



Environmental
Defenders Office

Supplementary submission to the inquiry into Australia's extinction crisis

31 August 2022

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

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INTRODUCTION

Environmental Defenders Office (**EDO**) welcomes the opportunity to make a supplementary submission to the inquiry into Australia's extinction crisis being undertaken by the Senate Environment and Communications References Committee (**the Committee**). We acknowledge that the inquiry was established in June 2018,¹ and re-adopted on 4 August 2022.² We also acknowledge that the original terms of reference (**ToRs**) have been expanded to address flora, and to consider new material, including the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (**the Samuel Review**)³ and the *Australia State of the Environment 2021* report (**SoE 2021**).⁴

EDO made a submission to the Committee in September 2018, which addressed ToRs A-K generally, and specifically ToRs C, D, E, F, G, H, I, and K.⁵ We also gave evidence at the public hearings on 20 August 2019 and 30 July 2020. This supplementary submission should be considered together with our 2018 submission and evidence given at the public hearings.

This supplementary submission provides additional and updated information relevant to the following ToRs:

- **ToR (h)** the adequacy of existing funding streams for implementing threatened species recovery plans and preventing threatened fauna loss in general;
- **ToR (l)** final report of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (the Samuel Review);
- **ToR (m)** the *Australia State of the Environment 2021* report; and
- **ToR (n)** any related matters, specifically:
 - Impacts of the 2019-2020 bushfires;
 - Australian National Audit Office report – 2022;
 - Proposed new Commonwealth biodiversity certificates scheme; and
 - Additional recommendations for strengthening protections for Australia's fauna and flora.

As SoE 2021 shows (see below), Australia's extinction crisis is worsening. It is imperative that the Australian Parliament takes decisive action before more species are listed as extinct.

The Committee has already delivered two overarching recommendations in its interim report,⁶ namely:

- to limit the drivers of faunal extinction, the Commonwealth develop new environmental legislation to replace the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) (Recommendation 1); and

¹ See www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Faunalextingtion

² See www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/ExtinctionCrisis

³ Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report*, October 2020, available at <https://epbactreview.environment.gov.au/resources/final-report>

⁴ <https://soe.dcceew.gov.au/>

⁵ Environmental Defenders Office, Inquiry into Australia's faunal extinction crisis, 10 September 2018, available at https://www.edo.org.au/wp-content/uploads/2019/12/180907_-_Fauna_Extinction_Inquiry_-_EDOs_of_Australia_submission.pdf

⁶ The Senate, Environment and Communications References Committee, *Australia's faunal extinction crisis - Interim Report*, April 2019, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Faunalextingtion/interim_report

- the Commonwealth establish an independent Environment Protection Agency (**EPA**), with sufficient powers and funding to oversee compliance with Australia's environmental laws (Recommendation 2).

The Committee's recommendations align generally with the outcomes of the Samuel Review, which found that "*(t)he EPBC Act is out dated and requires fundamental reform. It does not enable the Commonwealth to effectively fulfil its environmental management responsibilities to protect nationally important matters*".⁷ The Samuel Review made various recommendations, including, that the Australian Government establish new, enforceable National Environmental Standards (Chapter 1), and implement a rigorous compliance and enforcement regime with independent oversight (Chapter 9).

The newly elected Australian Labor Government has committed to:

- providing a full response to the Samuel Review;
- ongoing consultation on EPBC Act law reform; and
- establishing an independent Environment Protection Agency.⁸

It is in this context that the Committee can play a role in providing more detailed, specific recommendations on action that can be taken to reverse Australia's extinction crisis. While we acknowledge that the ToRs for the inquiry have expanded, we note that the Committee has already delivered its interim findings and the Samuel Review has also provided detailed recommendations for reform. As such, we strongly urge the Committee to deliver any additional findings and recommendations without delay and to advocate within the Parliament for strong action to overcome the extinction crisis threatening our native flora and fauna as a matter of urgency.

KEY RECOMMENDATIONS

Strong laws that provide robust protections for threatened species, and which are effectively implemented and enforced, are a key requirement for addressing Australia's extinction crisis. EDO has made numerous recommendations for strengthening Australia's environmental laws and we do not repeat them here – they are set out in the various EDO submissions and publications referenced in this submission and our 2018 submission.

Our **overarching recommendations** are that:

- Consistent with the interim recommendations of the Committee, and the recommendations of the Samuel Review, Australia's national environmental laws are overhauled. We recommend that this is done urgently.
- A new national EPA is established to provide independent environmental governance.
- Adequate funding is committed to effectively implement, resource and enforce Australia's national environmental laws.

Please see referenced EDO reports and submissions for more detailed recommendations for strengthening national environmental laws.

⁷ Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report*, October 2020, p ii, op.cit.

⁸ See <https://www.alp.org.au/policies/environmental-law-reform-and-a-national-environmental-protection-agency>

RESPONSE TO TERMS OF REFERENCE

- **ToR (h) – the adequacy of existing funding streams for implementing threatened species recovery plans and preventing threatened fauna loss in general;**

In the first half of 2022, former Federal Environment Minister Sussan Ley, determined that 176 species and communities listed as threatened under the EPBC Act would no longer require a recovery plan.⁹ Instead, the Minister intended for conservation advices to be the primary mechanism to drive conservation planning and recovery for species and communities listed as threatened under the EPBC Act.

