



# Environmental Defenders Office

21 February 2020

The Honourable Anastacia Palaszczuk  
Premier and Minister for Trade

By email only: [thepremier@premiers.qld.gov.au](mailto:thepremier@premiers.qld.gov.au)

Dear Premier,

## **Bushfire emergency: Urgent interim actions and further steps under state legislation to protect threatened species**

The Environmental Defenders Office is a community legal centre specialising in public interest environmental law.

The 2019/2020 bushfire season was unprecedented in scale and intensity and is likely to have fundamentally changed the landscape that supports our wildlife in large parts of south-east and central Queensland. Huge areas of habitat that support native species, including species already threatened with extinction, have been heavily affected by this bushfire season.

While it will take some time to fully assess the effects of this bushfire season on our biodiversity, it is likely that some species and regional ecosystems will move to a higher threat classification, while some species and ecosystems may meet the criteria for listing as threatened for the first time.

The Commonwealth Wildlife and Threatened Species Bushfire Recovery Expert Panel has begun the work of assessing the nation-wide biodiversity impacts of the fires.<sup>1</sup> We understand that the Department of Environment and Science and Queensland Herbarium are currently undertaking a similar analysis on a Queensland-scale, which we are informed has identified that about 6.6 million hectares as fire-affected, around 10% of which is within protected areas.

We write to identify powers available to your government to take three urgent interim measures to preserve species and ecosystems that may be at heightened risk of extinction as a result of the recent fire season, while a full assessment of the impacts of the bushfires is being undertaken.

We also recommend five further steps your government can take as the full extent of the impacts becomes known.

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<sup>1</sup> <https://www.environment.gov.au/biodiversity/bushfire-recovery/research-and-resources>

## Interim measures

Our immediate concern is that decisions are being made, and have been made, to authorise habitat destruction on the basis of out-of-date information that doesn't reflect the current – post-bushfire – level of threat to species and ecosystems. There are powers available to your government to prevent further irreversible impacts from occurring – on an interim basis – while scientific assessments are undertaken to understand the full extent of the impacts.

We have identified, in the **annexure** to this advice, the interim powers available to each relevant Minister. We strongly recommend that your government consider the immediate use of at least the following interim measures:

1. Creating a temporary 'pause' on clearing ecosystems and habitat that are likely to have reduced in extent as a result of the fire season through either an Interim Conservation Order under the *Nature Conservation Act 1992* or an interim declaration of an area of high nature conservation value under the *Vegetation Management Act 1999*;
2. Temporarily halting decision-making processes on applications seeking approval for vegetation clearing in affected regional ecosystems. This may be through use of Ministerial call in powers under the *Planning Act 2016*, as well as through the ordinary decision-making functions of both the Minister for Economic Development in relation to Priority Development Areas (such as Toondah Harbour) under the *Economic Development Act 2012* and the Coordinator-General in relation to state development areas and coordinated projects under the *State Development and Public Works Organisation Act 1971*;
3. Actively considering, and applying a precautionary approach to, the referral projects to the Commonwealth under s69 of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*. The changed status of fire-affected listed species and communities may have lowered the threshold at which an impact on such species or communities is a 'significant impact' which requires approval under that Act.

## Further steps

As more information about the impacts of the bushfires become available, your government's priority should be to ensure that the new threat levels for affected species and ecosystems are reflected in permanent biodiversity protections and decision-making criteria.

The **annexure** to this advice contains a discussion of the powers available to each relevant Minister to take further steps that may become necessary, depending upon the nature and scale of the impacts. We recommend that you, at minimum, consider the following steps:

1. Provide additional resourcing to the Threatened Species Technical committee to assess, or re-assess, fire-affected species for listing or changes in threat categories under the *Nature Conservation Act 1992*;
2. Ask the Queensland Herbarium to re-assess vegetation mapping under the *Vegetation Management Act 1999* for fire-affected regional ecosystems, with particular attention to whether certain regional ecosystems should be re-categorised to 'of concern' or 'endangered' status and whether new areas should be identified as 'essential habitat';
3. Consider the use of the Minister for Planning's power to direct local government's to make urgent amendments to planning schemes under the *Planning Act 2016*, if necessary to protect remnant ecosystems or threatened species;

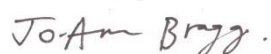
4. Review of the Regional Plans in effect under the *Planning Act 2016* for the relevant parts of south-east and central Queensland to ensure that planning for these regions is consistent with the need to conserve native species and preserve the diversity of Queensland's ecosystems;
5. In some cases it may even be appropriate to revoke approvals (such as development permits, environmental authorities or SDA development approvals) that authorise clearing of vegetation that is habitat for species at high risk of extinction or for regional ecosystems that have suffered further reductions in extent, where these approvals have not yet been acted upon.

The effects of climate change mean that events with large-scale ecological impacts are likely to become more widespread and frequent.<sup>2</sup> We recommend that your government also undertake a review to ensure that Queensland's biodiversity laws are adequate to safeguard Queensland's extraordinary biodiversity from the impacts of these types of extreme events, as they increasingly occur under climate change driven conditions.

