

30 Sept 2022

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Dear **Committee Secretary**,

UNSW LAW SOCIETY SUBMISSION REGARDING THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION AMENDMENT (SAVE THE KOALA) BILL 2021*.¹

The University of New South Wales Law Society Inc. welcomes the opportunity to provide a submission to the Senate Standing Committees on Environment and Communications.

The UNSW Law Society Inc. is the representative body for all students in the UNSW Faculty of Law.

Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

The enclosed submission deals broadly with the inferred terms of reference regarding the amendments proposed by the *Save the Koala Bill*. The submission reflects the opinions of the contributors, with the UNSW Law Society proud to facilitate these submissions. UNSW Law Society Inc. is not affiliated with any political party.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely,

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¹ Hereafter referred to as the '*Save the Koala Bill*'.

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I INTRODUCTION

In light of the koala (*Phascolarctos cinereus*) being listed as endangered in New South Wales ('NSW') by the NSW Threatened Species Scientific Committee (TSSC) earlier this year,² there is a great need to take significant and urgent action to protect koalas and koala habitat. As highlighted in the explanatory memorandum for this Bill, '[h]abitat loss, degradation and fragmentation is the greatest threat to koalas. Koalas will be extinct by 2050 unless land clearing is stopped'.³

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') currently contains no explicit reference to 'habitat critical to koalas' within the legislation. This lack of specificity exposes large areas of land to clearing and development, approved by the government for setting up of large housing blocks, despite the koala being declared endangered. Research by the Australian Conservation Foundation shows that approval of 61% of the koala habitat was permitted to be cleared by the Federal Government for mining, 12% was for land transport and 11% was for residential housing projects. A lack of restrictions and definition of habitat critical to the koala population continues to allow ongoing clearance of land that is necessary for koala populations to survive. Additionally, repeated natural disasters have claimed a proportion of land inhabited by koalas, further exposing them to limited land availability and conditions that lead to the dwindling of their population.⁴

Thus, the effectiveness of this Bill can largely be measured against the extent to which it limits habitat loss, fragmentation and degradation. In line with the legislative amendments proposed, this submission will make recommendations regarding the strengths and limitations of the insertion of section 18B and section 527G, and will briefly make recommendations regarding the protection afforded by the amendments regarding regional forest agreements ('RFAs').

² New South Wales Threatened Species Scientific Committee, Parliament of NSW, *Notice and Reasons for the Final Determination* (Report, 20 May 2022)

<<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Scientific-Committee/Determinations/final-determination-phascolarctos-cinereus-endangered-species.pdf?la=en&hash=005D26A4C7215AF7CF913ADE39FCC02F0E211089>>.

³ Explanatory Memorandum, Environment Protection and Biodiversity Amendment (Save the Koala) Bill 2021.

⁴ 'Federal government has approved the clearing of 25,000 hectares of koala habitat in the last 10 years'

Australian Conservation Foundation (Web Page, 8 February 2022)

<<https://www.acf.org.au/federal-govt-has-approved-clearing-25000ha-koala-habitat-10-yrs#:~:text=New%20research%20reveals%20the%20federal,to%20extinction%20ten%20years%20ago>>.

Critically, this submission argues that whilst the *Save the Koala Bill* is a welcomed step towards saving koalas from extinction, broader policy reforms that complement its implementation are required.

II INADEQUACY OF EXISTING HABITAT PROTECTION LAWS

In light of the failure of state laws to adequately protect koala habitats, this federal amendment should be supported as it necessarily curtails one of the greatest threats to koalas. Proposed section 139(3) inhibits the Federal Environment Minister from approving koala habitat clearing. Furthermore, proposed section 527G clarifies that activities which have a ‘significant impact’ on koalas involve those activities such that the population is placed at a greater risk of extinction. Whilst this submission elsewhere acknowledges deficiencies in section 527G’s wording, these proposals seemingly provide a reasonably strong level of koala habitat protection. More importantly, they offer substantial improvements to the weak and ineffective habitat protection measures of the status quo. Before addressing potential improvements to the proposed amendments, this submission will begin by outlining the clear shortfalls and limitations of existing state habitat protection laws and regulations. As most koala habitat is located in south-eastern Australia,⁵ the following analysis will focus on the law in NSW and Queensland.

