



Environmental  
Defenders Office

**PART OF THE DEFENDING THE UNBURNT SERIES**

# Legal mechanisms for protecting critical, unburnt habitat following the 2019-2020 bushfire season

**JUNE 2021**

# Defending the Unburnt

## Legal mechanisms for protecting critical, unburnt habitat following the 2019-2020 bushfire season

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This Fact Sheet identifies existing legal mechanisms for protecting critical habitat and areas of outstanding biodiversity value, including:

- Areas of Outstanding Biodiversity Value (NSW)
- Critical Habitat and areas of major interest (Qld)
- Critical Habitat (Vic)
- Critical Habitat (Cth)

These mechanisms comprise various powers to identify and declare areas for protection. If better utilised, these legal mechanisms could provide protection for critical, unburnt areas, to help species and ecosystem recover from the devastating impacts of the 2019-2020 bushfire season and to safeguard against future impacts of climate change.

### INTRODUCTION

The bushfire season of 2019-2020 was unprecedented in terms of scale, intensity and duration in Australian bushfire history. The bushfires had a devastating impact on our natural environment:

- In NSW bushfires burnt over 5.52 million hectares of land.<sup>1</sup> 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 habitat of more than 293 threatened animals and 680 threatened plants has been impacted.<sup>2</sup>
- In Victoria bushfires impacted more than 1.5 million hectares.<sup>3</sup> 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 extent burnt.<sup>4</sup>
- More than 7 million hectares were burnt in bushfires in Queensland.<sup>5</sup> Impacts in Queensland are still under assessment.<sup>6</sup>

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,<sup>7</sup> with more recent analyses suggesting as many as three billion nationally.<sup>8</sup> The time required for recovery of threatened and sensitive species after average fires ranges from around 10 years up to 120 years for some species.<sup>9</sup>

Protecting intact and unburnt, as well as lightly burnt areas,<sup>10</sup> areas of high conservation value is crucial, 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.

## MECHANISMS FOR PROTECTING CRITICAL HABITAT

In general, critical habitat is exactly that: habitat that is critical to the survival of a species. However, mechanisms for protecting critical habitat, including definitions and criteria for identifying critical habitat and the form of protection provided, **vary across jurisdictions.**

The key provisions and processes for identifying, nominating and declaring areas as critical habitat in New South Wales, Queensland and Victoria, and under Federal environmental laws, are set out in the following appendices:

- **Appendix 1** – New South Wales - Areas of Outstanding Biodiversity Value (p 3)
- **Appendix 2** - Queensland - Critical Habitat and areas of major interest (p 6)
- **Appendix 3** – Victoria - Critical Habitat (p 9)
- **Appendix 4** – Commonwealth - Critical Habitat (p 12)

Nominations or submissions to have critical habitat identified or declared should address the relevant legal criteria, and include evidence in support, such as a scientific expert report. Any person wanting to nominate an area as critical habitat should check with the relevant government department to find out more about the process for nominations and what information should be provided to support the nomination.

If better utilised, critical habitat mechanisms could provide protection for critical, unburnt areas, to help species and ecosystem recover from the devastating impacts of the 2019-2020 bushfire season and to safeguard against future impacts of climate change.

## Appendix 1 - New South Wales - Areas of Outstanding Biodiversity Value (AOBVs)

### Introduction

The *Biodiversity Conservation Act 2016* (**BC Act**) introduced new provisions relating to areas of outstanding biodiversity value (**AOBVs**). These replaced critical habitat provisions under the repealed *Threatened Species Conservation 1995* (**TS Act**).

Four areas declared as critical habitat under the TS Act became AOBVs under transitional provisions.<sup>11</sup> No AOBVs have been declared in NSW since the BC Act commenced in 2017.

