now available had been known at the time of the controlled action decision in 2012, there would have been a finding that the project would have a significant impact on the matters protected under Part 3 of the EPBC Act,<sup>21</sup> namely on the Maugean Skate, an endangered species, and on the world heritage values of the TWWHA.<sup>22</sup>

33. Based on these further scientific studies, the reconsideration request asked the Minister to reconsider the original controlled action decision for the following reasons:

- i. The fresh scientific studies establish that there has been a substantial unforeseen change in circumstances of the potential impacts of the project which warrants the Minister's reconsideration of the original controlled action decision.
- ii. The significant impacts of the project on both the Maugean Skate and the TWWHA, as documented in the 2022 and 2023 scientific studies, raised serious questions about whether the proponents had complied with the requirement in the Particular Manner Notice to "ensure there are no significant impacts" arising from the project on the Maugean Skate or the TWWHA.
- iii. That the current practice of marine farming in Macquarie Harbour is not occurring in the same way as described when the project was originally referred to the Department in 2012 under the EPBC Act.

The Reconsideration Request is an example of the important role that s 78A plays in achieving the objects of the EPBC Act

34. The substantial change in circumstances that this reconsideration request drew the Minister's attention to, is an example of the important role that s 78A plays in achieving the

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<sup>20</sup> Ibid.

<sup>21</sup> See Request for reconsideration of decision on referral numbered EPBC 2012/6406 and investigation into compliance with the EPBC Act sent by the Environmental Defenders Office on behalf of Australian Marine Conservation Society and Humane Society International Australia dated 23 August 2023, p 6.

<sup>22</sup> Ibid, p 3.

objects of the EPBC Act. This was recognised by the Court in *Huon Aquaculture Group Ltd v Minister for the Environment*,<sup>23</sup> in which the Court stated that:

*“... given the precautionary approach to decision-making made in section 75(1), and the fact that it is not — or that it is a decision made in the absence of a full part 8 assessment, the construction of s 78 that allows the minister a flexibility to potentially correct mistakes that may have occurred in the section 75(1) process, ought to be preferred to one that unduly constrains that section...”*<sup>24</sup>

35. Section 78 and 78A represent important safeguards under the EPBC Act by providing the Minister with an opportunity, where it is needed, to potentially correct mistakes that may have occurred in the s 75 process of determining whether an action is a controlled action. This includes, as was the case for the reconsideration request, circumstances where information that was not available at the time of the original decision comes to light which provides clear evidence of the substantial impacts that an action might have on MNES.

36. Any steps that are taken to fetter the ability to make a reconsideration request to the Minister pursuant to s 78A including through the imposition of time limits to make a s 78A request, not only directly undermines the purpose of s 78 – which is to allow the Minister flexibility to potentially correct mistakes made in the s 75 process – but also the overarching objectives of the EPBC Act to provide for the protection of the environment and the promotion of biodiversity conservation.<sup>25</sup>

The assessment and approvals process of the EPBC Act already provides industry with sufficient certainty whilst balancing the need to ensure community participation in decision making

37. Senator Colbeck has also stated that this Bill will address the “untold levels of uncertainty” created by the reconsideration request. However, as outlined above at [24.i] – [24.iii], the reconsideration request merely drew the Minister’s attention to existing circumstances that warranted (in accordance with the EPBC Act) the Minister’s reconsideration of the original controlled action decision.

38. In drawing these matters to the Minister’s attention in the reconsideration request, the community organisations were not seeking to further an agenda to hold an “environmental crusaders sword of Damocles” over the proponents’ heads. Rather, the matters raised in

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<sup>23</sup> [2018] FCA 1011; 160 ALD 292 (*Huon*).

<sup>24</sup> *Ibid*, [219], [230].

<sup>25</sup> EPBC Act, s 3.

the reconsideration request relied on existing evidence that very clearly established a substantial unforeseen change in circumstances of the potential impacts of the project which warranted the Minister's reconsideration of the original controlled action decision.