On its face, state protections against the development of koala habitat are apparently strong, though complicated to find. In Queensland, development policy guidelines⁶ state that development assessments should avoid koala habitat destruction to the greatest extent possible,⁷ or, if not avoided, mitigated to the greatest extent possible.⁸ In NSW, the *Biodiversity Conservation Act 2016* (NSW) makes an offence of damaging the habitat of endangered species, like the koala.⁹ However, these protections are weak in practice. Queensland’s assessment provisions are guidelines without the force of law. In NSW, protections can be avoided with a ‘conservation licence’,¹⁰ the approval procedure for which does not have statutory criterion¹¹ nor other strict guidelines.¹² Approved development and

⁵ ‘Distribution’, *Australian Koala Foundation* (Web Page) <https://www.savethekoala.com/about-koalas/distribution/>.

⁶ Queensland Government, *State Code 25: Development in South East Queensland Koala Habitat Areas* (State Development Assessment Procedures, 4 February 2022) (‘*QLD State Code 25*’) read with Queensland Government, *Guideline: State Development Assessment Provisions: State Code 25 Development in South East Queensland Koala Habitat Areas* (Guidelines, 7 February 2020) (‘*QLD State Code 25 Guidelines*’).

⁷ *QLD State Code 25* (n 3) 1; *QLD State Code 25 Guidelines* (n 3) 5.

⁸ *QLD State Code 25* (n 3) 1; *QLD State Code 25 Guidelines* (n 3) 5.

⁹ *Biodiversity Conservation Act 2016* (NSW) s 2.4 (‘*Biodiversity Conservation Act*’).

¹⁰ *Biodiversity Conservation Act* (n 6) s 2.10.

¹¹ *Biodiversity Conservation Act* (n 6) div 3, especially s 2.12.

¹² See also ‘Licence to Pick or Harm a Threatened Species or Ecological Community’, *NSW Environment and Heritage* (Web Page, 31 August 2022)

authorised clearing of native vegetation also bypass the protection.¹³ Perhaps the clearest indicator of the inadequacies of the *EPBC Act* in its current form is the *increase* in habitat clearing that has been observed in spite of the Act listing the koala as a ‘vulnerable species’.¹⁴

In the absence of significant legislative amendments, it is unlikely that these limitations will be remedied. In NSW, for instance, recent laws that were framed by its state government as strengthening habitat protections, were criticised by MPs and conservationists for their failure to address excessive logging and habitat clearing.¹⁵ In Queensland, whilst more funds have recently been invested into habitat protection,¹⁶ conservationists are still calling for stronger habitat protection¹⁷ which appear highly unlikely in light of the state government’s preference for funding over substantive legislative reform.

III OPERATION OF SECTION 527

3.1 Analysis of the role of habitat loss as a threat to the survival of Koalas

The proposed amendment to the *EPBC Act* should be assessed with reference to its policy goals, and the inquiries and recommendations that inform such goals. The overarching goal of the *Save the Koala Bill* amendment is to prevent further destruction and fragmentation of koala habitats, which ‘poses the most serious threat to koala populations’.¹⁸ However, habitat is not simply an identifiable area or physical environment that is specific to a location.¹⁹ Insofar as the *EPBC Act* amendment addresses only the flora and vegetation relevant to koalas, it does not capture what is holistically required to support koala populations. The proposed definition of ‘koala habitat’ in section 527F(b),

<<https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/licences-to-control-or-harm/licences-to-harm-threatened-species>>.

¹³ *Biodiversity Conservation Act* (n 6) s 2.8(a)-(b).

¹⁴ Martin FJ Taylor ‘Destruction of Koala Habitat Increased After Listing as Vulnerable in 2012’ (Technical Briefing Paper, 2020), 2, 4. See also ‘Destruction of Koala Habitat Increased After “Vulnerable” Listing’, *World Wildlife Fund – Australia* (News Article, 14 April 2020)

<<https://www.wwf.org.au/news/news/2020/destruction-of-koala-habitat-increased-after-vulnerable-listing>>.

¹⁵ Lisa Cox, ‘New NSW Logging Rules Still Allow Clearing of Koala Habitat, Conservationists Say’, *The Guardian* (online, 5 May 2022)

<<https://www.theguardian.com/australia-news/2022/may/05/new-nsw-logging-rules-still-allow-clearing-of-koala-habitat-conservationists-say>>.

¹⁶ Adeshola Ore, ‘Queensland Announces More Than \$24m for Koala Population and Habitat Protection’, *The Guardian* (online, 5 June 2022)

<<https://www.theguardian.com/australia-news/2022/jun/05/queensland-announces-more-than-24m-for-koala-population-and-habitat-protection>>.

