



**HUMANE SOCIETY  
INTERNATIONAL**

**AUSTRALIA**

**Humane Society International Ltd**

ABN 63 510 927 032

PO Box 439, Avalon NSW 2107, Australia

Telephone +61 2 9973 1728

Facsimile +61 2 9973 1729

Email [admin@hsi.org.au](mailto:admin@hsi.org.au)

[www.hsi.org.au](http://www.hsi.org.au)

## **Senate inquiry into Australia's extinction crisis 9 April 2024**

### **About HSI**

Humane Society International (HSI) is the world's largest animal protection organisation and HSI Australia established our office in 1994. We work to create a humane and sustainable world for animals advocating across wildlife conservation and animal welfare policy areas.

Our vision is for a world where people treat animals and nature with respect and compassion.

### **Submitted to:**

Committee Secretary

Senate Standing Committees on Environment and Communications

PO Box 6100

Parliament House

Canberra ACT 2600

By email: [ec.sen@aph.gov.au](mailto:ec.sen@aph.gov.au)

### **For further information on this submission, please contact:**

Dr Megan Kessler

Nature Campaigner

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## Introduction

HSI Australia welcomes this opportunity to make a further submission to the Senate inquiry into Australia's extinction crisis (Inquiry). HSI Australia has previously made two submissions to the Inquiry, one in September 2018 and one in August 2022. The information provided in those submissions remains relevant to the current Inquiry.

Since our last submission many more species and ecological communities have been added to or uplisted on Australia's federal threatened species and ecological communities list,<sup>1</sup> Australia's role as a deforestation hotspot has been confirmed,<sup>2</sup> and we have seen annual average temperatures in Australia increase by more than 1.4°C since national records began in 1910.<sup>3</sup>

Australia's extinction crisis continues unabated and we need urgent national law reform that delivers strong protection for nature.

## National nature law reform

Professor Graeme Samuel's October 2020 *Independent Review of the EPBC Act – Final Report* (Samuel Review) highlighted four key areas for reform, specifically:

1. setting clear outcomes through new, legally enforceable National Environmental Standards that set the boundaries for decision-making to deliver the protections needed;
2. actively restoring the environment and facilitating the scale of investment needed to deliver better outcomes;
3. taking an adaptive approach, through better planning, measuring the effectiveness of implementation and adjusting where needed to achieve outcomes;
4. harnessing the knowledge of Indigenous Australians to better inform how the environment is managed.

The Samuel Review also noted that “an elected government should always retain the ability to exercise discretion in individual cases. Such discretion should be a **rare exception**, demonstrably justified in the public interest, with reasons and environmental implications transparently communicated” (our emphasis).

In December 2022, HSI Australia welcomed the release of the Australian Government's *Nature Positive Plan*, a response to the Samuel Review. We welcomed key features of the reforms including commitments to develop and implement National Environment

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<sup>1</sup> See <https://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl> and <http://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=flora>

<sup>2</sup> The Wilderness Society (2024) The stats that expose Australia's hidden deforestation crisis. <https://www.wilderness.org.au/protecting-nature/deforestation/the-stats-that-expose-australias-hidden-deforestation-crisis>

<sup>3</sup> <https://www.csiro.au/en/research/environmental-impacts/climate-change/state-of-the-climate/australias-changing-climate>

Standards, prevent unacceptable impacts on Matters of National Environmental Significance (MNES), introduce a new independent Environment Protection Agency, place an increased focus on addressing cumulative impacts through regional planning, and strengthen regulation of wildlife trade. We expressed caution that the National Environmental Standards needed to be informed by experts and ensure the protection of all critical habitat for threatened species (and their climate refuges), and remnants of threatened ecological communities and other high conservation value ecosystems. We also flagged concern about measures that had the potential to undermine the reforms, particularly the use of relaxed biodiversity offset systems, including offset payments, and maintaining pathways for the Australian Government to devolve their responsibility for nationally significant environmental matters to states and territories. We highlighted that reform of Australia's national environmental laws will only deliver for wildlife and their habitats if they are supported by significantly increased funding, commensurate with the scale of the extinction crisis currently facing Australia.