### Key criteria

The Minister for Environment and Energy can declare an area as an AOBV if Minister is of the opinion that:

- (a) the area is important at a state, national or global scale, and
- (b) the area makes a significant contribution to the persistence of at least one of the following—
  - (i) multiple species or at least one threatened species or ecological community,
  - (ii) irreplaceable biological distinctiveness,
  - (iii) ecological processes or ecological integrity,
  - (iv) outstanding ecological value for education or scientific research.<sup>12</sup>

The declaration of an area may relate to, but is not limited to, protecting threatened species or ecological communities, connectivity, climate refuges and migratory species.

The *Biodiversity Conservation Regulation 2017* (NSW) sets out more detailed criteria to be applied by the Minister in forming the opinion that an area can be declared an AOBV.<sup>13</sup>

### Procedural Requirements

#### *Nominations*

Anyone can nominate an area for consideration as an AOBV. Nominations are usually required to address the relevant legal criteria, and include evidence to support the nomination, such as a scientific expert report. We understand that the NSW Government is developing guidelines and template forms to guide the AOBV nomination and assessment process.<sup>14</sup> In the meantime, the NSW Department of Planning, Industry and Environment can be contacted on 1300 361 967 or [AOBV@environment.nsw.gov.au](mailto:AOBV@environment.nsw.gov.au) for more information.

#### *Recommendation and public consultation*

The BC Act sets out the procedural requirements to be followed before an area is declared an AOBV, and includes:<sup>15</sup>

- **Recommendation:** The head of the Environment Agency must recommend the declaration of the area.

- **Consultation with Interest-Affected Parties:** The head of the Environment Agency must notify landholders, and any relevant public authorities, of the recommendation to declare the area. These parties must be provided a reasonable opportunity to make submissions.
- **Public Consultation:** The proposed declaration of an area as an area of outstanding biodiversity value must undergo public consultation as required by Part 9. The proposed declaration document must be publicly exhibited for at least 4 weeks.<sup>16</sup> During this public consultation period, any person may make a written submission to the Minister.<sup>17</sup> Before the Minister makes a declaration, they are to consider any submissions made on the proposed document and any recommendations made by the Environment Agency Head in relation to submissions.<sup>18</sup> The public consultation process under Part 9 also applies to any amendment of the proposed declaration, except if the Minister considers that the amendment is of a minor nature or the matter is urgent.<sup>19</sup> However, a failure to comply with public consultation requirements does not prevent the declaration from being made or amended, or invalidate the declaration once it is made or amended.<sup>20</sup>
- **Expert Consultation:** The head of the Environment Agency must seek and consider the advice of the Threatened Species Scientific Committee (**NSW TSSC**), the Biodiversity Conservation Trust (**BCT**) and the Biodiversity Conservation Advisory Panel (**BCAP**).

Although these procedures must be undertaken, a declaration will not be invalid because of a failure to fully comply with these requirements.<sup>21</sup>

### ***Making a Declaration***

An AOBV is declared by publication of a notice of the declaration on the NSW legislation website.<sup>22</sup>

### ***Amending a Declaration***

The Minister may amend a declaration of an area of outstanding biodiversity value, including by revoking it, by publishing a notice on the NSW legislation website.<sup>23</sup> To amend or revoke a declaration, the same procedure that applies to the making of a declaration must be followed, except where the amendment is to correct a minor error or omission.<sup>24</sup> A declaration cannot be revoked or amended to remove any part of the area unless the Minister considers that the area is not eligible to be declared or that the procedural requirements for making the declaration were not complied with.<sup>25</sup>

### ***Notification to Interest-affected Parties***

The head of the Environment Agency is to notify any landholder of land in the proposed area and any public authorities which exercise functions in relation to land that is covered by the declaration.<sup>26</sup> The Agency Head is also to notify these parties if the declaration is amended or revoked.<sup>27</sup>

## **Subsequent legal protections/requirements/outcomes**

### **Offences**

It is an offence to damage the biodiversity values of a declared area of outstanding biodiversity value.<sup>28</sup> The maximum penalty is \$1.65 million in the case of a corporation or \$330,000 in the case of an individual, or imprisonment for 2 years, or both.