¹⁷ *Ibid.*

¹⁸ Commonwealth, *Parliamentary Debates*, Senate, 4 February 2021, 353 (Sarah Hanson-Young).

¹⁹ Kara N Youngentob, Karen J Marsh and James Skewes, *A Review of Koala Habitat Assessment Criteria and Methods* (Australian National University, 2021) 85.

that an area should be ‘reasonably suitable for sustaining koalas’,²⁰ fails to protect potential habitat areas that do not currently have koala populations. As Senator Hanson-Young noted in her Second-Reading Speech,²¹ habitat destruction has resulted in a significant decrease in koalas outside captivity; an implication of this trend is that koala populations have dwindled or disappeared in areas capable of supporting them. It cannot be reasonably argued that such habitat areas should not be maintained or protected on the grounds of an absence of koala populations that was caused by human-induced environmental degradation and habitat loss. In the proposed amendment, the additional qualification of ‘reasonably suitable’ may result in that very argument becoming a loophole for those seeking to prove their operation does not affect ‘koala habitat’. Additional positive measures, such as sustained efforts with habitat restoration projects,²² should be coupled with preventative measures under the *EPBC Act* to maximise the effectiveness of this *Save the Koala Bill*.

Furthermore, Youngentob, Marsh and Skewes’ review of the *EPBC Act*²³ states that the area required to sustain koalas differs according to the availability of resources, and koalas may persist in fragmented populations.²⁴ This may factor into the *Save the Koala Bill*’s consideration of whether there is a ‘significant impact’ on koalas. An incremental clearing of habitat may occur on the basis that there is no widespread destruction, and that koalas can live in pockets of vegetation. The NSW Rural Boundary Clearing Code,²⁵ for example, potentially facilitates the incremental clearing of koala habitat by allowing landowners to clear certain vegetation for bushfire mitigation purposes. Although it does not override the obligation to obtain approval under the *EPBC Act*, the Environmental Defenders Office (‘EDO’) notes that land clearing under the Code is not easily monitored. Over a period of time, landowners in a region may collectively diminish the area available to sustain a local koala population. This is also precisely why every area of vegetation classifiable as ‘koala habitat’ should be protected. The amendment therefore does well in this respect to not quantify a minimum area to be established for blocking approval of an operation with a ‘significant impact on koalas’.²⁶ However, historical interpretation and treatment of the meaning of ‘significant impact’ under the *EPBC Act* indicates that small areas of habitat vital to the survival of threatened species are less likely to be protected when contrasted to greater areas of land. Thus, it may be pertinent to include an explicit statement in section 527G pertaining to the importance of *all* areas of koala habitat, irrespective of their surface area.

²⁰ Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021 (Cth).

²¹ Commonwealth, *Parliamentary Debates*, Senate, 4 February 2021, 353 (Sarah Hanson-Young).

²² Department of Agriculture, Water and the Environment, ‘Koala Conservation Projects’.

²³ Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report* (Review, October 2020) 17.

²⁴ Kara N Youngentob, Karen J Marsh and James Skewes, *A Review of Koala Habitat Assessment Criteria and Methods* (Australian National University, 2021) 10.

²⁵ *Rural Boundary Clearing Code for New South Wales*, NSW Rural Fire Service, 26 August 2021.

²⁶ Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021 (Cth), s 527G.

Recommendation 1: That the qualification of ‘reasonably suitable’ in section 527F(b) be reconsidered owing to its capacity to weaken the protection of koala habitat.

Recommendation 2: That section 527G(2) is amended, with the words ‘irrespective of the surface area,’ inserted after ‘any loss of connectivity or available koala habitat’.

3.2 Analysis of scope and threshold of ‘significant impact’

Neither the *EPBC Act*²⁷ nor the Significant Impact Guidelines (‘Guidelines’)²⁸ set out clear criteria or quantitative thresholds to determine the meaning and scope of ‘significant impact’.²⁹ This ambiguity creates two issues. First, it confers a high level of ministerial discretion in impact assessment decisions. Statistics indicate a high rate of ‘not a controlled action’ decisions where no approval is required. Indeed, 114 such decisions were passed in the year 2018-19 alone.³⁰ Reports indicate a similar trend in decisions based on referrals received from the agricultural industry, too.³¹

Secondly, the vagueness of ‘significant impact’ likely contributes to the historically low referrals made by proponents of activities,³² especially from the agricultural sector.³³ The *EPBC Act* requires proponents to undertake a self-assessment and make a referral to the Minister where their activities may have a significant impact on a matter of national environmental significance. This lack of clarity on ‘significant impact’ thresholds and criteria relies heavily on the self-initiative and honesty of proponents who must subjectively assess whether their operations would not have a significant impact and therefore, not warrant a referral.³⁴ For example, proponents generally fail to make a

²⁷ See *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

²⁸ Department of the Environment, *Matters of National Environmental Significance - Significant impact guidelines 1.1 - Environment Protection and Biodiversity Conservation Act 1999*, <https://www.dceew.gov.au/sites/default/files/documents/nec-guidelines_1.pdf>.