Since December 2022, HSI Australia has been extensively engaged, with many other stakeholders, in consultation about the implementation of these commitments. Of key concern to HSI Australia is the need for the Government to act urgently to deliver strong national nature laws that will effectively address the extinction crisis. What is clear is that the transformational change required to adequately address the extinction crisis will require a holistic package of reforms that embeds independent and outcomes based decision making into every aspect of the new national nature laws. Piecemeal changes that do not empower or require an independent Environment Protection Australia (EPA) to make decisions consistent with avoiding unacceptable impacts and applying strong National Environmental Standards will not deliver the changes that are needed.

The remainder of this submission considers the current reform process in the context of the key recommendations from the Samuel Review and the commitments in the *Nature Positive Plan*.

## **1. National Environmental Standards**

We were pleased to see the *Nature Positive Plan* commitment that "National Environmental Standards will set out the environmental outcomes that our laws are seeking to achieve." We strongly welcome the Government's proposals to clearly embed upfront information on what will constitute an unacceptable impact on the environment directly into new nature laws.

The introduction of unacceptable impacts and National Environmental Standards has the potential to drive the transformation change needed in our nature laws. For this to be effective, unacceptable impacts must be clearly and unambiguously defined and the tools required to identify and deliver decision making that properly considers what will constitute an unacceptable impact must be made available as a matter of priority.

Each National Environmental Standard must set the environmental outcome it is intended to achieve and be clear on how decision making will meet the Standard. Standards should be designed in a way that ensures all decisions contribute to achieving the objectives of our reformed nature laws. They must require decision making based on the best available science and drive environmental improvement and best practice management. They must also apply across all industries, sectors or jurisdictions and be legally enforceable.

Draft legislation reviewed to date has provided a clear framework for the establishment of unacceptable impacts and National Environmental Standards and given clear direction that there can be no regression in National Environmental Standards over time. However, as currently drafted there is a risk that these features will not deliver on the stated intent, and the introduction of concepts such as 'net positive' into National Environmental Standards creates a significant risk that individual MNES will be allowed to decline by setting up a trade-off between different species and ecological communities.

## **2. Restoration and adequate investment**

### **Restoration**

The Samuel Review identified a need for “adequate up-front and ongoing funding”. It has been estimated that at least \$2 billion a year is required to address and reverse the extinction crisis<sup>4</sup> but current funding falls well short of this requirement. In this context, it is concerning that the *Nature Positive Plan* primarily referred to increased investment through external market mechanisms such as offset mechanisms, which do not provide environmental gain but instead compensate for allowing damage, as potential new sources of funding for environmental actions. Decision making frameworks and funding commitments that drive genuine restoration efforts must be urgently addressed.

### **Biodiversity offsets**

In contrast, biodiversity offsets, by whatever name, are quantifiable biodiversity outcomes designed to compensate for negative and unavoidable impacts of developments, usually with the goal of achieving a standard such as 'no net loss' or 'net gain'. They are a measure of last resort. In some cases, offsets are simply not appropriate. For example, critical habitat for threatened species should be fully protected and never offset. The proposed reforms not only propose to rely heavily on offsets, they propose the introduction of offset payments in lieu of direct offsets. Offset payments have been shown to manifestly fail wherever they are introduced. Including offset payments in our national environmental laws would be a significant regression from the existing *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) requirements.

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<sup>4</sup> See for example: <https://theconversation.com/if-the-budget-ditched-the-stage-3-tax-cuts-australia-could-save-every-threatened-species-and-lots-more-205305>

Adequate environmental protection and restoration is a core responsibility of Government and the Government must commit sufficient funding to halt and reverse biodiversity declines, without relying on funding generated as a consequence of approved destruction or through other external mechanisms such as the Nature Repair Market. Stronger national environmental laws and delivery of the Government's commitment to no new extinctions can only be met with significant new investment. Significantly enhanced public funding must be urgently allocated to halting and reversing the extinction crisis.

### **Recovery planning**

Documents released under Freedom of Information (FOI) laws<sup>5</sup> showed that the most cited reason for not progressing necessary recovery planning is the lack of sufficient resources. As proposed, new national nature laws will rely heavily on the development and implementation of new Protection Statements and Critical Protection Areas to provide meaningful protection for threatened species and ecological communities. Ensuring Recovery Strategies, including mandatory Protection Statements, are in place for all species in a timely manner, and ensuring that existing protections for all forms of critical habitat are efficiently transitioned to the new system, will require significant investment. We have yet to see this level of funding committed.