The regulations also include specific offences for declared areas. For example, in relation to the Little Penguin declared area at North Harbour, it is an offence to fish in the Little Penguin declared area between sunset and sunrise during the Little Penguin breeding season.<sup>29</sup>

### **Other protections**

An area that has been recommended as an AOBV must be mapped as category 2 sensitive-regulated land under Part 5A of the *Local Land Services Act 2013 (LLS Act)*.<sup>30</sup> Rural land clearing that is not exempt in that area will require approval (self-assessable codes will not apply).<sup>31</sup> Once an area is declared as AOBV, any proposed clearing will require assessment and consent under the *Environmental Planning and Assessment Act 1979* and/or *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*.

The Minister must take reasonable steps to enter into a private land conservation agreement with any landholder whose land is within the proposed area.<sup>32</sup>

AOBVs are an automatic priority for private land conservation funding and support under the NSW Government's [Biodiversity Conservation Investment Strategy](#).<sup>33</sup> The BC Act requires the Minister for the Environment (or delegate) to direct the BCT to take reasonable steps to enter into a private land conservation agreement with any landholder whose land is within an AOBV.<sup>34</sup>

## Appendix 2 - Queensland – Critical habitat and areas of major interest

### Introduction

The *Nature Conservation Act 1992* (Qld) (**NC Act**) includes provisions for identifying and protecting both critical habitat and an area of major interest. Additionally, the Minister may declare a nature refuge over critical habitat or an area of major interest; or may make an interim conservation order for the conservation, protection or management of critical habitat or an area of major interest that is subject to a threatening process.

### Key Criteria

The NC Act defines critical habitat as follows:<sup>35</sup>

#### ***Meaning of critical habitat***

- (1) ***Critical habitat*** is habitat that is essential for the conservation of a viable population of protected wildlife or community of native wildlife, whether or not special management considerations and protection are required.
- (2) A ***critical habitat*** may include an area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife.

Area of major interest is defined as follows:<sup>36</sup>

**area of major interest** means an area that contains natural resources of significant nature conservation value.

### Procedural Requirements

#### ***Identification of critical habitat or area of major interest in regulation or conservation plan***

The NC Act allows for critical habitat or an area of major interest to be identified in either a regulation or conservation plan made under the NC Act. The Chief Executive is required to keep a register of any critical habitat or area of major interest identified in a regulation or conservation plan.<sup>37</sup>

To the best of our knowledge, we are not aware of any areas that have been identified as critical habitat or an area of major interest under the NC Act.

A regulation or conservation plan may include provisions for the use or development of land, and activities, in an area identified as, or including, a critical habitat or an area of major interest.<sup>38</sup> A local government must not issue or give any approval, consent, permit or other authority for a use of, or a development on, the land that is inconsistent with the regulation.<sup>39</sup>

### **Compulsorily declared Nature Refuges**

The Environment Minister may compulsorily declare a nature refuge if the Minister is of the opinion that the area is, or includes— (i) an area of major interest; or (ii) a critical habitat; and should be declared a nature refuge.<sup>40</sup> However, the NC Act first requires the Minister to prepare a nature refuge proposal and negotiate a conservation agreement with the landholder.<sup>41</sup> We are not aware of a nature refuge having been compulsorily declared under these provisions.

Where the landholder and the Minister are unable to agree that an area should be a nature refuge and the management intent for that area, the Minister can make a recommendation to the Governor in Council for the area to be compulsorily declared as a nature refuge under the NC Act.<sup>42</sup>

The Minister must provide written notice to the landholders and any other people with an interest in the related land.<sup>43</sup> This notice must include the proposed management intent, the Minister's reasons for their opinion, and a deadline for the interest-affected parties to submit objections to the Minister.

After considering any objections received, the Governor in Council may, by regulation, declare the area as a nature refuge.<sup>44</sup> This regulation must describe the area over which the declaration is made, specify the declared management intent, specify the covenant applying to the declaration, and include any other prescribed information.