Prior to the Minister's decision, EDO had raised concerns that the proposed changes to conservation planning would result in a weakening of recovery tools.¹⁰ This is because, from a legal point of view, one critical difference is the legal weight of recovery plans in decision making processes, compared with conservation advices. Notably, in deciding whether or not to approve the taking of an action under the EPBC Act, and deciding whether to attach any conditions to the approval, the Minister "must not act inconsistently" with any recovery plan.¹¹ In contrast, the Minister need only "have regard to" a conservation advice in approval decisions.¹² Conservation advices also carry less weight in relation to decisions to enter into bilateral agreements – i.e., whereas the Minister must be satisfied a proposed bilateral agreement (management arrangement or authorisation process) is not inconsistent with any recovery plan, the Minister need only *have regard to* conservation advices.¹³ Conservation advices and recovery plans are also given different weight in relation to decisions for approving plans, policies or programs for the purpose of strategic assessments.¹⁴ In practice, the obligation to act consistently with recovery plans (rather than simply have regard to them) means that recovery plans carry more weight in decision making.

The decision to remove the requirement for recovery plans is concerning in the context of the current extinction crisis. Rather than weakening standards, Australia needs to invest in the development and implementation of stronger tools to recover threatened species and communities. Accepting weaker standards will not reverse the trajectories of biodiversity decline.

In particular, EDO recommends that:

- The Department of Climate Change, Energy, the Environment and Water should be fully resourced to effectively implement recovery plans as the primary tool for species recovery.
- Recovery plans should be clearly written, with clear obligations that can be legally enforced.

⁹ The recovery plans decision is available at <https://www.dcceew.gov.au/sites/default/files/documents/outcome-recovery-plan-decision-review.pdf>. The exact date of the decision is unclear. It has been reported that decision was made in March 2022, and published on the website of the former Department of Agriculture, Water and the Environment in April 2022, see The Guardian, *Coalition scrapped recovery plans for 176 threatened species and habitats in one of its final acts*, 2 June 2022, available at <https://www.theguardian.com/environment/2022/jun/02/coalition-scrapped-recovery-plans-for-176-threatened-species-and-habitats-in-one-of-its-final-acts>

¹⁰ Environmental Defenders Office, *Submission regarding proposed changes to conservation planning decisions*, 2 November 2021, available at <https://www.edo.org.au/publication/submission-regarding-the-proposed-changes-to-conservation-planning-decisions/>

¹¹ EPBC Act, s 139(1)(b)

¹² EPBC Act, s 139(2)

¹³ EPBC Act, s 53

¹⁴ EPBC Act, s 146K(2) and (3)

- Any decision to not require or no longer require a recovery plan should be based on scientific evidence and not for reasons of administrative efficiency or lack of resources; and be accompanied by published reasons for consultation.
- Broader reform of threatened species provisions in the EPBC Act or a new Federal Environment Act is needed to address the extinction crisis.

EDO's full submission to the proposal to remove the requirements for recovery plans is available on our website: <https://www.edo.org.au/publication/submission-regarding-the-proposed-changes-to-conservation-planning-decisions/>

The importance of recovery planning for endangered species is highlighted in a case study on the Spectacled Flying Fox in North Queensland - see EDO's report, *Flying-fox roost management reform for Queensland*, available at <https://www.edo.org.au/2021/10/12/first-nations-lore-key-to-flying-fox-recovery-in-the-wet-tropics/>

- **ToR (l) – final report of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (the Samuel Review)***

The findings and recommendations of the Samuel Review speak for themselves. The Samuel Review addresses a number of key issues relevant to the ToRs of this inquiry, in particular ToR (c)-(k), including the adequacy (or rather, inadequacy) of the EPBC Act in providing sufficient protections for threatened species and against key threatening processes. EDO engaged constructively in the Samuel Review process including as a member of the consultative group.¹⁵ Significant work went into the review process and it provides a foundation to build upon for EPBC Act reform.

From an EDO perspective, we highlight the following key findings and recommendations of the Samuel Review:

- The EPBC Act has failed to achieve its objectives and needs a complete overhaul (Chapter 3). The Samuel Review states: "*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. The EPBC Act does not clearly outline its intended outcomes, and the environment has suffered from 2 decades of failing to continuously improve the law and its implementation*".¹⁶
- The proposed centrepiece of a reformed national system are new legally enforceable national environmental standards. The Samuel Review specifically provides a number of proposed standards – developed with input from a consultative group of stakeholders and experts including EDO – to be implemented immediately. These include standards for matters of national environmental significance (such as world heritage, threatened species, wetlands, migratory species), Indigenous engagement and participation, compliance and enforcement, and data and information (Appendix B); with recommendations for immediate development of a

¹⁵ See <https://epbcactreview.environment.gov.au/news/stakeholder-consultation-update>

¹⁶ Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report*, October 2020, p viii, op. cit.

full suite of detailed standards. The standards are to be enforceable and applied at all scales by all relevant decision makers.