²⁹ Australian Capital Territory Environmental Law Handbook, *Commonwealth EPBC Act*, <<https://www.austlii.community/foswiki/ACTEnvLawHbk/CommonwealthEPBCAct>>; Environmental Defenders Office, ‘Submission to the 10-year review of the EPBC Act’ (Report, Department of the Environment and Energy, April 2020) 73 <<https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf>>.

³⁰ Department of the Environment and Energy, *Annual Report 2018-19*, Table A4.A.1 <<https://www.transparency.gov.au/annual-reports/departement-environment-and-energy/reporting-year/2018-2019-57>> (‘Annual Transparency Report’).

³¹ Department of the Environment and Energy, *Review of Interactions between the EPBC Act and the Agriculture Sector* (Final Report, 28 September 2018) 18 (‘Final Report’).

³² Statistics indicate that the total number of referrals received since the commencement of the Act is only 6403. See Annual Transparency Report (n 32) Table A.4.A.1.

³³ Statistics indicate that agricultural referrals only constitute 2.7% of the total referrals made since the commencement of the Act. See Final Report (n 33) 17.

³⁴ Michelle S Ward et al, ‘Lots of Loss with Little Scrutiny: The Attrition of Habitat Critical for Threatened Species in Australia’ (2019) *Conservation Science and Practice* 1, 11-12 <<https://conbio.onlinelibrary.wiley.com/doi/pdfdirect/10.1111/csp2.117>>.

referral where their operations are small-scale and involve only an incremental clearance of land.³⁵ However, whilst prior approval decisions indicate that clearing even 0.5 ha of threatened species habitat is likely to have a significant impact,³⁶ this is not properly redressed due to the lack of clear guidance on ‘significant impact’ criteria for referral and assessment actions by proponents and the regulator alike. This ambiguity could also result in successive incremental removal of lands adjacent to koala habitats by proponents, which may not appear ‘significant’ when assessed as an individual action and therefore not warrant a referral but could likely have a significant cumulative impact or an indirect impact on Koalas over time.

Recommendation 3: The protection afforded by the *Save the Koala Bill* would benefit from amendments to section 527G(2). A clearer definition of the meaning of ‘significant impact’ on koalas is necessary, incorporating specific quantifiable thresholds and criteria based on scientific research. It would also consider the cumulative impact (including indirect impact) on koalas including koala habitat. This submission further recommends more effective monitoring of unreported land clearances by proponents in or near the Koala habitat, which may indirectly impact the species and/or their habitat.

Recommendation 4: The protection afforded by section 527G could be strengthened by the EDO’s recommendation to insert the phrase ‘but is not limited to’ after the words ‘significant impacts on koalas includes’.³⁷ This would facilitate a greater balance between the interests of social, corporate and environmental interests.³⁸

3.3 Issues inherent in the current ‘significant impact’ definition: genetic diversity and loss of connectivity

The proposed section 527G(2) attempts to define what a “significant impact” means for koalas. The current proposal is non-exhaustive and includes:

1. any substantial loss of genetic diversity;
2. any loss of connectivity or available koala habitat; and
3. any population of koalas such that the population is placed at a greater risk of extinction.³⁹

³⁵ Final Report (n 33) 17.

³⁶ Department of the Environment and Energy, *Approval Decision Recommendation Report for East Gippsland Shire Council Poplar Removal Program - Grey-headed Flying Fox* (Approval Decision, 31 March 2014) 2 <<https://www.agriculture.gov.au/sites/default/files/documents/180819.pdf>>.

³⁷ Environmental Defenders Office, ‘Submission to the inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021*, 8 April 2021.

³⁸ Although it is noted that higher levels of biodiversity are beneficial for society at large too.

³⁹ Explanatory Memorandum, *Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021* 4.