A nature refuge declaration does not automatically override any extractive industry interests on the land, such as mining or extractive forestry.<sup>45</sup>

### **Interim Conservation Order**

If protected wildlife habitat that is a critical habitat, or an area of major interest, is subject to a threatening process that is likely to have significant detrimental effect, the Minister may make an interim conservation order for the conservation, protection or management of that area.<sup>46</sup>

The NC Act defines a threatening process as follows:<sup>47</sup>

**A threatening process** is any process that is capable of—

- a) *threatening the survival of any protected area, area of major interest, protected wildlife, community of native wildlife or native wildlife habitat; or*
- b) *affecting the capacity of any protected area, area of major interest, protected wildlife, community of native wildlife or native wildlife habitat to sustain natural processes.*

Additionally, an interim conservation order:

- may provide for the prohibition or control of a specified threatening process; or such other matters as are prescribed;<sup>48</sup>
- may be made in relation to land even though the wildlife or habitat is not within the land; or the land is not within an area of major interest or protected area;<sup>49</sup>
- can be in place for 60 days, and extended by not more than 90 days;<sup>50</sup> and



- allows the Minister to suspend any licence, permit or other authority granted under any Act that would permit the holder to do an act that would contravene an interim conservation order.<sup>51</sup>

There are no express provisions saying that critical habitat or area of major interest needs to be identified in a regulation or conservation plan before the powers for declaring a nature refuge or issuing an interim protection order can be used. The provisions simply require the Minister to form an opinion as to an area being critical habitat or an area of major interest.

### ***Seeking protection***

Unlike other jurisdictions, there is no formal process for nominating critical habitat in Queensland. However, a person seeking protection for critical habitat can write to the Environment Minister requesting that the Minister use appropriate powers to identify and protect critical habitat, or an area of major interest. Any such request should address any relevant legislative criteria, and include appropriate evidence, including for example, a scientific expert report. If seeking an Interim Conservation Order, it will also be necessary to provide evidence of the urgency in the Minister intervening to protect an area.

### **Subsequent legal protections/requirements/outcomes**

#### ***Offences***

It is an offence for a person to take or interfere with native wildlife in identified critical habitat or area of major interest, unless a licence, permit or other authority permits the person to do so.<sup>52</sup>

#### ***Compensation for the Landholder***

A landowner may be entitled to compensation from the State in the following circumstances:

- where land is identified in regulation or a conservation plan as including a critical habitat or an area of major interest;<sup>53</sup>
- where the Minister declares that the area is a nature refuge without the agreement of the landowner;<sup>54</sup> or
- land is subject to an interim conservation order.<sup>55</sup>

## Appendix 3 - Victoria – Critical Habitat

### Introduction

The *Flora and Fauna Guarantee Act 1988* (Vic) (**FFG Act**) provides that the Secretary (the Department Head of the Victorian the Department of Environment, Land, Water and Planning)<sup>56</sup> may determine an area in Victoria is a critical habitat.<sup>57</sup> Once an area has been determined to be critical habitat the Minister may make a Habitat Conservation Order to stop, prevent or repair damage to the critical habitat or to manage the critical habitat or to ensure its conservation or protection.<sup>58</sup>

Historically, there has been only one critical habitat determination made under the FFG Act, in 1996, which was subsequently withdrawn.<sup>59</sup> Recent amendments to the FFG Act included revisions to the critical habitat provisions that expand the concept of critical habitat, provide an inclusive list of factors which may contribute to an area being critical habitat and create a greater role for the Scientific Advisory Committee (**SAC**).<sup>60</sup>

### Key Criteria

A determination that an area is critical habitat must not be made unless:<sup>61</sup>

- the area significantly contributes to the conservation in Victoria of a listed taxon or community of flora or fauna; or
- the area significantly contributes to the conservation in Victoria of a taxon or community of flora or fauna that is not listed, but in respect of which—
  - a recommendation has been made by the Committee under section 16D; and
  - the Minister has not made a decision under section 16G or has made a decision under that section to make a recommendation; or
- the area supports ecological processes or ecological integrity that significantly contributes to the conservation of a taxon or community that is listed.

