

# The Wilderness Society: Submission into the Inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020*

Senate Environment and Communications Legislation Committee

November 2020

## Summary

- The *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020* (the Bill) is almost exactly the same as the 2014 EPBC Bilateral Agreement Implementation Bill in form and function.
- The world has changed significantly since 2014, clearly demonstrating the need for improved national leadership and effective regulation to protect and restore the environment.
- The Bill does not reflect important recommendations in the interim independent review, and both that bill, and this inquiry, are without the benefit of being informed by the final report of the independent review.
- The Federal Government has a fundamental obligation and responsibility to ensure the protection of Matters of National Environmental Significance (MNES), including significant international obligations.
- State and territory environmental laws are insufficient to implement existing (inadequate) EPBC Act standards, let alone new standards required as the ecological context changes.
- Devolution without important safeguards like binding national environment standards, an independent regulator and robust assurance frameworks creates substantial risks, and is highly likely to lead to negative environmental outcomes.
- The Regional Forest Agreements (RFAs) provide an instructive example of poorly thought out and ineffective devolution of approval powers.
- The Bill would support devolution without safeguards.
- The scale of the reform task to bring states and territories up to standard is complex, substantial and should not be underestimated.
- It is doubtful that the Bill will produce the desired efficiencies in decision making, and will likely result in a complex eight touch shop.
- The timeframe for this inquiry is insufficient given the complex and substantial nature of changes required by the Bill and, notably, the lack of key inputs such as the Final Report from the EPBC Act Independent Review.
- The Bill should not be supported by the Committee until a comprehensive package of reforms, comprising a complete overhaul of the EPBC Act and the creation of strong and independent institutions, including an independent regulator, to ensure the laws are implemented and environmental outcomes are significantly improved, is brought back before the Parliament and given due public and parliamentary scrutiny.



## Introduction

The Wilderness Society is an independent environmental advocacy organisation. We are membership-based, and we know that everyday Australians want governments to take action to protect species and act on climate change. For over 40 years, we've engaged Commonwealth and state governments to ensure Australia's natural environment is healthy, biodiverse and resilient to the growing impacts of climate change.

Our interaction with federal environment law stretches from the Franklin Dam campaign and our core role in the Franklin Dam High Court case upholding the constitutional power of the Commonwealth to protect Australia's globally important ecosystems, through campaigning for the creation of a national environment act in the 1990s, to being a founding member of the Places You Love Alliance advocating for national environmental law reform to deliver national leadership, achieve environmental outcomes and enshrine community rights.

We have interacted with the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), and various statutory processes under it, for the 20 year life of the Act.

The Wilderness Society welcomes this opportunity to provide Submission into the Inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 (the Bill)*.

## The EPBC Amendment Bill 2020

In its purpose, aims and in the majority of its text, the Bill is materially the same as the Abbott Government's EPBC Act Amendment (Bilateral Agreement Implementation) Bill 2014.

The Chair's Report from the Inquiry into the Bilateral Agreement Implementation Bill 2014 noted that nearly all of the submissions received by that inquiry raised significant concerns around the 2014 bill, including that:

- no state or territory had sufficient resources or the appropriate environmental processes in place to adequately assess actions that may impact on national environmental standards;
- it would result in a diminution of current environmental standards pertaining to matters of national environmental significance;
- it would add complexity to approval processes without improving efficiency;
- it would create potential conflicts of interest; and
- there were significant concerns around the role of parliamentary and public oversight in the making of amendments to bilateral agreements.

The almost complete similarity between the text of the Bill currently before the Committee and the Bilateral Agreement Implementation Bill 2014 means the Wilderness Society has little confidence that these significant issues have been addressed in the drafting of the 2020 Bill.

## Changed ecological context since 2014

The above is especially important given major changes since 2014 to the ecological context in which the EPBC Act operates clearly demonstrate the need for reformed national leadership and more effective environmental governance and regulation to deal with escalating ecological crises:

- **The 2019 Intergovernmental Platform on Biodiversity and Ecosystem Services' (IPBES) Global Assessment Report** found that human actions have significantly altered nature

across the globe, including that three-quarters of the land-based environment and about 66% of the marine environment have been significantly altered. Recently, 78 global leaders signed the “Leader’s Pledge for Nature”, committing to reversing biodiversity loss by 2030. Australia has not signed the Pledge.