- The Review highlighted the importance of establishing new independent oversight and assurance bodies and mechanisms to ensure new national standards are implemented consistently and effectively (Chapter 7). These include: a new Assurance Commissioner that is to be free from political interference and publish timely performance audits on how the standards are being implemented, an Office of Compliance and Enforcement with a full tool kit of enforcement powers (housed in the Environment Department), transparent audit and reporting requirements and standards, and new oversight committees (for Indigenous engagement & participation, biodiversity conservation, heritage, water resources, with an overarching Ecologically Sustainable Development Committee). We note the new Government has committed to establishing a national EPA, and the findings of the Samuel Review will provide context for forthcoming consultation. EDO agrees that independent oversight and assurance are essential and strongly supports establishment of an independent national EPA.
- Indigenous-led reform should be galvanised to significantly improve Indigenous engagement and participation in decision-making, protection of cultural heritage, and land management (Chapter 2). The Samuel Review also recommends that national-level laws for Indigenous cultural heritage protection require immediate and comprehensive review. EDO strongly agrees with this recommendation.
- Vastly improved data and information systems are to underpin more efficient and accurate processes (Chapter 10) – from impact assessment to decision-making to planning to monitoring, evaluation and reporting. Information is to be publicly available, meaning valuable data will no longer be unavailable under commercial-in-confidence barriers and can be shared and used for a range of purposes – including to track the effectiveness of the laws. The Samuel Review recommends: a new data and information standard; appointing an information ‘supply chain Custodian’ to oversee reforms to ensure best available information and evidence is delivered when and where it is needed to support efficient processes; and designating (and maintaining) a set of national environmental information assets.
- The Samuel Review recognises that there are fundamental shortcomings in the interactions between Regional Forest Agreements (**RFAs**) and the EPBC Act. The Samuel Review recommends that the EPBC Act exemption for actions under RFAs be repealed.
- It is recommended that cumulative impacts are better assessed and addressed through new national and regional plans and multi-party investment in restoration (Chapter 8). The planning recommendations refer to new national plans, Ecologically Sustainable Development plans (akin to bioregional plans) and focuses on regional recovery plans (rather than for individual species). The recommendations relating to restoration include reforming biodiversity offsets policy to require ‘ecologically feasible’ upfront offset requirements in law.
- It is intended that a new system based on clear standards, assurance oversight, improved transparency and information, and effective compliance and enforcement will reduce the need for third party legal challenges (Chapter 4). These rights are confirmed as fundamental to

democracy,¹⁷ and the Samuel Review recommends retaining extended standing for third parties to bring legal proceedings and recommends a new pathway of merits review¹⁸ – focusing on outcomes rather than process.

- The Review was highly critical of the fact the current EPBC Act does not address impacts of climate change. While not recommending a climate change ‘trigger’ (i.e., that projects emitting certain levels of greenhouse gases require federal assessment and approval), the Samuel Review does recommend standards be developed to require development proposals to explicitly consider the likely effectiveness of avoidance or mitigation measures on nationally protected matters under specified climate change scenarios, and transparently disclose the full emissions of the development. EDO maintains our support for a clear climate trigger in national environmental law.
- The proposed reforms are an interrelated and interdependent package of reforms. Professor Samuel has made it quite clear that it will not be sufficient for the Government to ‘cherry pick’ reforms (i.e., as proposed by the former Morrison Government). A comprehensive legislative package is needed to establish the necessary legal architecture to ensure legally enforceable national standards, oversight, assurance, Indigenous engagement, data and information, compliance and enforcement, resourcing, capability and capacity to reverse Australia’s declining environment.

EDO’s response to the release of Samuel Review is available on our website:

<https://www.edo.org.au/2021/02/04/trajectory-unsustainable-10-key-findings-of-the-epbc-act-review-final-report/>

To date, progress on properly responding to or implementing the recommendations of the Samuel Review has been limited, however the new Labor Government has indicated it intends to consult and develop new legislation that establishes national environmental standards and responds to a range of other recommendations, and that it will consult on the establishment of a national Environmental Protection Authority. The Samuel Review recommendations provide a foundation for reform and should be built upon to address the extinction crisis.

We encourage the Committee to deliver its final report and recommendations (or at least a second interim report) promptly so that it may be available for the Government and the Parliament in considering any new environmental legislation. In particular, it may be useful for the Committee to provide more specific recommendations on how new environmental legislation or an amended EPBC Act can better respond to Australia’s extinction crisis.

¹⁷ The Samuel Review states: “The ability of the public to hold decision-makers to account is a fundamental foundation of Australia’s democracy. To characterise these types of actions as ‘lawfare’ misrepresents the importance of legal review in Australian society”. Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report*, October 2020, p 10, op. cit.

¹⁸ The Samuel Review states: “Adjustments to legal review provisions should be made to provide for limited merits review ‘on the papers’ for development assessment and approval decisions made under the EPBC Act. This type of review should be: available to proponents and those with standing; limited to the material available at the time of the original decision; apply to the approval decision and the application of conditions; and related to consideration of decisions where the exercise of discretion was in correct in the circumstances or the decision was unreasonable in the circumstances.” Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report*, October 2020, p 11, op. cit.

- **ToR (m) - the Australia State of the Environment 2021 report**

If there was any doubt that Australia was facing an extinction crisis, the release of SoE 2021 in July 2022 should well and truly remove it. When the Committee was first established, Australia's fauna was in a dire predicament. The 2016 State of the Report advised that:

- *“(a)s at December 2015, a total of 480 fauna species (terrestrial and aquatic) were listed under the EPBC Act, including 55 that are listed as extinct or extinct in the wild. This reflects an overall increase of 44 species since 2011”*.¹⁹
- *“Pressures (on biodiversity) are common across all jurisdictions—for example, land clearing and vegetation fragmentation, pest animals, weeds, disease and pressures resulting from climate change—with varying impacts in each jurisdiction”*.²⁰

Since then, pressures on flora and fauna species have increased, including through rising land clearing rates particularly in NSW and Queensland,²¹ and impacts from the 2019-2020 bushfire season (see below). Legal frameworks have remained generally unchanged, allowing high impact activities such as forestry operations, industry, and urban development to continue ‘business-as-usual’ with limited effort to increase protections for species at risk.