Further, a determination of a critical habitat may be made if—

- the area is critical to the persistence of a taxon or community of flora or fauna; or
- flora or fauna aggregate in the area for reproduction or other important life stages; or
- the area is used by flora or fauna to move between populations, migrate or disperse, or as refugia during environmental stress; or
- the taxon or community of flora or fauna is occasionally present in the area; or
- the taxon or community of flora or fauna is not present in the area but was previously present in the area and there is potential to reintroduce it; or
- the area is likely to be needed by a taxon or community of flora or fauna in the future.

The Secretary, in consultation with the SAC, may make and publish guidelines in relation to areas that may be eligible for critical habitat determinations.<sup>62</sup> There are currently no guidelines published.

## **Procedural Requirements**

### ***Nominations***

Any person can nominate an area as critical habitat. Nominations are usually required to address the relevant legal criteria, and include evidence to support the nomination, such as a scientific expert report. We understand that the Victorian Government is developing guidelines and template forms to guide the critical habitat nomination and assessment process.<sup>63</sup> In the meantime, the Victoria Department of Environment, Land, Water and Planning can be contacted on 136 186 for more information.

### ***Scientific Advisory Committee (SAC)***<sup>64</sup>

The SAC may make a recommendation to the Secretary to make a critical habitat determination.<sup>65</sup> The Secretary is required to consider any recommendations by the SAC to make a critical habitat determination.<sup>66</sup> The Secretary must also give reasons to the Committee for its decision to propose or not propose to make a critical habitat determination,<sup>67</sup> and publish its decision.<sup>68</sup>

### ***Public Consultation***

- *Consultation with Interest-affected Parties:* The Secretary must provide written notice to any landholders of land within the area of the proposed critical habitat determination and any public authorities that perform a function or exercise a power in that area.<sup>69</sup> The Secretary must also provide written notice to any person whose ‘interests... are likely to be adversely affected by the proposed determination’.<sup>70</sup> The notice must notify the recipient of their right to make submissions on the proposed determination and the submission deadline.<sup>71</sup> The deadline must be at least 30 days after the notice is provided.<sup>72</sup>
- *General Public Consultation:* The Secretary must publish on the internet a copy of the proposed determination, a general description of the effect of the proposed determination, and must specify that there is an option to make a submission by a submission deadline.<sup>73</sup> Any person may make submissions to the Secretary on the proposed determination,<sup>74</sup> and the deadline must be at least 30 days after the notice is provided.<sup>75</sup>

The Secretary is not required to provide written notice or to publish the proposed determination if such action is ‘likely to result in damage being done to the habitat within the area’ of the proposed determination.<sup>76</sup> The Secretary is also not required to publish the proposed determination if the landholder so requests and it is approved by the Minister. Once the submission deadline has passed, the Secretary must consider the submissions, and further consult with the SAC in preparing a critical habitat determination.

### ***Making a Critical Habitat Determination***

The Secretary must determine whether a critical habitat determination will be made within 12 months after the proposed determination is published.<sup>77</sup> The Secretary must publish notice of the making of a critical habitat determination in the Government Gazette.<sup>78</sup> The Secretary must ensure that a register of critical habitat determinations and habitat conservation orders is kept and maintained.<sup>79</sup>

### ***Amending a Critical Habitat Determination***

If the Secretary amends a critical habitat determination the amendment operates as if it were a proposed critical habitat determination and the steps listed above must again be repeated,<sup>80</sup> except where the proposed amendment is declaratory, machinery or administrative in nature.