It will also be necessary to enhance and better fund the role of the Threatened Species Scientific Committee (TSSC). The TSSC is essential to public trust and effectiveness of national nature laws. The TSSC is responsible for considering threatened species and ecological community nominations and key threatening processes, and preparing conservation planning documents, amongst other responsibilities. Ensuring the TSSC is of a sufficient size and composition, with adequate technical and administrative support, will be vital for the appropriate functioning of new national nature laws. Current funding levels are proving inadequate, as demonstrated by the multi-year delays in the assessment and listing of species that have been determined a priority, including species nominated as Endangered and Critically Endangered.

### **Environment Protection Australia**

One of the key commitments the Government has made as part of their Nature Positive reforms is to introduce a new national 'Environment Protection Australia'. The EPA will have significant responsibilities under the new laws, including making decisions on individual projects, ensuring that programs and policies are consistent with the laws, and ensuring that approved projects comply with their conditions of consent.

To restore trust and integrity in environmental decision making, the EPA must be established with an independent Board and sufficient staff and resourcing levels to allow it to immediately perform its new functions in ensuring environmental decision-making is consistent with National Environmental Standards and to undertake monitoring and compliance activities at the required level.

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<sup>5</sup> FOI Reference 28051, available at: <https://www.dcceew.gov.au/sites/default/files/documents/28051.pdf>

### 3. Taking an adaptive approach and measuring effectiveness

#### Regional planning

The Samuel Review recommended that regional planning should be a key tool for applying adaptive management. The *Nature Positive Plan* also adopted regional planning as an important mechanism to deliver outcomes set in the National Environmental Standard for MNES and to address the issue of cumulative impacts. The promised approach was that regional plans will identify areas upfront that should be prioritised for protection, restoration or sustainable development.

HSI Australia has long supported the use of good regional planning systems. We envisage a regional planning framework protecting natural and cultural heritage places, achieving biodiversity goals and ensuring ecologically sustainable development. Good regional planning must:

- Provide clear guidance on the outcomes and measurable objectives that must be achieved, including identifying those areas that must be maintained and improved to provide effective protection of wildlife and their habitats.
- Be consistent with the objects of national nature laws and conservation planning requirements, including protecting critical habitats and other areas needed to ensure species and habitat recovery.
- Be conservation-led and science based, recognising and incorporating new information as it becomes available.
- Be consistent with the Global Biodiversity Framework that Australia has signed on to, ensuring that all areas are effectively managed, so that by 2030 the loss of areas of high biodiversity importance is close to zero.
- Be developed and implemented with strong community engagement and involvement, including respecting the knowledge and rights of First Nations peoples.
- Have a role for the proposed new Environment Protection Australia (EPA) to maintain oversight of the implementation of the plans, including monitoring and enforcement, as well as updating the plans as new information becomes available.

Unfortunately, what we have seen in consultations so far, falls well short of this. While the proposed regional planning framework does include some welcome adaptive management components such the ability to review regional plans in response to new information or significant events and to suspend or revoke a regional plan on ecological grounds, other proposed 'flexibility' appears to merely weaken the strong outcomes based system recommended by the Samuel review. For example, the *Nature Positive Plan* committed to identifying Areas of High Environmental Value where development will largely be prohibited. These were intended to be areas of high environmental sensitivity, including critical habitat for threatened species, giving prospective proponents with certainty of which areas will be off limits. Current proposals have weakened this to establishing 'Conservation Zones' where only certain classes of actions may be prohibited. This is not the holistic consideration required or apparently intended through the *Nature Positive Plan*.

Conceptually regional planning remains important for integrated decision making. While we have seen some good features in the proposed regional planning framework around decision making – primarily around improving our knowledge of the region and the ability to respond to new information – what is currently being proposed falls well short of the conservation-led integrated management arrangements that regional planning can, and should, offer.