It is no surprise then, that the recent release of SoE 2021 revealed that the predicament of Australia's fauna and flora has worsened. Specifically, SoE 2021 states:

- *“In June 2021, 533 animal and 1,385 plant species were listed under the EPBC Act.... The list includes 105 species that are Extinct or Extinct in the Wild”*;
- *“The number of threatened species listed under the EPBC Act has risen for almost all taxa over the past 5 years”*;
- *“We can expect further extinctions of Australian species over the next two decades unless current management effort and investment are substantially increased. Conservation actions are linked to reduced rates of decline for threatened Australian plants, mammals and birds, but they have not been sufficient to reverse declines overall”*; and
- *“Many of the pressures on biodiversity in Australia have increased in intensity in the past 5 years. Habitat loss and degradation and invasive species result in persistent and sometimes irreversible impacts on biodiversity across almost all areas of Australia. Many Australian ecosystems are*

¹⁹ Cresswell ID, Murphy H (2016). *Biodiversity: Terrestrial plant and animal species: Threatened species lists*. In: *Australia state of the environment 2016*, Australian Government Department of the Environment and Energy, Canberra,

<https://soe.environment.gov.au/theme/biodiversity/topic/2016/terrestrial-plant-and-animal-species-threatened-species-lists>

²⁰ Cresswell ID, Murphy H (2016). *Biodiversity: Jurisdictional reporting on pressures*. In: *Australia state of the environment 2016*, Australian Government Department of the Environment and Energy, Canberra, op. cit.

²¹ Land clearing rates in New South Wales and Queensland in particular are continuing to rise under current legal frameworks - see for example:

- The Guardian, *Emissions warning: calls to stop ‘skyrocketing’ land clearing in NSW*, 30 June 2022, available at <https://www.theguardian.com/australia-news/2022/jun/30/emissions-warning-calls-to-stop-skyrocketing-land-clearing-in-nsw>
- The Guardian, *‘Carbon bomb’: Queensland reveals big jump in land clearing*, 31 December 2021, available at <https://www.theguardian.com/environment/2021/dec/31/carbon-bomb-queensland-reveals-big-jump-in-land-clearing>

*experiencing cumulative and compounding pressures, leading to ecosystem collapse characterised by loss of key defining features and functions”.*²²

SoE 2021 confirms further alarming headlines and statistics. 93% of habitat clearing (of 7.7 million hectares) was not referred for assessment under national environmental laws. Even areas specifically protected by law – such as world heritage areas – are not improving. Australia now has more foreign plant species than native. The interaction of water regulation and drought conditions have resulted in devastating fish death events across the Murray Darling Basin, and of the 450 gigalitres promised for the environment under the Murray Darling Basin plan, only 2 gigalitres have been delivered.

The report makes clear “*climate change is affecting all aspects of our environment. Land and ocean temperatures are increasing, driving changing rainfall patterns and extreme weather events that affect our soils, water and vegetation, and all the species that rely on them*”.²³ Marine heatwaves caused mass coral bleaching on the Great Barrier Reef in 2016, 2017 and 2020. For natural disasters, the outlook is poor and deteriorating, and the impact of changing climate and extreme events on wellbeing is also poor and deteriorating.

SoE 2021 is a massive wake up call. There is no doubt that the deteriorating state of the environment is contributing to Australia's extinction crisis. Australia must act urgently to reverse ongoing decline and to stop more species being added to the extinction list.

EDO's full response to the release of SoE 2021 is available on our website:

<https://www.edo.org.au/2022/07/28/our-legal-solutions-for-the-dire-state-of-the-environment/>

- **ToR (n) - any related matters**

EDO wishes to provide the Committee with information relating to impacts of the 2019-2020 bushfires on Australia's fauna and flora. We also direct the Committee to a report of the Australian National Audit Office regarding the management of threatened species and ecological communities under the EPBC Act; and the announcement of the Australian government that it will develop a biodiversity certificates scheme. Finally, we direct the Committee to further EDO recommendations for strengthening protections for Australia's fauna and flora, in addition to those provided in our 2018 submission and above.

- **Impacts of the 2019-2020 bushfires**

The bushfire season of 2019-2020 was unprecedented in terms of scale, intensity and duration in Australian bushfire history. Around the country 33 lives were lost,²⁴ an estimated 417 people died

²² Murphy H & van Leeuwen S (2021). Australia state of the environment 2021: biodiversity, independent report to the Australian Government Minister for the Environment, Commonwealth of Australia, Canberra, see specifically pp 7, 8 and 18, available at <https://soe.dcceew.gov.au/sites/default/files/2022-07/soe2021-biodiversity.pdf>

²³ See https://www.dcceew.gov.au/sites/default/files/documents/0.%20DCCEEW-SOE_factsheet_Overview.pdf#:~:text=Climate%20change%20is%20affecting%20all%20aspects%20of%20our.vegetation%2C%20and%20all%20the%20species%20that%20rely%20on%20them.