### **Subsequent legal protections/requirements/outcomes**

#### ***Management Agreements***

Once an area is subject to a critical habitat determination, the Secretary is required to take ‘all reasonable steps’ to enter into a public authority management agreement or s 69 agreement in respect of that area.<sup>81</sup> The agreement must outline the measures to provide for the long-term conservation and protection of the critical habitat.<sup>82</sup>

#### ***Habitat Conservation Orders***

The Minister may make a Habitat Conservation Order if it is necessary to stop, prevent or repair damage to the critical habitat or to manage the critical habitat or to ensure its conservation or protection.<sup>83</sup> The order may apply for up to 10 years.<sup>84</sup> A Habitat Conservation Order requires or prohibits actions or activities within a critical habitat or outside the critical habitat if the proposed activity is likely to adversely affect the critical habitat.<sup>85</sup> It is an offence to contravene a Habitat Conservation Order.<sup>86</sup>

The Minister may also make a Habitat Conservation Order in relation to an area proposed as a critical habitat by the Secretary of the DEWLP.<sup>87</sup> However, these are limited in duration to 12 months.<sup>88</sup>

Before a Habitat Conservation Order or requirement imposed by a Habitat Conservation Order expires, the Minister and the Secretary must take all reasonable steps for the purpose of ensuring the long-term conservation of the taxon, community or critical habitat in respect of which the order was made.<sup>89</sup>

*Compensation to landowners:* In certain circumstances, the landowner is entitled to compensation for financial loss suffered as a consequence of the making of a Habitat Conservation Order.<sup>90</sup>

#### ***Management Plans***

A flora and fauna management plan<sup>91</sup> may provide for the conservation, management or restoration of a critical habitat.<sup>92</sup>

#### ***Implications for Ministers and public authorities***

Ministers and public authorities, so far as is consistent with the proper exercising of their functions, must give proper consideration to critical habitat determinations.<sup>93</sup>

If the Secretary is of the opinion that action taken, or to be taken, by a public authority is likely to threaten the persistence of a listed taxon or community of flora or fauna or a critical habitat the Secretary may require the public authority to consult with the Secretary either before the action starts, or if the action has already started, within 15 days of the request being made.<sup>94</sup>

## Appendix 4 - Commonwealth – Critical Habitat

### Introduction

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) includes provisions for the Federal Environment Minister to identify and list critical habitat on a Register of Critical Habitat.

To date, habitat for only 5 species has been listed on the Commonwealth Register of Critical Habitat.<sup>95</sup>

Separately, a recovery plan must identify habitat ‘critical to the survival of the species or ecological community’.<sup>96</sup> Habitat identified in this way is not critical habitat for the purpose of the Register and does not receive the same legal protections as registered critical habitat. However, when making a recovery plan the Minister must consider whether to list habitat that is identified in the recovery plan as being critical to the survival of the species or ecological community on the Register.<sup>97</sup>

### Key criteria

The *Environment Protection and Biodiversity Conservation Regulation 2000* provides that the Minister may, in identifying habitat, take into account the following matters:<sup>98</sup>

- (a) whether the habitat is used during periods of stress;  
Examples of period of stress: Flood, drought or fire.
- (b) whether the habitat is used to meet essential life cycle requirements;  
Examples: Foraging, breeding, nesting, roosting, social behaviour patterns or seed dispersal processes.
- (c) the extent to which the habitat is used by important populations;
- (d) whether the habitat is necessary to maintain genetic diversity and long-term evolutionary development;
- (e) whether the habitat is necessary for use as corridors to allow the species to move freely between sites used to meet essential life cycle requirements;
- (f) whether the habitat is necessary to ensure the long-term future of the species or ecological community through reintroduction or re-colonisation;
- (g) any other way in which habitat may be critical to the survival of a listed threatened species or a listed threatened ecological community.

In determining whether to list a habitat, the Minister must also consider the potential conservation benefit of listing the habitat.<sup>99</sup>

### Procedural requirements

#### *Identifying and adding critical habitat to the Register*

The usual way in which the public can provide input on critical habitat under the EPBC Act is through the recovery planning process. A recovery plan is required to describe areas of habitat that are critical to the survival of the species or ecological communities.<sup>100</sup> The Minister is required to consult on a recovery plan before making it.<sup>101</sup> Information on how to get involved in the

recovery planning process can be found on the Department of Agriculture, Water and Environment [website](#).<sup>102</sup>

Once critical habitat is identified in the recovery plan, the Minister must then consider whether to list that habitat identified in the recovery plan on the Register.<sup>103</sup>

Outside of this process, any questions or concerns regarding critical habitat should be discussed with the Department of Agriculture, Water and Environment. Comments or concerns can also be put in writing to the Environment Minister.

