



31 August 2022

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100, Parliament House
Canberra ACT 2600
By email: ec.sen@aph.gov.au

Dear Committee Secretary,

RE: Senate Inquiry into Australia's Fauna and Flora Extinction Crisis – call for supplementary submissions

The National Environmental Law Association Ltd ACN 008 657 761 ('NELA') welcomes the opportunity to contribute to the Senate Inquiry into Australia's extinction crisis ('the Senate Inquiry' or 'this Inquiry'). This submission has been prepared by a group of NELA Directors and appointed officers, and has been reviewed and approved by NELA's Board.¹

1. NELA's objects and its interest in this Senate Inquiry

NELA is a peak body for advancing Australian environmental law. We are a national, multidisciplinary, member-based association focused on environmental law and sustainability. We are managed by a national board that includes Directors with expertise in international and domestic legal frameworks for biodiversity conservation, climate change and natural disasters, environmental regulation and regulatory theory and natural resource management.

One of NELA's core objectives is to provide a forum for, and to otherwise assist in, the discussion, consideration and advancement of environmental law across the legal profession and the wider community. Australia's species extinction record and trajectories, and the

¹ Submission authors: Dr Phillipa McCormack, Dr Katie Woolaston, Patrick Cenita.

nation's broader contribution to global efforts to mitigate and reverse biodiversity loss, are key concerns for NELA's members. We are grateful for the opportunity to make a supplementary submission to this Inquiry.

2. **Summary**

NELA makes the following submissions:

- Australia's environmental laws are beyond the need for tinkering. Rather, they require urgent, holistic and transformative change;
- There is a strong case for environmental law reform to happen at the national scale, even though there is also a need for law reform at the state and territory scale to effectively address the issue of species extinctions; and
- Including flora extinctions in this Inquiry broadens the opportunity to take a national stance on the role of native vegetation clearing and historical exemptions of Regional Forest Agreements from national environmental oversight – not just as drivers of biodiversity loss and flora and fauna extinctions, but also as activities that undermine Australia's capacity to meet its climate targets in a cost-effective and biodiversity-positive way.

3. **Australia's environmental laws are beyond the need for 'tinkering' – they require urgent, holistic and transformative change**

There are major shortfalls in our existing laws that have not been adequately addressed in recent years, despite repeated evidence of species loss and ineffective resourcing of laws, implementation and enforcement. From a procedural perspective, the recent independent review of the national *Environment Protection and Biodiversity Conservation Act 1999* ('the Samuel Report') identified major shortfalls in transparency, accountability, trust and compliance; while from a substantive perspective, the Act's shortfalls were identified to include:

- a failure to clearly articulate the outcomes that Australia's national environmental laws should be achieving;
- limitations in the scope of the Act's goals and substantive tools for management;
- a piecemeal and fragmented approach to conservation and environmental management;

- extremely complicated, limited and siloed assessment processes established under the Act;
- a lack of duties on decision makers and far-too-broad decision-making discretions;
- poor implementation and chronic under-resourcing;
- little monitoring or measuring of proposed outcomes; and
- little-to-no enforcement.²

These criticisms cannot be overcome without transformative legal reform. They go to the heart of the legislation and its profound failure to prevent biodiversity decline and species extinctions, let alone demonstrate good environmental management. In fact, there is almost nothing to be weighed on the other side of the ledger. Despite 20 years in operation, just one species has been removed from the EPBC Act's threatened species list as a result of a genuine improvement in its status.³

In response, **NELA submits that the Senate Inquiry ought to urge the Australian Government, in the strongest possible terms, to draft a new Environment Act as a matter of urgency.** The new legislation should include the following characteristics:

- a holistic, rather than piecemeal, approach to environmental management, providing “[o]pportunities for coordinated national actions and investments to address key environmental challenges – such as feral animals, habitat restoration and adapting to climate change” (Samuel Report, p 17);
- a strategic and regional approach (rather than species-by-species approach), that relies on planning tools such as strategic national plans and Commonwealth-led ‘regional recovery plans’. These plans could be used to ‘identify recovery priorities for multiple threatened species and ecological communities at the landscape scale’, including in response to extreme events such as bushfires and droughts (Samuel Report, recommendations 25, 26);
- a new statutory mechanism that enables quick responses to acute threats such as biosecurity incursions and extreme events, which are both anticipated to become

² Professor Graeme Samuel AC, *Independent Review of the EPBC Act - Final Report* (20 October 2020) (‘The Samuel Report’).