Genetic diversity is of key concern in koala populations given the high prevalence of koala retrovirus ('KoRV') and chlamydia (*Chlamydomphila pecorum* and *Chlamydomphila pneumoniae*)⁴⁰ within the koala population; it is believed that a lack of genetic diversity may undermine the ability of the koala to resist the effects of either pathogen.⁴¹

Caution must also be exercised when assessing the level of genetic diversity within the species. The significance of genetic diversity of koalas in relation to disease-protection varies greatly and is dependent on which koala population one refers to.⁴² Regarding KoRV, for instance, it has been found that some populations in QLD and NSW remain at high risk of the disease despite being relatively genetically diverse.⁴³ Therefore, the words 'substantial loss of genetic diversity', without a qualifying factor that links it to a specific koala population, means that judicial interpretations of 'substantial loss' could potentially fail to reflect the substantiality to that particular population of koalas. Researchers have suggested that genomic management decisions should be informed by the 'empirical data relevant to each bioregion'.⁴⁴ Therefore, this submission recommends that the words 'relative to that bioregion' follow the phrase 'any substantial loss to genetic diversity' to accurately reflect the impact that the loss of genetic diversity may have.

The *Save the Koala Bill* also highlights the importance of connectivity of habitat to koalas. Connectivity is important as although koalas often rest or sleep for up to 20 hours a day,⁴⁵ they live in an intricate series of overlapping home ranges that can be up to 135 km,⁴⁶ making them largely inactive but sparsely populated.

The koala population is not completely mapped and often predicted using tools like the *Koala Likelihood Map*.⁴⁷ The problem with the proposed Bill is that in the absence of accurate koala population mapping, a created 'loss of connectivity' of koala populations cannot be proven.

⁴⁰ J M Seddon and B Schultz, 'Koala Conservation in Queensland, Australia: A Role for Assisted Gene Flow for Genetic Rescue?' in Jorge Ortega and Jesus E Maldonado (eds), *Conservation Genetics in Mammals: Integrative Research Using Novel Approaches* (Springer International Publishing, 2020) 331, 335.

⁴¹ Kyriakos Tsangaras et al, 'Historically Low Mitochondrial DNA Diversity in Koalas (*Phascolarctos Cinereus*)' (2012) 13, *BMC Genetics* 92
<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3518249/pdf/1471-2156-13-92.pdf>> 7.

⁴² J M Seddon and B Schultz, 'Koala Conservation in Queensland, Australia: A Role for Assisted Gene Flow for Genetic Rescue?' in Jorge Ortega and Jesus E Maldonado (eds), *Conservation Genetics in Mammals: Integrative Research Using Novel Approaches* (Springer International Publishing, 2020) 331, 332–336.

⁴³ Rebecca Johnson et al, 'Adaptation and Conservation Insights from the Koala Genome' (2018) 50, *Nature Genetics* 1102, 1108–1109.

⁴⁴ Ibid 1108.

⁴⁵ Queensland Government, 'Koala Facts' *Department of Environment and Science* (Information, 24 March 2022)

<<https://environment.des.qld.gov.au/wildlife/animals/living-with/koalas/facts#:~:text=in%20adult%20life.-,Behaviour,to%20break%20down%20toxic%20leaves.>>.

⁴⁶ Ibid.

⁴⁷ State of NSW and Department of Planning, Industry and Environment, *Koala Habitat Information Base Technical Guide* (Report, September 2019) 14. See also Claire Runge et al, *Harmonised Koala Habitat Mapping Report* (Report, March 2021).

Therefore, in order to prove whether there would be a loss of connectivity, there needs to be a positive obligation for developers to map koala populations in the proposed development areas where those areas are likely to be inhabited by koalas.⁴⁸

Recommendation 5: The insertion of the phrase ‘relative to that bioregion’ after the phrase ‘any substantial loss to genetic diversity’ in section 527G(2) to accurately reflect the impact that genetic diversity loss may have.

Recommendation 6: In order to prove whether there would be a loss of connectivity, there needs to be a positive obligation that a development has mapped a koala population in the proposed development area if it is in an area likely to be inhabited by koalas.

IV OPERATION OF SECTION 18: REGIONAL FOREST AGREEMENT AMENDMENT

The protections afforded by section 18 of the *EPBC Act* with respect to threatened and endangered species are currently unavailable in circumstances where regional forest agreements exist (‘RFA’). RFA’s have historically impeded the ability to protect habitat areas for threatened and vulnerable species throughout Australia; an issue highlighted in *VicForests v Friends of Leadbeater’s Possum Inc.*⁴⁹ In that case, the Court found that VicForests could still benefit from the section 38(1) exemption in the *EPBC Act*,⁵⁰ despite the Court also finding that the survival of the Leadbeater’s possum and Greater Glider was at risk due to VicForests’ habitat destruction.