### ***Register***

The Minister must keep a Register, and may list (on the Register) habitat as being critical to the survival of a listed threatened species or listed threatened ecological community.<sup>104</sup> The Register must include sufficient information to identify the habitat, including its location and extent.<sup>105</sup> It should also outline the reasons why a listing is considered a critical habitat.<sup>106</sup> The Register of Critical Habitat must be made publicly accessible at the office of the Department of Agriculture, Water and the Environment and is also available online.<sup>107</sup> However, information may be kept confidential where it is necessary to protect the species or ecological community or the habitat, or the interests of relevant landholders.<sup>108</sup>

### ***Expert Consultation***

Before listing habitat in the Register, the Minister must consider any advice from the Scientific Committee about whether the habitat is critical to the survival of a listed threatened species or listed threatened community.<sup>109</sup>

### ***Landholder Consultation***

If the habitat is outside a Commonwealth area, the Minister must take reasonable steps to consult with the landowner of the area where the habitat is located.<sup>110</sup>

### **Subsequent legal protections/requirements/outcomes**

#### ***Offences***

It is an offence to knowingly damage critical habitat in or on a Commonwealth area.<sup>111</sup> That is, while critical habitat in any jurisdiction may be identified on the Register, the offence under the EPBC Act has limited application as it only relates to damaging critical habitat in or on a Commonwealth area.

#### ***Sale or Lease of the Land***

Where a Commonwealth agency completes a contract to sell or lease Commonwealth land that includes critical habitat, the agency must ensure that the contract includes a covenant which in effect protects the critical habitat.<sup>112</sup> The agency must take reasonable steps to ensure that the covenant binds subsequent buyers or lessees.<sup>113</sup>

## Endnotes

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- <sup>1</sup> 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>
- <sup>2</sup> 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>
- <sup>3</sup> 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](https://www.vic.gov.au/sites/default/files/2021-04/BRV_Statewide%20Recovery%20Plan.pdf)
- <sup>4</sup> 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](https://www.wildlife.vic.gov.au/_data/assets/pdf_file/0030/484743/Victorias-bushfire-emergency-Biodiversity-response-and-recovery-Version-2-1.pdf)
- <sup>5</sup> Queensland Government, *2019 Queensland Bushfires - State Recovery Plan 2019-2022*, August 2020, available at <https://www.qra.qld.gov.au/2019-queensland-bushfires>
- <sup>6</sup> 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, available at <https://www.qra.qld.gov.au/2019-queensland-bushfires>
- <sup>7</sup> 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>
- <sup>8</sup> 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](https://www.wwf.org.au/ArticleDocuments/353/WWF_Impacts-of-the-unprecedented-2019-2020-bushfires-on-Australian-animals.pdf.aspx)
- <sup>9</sup> Smith, Dr A. *Review of CFIQA 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-cifoqa-mitigation-conditions-for-timber-harvesting-in-burnt-landscapes.pdf?la=en&hash=6360E080DB80E7BEF935A1A4A6BDDAB46BBFD0A7>
- <sup>10</sup> 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 CFIQA 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-cifoqa-mitigation-conditions-for-timber-harvesting-in-burnt-landscapes.pdf?la=en&hash=6360E080DB80E7BEF935A1A4A6BDDAB46BBFD0A7>
- <sup>11</sup> These four habitats are habitats for the Gould’s Petrel, Little Penguin population in Sydney’s North Harbour, Mitchell’s rainforest snail in Stotts Island Nature Reserve and the Wollemi Pine. See further <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/areas-of-outstanding-biodiversity-value/area-of-outstanding-biodiversity-value-register>
- <sup>12</sup> *Biodiversity Conservation Act 2016* (NSW) s 3.1(1).
- <sup>13</sup> *Biodiversity Conservation Regulation 2017* (NSW) cl. 3.1
- <sup>14</sup> Current information about AOBVs is available on the NSW Government website. See <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/areas-of-outstanding-biodiversity-value>
- <sup>15</sup> *Biodiversity Conservation Act 2016* (NSW) s 3.3
- <sup>16</sup> *Biodiversity Conservation Act 2016* (NSW) s 9.2.
- <sup>17</sup> *Biodiversity Conservation Act 2016* (NSW) s 9.3(1)
- <sup>18</sup> *Biodiversity Conservation Act 2016* (NSW) sub-s 9.3(3)-(4).
- <sup>19</sup> *Biodiversity Conservation Act 2016* (NSW) s 9.4.
- <sup>20</sup> *Biodiversity Conservation Act 2016* (NSW) s 9.5.
- <sup>21</sup> *Biodiversity Conservation Act 2016* (NSW) s 3.3(3).
- <sup>22</sup> *Biodiversity Conservation Act 2016* (NSW) s 3.1(2).
- <sup>23</sup> *Biodiversity Conservation Act 2016* (NSW) s 3.5(1).
- <sup>24</sup> *Biodiversity Conservation Act 2016* (NSW) s 3.5(3).
- <sup>25</sup> *Biodiversity Conservation Act 2016* (NSW) s 3.5(2).
- <sup>26</sup> *Biodiversity Conservation Act 2016* (NSW) s 3.4(1)(a).
- <sup>27</sup> *Biodiversity Conservation Act 2016* (NSW) s 3.4(2).
- <sup>28</sup> *Biodiversity Conservation Act 2016* (NSW) s 2.3.
- <sup>29</sup> *Biodiversity Conservation Regulation 2017* (NSW) cl 3.6.
- <sup>30</sup> *Local Land Services Regulation 2014*, cl 108(g).