- **The 2016 State of the Environment Report** found that Australia’s environment is under increased pressure and that the ‘condition of the environment in certain areas’ is... poor and/or deteriorating’. The Report found that the major pressures impacting the Australian environment (climate change, deforestation, habitat degradation and fragmentation and invasive species) had remained the same since the previous State of the Environment in 2011. There is no suggestion this has improved.
- **The 2019 OECD Environmental Performance Review for Australia** also found that the overall status of Australia’s biodiversity is poor and worsening. The Review concluded that more efforts are needed to improve coordination and guidance between levels of government<sup>2</sup>.
- **Australia’s extinction record** is one of the world’s worst for extinction and protection of animal species. Australia is ranked worst in the world for mammal extinctions<sup>3</sup>, second worst in the world for loss of diversity of life<sup>4</sup>, and fourth in the world for overall plant and animal extinctions<sup>5</sup>. Australia has the dubious global honour of being responsible for the first mammal extinction caused by climate change - the Bramble Cay Melomys. Six animals declared on the national list have become extinct since the list commenced in 2000<sup>6</sup>, with at least three endemic animals having gone extinct since 2009. A recent study found that unless management improves, Australia’s extinction rate will accelerate from a confirmed six extinctions in the 20 years to a probable 17 in the next 20<sup>7</sup>.
- **The 2019-2020 Bushfires** are an ongoing ecological crisis, with many species and ecosystems catastrophically affected. More than 11 million hectares of land burned across the south and east of the country over a period of about six months. There have been significant impacts on matters for which the Commonwealth is responsible, including:
  - The Government’s Wildlife and Threatened Species Bushfire Recovery Expert Panel have identified 810 priority species and ecological communities requiring urgent management intervention post the 2019-20 fires.
  - 21 nationally-listed endangered or critically endangered species have more than 80% of their modelled likely or known habitat within the burnt areas.
  - Approximately 54% of the Gondwana World Heritage Rainforests of Australia, 81% of the Greater Blue Mountains World Heritage Area and 99% of the Old Great North Road (part of the Australian Convict Sites World Heritage property) has been affected by fires.

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<sup>1</sup> Especially urban, coastal populated areas and the extensive land-use zone of southern and eastern Australia

<sup>2</sup> OECD (2019), *OECD Environmental Performance Reviews: Australia 2019*, OECD Environmental Performance Reviews, OECD Publishing, Paris

<sup>3</sup> Woinarski et al (2015) “Ongoing unraveling of a continental fauna: decline and extinction of Australian mammals since European settlement” *Proceedings of the National Academy of Sciences* 112(5): 4531-4540

<sup>4</sup> Waldron A et al (2017) “Reductions in global biodiversity loss predicted from conservation spending” *Nature* 551: 364-367.

<sup>5</sup>

<http://www.abc.net.au/news/2015-08-19/fact-check-does-australia-have-one-of-the-highest-extinction/6691026>

<sup>6</sup> Only four are reflected in current EPBC Act list with the Christmas island Forest Skink and Christmas Island Pipistrelle still listed as endangered/critically endangered despite consensus around their extinction [Lake Pedder Earthworm, Lord Howe Long-eared Bat, Pedder Galaxias, Bramble Cays Melomys, Christmas Island Forest Skink and Christmas Island Pipistrelle]

<sup>7</sup> Gayle H et al (2018) “Quantifying extinction risk and forecasting the number of impending Australian bird and mammal extinctions” *Pacific Conservation Biology* 24:157-167



- **Major fire events** are now occurring with unprecedented frequency, severity and intensity, and affecting areas that, for millennia, did not burn<sup>8</sup>. In 2014, the fifth IPCC report projected an increase in days of very high and extreme fire danger would be apparent by 2020, with further increases by 2050<sup>9</sup>.
- **The scale of the 2019-2020 fire catastrophe requires a substantive regulatory response** to both support environmental recovery from this event and mitigate the impact of future major events on MNES. The Wilderness Society does not believe that the Bill will meet either of these two tests.
- **Increasing impacts from climate change** are widely acknowledged as one of the largest systemic threats to biodiversity in Australia. Research predicts dramatic environmental change due to climate change, with the predicted disappearance of many ecosystems currently occupied by Australian biodiversity so significant that the magnitude of these changes will overcome species's ability to adapt by 2070<sup>10</sup>. Severe impacts are already being seen in both heavily compromised systems (such as the Great Barrier Reef and Tasmanian Kelp Forests) and relatively pristine systems (such as the Tasmanian Cradle Mountain World Heritage Area).

### Ineffectiveness of the current EPBC Act

The EPBC Act is Australia's primary existing legislative mechanism for species, biodiversity, ecosystem and natural heritage conservation and for realising the Australian Government's substantial international obligations to preserve its unique biodiversity and ecosystems under international agreements to which we are signatories.