### **Environment Information Australia**

Improving the efficiency and effectiveness of decision making under the proposed new nature laws will require substantial additional investment both in the establishment of the proposed new Environment Information Australia (EIA) and in the data collection and collation that the EIA is expected to complete. It is proposed that the EIA will be responsible for ensuring that decision-makers and the public have access to authoritative, high-quality information and data and that decision-making is based on best available information. EIA will also be responsible for holding data, and where possible, mapping key information such as critical habitat. This will give the EIA a foundational role for good decision-making and it is vital that it is appropriately resourced to fulfil that function.

It is also proposed that the EIA will be responsible for delivering monitoring the effectiveness of decision making, including through the production of State of the Environment reports every two years and environmental economic accounts annually. The EIA will develop an environmental baseline against which to measure progress towards achieving a nature positive Australia. In HSI Australia's view, another important role for EIA will be to track progress on the implementation of recovery and threat abatement strategies. This centralising of environmental data will make an important contribution to better understanding whether the reformed laws are effectively reversing the extinction crisis.

## **4. Harnessing the knowledge of Indigenous Australians**

We understand that the Government is currently consulting with the Indigenous Advisory Committee (IAC) and others on how to implement its commitment to engage with First Nation peoples as part of overall reforms to co-design stand-alone cultural heritage legislation and incorporate and protect First Nations data and knowledge. We also note the Government committed that "(t)he Standard for First Nations Engagement and Participation in Decision-making will be co-designed with the IAC as a priority." In light of this, it is concerning that no further information on the status of this Standard has been made publicly available. Information on how inclusion of First Nations knowledge in listing assessments, conservation planning, and threat abatement for species and ecological communities, and consideration of how species that are of cultural significance to First Nations people will be considered in environmental and heritage protection processes have also been absent from consultation materials seen to date.

## **5. Limiting discretion**

### **National interest exemption**

HSI Australia has strongly welcomed the proposed tightening of the existing 'national interest exemption' within the proposed legislation. When introduced, the national interest exemption was intended to apply to genuine national emergencies where urgent action that may significantly impact protected matters was required in the national interest, for example for national defence and security emergencies. Unfortunately, this is not the way that this exemption has been used. Instead, it has been used to allow significant harm to wildlife, including flying-foxes in urban areas and through new shark culling programs, without any environmental assessment of those impacts. As previewed, the current reforms are proposing to tighten this exemption to ensure that it can only be used where it is reasonable and necessary to address an emergency or threat that affects the national interest and when the proposed action is time-critical and needs to be undertaken faster than the usual processes would allow. These are welcome limitations that must ensure that future national interest provisions cannot be misused in the way that the current exemption is.

### **Ministerial call in powers**

Unfortunately, the strengthening of the current national interest exemption is being more than undermined by the proposed Ministerial 'call-in' powers. The call-in power would allow the Minister to choose to make an environmental approval decision that would otherwise be made by the EPA. If the Minister chooses to do so, it would switch off a number of decision-making safeguards and allow the Minister to approve projects that would otherwise be considered unacceptable, and to avoid the strict application of National Environmental Standards. These powers would undermine the independence of the EPA and call into question the integrity of the entire proposed new scheme. The proposed Ministerial call-in power should not be progressed.

### **Subjective decision making**

The proposed reforms also have high levels of subjective decision making embedded throughout the proposed legislative package. For example, the CEO of the EPA will only have to be "satisfied" that projects are not inconsistent with National Environment Standards, rather than deciding that projects are objectively not inconsistent with the Standards. This subjective decision making framework is entirely at odds with the Samuel Review recommendation for outcomes based decision making with limited discretion. Decision making pathways under the new laws must be guided by clear and unambiguous definitions of unacceptable impacts and the mandatory application of strong, objective National Environmental Standards. We are constructively working with Department to ensure that definitional issues will deliver on the intent of these new initiatives.



## Key gaps in current reforms

### Regional Forest Agreements

An important commitment in the *Nature Positive Plan* was that “The government will work with stakeholders and relevant jurisdictions towards applying National Environmental Standards to Regional Forest Agreements to support their ongoing operation together with stronger environmental protection”. At this point, no further information has been provided on how or when this commitment will be met. Native forest logging is being phased out in many jurisdictions across the country but where it continues, it continues to imperil many threatened species, including the koala. The absence of information on how and when National Environmental Standards will be applied to Regional Forest Agreements is again failing to address the urgency required.