We would welcome the opportunity to meet with you or your Ministers to discuss these powers further.

Yours sincerely,

**Environmental Defenders Office**



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<sup>2</sup> Chris Dickman, Don Driscoll, Stephen Garnett, David Keith, Sarah Legge, David Lindenmayer, Martine Maron, April Reside, Euan Ritchie, James Watson, Brendan Wintle, John Woinarski (2020) *After the catastrophe: a blueprint for a conservation response to large-scale ecological disaster*, Threatened Species Recovery Hub, January 2020.

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# Annexure: Bushfire-affected biodiversity – Ministerial powers

## **Minister for Environment**

### Interim measure: Interim conservation order, *Nature Conservation Act 1992*

Interim conservation orders under Part 6 of the *Nature Conservation Act 1992* (**NCA**)<sup>3</sup> are available if the Minister is of the opinion that threatened or near threatened wildlife, critical habitat or an area of major interest is subject to a threatening process that is likely to have a significant detrimental effect.<sup>4</sup> An interim conservation order can prohibit or control a threatening process<sup>5</sup> and remains in force for 60 days.<sup>6</sup> An interim conservation order also allows the Minister to suspend any licence, permit or other authority granted under any Act that permits an activity that is inconsistent with the interim conservation order.

Such an order would therefore allow the Minister for Environment to, as a precaution, create temporary protections over fire-affected ecosystems or habitat, in order to ensure that further irreversible changes aren't made while information is gathered about the impacts of the fires.

### Further steps: Environmental Authorities authorising clearing

The Administering Authority under the *Environmental Protection Act 1994* (which is the Department of Environment and Science (**DES**) for most activities) has the power to amend an environmental authority (**EA**) on the basis of the information contained in a report of a 'recognised entity'<sup>7</sup> (which includes DES and interstate and commonwealth environment agencies, the CSIRO and Australian Universities). As a consequence, any report produced by DES or by the Commonwealth Environment Department on the changed status of species or ecosystems would provide grounds to reconsider the appropriateness of the conditions of EAs.

Given that EAs for mining and petroleum activities authorise vegetation clearing, it would be appropriate for DES to consider the scale of the clearing that has been authorised, but not yet undertaken, and reconsider whether, in light of the current status of certain species or communities, it remains appropriate that the clearing proceed.

### Further steps: Re-assess listing status and Conservation Plans under *Nature Conservation Act 1992*

Part 5 of the *Nature Conservation Act 1992* allows the Minister to identify wildlife that is threatened with extinction as least concern, near threatened, vulnerable, endangered, critically endangered, extinct in the wild or extinct.

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<sup>3</sup> *Nature Conservation Act 1992*, ss101 - 109

<sup>4</sup> *Ibid* s102

<sup>5</sup> *Ibid* s103

<sup>6</sup> *Ibid* s105

<sup>7</sup> *Environmental Protection Act 1994*, s215(2)(l)

The Species Technical Committee, which has been convened to advise the Minister on the listing of species,<sup>8</sup> currently meets twice per year. Given the high risk that there will be species that should be moved to a higher threat category and species that will now need to be listed for the first time, the Species Technical Committee should be provided with additional resources to assess and reassess species (as appropriate). This should be done at the earliest opportunity, rather than awaiting the next scheduled meeting, to ensure that applications currently in progress can proceed on the basis of accurate and up to date information.

In some cases, the threat level may be such that it is appropriate for the Minister to make a conservation plan identifying areas of critical habitat. Once critical habitat has been identified in a conservation plan, the relevant local government is prevented from granting approvals, consents or permits for the use or development of land that are inconsistent with the conservation plan.<sup>9</sup>

### **Minister for Natural Resources**

#### Interim measure: Interim declaration under *Vegetation Management Act 1999*

The Minister has the power under s18 of the *Vegetation Management Act 1999* (**VMA**) to make an interim declaration that an area is an area of high nature conservation value, if urgent action is needed to protect the area. Such declarations remain in effect for not more than 3 months. While the declaration is in effect it is an offence to clear vegetation in the area. This power could be used to ensure that there is a moratorium on clearing in bushfire-affected regions.

#### Further steps: review of mapping under *Vegetation Management Act 1999*

The Minister should subsequently re-assess mapping under the VMA, particularly for essential habitat,<sup>10</sup> and whether certain ecosystems should be reclassified (ie. whether certain regional ecosystems currently classified as least concern or of concern should move to a higher category such as the endangered category<sup>11</sup>).

### **Minister for Planning**

#### Interim measure: Direct urgent amendments to planning schemes

The Minister for Planning has the power under s26 of the *Planning Act 2016* to direct local governments to amend existing planning schemes to protect a State Interest,<sup>12</sup> which could include the protection of threatened species. The Minister also has the power under s27 to take such action on an urgent basis, in the place of the local government. In our view, the urgent amendment of a planning scheme under s27 could well be justified to preserve habitat necessary for species that are, or have become, threatened species at heightened risk of extinction due to the recent bushfire events.