The Interim Report of the 2019-2020 Independent Review of the EPBC Act found that "(t)he EPBC Act is ineffective. It does not enable the Commonwealth to play its role in protecting and conserving environmental matters that are important for the nation. It is not fit to address current or future environmental challenges."

The Interim Report also found that "fundamental reform of national environmental law is required, and new, legally enforceable National Environmental Standards should be the foundation."

It is the view of the Wilderness Society that the EPBC Amendments Bill 2020 does not meet that challenge. The handing of assessment and approval powers on Matters of National Environmental Significance (MNES) does little to fix the underlying issues in the EPBC Act, and is a major step backwards in the protection of the environment in Australia.

The Wilderness Society strongly advocates that the federal government should retain its role in assessing and approving projects that impact on matters of national environmental significance.

Federal Environment Minister Sussan Ley has publicly committed to create national standards to

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<sup>8</sup> Bowman, D, Murphy, B., Neyland, D, Williamson, G and Prior, L (2014) "Abrupt fire regime change may cause landscape-wide loss of mature obligate seeder forests" *Global Change Biology* 20: 1008-1015. doi:10.1111/gcb.12433; Dunlop et al (2012) *The Implications of Climate Change for Biodiversity, Conservation and the National Reserve System: Final Synthesis* CSIRO Climate Adaptation Flagship, Canberra

<sup>9</sup> Lucas C, Hennessy K and Bathols J (2007) Bushfire Weather in Southeast Australia: Recent Trends and Projected Climate Change Impacts. Consultancy Report prepared for The Climate Institute of Australia by the Bushfire Cooperative Research Centre. Quoted in Reisinger A, Kitching R, Chiew F, Hughes L, Newton P, Schuster S, Tait A and Whetton P (2014) Australasia. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change pp. 1371-1438. See [https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap25\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap25_FINAL.pdf)

<sup>10</sup> Dunlop et al (2012) *The Implications of Climate Change for Biodiversity, Conservation and the National Reserve System: Final Synthesis* CSIRO Climate Adaptation Flagship, Canberra



ensure continued national leadership in the protection of MNES<sup>11</sup>, and that there will be no handover of any project approval powers until state governments had demonstrated their bureaucracies would and could implement national environment standards.

Minister Ley has indicated that the above elements (standards and assurance) are fundamental to the Government's "one touch" devolution proposal. The Wilderness Society believes that these measures are vital in ensuring robust, transparent and effective regulation.

However, we have yet to see concrete measures to bring the above into being. The EPBC Amendments Bill 2020 does not contain reference to or provide a legislative basis for national environment standards, any assurance measures to ensure state and territory governments must enforce such standards or support robust transparency and accountability measures to ensure sufficient parliamentary and public oversight of a devolved environmental decision-making system.

On this basis, the Wilderness Society strongly believes EPBC Amendments Bill 2020 should not be supported by the Committee until a comprehensive package of reforms informed by the Independent Review is brought back before the Committee and given due public and parliamentary scrutiny.

### **The States and Territories**

The Wilderness Society believes the states and territories are incapable of adequately assessing projects that impact MNES, and should not be given the task of approving these projects.

State and territory governments do not assess projects with the national interest—or national significance of species or ecosystem—in mind. They are not appropriate authorities to assess the impact of projects that impact across state borders or on shared environmental values such as migratory species, terrestrial aquatic ecosystems, or even endemic species.

State and territory governments are neither signatory to nor the appropriate authorities to assess and approve on issues relevant to global agreements. They are not the appropriate authorities to assess and approve projects that impact on World and Nationally listed heritage areas.

The Wilderness Society believes that is fundamentally the role of the Australian Government.

State and territory governments are often the proponents of major developments that have impacts on MNES. The states are heavily reliant on income from developments, mines and energy projects they are assessing and potentially approving. This constitutes a clear conflict of interest if they were to act as sole approver of such projects.

Often there is also a political imperative for state and territory governments to ensure projects are approved rapidly which can stand in conflict with the transparent application of national environment standards.

In addition, state and territory governments do not have consistent laws that even mention many of these MNES. A 2020 Environment Defenders Office study found that no state or territory legislation met the full suite of existing national environmental standards required to protect

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<sup>11</sup> <https://www.abc.net.au/news/2020-09-13/environmental-law-deregulation-states/12656318>



matters of national environmental significance. The report found that for state and territory laws to actually meet existing standards, law reform is already needed<sup>12</sup>.