²⁴ Parliament of Australia, 2020, *2019–20 Australian bushfires—frequently asked questions: a quick guide*, available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/Quick_Guide/AustralianBushfires. We note that some reports state 34 deaths, however we have been unable to confirm this number.

due to smoke inhalation,²⁵ more than 3,000 homes burnt down,²⁶ and property and infrastructure was destroyed including thousands of farms and forest communities. The bushfires also had a devastating impact on our natural environment. Significant ecosystems and landscapes were decimated, including World Heritage-listed National Parks,²⁷ ancient rainforests²⁸ and even waterways, following post-fire flooding.²⁹ An estimated 830 million tonnes of greenhouse gases were emitted.³⁰

While it is difficult to estimate the exact number of native animals impacted by the fires, some experts originally predicted it could be as many as 800 million in NSW and one billion nationally,³¹ with more recent analyses suggesting as many as three billion nationally.³²

In NSW, bushfires burnt over 5.52 million hectares of land.³³ The fire ground in NSW covered approximately 7% of the state, including 2.7 million hectares in national parks (37% of the NSW park system), and that the habitat of more than 293 threatened animals and 680 threatened plants has been impacted.³⁴ In Victoria, bushfires impacted more than 1.5 million hectares.³⁵ Analysis indicates that 244 species have more than 50% of their modelled habitat within the burnt area, including 215 rare or threatened species and nine ecological vegetation classes (EVCs) with more than 50% of their

²⁵ Arriagada, N.B, et al; 2020, *Unprecedented smoke-related health burden associated with the 2019–20 bushfires in eastern Australia*. *Med J Aust* 2020; 213 (6): 282-283. Available at <https://www.mja.com.au/journal/2020/213/6/unprecedented-smoke-related-health-burden-associated-2019-20-bushfires-eastern>

²⁶ AFAC (Australasian Fire and Emergency Service Authorities Council) (2020) *Cumulative Seasonal Summary*, AFAC National Resource Sharing Centre, 28 February 2020. Accessed at <https://twitter.com/AFACnews/status/1233262259612213248/photo/1>.

²⁷ See, for example, Department of Agriculture, Water and the Environment, 2020. *Greater Blue Mountains Area State of Conservation update - April 2020*, available at <http://www.environment.gov.au/system/files/resources/2073fd28-88e8-42f6-8b2a-20a811f7a279/files/greater-blue-mountains-area-state-conservation-update-april-2020.pdf>

²⁸ See, for example, Queensland Government, 2020, *Altered fire regimes pressure on the Gondwana Rainforests*. Available for viewing at <https://www.stateoftheenvironment.des.qld.gov.au/heritage/world/altered-fire-regimes-pressure-on-the-gondwana-rainforests-of-australia>

²⁹ NSW Government, 2020. *Bushfire impacts on water quality, February 2020*, available at <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/water/20p2093-bushfire-impacts-on-water-quality.pdf>

³⁰ DISER, 2020, *Estimating greenhouse gas emissions from bushfires in Australia's temperate forests: focus on 2019-20*, Australian Government, available at <https://www.industry.gov.au/data-and-publications/estimating-greenhouse-gas-emissions-from-bushfires-in-australias-temperate-forests-focus-on-2019-20>

³¹ Professor Chris Dickman, Faculty of Science, University of Sydney. For an explanation of Professor Dickman's estimates see <https://www.sydney.edu.au/news-opinion/news/2020/01/08/australian-bushfires-more-than-one-billion-animals-impacted.html>

³² WWF-Australia, *Impacts of the Unprecedented 2019-20 Bushfires On Australian Animals*, November 2020, available at https://www.wwf.org.au/ArticleDocuments/353/WWF_Impacts-of-the-unprecedented-2019-2020-bushfires-on-Australian-animals.pdf.aspx

³³ NSW Independent Bushfire Inquiry, *Final Report of the NSW Bushfire Inquiry*, 31 July 2020, available at <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/NSW-Bushfire-Inquiry-1630/Final-Report-of-the-NSW-Bushfire-Inquiry.pdf>

³⁴ See NSW Department of Planning, Industry and Environment, *Understanding the effects of the 2019–20 fires*, available at <https://www.environment.nsw.gov.au/topics/parks-reserves-and-protected-areas/fire/park-recovery-and-rehabilitation/recovering-from-2019-20-fires/understanding-the-impact-of-the-2019-20-fires>

³⁵ Bushfire Recovery Victoria, *Eastern Victorian Fires 2019–20 State Recovery Plan*, August 2020, available at https://www.vic.gov.au/sites/default/files/2021-04/BRV_Statewide%20Recovery%20Plan.pdf

extent burnt.³⁶ More than 7 million hectares were burnt in bushfires in Queensland,³⁷ the impacts from which are still under assessment.³⁸

In the wake of the bushfires, protecting intact and unburnt areas of high conservation value is critical, as well as lightly burnt areas,³⁹ particularly while burnt areas and impacted species recover. These remaining areas are essential for providing habitat and refuge for wildlife; providing future climate change refugia; delivering important ecosystem services, assisting impacted ecosystems and landscapes to recover; building resilience and ensuring our remaining natural areas thrive. In considering the impacts of the 2019-2020 bushfires on wild life, it has been suggested that the time required for recovery of threatened and fire sensitive species ranges from around 10 - 120 years, depending on the severity of the fire and extent of impacts on individual populations.⁴⁰

It is also crucial that environmental assessment, decision-making and policy settings take into account the impacts of the bushfires. The 2019-2020 bushfire season changed the Australian landscape and the environmental baseline of our biodiversity conservation and natural resource management frameworks. Widespread damage to ecosystems, landscapes and the significant loss of wildlife caused by the fires means that any assumptions underpinning environmental assessment, decision-making and policy settings must be re-visited to consider the impacts of the bushfires.

Many environmental indicators were in decline even before the catastrophic bushfire season.⁴¹ Ongoing threats to the environment (including habitat clearing and fragmentation from development, land clearing and forestry) have now been compounded by the damage caused by the bushfires. The bushfires followed years of drought in south-eastern Australia, with low rainfall records and high temperature records broken due to global heating. We are now also seeing further impacts from multiple flood events that have occurred across NSW and Queensland in the first half of 2022, in some instances in areas that are still recovering from the impacts of the 2019-2020 bushfires.