³ Wentworth Group of Concerned Scientists, quoted in the Samuel Report.

increasingly frequent and their effects more severe as the climate changes (Samuel Report, p 17);

- a clear, legally-enforceable baseline, or minimum set of standards for environmental management, building on the core recommendation of the Samuel Report for National Environmental Standards. These standards should include clear mechanisms for avoiding and mitigating the risk of species extinctions in decision making at all scales of government, industry and private land management;
- a commitment to actively restoring Australia's degraded, declining and destroyed ecosystems, ecological communities, critical habitats and crucial climate refuges (to which native species can retreat as the climate changes), rather than simply seeking to minimise ongoing losses (Samuel Report p 54 and recommendation 4); and
- a mechanism for recognising, accounting for and preventing cumulative impacts that, together, contribute to environmental decline rather than conservation (Samuel Report, recommendation 25).

NELA submits that, alongside urgent statutory reform, the Senate Inquiry should consider the implications of government decisions about institutional support including staffing and other resourcing requirements, transparency and a culture of openness, and accountability. In its damning 2021-22 review of the implementation of the EPBC Act, the Commonwealth Auditor-General found that “desired outcomes [of the Act were not] being achieved, due to the department’s lack of monitoring, reporting and support for the implementation of conservation advices, recovery plans and threat abatement processes”.⁴ In our respective roles we have heard that institutionally, training on new policies is lacking and many decision-makers are not aware of the relevant processes and policies upon which their decisions have to be made. Often, decision-making guidelines are unclear and overly complex, leading to a lack of engagement with them from decision-makers.

In designing a new Environment Act that is effective at managing Australia’s rich natural heritage and preventing species decline and extinction, **NELA supports all of the recommendations set out in the 2018 report: ‘Next Generation Biodiversity Laws’,**

⁴ Department of Agriculture, Water and the Environment, *Management of Threatened Species and Ecological Communities under the Environment Protection and Biodiversity Conservation Act 1999* (Auditor-General Report No.19 2021–2022).

drafted by the NSW Environmental Defenders Office on behalf of Humane Society International (**attached**).⁵

NELA submits that the fundamental and urgent need is now to see the host of solutions and comprehensive proposals for reform that have been proposed in recent years, actually implemented by the new Australian government. After decades of reports, inquiries and recommendations that highlight ongoing environmental decline, we know that Australia's environmental laws are comprehensively inadequate for the task of protecting Australia's unique natural assets. It is time to act on that knowledge and begin the task of turning around Australia's devastating record of biodiversity decline.

4. There is a strong case to be made for reform at the national scale, even though state and territory governments also have important environmental law reform work to do

The Australian Government must lead national law reform efforts if we are to see effective implementation of the recommendations – especially those proposed in the Samuel Report, Auditor-General's report and the EDO's *Next Generation Biodiversity Laws* report – and if we are to address the challenges identified in the 2021 State of the Environment report, including species extinctions. While state and territory environmental laws have also been demonstrated to be inadequate for preventing environmental decline and species extinctions (e.g. Queensland audit report⁶), NELA anticipates that national reform could have important 'flow on effects' for the standard and implementation of state and territory laws, and the resulting protection of threatened flora and fauna.