For state and territory laws to meet new national standards for environmental outcomes and assurance – as foreshadowed by the independent review process – there would need to be significant reform at the national, state and potentially regional and local levels. There also needs to be governance reform and significant resourcing at multiple levels to ensure that national standards are consistently applied and enforced on the ground at the project level.

The scale of the reform task is complex, substantial and should not be underestimated.

Without legally-binding national standards, a robust assurance framework that ensures states and territories can and do implement these standards and independent oversight of the system from an independent regulator, this will result eight separate jurisdictions having eight very different legislative and regulatory regimes attempting to deliver what has been a single standard under the existing EPBC regime.

It is hard to see how this will reduce complexity and ensure the consistent application of national standards. Without significant changes in state and territory legislation, and the above mentioned assurance measures, the Wilderness Society does not believe the process of implementing a “one touch” as currently proffered by the Government can lead to state and territory governments delivering standards of assessment and approval that are consistent and at the same level as the current system.

And without this being altered, there can not be public or institutional confidence in any accreditation of state and territory processes.

### **Is devolution the solution?**

Inefficiencies from ‘duplication’ and in receiving approvals are often highlighted as key reasons why some across business and industry are calling for a ‘one-stop-shop’ model to reduce duplication and assessment time frames.

However findings from the Interim Report of the 2019-2020 Independent Review of the EPBC Act indicated that these regulatory delays may be more perceived than actual. The Interim Report found that “(o)n average, the process is with the proponent for more than 3 quarters of the total assessment time. This includes the time needed to collect required environmental information and collate necessary documentation, or when projects are shelved for periods of time for commercial reasons by proponents<sup>13</sup>”.

There is no doubt that the Department of Agriculture, Water and the Environment (the Department) is currently not performing as an effective regulator under the EPBC Act. A recent damning Auditor-General Report found that “(r)eferrals and assessments are not administered effectively or efficiently” and “(r)egulation is not supported by appropriate systems and processes, including an appropriate quality assurance framework” in the Department.

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<sup>12</sup> Environment Defender’s Office (2020) *Devolving Extinction: The risks of handing environmental responsibilities to state & territories*  
<https://www.edo.org.au/2020/10/05/devolving-extinction-the-risks-of-handing-environmental-responsibilities-to-state-territories/>

<sup>13</sup> Samuel, G (2020) *Independent Review of the EPBC Act—Interim Report*, Department of Agriculture, Water and the Environment, Canberra, June, p73





The Wilderness Society does not believe this justifies handing substantial powers to the states and territories without a substantive process of accreditation and improvement in state regulators. With large-scale cuts to environment departments, potential and real conflicts of interest, lack of appropriate skills and a history of environmental regulatory failure, it is our very strong view that the proposal to hand the states and territories assessment and approval powers over MNES is a very bad mistake.

Rather, the Wilderness Society strongly recommends the Commonwealth retain environment decision making powers and establish a strong, independent and adequately-funded environment regulator to ensure the laws are implemented and environmental outcomes are significantly improved.

### **The instructive example of Regional Forest Agreements**

The Regional Forest Agreements (RFAs) provide a well documented and salutary example of the dangers inherent in bilateral assessment and approval agreements.

Under the RFAs, the Commonwealth Government formally removes itself from any ongoing involvement in the assessment and approval of forest logging operations, via the so-called 'RFA exemption' clauses incorporated into the EPBC Act and the Regional Forest Agreement Act 2002 (RFA Act). RFAs were intended to provide for the needs of conservation and industry by establishing a Comprehensive, Adequate and Representative (CAR) Reserve System, sustainably managing areas available for logging outside of reserves and providing secure access to the forest resource for the native forest logging and log processing industry.

The reality over the past 20 years has been that:

- 12 forest vertebrate fauna species have been up-listed to the 'Endangered' or 'Critically Endangered' categories since RFAs commenced;
- More than a quarter Federally-listed forest dependent species that were listed when the RFAs were signed are closer to extinction now than they were 20 years ago;
- 15 forest vertebrate fauna species have been listed for the first time as threatened in the 20 years since the RFAs were commenced;
- 15 listed forest-dwelling fauna species have no EPBC Act Recovery Plan;
- The CAR Reserve System is based on outdated science and technology. Additionally, many of the accredited CAR reserves ('informal reserves') lack any secure protection;
- Five-yearly reviews have been consistently late by three years on average. The first RFA to be signed in 1997 was not reviewed until 2010, 13 years after it was signed; and
- The recent Federal Court ruling that found that state-owned logging agency VicForests breached the code of practice under the Central Highlands RFA and therefore was not exempt under the EPBC Act 1999, has profound implications for the RFAs. It throws into doubt the legality of the exemption for all RFAs<sup>14</sup>.