³⁶ Department of Environment, Land, Water and Planning, *Victoria's bushfire emergency: biodiversity response and recovery - Version 2*, August 2020, available at https://www.wildlife.vic.gov.au/data/assets/pdf_file/0030/484743/Victorias-bushfire-emergency-Biodiversity-response-and-recovery-Version-2-1.pdf

³⁷ Queensland Government, *2019 Queensland Bushfires - State Recovery Plan 2019-2022*, August 2020, available at <https://www.qra.qld.gov.au/2019-queensland-bushfires>

³⁸ The Queensland Government's State Recovery Plan 2019-2022 indicates that "further fine scale analysis of fire extent, severity and field surveys are needed to confirm distribution and level of impact for priority species and locations, see Queensland Government, *2019 Queensland Bushfires - State Recovery Plan 2019-2022*, August 2020, op.cit.

³⁹ The importance of protecting lightly burnt and some moderately burnt areas from forestry operations post-bushfires was highlighted in the following report: Smith, Dr A. *Review of CFIOA Mitigation Conditions for Timber Harvesting in Burnt Landscapes - A Report to the NSW Environment Protection Authority*, September 2020, available at <https://www.epa.nsw.gov.au/media/epa/corporate-site/resources/forestry/review-of-cfoa-mitigation-conditions-for-timber-harvesting-in-burnt-landscapes.pdf?la=en&hash=6360E080DB80E7BEF935A1A4A6BDDAB46BBFD0A7>

⁴⁰ Smith, Dr A. *Review of CFIOA Mitigation Conditions for Timber Harvesting in Burnt Landscapes - A Report to the NSW Environment Protection Authority*, September 2020, op.cit.

⁴¹ See Australian State of the Environment Report 2016, available at <https://soe.environment.gov.au/>; see also NSW State of the Environment Report 2018, available at <https://soe.epa.nsw.gov.au/>; see also Queensland State of the Environment Report 2017 available at <https://www.stateoftheenvironment.des.qld.gov.au/>; see also Victorian State of the Environment Report 2018, available at <https://www.ces.vic.gov.au/reports/state-environment-2018>.

EDO, in collaboration with WWF Australia, has been working to protect priority unburnt areas using existing legal mechanisms.⁴² In general, we have found that:

- **Concerns about the inadequacy and effectiveness of environmental laws in providing sufficient protections for threatened species have been heightened given the extent and scale of the bushfire impacts;**
- **Some mechanisms designed to protect threatened species and their habitats are generally underutilised, and have not been used post-bushfires to assist with species recovery; and**
- **In general, environmental laws can be strengthened to support more rapid, effective responses to major events, such as bushfires, in the future.**

For example:

- the conservation status (e.g. whether a species is threatened and the degree of threat – i.e. vulnerable, endangered, critically endangered, extinct) of many bushfire-impacted species is still under assessment, leaving species at risk of further decline despite the catastrophic impacts that have occurred;
- legal mechanisms to protect habitat critical to the survival of species are underused;
- while targeted bushfire recovery initiatives are being implemented,⁴³ it is unclear if they will continue to be resourced beyond the initial funding outlay or whether there is effective monitoring to assess whether those programs have led to improved outcomes for threatened species;

⁴² See <https://www.edo.org.au/defending-the-unburnt-a-landmark-legal-initiative/>

⁴³ For example:

- The Commonwealth Government convened a Wildlife and Threatened Species Bushfire Recovery Expert Panel that identified species requiring urgent management intervention – see <https://www.environment.gov.au/biodiversity/bushfire-recovery/priority-animals>. It also announced an interim threatened species nomination and prioritisation processes to allow further bushfire-affected species to be considered for assessment – see <https://www.awe.gov.au/environment/biodiversity/threatened/nominations>; and provided funding to undertake mapping and monitoring of species post-bushfires and support further scientific assessment, planning and coordination – see <https://www.awe.gov.au/environment/biodiversity/bushfire-recovery>
- In NSW, the Department of Planning, Industry and Environment developed the *NSW Wildlife and Conservation Bushfire Recovery: Medium-term response plan* which a five-year plan to support the recovery of biodiversity in NSW following the 2019-2020 bushfires – see <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Parks-reserves-and-protected-areas/Fire/nsw-wildlife-and-conservation-bushfire-recovery-medium-term-response-plan-200478.pdf>. It also developed its own state-specific priority fauna list that considers additional information and factors relevant to NSW, such as the impact of drought – see <https://www.seed.nsw.gov.au/need-help/finding-data-on-dataset-catalogue/bushfire-related-datasets>.
- *The Queensland Government's 2019 Queensland Bushfires - State Recovery Plan 2019-2022* identifies impacts of the bushfires in Queensland and recovery strategies – see <https://www.qra.qld.gov.au/2019-queensland-bushfires>. The Queensland government is also implementing a 2019-20 bushfires: *Threatened species recovery program* identifying priority species and actions for recovery – see <https://www.qld.gov.au/environment/plants-animals/conservation/bushfires-threatened-species-recovery>
- The Victorian Department of Environment, Land, Water and Planning has analysed and published information on the impacts of the 2019-2020 bushfires,⁴³ including its biodiversity response titled *Victoria's bushfire emergency: biodiversity response and recovery - Version 2*, published in August 2020 – see <https://www.wildlife.vic.gov.au/home/biodiversity-bushfire-response-and-recovery>

- there has been no wholesale review of pre-existing conservation plans, recovery plans or programs to ensure they are up-to-date post-bushfires; and
- there has been no wholesale review of specific threatened species protections to ensure they are fit-for-purpose following the 2019-2020 bushfires (e.g. threatened species prescriptions in forestry rules).