In particular, NELA submits that:

- the Commonwealth Government must work to complete the long-running project that has been seeking to consolidate threatened species listings and recovery and habitat plans across jurisdictions and scales. Inconsistencies between State and Commonwealth threatened species lists create inefficiencies in conservation management and resourcing, complexity and gaps, and bureaucratic difficulties - especially for State government decision-makers. Many State-based legislative

⁵ NSW Environmental Defender's Office & Humane Society International, *Next Generation: Biodiversity Laws* (2018).

⁶ https://www.qao.qld.gov.au/sites/default/files/reports/conserving_threatened_species_.pdf

mechanisms that allow for the creation of habitat recovery plans and listing of threatened ecological communities have not been utilised, so if the Commonwealth government resolves the need for streamlined, nationally-consistent threatened species lists, it will also create clarity and a new imperative for State-based conservation management.

- if the Commonwealth government takes responsibility for delivering National Environmental Standards, Australia would have a clear, consistent, rigorous and measurable baseline against which to assess the effectiveness (or otherwise) of State and Territory laws, including their resourcing, implementation and enforcement.

Australia's extinction crisis requires more than legislative reform; it also requires decisive political leadership at a national level. Biodiversity conservation decision-making is often compromised in favour of competing or conflicting values, such as economic productivity and industry developments. There are particular challenges at State and Territory scales, where land uses and developments that threaten biodiversity also, often, promise substantial increases in State royalty payments, along with rates, fees, permitting payments and other financial imperatives. These financial incentives can undermine ambition and political commitment to conservation, and have served to exacerbate threatening processes such as native vegetation clearing and biodiversity decline. Overcoming this political imperative would allow decision-makers to prioritise conservation outcomes in decisions about land use changes and potentially-destructive development proposals, and to prioritise long-term economic and social stability - both of which can be supported by strong conservation-oriented decisions. Political leadership from the Commonwealth Government is needed, to demonstrate and incentivise a better way forward for environmental law in this country.

5. The Australian Government should take responsibility for mitigating the effects of native vegetation clearing, including under Regional Forest Agreements, to prevent flora extinctions and better-manage the risks of habitat loss for all threatened species

NELA urges the Australian government to embrace the challenge of designing regulatory oversight for more effectively managing these crucial areas of environmental conflict, particularly in light of the Australian government's commitment to action on climate change and a net zero emissions target by 2050. Expanding the Senate Inquiry to consider the implications of flora extinctions creates, for the first time, an opportunity to

highlight the role that the Australian Government could play in reconciling national climate and biodiversity goals through better management of native vegetation, forestry and agricultural practices across the continent. For example, the Samuel Report highlights the need for clear minimum standards against which Regional Forest Agreements should be assessed, and transparent reporting obligations to ensure that RFA operations meet national environmental benchmarks and do not contribute to biodiversity decline (Recommendation 15, Samuel Report). For example, the Samuel Report notes that:

There is insufficient Commonwealth oversight of RFAs and the assurance and reporting mechanisms are weak. The RFA Act requires agreements to be subject to a 5-yearly review process but those reviews have been consistently late by an average of approximately 3 years. The first RFA to be signed was not reviewed until 13 years after the commencement date. All RFAs have been progressively extended as their initial 20-year term came to an end, rather than renegotiated from scratch. The extended RFAs included some incremental improvements, including mandating annual meetings between State and Commonwealth officials responsible for administering the RFA Act, to consider compliance issues and the overall performance of the RFAs...

The RFAs rely solely on the States to undertake surveillance, compliance and enforcement. During this Review, a Federal Court ruling 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 (*Friends of Leadbeater's Possum Inc v VicForests* 2020). As of October 2020, the Commonwealth had not commenced compliance action for this potential breach of the EPBC Act. The EPBC Act does not require reporting on the environmental outcomes of activities conducted under RFAs. The Review considers that Commonwealth oversight of environmental protections under RFAs is insufficient and immediate reform is needed. *The National Environmental Standard for MNES should be immediately applied and RFAs should be subject to robust Commonwealth oversight.* (pp 106-7, emphasis added).