39. If anything, the reconsideration request and the Minister's subsequent reconsideration of the controlled action decision for this project provides direct clarity to industry that the Minister recognises, in accordance with s 78 of the EPBC Act, the ongoing importance of ensuring that activities that are likely to have significant impacts on the environment are properly assessed and reaffirms the important role that industry plays in ensuring that their activities are carried out in accordance with their obligations under the EPBC Act.

### 3 Community participation in environmental decision-making must be preserved and enhanced

40. "The ability of the public to hold decision-makers to account is a fundamental foundation of Australia's democracy and improves the performance of law over time."<sup>26</sup>

41. EJA has previously made submissions in support of expanding the rights of the public under the EPBC Act to: seek civil penalties against entities that breach the EPBC Act; and appeal the merits of decisions on the referral, assessment and approval of new projects or developments.<sup>27</sup> EJA has called for these amendments because they would provide access to justice to the public, improved deterrence and enforcement under the Act and provide for public accountability. Community participation in environmental decision-making is crucial to ensuring that decisions are scientifically sound and justifiable.

42. The proposed amendments would weaken public participation in reconsideration request processes under the Act and they cannot be supported.

### 4 Parliament must focus its efforts on comprehensive EPBC Act reform

43. The 2020 review of the EPBC Act by Professor Graeme Samuel AC (**Samuel Review**) found that the Act has not enabled the Commonwealth Government to effectively manage

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<sup>26</sup> Graeme Samuel, *Independent Review of the EPBC Act – Final Report* (Commonwealth of Australia, 2020) p92.

<sup>27</sup> Environmental Justice Australia, Submission No 51 to the Senate Standing Committees on Environment and Communications, *Inquiry into the Nature Positive Bills* (15 July 2024) 5-6.

Australia's environmental needs.<sup>28</sup> Professor Samuel recommended fundamental reform to enable, amongst other things, transparency and strong oversight to build trust and confidence that decisions deliver clear outcomes for the environment and adhere to the law.<sup>29</sup>

44. The Government has confirmed that it is reforming the EPBC Act in response to the Samuel Review. Parliament has limited resources and time. This is also true of corporations who operate under the remit of the EPBC Act and environmental and other organisations keenly focussed on ensuring that Australia makes good on its international commitments for nature.

45. The Explanatory Memorandum to the Bill:

- i. Raises concerns about the risk that the ideology of the Minister of the time can impact upon environmental approvals – EJA shares this concern and its why we've advocated for a strong, independent, accountable Environment Protection Australia that can deliver decisions based on science rather than politics.<sup>30</sup>
- ii. Reiterates the need for certainty for project proponents, industry and the community – This is why environmental decision-making must be grounded in the best available science and the application of the precautionary principle. We need wholesale reforms to the EPBC Act that ground environmental decision-making in meaningful national environmental standards without illogical exceptions for deforestation and native forest logging. And the EPBC Act must be reformed to comprehensively address the threat of climate change and to link it with Australia's climate targets under the *Climate Change Act 2022* and the emissions limits in the newly reformed Safeguard Mechanism.
- iii. States the importance of local knowledge of an area in environmental decision-making – This reiterates the importance of community participation in decision-making, as discussed above, and the importance of EPBC Act reform to ensure legal rights for First Nations to protect, care for and manage Country, embedding the United Nations Declaration on the Rights of Indigenous People.

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<sup>28</sup> Samuel (n 26) viii.

<sup>29</sup> Ibid.

<sup>30</sup> Environmental Justice Australia (n 27) 3.

46. EJA urges that we must get on with the crucial task of comprehensive reform of the EPBC Act.

## 5 Conclusion

47. For the reasons outlined above, EJA considers that the proposed amendments are based on a flawed interpretation of the operation of s 78 and s 78A of the EPBC Act. On a correct understanding of the operation of the EPBC Act, it is apparent that the Bill's proposed amendments are unnecessary and directly undermine the objectives of the EPBC Act.

48. Furthermore, the proposed amendments would weaken public participation in reconsideration request processes under the Act and are wholly unnecessary in light of the comprehensive reform of the EPBC Act that is currently being undertaken by the Government. The amendments proposed in this Bill are unnecessary and should not be supported.

49. EJA thanks the Committee for its consideration of this submission and we welcome any questions or requests for further material arising from this submission.