Further, in many instances, activities that impact on threatened species, such as development, infrastructure, land clearing and resource extraction have been allowed to continue 'business-as-usual'. For example, salvage logging (logging in areas impacted by bushfires or other incidents (floods, disease etc.) in order to mitigate economic loss) has been allowed in bushfire impacted areas despite concerns that such operations will hinder recovery efforts and further impact threatened species and ecosystems;⁴⁴ and logging operations in general have been allowed to continue despite independent advice that logging should be suspended in certain highly impacted areas.⁴⁵ Little has been done to protect remaining unburnt areas while the conservation status of impacted flora and fauna is still being assessed. This is despite the Wildlife and Threatened Species Bushfire Recovery Expert Panel established by the Federal government identifying the protection of unburnt areas within or adjacent to recently burnt ground as a priority action, necessary for the ongoing survival of bushfire-impacted threatened species and ecological communities.⁴⁶

The impacts of the bushfires, effectiveness of bushfire recovery initiatives, and adequacy of environmental laws in responding to not only the 2019-2020 bushfires, but also other future events, should be considered by the Committee as part of its inquiry into Australia's extinction crisis. In particular, the impacts of the bushfires should be considered when having regard to:

- The adequacy and effectiveness of protections for critical habitat for threatened fauna under the EPBC Act (**ToR (e)**). Despite the impacts of the bushfires on wildlife, and the uplisting (or nomination for uplisting) of numerous bush-fire impacted species to critically endangered, the Commonwealth government has failed to include any additional areas on the Register of Critical Habitat.
- The adequacy of both the management and extent of the National Reserve System (**ToR (f)**). As noted above, in NSW, bushfires burnt over 5.52 million hectares of land and the fireground included 2.7 million hectares of national parks (37% of the NSW park system), all of which form part of the National Reserve System.⁴⁷ In Victoria, bushfires burnt more than

⁴⁴ See, for example, Thorn S., Bässler C., Brandl R., et al. *Impacts of salvage logging on biodiversity: A meta-analysis*, 2018, .J Appl Ecol. 2018 available at <https://besjournals.onlinelibrary.wiley.com/doi/epdf/10.1111/1365-2664.12945>; see also Lindenmayer, D. B., and Noss, R. F., *Salvage Logging, Ecosystem Processes, and Biodiversity Conservation*, 2006, Conservation Biology, vol. 20, no. 4, 2006, pp. 949–58.

⁴⁵ For example, the NSW Natural Resources Commission advised that in "management zones rated as being extreme risk, there is a risk of serious and irreversible harm to environmental values from the cumulative impacts of fire and harvesting. In line with the precautionary principle, harvesting must be temporarily suspended for three years from the time of fire (taken to be February 2020). See Natural Resources Commission, *Final report - Coastal IFOA operations post 2019/20 wildfires*, June 2021, available at <https://www.parliament.nsw.gov.au/lcdocs/other/17530/23%20August%202022%20-%20PC%207%20-%20tabled%20by%20Sue%20Higginson.pdf>

⁴⁶ Wildlife And Threatened Species Bushfire Recovery Expert Panel, *Communiqué*, 15 January 2020, available at <https://www.dcceew.gov.au/sites/default/files/env/pages/effd94e2-00fc-4e4b-8692-941f90f5ad8c/files/communique-15jan2020.pdf>

⁴⁷ See NSW Department of Planning, Industry and Environment, *Understanding the effects of the 2019–20 fires*, op.cit.

1.5 million hectare of land, impacting 463,000 hectares of National Parks and other land managed by Parks Victoria.⁴⁸ These impacts (and the prediction that bushfire frequency and severity is likely to continue to increase in parts of Australia as the climate continues to warm) should be taken into account when the Committee reports on the adequacy of both the management and extent of the National Reserve System.

- The adequacy of existing assessment processes for identifying threatened species conservation status (**ToR (j)**). Despite those governments' efforts, two years on from the bushfires the conservation status of many bushfire-impacted species is still under assessment, with the timeframe for completing assessments for a large number of species recently extended,⁴⁹ leaving species at risk of further decline despite the catastrophic impacts that have occurred. The EPBC Act should include provisions that allow the rapid, provisional listing species, following a major event such as the 2019-2020 bushfires. More detailed recommendations are set out in EDO's report, *Defending the Unburnt: The need for additional legal measures to ensure timely protection of wildlife and plants* (forthcoming).

EDO has raised concerns about the impacts the 2019-2020 fires on native flora and fauna, and has made recommendations for reviewing and strengthening policies and laws aimed at protecting threatened species. See, for example:

- EDO submission to the NSW Parliamentary inquiry into the long term sustainability and future of the timber and forest products industry,⁵⁰ available at <https://www.edo.org.au/publication/inquiry-into-the-long-term-sustainability-and-future-of-the-timber-and-forest-products-industry/>
- EDO Submission to Major Event Review for Victoria's Fire Impacted Forests – Summary Report,⁵¹ available at <https://www.edo.org.au/publication/submission-to-major-review-for-victorias-fire-impacted-forests/>

EDO is currently developing further, targeted recommendations for enhancing opportunities to protect priority unburnt areas and strengthening environmental laws in response to the bushfires. We can provide the Committee with our final recommendations on these matters in due course.