NELA strongly supports this finding and recommendation of the Samuel Report.

6. **Background to this submission**

We refer the Committee to NELA's original submission to the Senate Inquiry into Australian Faunal Extinctions, dated 10 September 2018, and currently listed as Submission Number 153 on the Inquiry's Submissions website. While we do not wish to restate the arguments made therein, we note that an update is required. Since 2018, the effects of a changing climate have become clearer and more immediate, and more research on the causes of biodiversity extinction is now available, demonstrating even more clearly that our legal framework for conservation and environmental management is failing Australia's rich biodiversity. NELA's submission is informed by these developments and, in particular, the implications of recent extreme events for Australia's biodiversity; the crucial role that native flora plays in sustaining ecosystem processes, functions and services; and the increasing urgency of the need for comprehensive law reform.

NELA welcomes the opportunity to make a supplementary submission, given recent events and reporting on Australia's extinction crisis. In particular, the catastrophic effect on biodiversity of the 2019-2020 bushfires (which impacted approximately 3 billion animals) has resulted in at least one species extinction and placed many other unique native species on an accelerated path towards extinction.⁷ Extreme bushfire events, along with extended droughts, heatwaves and damaging storms, will occur more frequently and with greater intensity over coming years, and worse still, will increasingly occur simultaneously with catastrophic flow-on effects, in what the Intergovernmental Panel on Climate Change has described as 'complex, compound and cascading' risks.⁸ The latest IPCC report on impacts, adaptation and vulnerability has found that up to 18% of terrestrial species assessed in the report will be at high risk of extinction under 2 degrees of warming, while under 4 degrees of warming, roughly every second plant or animal species assessed will be threatened.⁹

⁷ WWF, *Australia's 2019-2020 Bushfires: The Wildlife Toll* (Interim Report, 2020).

⁸ [Ritaban Dutta](#) et al, 'Big data integration shows Australian bush-fire frequency is increasing significantly' (2016) 3(2) *Royal Society Open Science* 150241-150241; Hans-O. Pörtner et al, 'Summary for Policymakers' in *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press 2022).

⁹ Mark Howden, Joy Pereira and Roberto Sanchez, 'Mass starvation, extinctions, disasters: the new IPCC report's grim predictions, and why adaptation efforts are falling behind' (28 February 2022) *The Conversation* <<https://theconversation.com/mass-starvation-extinctions-disasters-the-new-ipcc-reports-grim-predictions-and-why-adaptation-efforts-are-falling-behind-176693>>.

NELA also strongly supports the expansion of the Terms of Reference for this Inquiry, to include the risk of extinction to native flora as well as faunal extinctions. Healthy, balanced and sustainable ecosystems include, of course, both flora and fauna, along with other biodiversity such as fungi, and the full diversity of microbial and bacterial life. These ecosystems underpin rich and deeply-complex arrangements of ecological functions, processes and services. Australia's extraordinary ecosystems are largely irreplaceable and provide a fundamental foundation to our quality of life.¹⁰ Species extinctions threaten ecosystems by speeding up the rate of ecological decline and extending its scope and scale. Under the previous terms of reference, the Inquiry could only consider native vegetation loss through the lens of habitat. While habitat loss is a crucial consideration for species extinctions, the extinction of native flora is, in itself, a failure to meet Australia's international biodiversity conservation obligations and a separate driver of ecological decline. Australia is one of just five countries that are, together, home to the majority of endemic plant species globally.¹¹ The true extent of extinction of native flora is difficult to know, as data is notoriously deficient,¹² but vascular plants comprise 70% of nationally listed threatened species, with more that are not on statutory lists but are nevertheless considered to be highly threatened.¹³

Given recent catastrophic events and the increasing threat to native flora and fauna, NELA contends that **it is more important now than it has ever been, for Australia's legal frameworks to be reformed and strengthened** to prevent and address the nation's species extinction crisis. Furthermore, NELA submits that it is long-past time to acknowledge Australia's poor record on biodiversity loss and species extinction, **and to develop an ambitious, national roadmap for halting – and beginning the process of reversing – the nation's terrible record of decline.** Evidence of species extinction as a result of human

¹⁰ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. (2019). Summary for policymakers of the global assessment report on biodiversity and ecosystem services (summary for policymakers). IPBES Plenary at its seventh session (IPBES 7, Paris, 2019) ('IPBES Global Assessment Report').