The need for protection from RFAs in this context has been exacerbated by the Australian summer bushfires between 2019-2020, as habitat loss has further increased. A closer look into the nature and operation of RFAs may indicate, as Environmental Justice Australia has argued, that the agreements are ‘no longer tenable’.⁵¹ Indeed, the viability of RFAs is tenuous in the context of climate change and the likelihood of fires similar to the 2019-2020 bushfires.⁵²

Whilst the insertion of (ba) after paragraph 42(b) will limit the scope of the RFA exemption, it will not completely bar the operation of RFA exemptions as the exemption will only not apply to ‘operations that have, will have, or are likely to have a significant impact on koalas’.⁵³ Therefore, the

⁴⁸ Ibid. Both reports show predictive capabilities of mapping.

⁴⁹ [2021] FCAFC 66.

⁵⁰ Ibid [130] (Jagot, Griffiths and SC Derrington JJ).

⁵¹ Margaret Blakers and Brendan Sydes, *No longer tenable: Bushfires and Regional Forest Agreements* (Environmental Justice Australia Report, 27 March 2020).

⁵² Ibid.

⁵³ Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021.

points made above in relation to the limitations provided by significant impact provisions are similarly applicable and of concern in relation to the RFA exemption.

Recommendation 7: That recommendations outlined above in regards to section 527G are taken into account in order to maximise the protection available to endangered koalas. It is further recommended that logging already approved under RFAs prior to the enforcement of this Bill are reconsidered, owing to the endangered status of koalas.

V PROTECTION GAPS

Although the amendments to the *Save the Koala Bill* have targeted the main areas of concern to limit habitat loss, there is inadequate funding for koala monitoring to execute this Bill.⁵⁴ The *Save the Koala Bill* addresses strategies to reduce habitat loss for koalas, such as statutory tests to determine impact on koalas, removal of the RFA exemption and preventing the power for the Minister to approve action that will involve the clearing of koala habitat.⁵⁵ However, it does not adequately address how these measures will be maintained to monitor koala populations.

Professor Graeme Samuel recommended that “legislative reform should not be a once-in-a-decade opportunity, but rather part of a sensible process of continuous improvement” in his *Independent Review of the EPBC Act*.⁵⁶ Therefore, despite government efforts in recognition and funding for the koala population, the *Save the Koala Bill* and the *EPBC Act* in its entirety promises very little investment in the monitoring of koala populations.⁵⁷ Thus, it fails to act as a reform that targets the ‘continuous improvement’ that Professor Graeme Samuel suggests.⁵⁸ This creates a contradiction between the aim of preventing habitat loss and the lack of investment in strategies that monitor this within the *EPBC Act*. Professor Graeme Samuel’s critiques that the *EPBC Act* ‘does not facilitate the maintenance or restoration of the environment.’⁵⁹ This further represents the contradiction of the

⁵⁴ Lachlan G. Howell, ‘Morrison Government Spends 50 Million Saving Koalas While Taking Away Their Homes’, *The Conversation* (online, 9 February 2022) <<https://theconversation.com/morrison-government-spends-50-million-saving-koalas-while-taking-away-their-homes-176370>>.

⁵⁵ Environmental Defenders Office, Submission to Senate Standing Committees on Environment and Communications, Parliament of Australia, *The Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021* (8 April 2021).

⁵⁶ Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report* (Review, October 2020) 17.

⁵⁷ Ibid.

⁵⁸ Lachlan G. Howell, ‘Morrison Government Spends 50 Million Saving Koalas While Taking Away Their Homes’, *The Conversation* (online, 9 February 2022) <<https://theconversation.com/morrison-government-spends-50-million-saving-koalas-while-taking-away-their-homes-176370>>.

⁵⁹ Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report* (Review, October 2020) 126.

EPBC Act in which it expects that koala populations will improve with the current legislation and standards of their habitats.⁶⁰

An example of the lack of investment in maintenance of the environment can be seen in the current streams of funding allocated by the Australian Government.⁶¹ The Morrison Government invested \$50 million into various koala habitat conservation initiatives, including \$10 million to extend the *National Koala Monitoring Program*,⁶² bringing the total funding to \$12 million since the initiative was first announced in 2020.⁶³

Monitoring the koala populations is not a simple or straightforward task. Koalas blend in with their environment, thus creating difficulty in identifying population numbers.⁶⁴ On-ground spotting has been the most widely used method for koala population monitoring, but as this method is slow, labour intensive and expensive, it has been inaccurate in predicting koala population and distribution.⁶⁵ These inconsistencies in research lead to a lack of direction for conservation efforts.⁶⁶ Due to these factors and the vast range of koala population across Australia's states and territories, the recent funding by the Morrison government is insufficient for effective koala monitoring that achieves the aims of the *Save the Koala Bill*.⁶⁷

By investing in effective monitoring, evaluation and reporting of the *EPBC Act*, the *Save the Koala Bill* will enforce and therefore achieve the desired environmental outcomes.⁶⁸ This also creates public

⁶⁰ Ibid.