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<sup>8</sup> [https://environment.des.qld.gov.au/\\_data/assets/pdf\\_file/0035/89639/stc-technical-committee-tor.pdf](https://environment.des.qld.gov.au/_data/assets/pdf_file/0035/89639/stc-technical-committee-tor.pdf)

<sup>9</sup> *Nature Conservation Act 1992*, s123

<sup>10</sup> *Vegetation Management Act 1999*, s20AC

<sup>11</sup> *Ibid* ss22LA to 22LC

<sup>12</sup> 'state interest' is defined to include an interest that the Minister considers affects the environmental interests of the State or part of the State or affects the interest of ensuring that the Act's purpose is achieved (the Act's purpose includes facilitating the achievement of ecological sustainability)

### Interim measure: Temporary state planning policy

The Minister for Planning has the power to make a temporary state planning policy<sup>13</sup> which can suspend or otherwise affect the operation of a state planning instrument. Currently the State Planning Policy<sup>14</sup> contains state interest policies about biodiversity, which may benefit from temporary provisions which preserve the *status quo* for certain species or ecosystems while their status is re-assessed.

### Further steps: regional plans, amend the State Development Assessment Provisions and call-in

Regional Plans under the *Planning Act 2016* are intended to set out regional-level planning about matters of state interest, which include matters that affect an environmental interest of the state, and to identify Strategic Environmental Areas for the purposes of the *Regional Planning Interests Act 2014*. Regional plans are the appropriate place to address the way in which landscape-level biodiversity protections (such as corridors) interact with other planning, such as for urban expansion and linear infrastructure. The intentions reflected in relevant regional plans about habitat protection and development should be reviewed in light of any relevant change in status of ecosystems and species.

The State Development Assessment Provisions (**SDAP**)<sup>15</sup> contain (in State code 16 and new 25) the assessment benchmarks that apply to development applications for the clearing of vegetation. The Minister for Planning could also, with limited formality,<sup>16</sup> amend the SDAP codes<sup>17</sup> to create temporary limitations on clearing ecosystems affected by fire as an interim measure while vegetation mapping is being re-assessed.

The Minister may also wish to exercise his power to call in<sup>18</sup> development applications which are currently in progress to ensure, in an exercise of the precautionary principle,<sup>19</sup> that proposals to clear additional parts of ecosystems affected by the bushfires are not approved (or at least are not approved until such time as there is a proper assessment of the extent of the impacts of the bushfires and consequential re-mapping of vegetation). The Minister's powers under ss94 and 95 to direct decision-makers may be useful powers in identifying applications requiring call-in and in preventing applications from being decided without adequate information.

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<sup>13</sup> *Planning Act 2016*, s12

<sup>14</sup> State Planning Policy, July 2017, found at: <https://dsdmipprd.blob.core.windows.net/general/spp-july-2017.pdf>

<sup>15</sup> The SDAP are incorporated by reference into the Planning Regulation 2017, which is a categorising instrument under s43 of the *Planning Act 2016*.

<sup>16</sup> An amendment to the definition of 'State development assessment provisions' in the *Planning Regulation 2017* would be required.

<sup>17</sup> The SDAP are incorporated by reference into the Planning Regulation 2017, which is a categorising instrument under s43 of the *Planning Act 2016*.

<sup>18</sup> *Planning Act 2016*, ss101 - 106

<sup>19</sup> See *Planning Act 2016*, ss5(2)(a)(ii)

While there is no express power under the *Planning Act 2016* to revoke a development approval authorising habitat destruction that has become inappropriate, it may be possible to exercise the revocation power in s24AA of the *Acts Interpretation Act 1954* in such cases.

The Minister is required to exercise his functions under the *Planning Act 2016* in a way that advances the purpose of the Act,<sup>20</sup> which includes applying the precautionary principle (which is that a lack of full scientific certainty is not a reason to delay taking measures to prevent the degradation of the environment if there is a threat of serious or irreversible environmental damage). In the current circumstances, it would certainly be appropriate for the Minister to act in accordance with this principle.

### **All Ministers**

#### Interim measure: Referral under *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

Actions that will, or are likely to, have a significant impact on a matter of national environmental significance (including listed threatened species and communities) are ‘controlled actions’ that require approval from the Commonwealth Environment Minister under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*.<sup>21</sup>

If a listed threatened species or ecosystem has been bushfire-affected, it could well be the case that smaller-scale impacts will now have a ‘significant impact’ on the capacity of that species or ecosystem to continue to survive. As a consequence, actions that would not have been ‘controlled actions’ prior to the 2019/2020 bushfire season, may now constitute controlled actions and require approval under the EPBC Act.

While project proponents should be referring their actions to the Commonwealth for a determination of whether they are controlled actions, section 69 of the EPBC Act also allows States and state agencies to refer actions that they believe to be controlled actions.

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<sup>20</sup> *Planning Act 2016*, s5

<sup>21</sup> EPBC Act ss67 and 67A