In addition, the needs of industry have not been met with sawmill closures, job losses, and a reduction in wood volumes availability (due to mismanagement and the impacts of successive bushfires (themselves more frequent and severe due to the impacts of logging)) -- certainty or the industry has proved elusive despite more than two decades of RFAs and an unnecessary and

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<sup>14</sup> Robertson P, Young A & Milthorpe S (2019) *Abandoned: Australia's forest wildlife in crisis* The Wilderness Society, Surry Hills Australia; The Wilderness Society (2020) *Creating Jobs, Protecting Forests? The State of the Nation's RFAs* The Wilderness Society, Melbourne, Australia



damaging exemption from national environment law.

For more information, see the Wilderness Society's *Abandoned* report (attachment 1).

The result of devolved approvals via the RFAs is that state governments are not required to secure forest species' survival and the Commonwealth Government has abrogated its responsibilities to protect them.

The 'RFA exemption' from the EPBC Act means the Commonwealth Government appears to be unable, as well as unwilling, to intervene even when logging threatens the survival of threatened and endangered species like the Spotted-tail Quoll, large forest owls, Leadbeater's Possum, Carnaby's Black Cockatoo, and Giant Freshwater Lobster.

### **Interaction between the Bill and the 2019-2020 Independent Review of the EPBC Act**

The Wilderness Society does not believe that the Bill constitutes a meaningful legislative response to the 2019-2020 Independent Review of the EPBC Act, despite public statements to that end from the Government.

We note that the independent review into the EPBC Act was not complete at the time of drafting and parliamentary introduction of the Bill and that drafting instructions for the Bill were given to the the Office of Parliamentary Counsel 11 days before the Minister for the Environment received the interim report from the Independent Review<sup>15</sup>.

We note that the Final Report of this Review still has not been tabled in Parliament or made public. Given that the Review constitutes a major decadal review of the effectiveness, operation and implementation of the EPBC Act, the Wilderness Society strongly believes that no amendments should be made to the EPBC Act until, at a minimum, the Final Report is tabled and a comprehensive package of reforms is developed and given due public and parliamentary scrutiny.

Given the impact of major climate events like the 2019-2020 summer bushfires, the Independent Review of the EPBC Act presents a key opportunity to ensure Australia's environmental legislation and regulation are fit for purpose and can take a proactive approach to ensuring Australia's nature is healthy and resilient in the face of the growing impacts of climate change.

The Wilderness Society strongly recommends a complete overhaul of Australia's national environment laws and the creation of strong and independent institutions to ensure the laws are implemented and environmental outcomes are significantly improved. Key elements of a reformed approach to the protection of MNES are outlined in the Wilderness Society's submission to the Independent Review (attachment 2).

### **Process and timeframes of this inquiry**

The Wilderness Society would like to note its concern with the short timeframe of this Inquiry, and our belief that a two week inquiry period (12-27 November) is insufficient to fully understand the complex impacts such a significant change to existing environmental regulation and determine whether the Bill is fit for purpose, and what other legislative and institutional arrangements are required.

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<sup>15</sup> Commonwealth, *Public Hearing: Australia's faunal extinction crisis*, Senate Environment and Communications References Committee, 25 August 2020 (James Tregurtha, Department of Agriculture, Water and the Environment)





The impacts of the EPBC Amendment Bill 2020 on the operation of the EPBC Act cannot be considered in isolation from the framework of subsidiary legislation and instruments, such as the Regional Forest Agreements, strategic assessments, recovery and threat abatement plans, as well as the impact on, and of, various state and territory environmental regulatory regimes on the proposal to devolve decision making to those jurisdictions.

This change affects the entire Federation and we are concerned that the short timeframe for this inquiry does not provide this Committee sufficient time to give these impacts the scrutiny they require.

As above, we are concerned that the Final Report of the Independent Review still has not been tabled in Parliament or made available to the public, and that this limits the ability of the Committee to consider the proposed Bill in light of the expert analysis provided by the Review.

And finally, we consider the short timeframe provided for public comment to be insufficient to allow for substantive community feedback on the proposed Bill. We note that 30,000 Australians fed into the Independent Review via public submissions, indicating high levels of community interest in the effective operation of our national environment laws.

The Wilderness Society requests this Committee extends the timeframe of this inquiry until February 2021 to allow for that scrutiny and community input.