⁶¹ Lachlan G. Howell, 'Morrison Government Spends 50 Million Saving Koalas While Taking Away Their Homes', *The Conversation* (online, 9 February 2022) <<https://theconversation.com/morrison-government-spends-50-million-saving-koalas-while-taking-away-their-homes-176370>>.

⁶² CSIRO, 'Collaborative Partnerships for the National Koala Monitoring Program' (Web Page) <<https://www.csiro.au/en/research/indigenous-science/managing-country/koala-monitoring-program>>.

⁶³ Lachlan G. Howell, 'Morrison Government Spends 50 Million Saving Koalas While Taking Away Their Homes', *The Conversation* (online, 9 February 2022) <<https://theconversation.com/morrison-government-spends-50-million-saving-koalas-while-taking-away-their-homes-176370>>.

⁶⁴ CSIRO, 'Collaborative Partnerships for the National Koala Monitoring Program' (Web Page) <<https://www.csiro.au/en/research/indigenous-science/managing-country/koala-monitoring-program>>.

⁶⁵ James Purtill, 'Drones Count Koalas Faster and Cheaper Than Manual Spotting Methods: Study' *ABC News* (online, 10 January 2021) <[https://www.dcccew.gov.au/environment/biodiversity/bushfire-recovery/funding-support/koala-conservation#:~:text=National%20Koala%20Monitoring%20Program%20\(NKMP,health%20across%20the%20species%20range](https://www.dcccew.gov.au/environment/biodiversity/bushfire-recovery/funding-support/koala-conservation#:~:text=National%20Koala%20Monitoring%20Program%20(NKMP,health%20across%20the%20species%20range)>.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report* (Review, October 2020) 23.

trust in environmental management, as jurisdictions are open to understand the performance of the Bill and adapt it as the environment changes.⁶⁹

Thus, although the *Save the Koala Bill* is influential in initiating koala habitat conservation, it is not efficient in ensuring that this conservation is monitored.⁷⁰ In order for the *Save the Koala Bill* to have a reformative impact, this submission recommends that monetary investments and legislation are needed to enforce the monitoring of koala populations' movement and habitation.

Recommendation 8: Increased funding is required to achieve the objects of the *Save the Koala Bill*.

VI GREATER POLICY CHANGE AND COMMITMENT NEEDED TO SAVE THE KOALA

In evaluating the *Save the Koala Bill*, it is critical to consider the findings of past reviews and recommendations concerning the *EPBC Act* to ensure new measures adequately address previously identified risks and gaps in protection. Framing analysis of the *Save the Koala Bill* in the context of preceding assessments of the *EPBC Act* enables us to verify consistency with wider reforms (e.g. non-species specific) and to ensure that the Government meaningfully engages with all findings and recommendations presented.

In 2019, the Minister for the Environment appointed Professor Graeme Samuel to conduct the second decennial *Independent Review of the EPBC Act*.⁷¹ In the Final Report, Professor Samuel described the *EPBC Act* as outdated and a barrier to streamlining environmental management.⁷² Its implementation results in piecemeal decisions that conflict with the responsibilities of States and Territories.⁷³ The Review called for immediate fundamental reform and sustained commitment to change in order to deliver the best possible outcomes and modernise the *EPBC Act* and its implementation.⁷⁴ A comprehensive package of reforms was proposed, including but not limited to, the establishment of legally enforceable National Environmental Standards; new independent bodies and oversight committees; improved decision-making transparency and accountability; increased focus on active restoration of the environment and Indigenous engagement in reform processes.⁷⁵

⁶⁹ Ibid.

⁷⁰ Lachlan G. Howell, 'Morrison Government Spends 50 Million Saving Koalas While Taking Away Their Homes', *The Conversation* (online, 9 February 2022) <<https://theconversation.com/morrison-government-spends-50-million-saving-koalas-while-taking-away-their-homes-176370>>.

⁷¹ Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report* (Final Report, October 2020).

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid iii.