¹¹ R V Gallagher et al, 'Global Shortfalls in Extinction Risk Assessments for Endemic Flora' (2022) Preprint available [Global shortfalls in extinction risk assessments for endemic flora \(biorxiv.org\)](https://doi.org/10.1101/2022.03.15.481111).

¹² Carl R Gosper et al, 'Distribution, Biogeography and Characteristics of the Threatened and Data-Deficient Flora in the Southwest Australia Floristic Region' (2022) 14(6) *Diversity* 493; J L Silcock et al, 'To name those lost: assessing extinction likelihood in the Australian vascular flora' (2020) 54(2) *Oryx* 167.

¹³ J L Silcock and R J Fensham, 'Using evidence of decline and extinction risk to identify priority areas, habitats and threats for plant conservation in Australia' (2018) 66(7) 541-555.

activity has been well documented.¹⁴ Over 100 Australian species have been listed as extinct since British colonisation, with the result that the continent has one of the worst extinction rates in the world.¹⁵ Mammal decline has been particularly severe with Australians alive today seeing just “a faint shadow of the richness and abundance of the Australian mammal fauna that existed at the time of European settlement”.¹⁶

Without urgent action, native species will continue to face ongoing threats such as pollution, land clearing, urban development, pests and invasive species, while also having to contend with climate change, with its unique impacts on species, for example, as a result of sea level rise and changing rainfall conditions, and its role as a ‘threat multiplier’, amplifying the damaging effects of existing drivers of extinction.¹⁷ Failing to take urgent action on this crisis will also have lasting and devastating impacts on Australia’s basic societal needs such as the provision of ecological services such as water and air filtration, food systems, medical science, rural, regional and urban economies, Aboriginal and Torres Strait Islander cultures and communities, and Australians’ physical and mental health and wellbeing.

7. Conclusion

This Senate Inquiry has an opportunity to have a real impact on Australia’s legal framework for biodiversity conservation. NELA welcomes the opportunity to make a supplementary submission, drawing on developments in research and biodiversity threats since 2018.

NELA urges the Senate Inquiry to push for a renewed, ambitious national commitment to comprehensive and transformative environmental law reform (not just tinkering around the edges); national leadership and resourcing to support a long-term, collaborative environmental law reform agenda that brings the states and territories along with it; and a clear, national policy position on native vegetation clearing and Regional Forest Agreements,

¹⁴ John Woinarski et al, 'Ongoing unravelling 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* (2015); Johan Rockström et al, 'A safe operating space for humanity' (2009) 461 *Nature* 472-475.

¹⁵ Australian Government, *Australia State of the Environment 2021* (2022).

¹⁶ John Woinarski et al, 'Ongoing unravelling of a continental fauna: Decline and extinction of Australian mammals since European settlement' (2015) 112(15) *Proceedings of the National Academy of Sciences of the United States of America* 4531-4540.

¹⁷ Stephen Kearney et al, 'Estimating the benefit of well-managed protected areas for threatened species conservation' (2018) 54(2) *Oryx* 276–284; see also IPBES Global Assessment Report, pp 12-14.

that brings both threats to biodiversity back into the regulatory responsibility and oversight of the Australian Government.

Sincerely,

Dr Phillipa McCormack, Education Portfolio Director

and

Dr Katie Woolaston, Vice President and Publications Portfolio Director

On behalf of the National Environmental Law Association.