### Addressing climate change

A key message from the Samuel Review was “Australia’s natural environment and iconic places are in an overall state of decline and are under increasing threat. The environment is not sufficiently resilient to withstand current, emerging or future threats, including climate change. The environmental trajectory is currently unsustainable.”

In the three and a half years since the Samuel Review was released we have continued to see the devastating impacts of climate change on people and wildlife. The 2021 *State of the Environment* report found that “... climate change and associated extreme events, compounded by other pressures, have had a major impact on biodiversity over the past 5 years, with consequences likely to be evident for many years to come... urgent recovery actions will be needed to avert extinction.” The Government’s *Nature Positive Plan* commitments to require reporting of Scope 1 and 2 emissions and related management actions for individual projects and to require regional and conservation planning to take account of climate change, are insufficient to address the scale of the challenges that climate change presents to the Australian environment. Our extinction crisis and climate crisis are intrinsically linked and, done well, the current environmental law reform process provides an opportunity to set the framework to address both. A much more holistic integration of climate change within new national environmental legislation is required.

### Addressing deforestation

Our current laws fail to properly assess large scale land clearing. This failing could be addressed by introducing a new land clearing trigger – one that requires that proposed clearing over a certain threshold in likely threatened species habitat must be assessed under the legislation.

### Continuing use exemption

The current EPBC Act also includes an exemption for any activity which was occurring lawfully before the implementation of the EPBC Act, unless there is a change that results in a substantial increase in intensity or scale. This exemption allows for the indefinite continuation of activities that are having a significant impact on matters

protected under the EBPC Act without those activities having ever been assessed under the Act. The NSW Shark Meshing Program is one activity that relies on this exemption. In the Program's 2021-22 reporting period, 71% of wildlife caught were threatened or protected species, including the critically endangered grey nurse shark. The Queensland Shark Control Program is having similar impacts on MNES including the Great Barrier Reef World Heritage Area. These legacy projects must be brought into line with current environmental standards and required to obtain approval under new nature laws within a specified timeframe.

### **Merit review rights**

The Samuel Review recommended that national environmental legislation should provide for limited merits review for development approval decisions. The *Nature Positive Plan* stated that the government will not introduce a new right to limited merits review of decisions. In HSI Australia's view, this response limits the community's access to environmental justice.

There are four key access to justice features that our new nature laws must contain:

- Any person must be able to review or appeal decisions made under the laws. Existing limitations on who can request a review or undertake an appeal must be removed.
- The community must be able to seek judicial review (the ability to argue before a Court that a decision was unlawful) of all administrative decision-making.
- Communities must have access to merits appeal (a re-hearing based on evidence) for all individual decisions (not just limited to some aspects of wildlife trade as is currently the case).
- Any individual or organisation should be able to take action to ensure compliance with the laws and individual project approvals where this necessary.

Implementation of the full complement of access to justice provisions listed above will provide for better scrutiny of decisions and result in better decisions for the environment and our communities. Embedding community rights, supported by clear and accessible data, is important to ensure that decisions concerning the future of our iconic wildlife and their habitats demonstrate integrity, accountability and transparency and foster public confidence and trust.

### **Conclusion**

The Government has been consulting on a legislative framework that has the potential to drive transformational change and deliver better outcomes for wildlife and their habitats. In its review of the consultation material, HSI Australia has identified that there is a strong foundation for delivering improved environmental outcomes but there remain many areas where the proposals are too discretionary or too open to interpretation to deliver clear protections for nature. If these concerns are comprehensively addressed, the proposed framework could deliver effectively for nature and we remain committed and determined to see that outcome.

In October 2009, Dr Allan Hawke released his 10 year review of the EPBC Act containing 71 primary recommendations for strengthening the Act which were never adequately addressed. It has been three and a half years since the release of the Samuel Review which contained 38 detailed recommendations for reform, and over one year since the release of the *Nature Positive Plan*. All of these reports and associated consultations recognised the seriousness of the environmental crisis being faced in Australia and the need for urgent action. It is time for the Parliament to respond to the urgent crisis with urgent action. A comprehensive package of strong new nature laws must be introduced and debated in Parliament as soon as possible – our wildlife and their habitats can not afford any further delay.