⁷⁵ Ibid 26-35.

A key finding of the Review relates to the Commonwealth and the States and Territories failing to manage their environmental responsibilities in concert.⁷⁶ In the absence of a legally enforceable national environmental standard for koalas, the *Save the Koala Bill* may produce disparities in its implementation.

A further criticism of the *Save the Koala Bill* in light of the recommendations made by the Review is the insufficient response to the call to invest in restoration as such initiatives are required to accommodate sustainable future development.⁷⁷ Based on the Review, the *Save the Koala Bill* as it stands, is insufficient in achieving the urgent and sweeping change necessary to holistically address the rapid trajectory of environmental decline. Without further reform addressing the Review's critiques, the effectiveness of the *Save the Koala Bill* will be limited.

As per the Review's Final Report recommendations, there is a need for the Government to introduce a comprehensive package of reforms to the *EPBC Act* to better protect Australia's species and ecosystems, including the koala.⁷⁸ Hence, the dominant concern in relation to the *Save the Koala Bill* in the context of the Review is the risk that ineffective Government half-measures and cherry-picking recommendations will ultimately be unsuccessful in overcoming current and future environmental challenges.

It is clear that whilst the *Save the Koala Bill* is progress in the way of strengthening koala protections, there remains an urgent need for strong and binding national standards as insisted by the Review including independent oversight and enforcement coupled with a guaranteed right for communities to have a say in how we protect our environment. This is not to say that the *Save the Koala Bill* should not be implemented, but rather broader reforms in conjunction with improved protections for the koala is crucial. As encapsulated by Professor Samuel's warning, "[to] shy away from the fundamental reforms recommended by this Review is to accept the continued decline of our iconic places and the extinction of our most threatened plants, animals and ecosystems".⁷⁹ In the interim, this proposed *EPBC Act* amendment is a narrow but steady step in the plight to protect the koala and koala habitat.

Recommendation 9: Koala protection must extend beyond this Bill, and recommendations made in the Review must be implemented in conjunction with these amendments to maximise protection.

⁷⁶ Ibid 1, 42.

⁷⁷ Ibid 126.

⁷⁸ World Wide Fund for Nature-Australia (WWF-Australia), Submission No 1 to Senate Standing Committees on Environment and Communications, *Submission on the Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021* (14 April 2021) 2-3.

⁷⁹ Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report* (Final Report, October 2020) iii.

VI SUMMARY OF RECOMMENDATIONS

Recommendation 1: That the qualification of ‘reasonably suitable’ in section 527F(b) be reconsidered owing to its capacity to weaken the protection of koala habitat.

Recommendation 2: That section 527G(2) is amended, with the words ‘irrespective of the surface area,’ inserted after ‘any loss of connectivity or available koala habitat’.

Recommendation 3: That section 527G(2) is further amended to provide a clearer definition of the meaning of ‘significant impact’ on koalas, that incorporates specific quantifiable thresholds and criteria based on scientific research and that considers the cumulative impact (including indirect impact) on koalas including koala habitat. This submission also recommends more effective monitoring of unreported land clearances by proponents in or near the Koala habitat, which may indirectly impact the species and/or their habitat.

Recommendation 4: That the protection afforded by section 527G could be strengthened by the insertion of the phrase ‘but is not limited to’ after the words ‘significant impacts on koalas includes’.

Recommendation 5: That the phrase ‘relative to that bioregion’ is inserted after the phrase ‘any substantial loss to genetic diversity’ in section 527G(2) to accurately reflect the impact that genetic diversity loss may have.

Recommendation 6: That there is a positive obligation that a development has mapped a koala population in the proposed development area if in an area likely to be inhabited by koalas, in order to prove whether there would be a loss of connectivity.

Recommendation 7: That logging already approved under RFAs prior to the enforcement of this Bill are reconsidered, owing to the endangered status of koalas.

Recommendation 8: That funding is increased to better achieve the objects of the *Save the Koala Bill*.

Recommendation 9: That koala protection extends beyond this Bill, and recommendations made in the Review must be implemented in conjunction with these amendments to maximise protection.

VII CONCLUSION

The 2021 *Save the Koala Bill* has the potential to play a critical role in ensuring the koala population across NSW is protected against social, developmental and environmental factors that may affect their extinction. While the *Save the Koala Bill* is a positive step towards protecting endangered koalas, it could be further strengthened by implementing the above recommendations. Thank you for allowing us the opportunity to comment on this issue. The UNSW Law Society would welcome an opportunity to engage in any further consultations on this issue.