- **Australian National Audit Office report - 2022**

We draw the Committee's attention to the 2022 report from the Australian National Audit Office, *Management of Threatened Species and Ecological Communities under the Environment Protection and Biodiversity Conservation Act 1999*,⁵² which concluded that:

⁴⁸ See <https://www.vic.gov.au/2019-20-eastern-victorian-bushfires>

⁴⁹ See <https://www.dcceew.gov.au/environment/biodiversity/threatened/nominations/extensions>

⁵⁰ Environmental Defenders Office, *Submission to the NSW Parliamentary inquiry into the long term sustainability and future of the timber and forest products industry*, 3 June 2021, available at <https://www.edo.org.au/publication/inquiry-into-the-long-term-sustainability-and-future-of-the-timber-and-forest-products-industry/>

⁵¹ Environmental Defenders Office, *Submission to Major Event Review for Victoria's Fire Impacted Forests – Summary Report*, 31 August 2021, available at <https://www.edo.org.au/publication/submission-to-major-review-for-victorias-fire-impacted-forests/>

⁵² Australian National Audit Office, *Auditor-General Report No.19 2021-22 - Management of Threatened Species and Ecological Communities under the Environment Protection and Biodiversity Conservation Act 1999*, March 2022, available at https://www.anao.gov.au/sites/default/files/Auditor-General_Report_2021-22_19.pdf

*“The administration of threatened species and ecological communities under the EPBC Act is partly effective. The department is unable to demonstrate it is efficient. There is limited evidence that desired outcomes are being achieved, due to the department’s lack of monitoring, reporting and support for the implementation of conservation advice, recovery plans and threat abatement plans”.*⁵³

This report reaffirms the general findings of the Committee’s interim report and the Samuel Review in relation to the failure of the EPBC Act to provide effective protection for Australia’s threatened flora and fauna.

- **Proposed new Commonwealth biodiversity certificates scheme**

In August 2022, the Albanese Labor Government announced that it would be implementing a new biodiversity certificates scheme.⁵⁴ This follows the announcement of the former Morrison Government that it would establish a biodiversity stewardship scheme.⁵⁵ The new biodiversity certificates scheme will operate in parallel to the existing carbon market scheme regulated by the Clean Energy Regulator. We understand that the Government will be consulting on the detailed rules for the new scheme over the coming months.

Market-based conservation can present both an opportunity and a risk.⁵⁶ On the one hand, market-based mechanisms can drive an increased uptake in environmental stewardship in two ways: by providing additional pathways for landholders to benefit from undertaking conservation action on their land, and by providing access to new, private investment where government funds may be limited. On the other, the integrity of offsets-based market mechanisms has been called into question and significant concerns have been raised about the ability of market-based mechanisms to deliver genuine environmental outcomes. **It is unclear whether the proposed new biodiversity certification scheme will operate as an offsets scheme.**

It is important that the new scheme is consistent with current science and based on best practice principles. It must deliver genuine, improved outcomes for biodiversity and not contribute to the ongoing decline of biodiversity.

This committee should consider the implications that a biodiversity certificates scheme may have on the ongoing decline of biodiversity and whether it will help or hinder our response to the extinction crisis.

⁵³ Ibid, p 8.

⁵⁴ See <https://minister.dcceew.gov.au/plibersek/media-releases/joint-media-release-biodiversity-certificates-increase-native-habitat-and-support-australian-landholders>

⁵⁵ In November 2021, the former Morrison Government announced it was developing a new legislative framework to underpin a national voluntary biodiversity stewardship market for agricultural lands, delivering a range of benefits including a new income stream for farmers and biodiversity outcomes for the environment. It introduced the *Agriculture Biodiversity Stewardship Market Bill 2022* (ABSC Bill) into the Federal Parliament in February 2022. The ABSC Bill aimed to set up a new voluntary biodiversity market, modelled off the carbon farming framework established by the *Carbon Credits (Carbon Farming Initiative) Act*. However, the ABSC Bill lapsed on the dissolution of Parliament ahead of the May 2022 Federal election. See https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6832.

⁵⁶ See, for example, EDO, *Defending the Unburnt: A guide to carbon sequestration opportunities for private landholders*, 2022, forthcoming.

- **Additional recommendations for strengthening protections for Australia's fauna and flora**

In addition to the specific recommendations in our 2018 submission and EDO reports and submissions referenced above, EDO directs the Committee to the following additional EDO publications that contain recommendations that, if implemented, will strengthen Australia's climate and environmental laws and provide improved protections for Australia's flora and fauna:

- EDO's report, *A Roadmap for Climate Reform*, which makes 58 recommendations for **climate reform** based on 5 opportunities – see: [A Roadmap for Climate Reform](#).⁵⁷
- For recommendations on establishing a **national EPA** see EDO's report [Implementing effective independent Environmental Protection Agencies in Australia](#).⁵⁸
- EDO supports legal recognition of the **right to a healthy environment**,⁵⁹ and has developed recommendations for how this may be implemented in Australia's laws in our report [A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia](#).⁶⁰
- For recommendations for **marine and oceans law reform** see EDO's report [More than just fish and ships – The case for an Oceans Act](#).⁶¹

⁵⁷ Available at <https://www.edo.org.au/publication/a-roadmap-for-climate-reform/>

⁵⁸ Available at <https://www.edo.org.au/publication/implementing-effective-independent-environmental-protection-agencies-in-australia/>

⁵⁹ See <https://www.edo.org.au/2022/07/25/australia-must-support-un-general-assembly-resolution-recognising-the-right-to-a-healthy-environment/>

⁶⁰ Available at <https://www.edo.org.au/2022/08/26/new-report-a-healthy-environment-is-a-human-right/>

⁶¹ Available at <https://www.edo.org.au/publication/more-than-just-fish-and-ships/>