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- <sup>31</sup> *Local Land Services Regulation 2014*, cl 124.
- <sup>32</sup> *Biodiversity Conservation Act 2016* (NSW) s 3.4(1)(b).
- <sup>33</sup> See <https://www.environment.nsw.gov.au/research-and-publications/publications-search/biodiversity-conservation-investment-strategy-2018>
- <sup>34</sup> *Biodiversity Conservation Act 2016* (NSW) s 3.4.
- <sup>35</sup> *Nature Conservation Act 1992* (Qld) s 13.
- <sup>36</sup> *Nature Conservation Act 1992* (Qld) Schedule Dictionary.
- <sup>37</sup> *Nature Conservation Act 1992* (Qld) s 133 and s 134.
- <sup>38</sup> *Nature Conservation Act 1992* (Qld) s 120H and s 175(2)(j).
- <sup>39</sup> *Nature Conservation Act 1992* (Qld) s123 and s 126A.
- <sup>40</sup> *Nature Conservation Act 1992* (Qld) s 49
- <sup>41</sup> *Nature Conservation Act 1992* (Qld) ss 44, 45.
- <sup>42</sup> *Nature Conservation Act 1992* (Qld) s 49.
- <sup>43</sup> *Nature Conservation Act 1992* (Qld) s 49.
- <sup>44</sup> *Nature Conservation Act 1992* (Qld) s 49(3).
- <sup>45</sup> For landholders who wish to voluntarily protect land from mining interest, Queensland recently introduced a new category of voluntary protected area – special wildlife reserves. Land declared as a special wildlife reserve does receive statutory protection from incompatible land uses such as mining, commercial grazing and native timber harvesting. See further: <https://www.qld.gov.au/environment/parks/protected-areas/private/special-wildlife-reserves>
- <sup>46</sup> *Nature Conservation Act 1992* (Qld) s 102(c).
- <sup>47</sup> *Nature Conservation Act 1992* (Qld) s 12.
- <sup>48</sup> *Nature Conservation Act 1992* (Qld) s103.
- <sup>49</sup> *Nature Conservation Act 1992* (Qld) s103.
- <sup>50</sup> *Nature Conservation Act 1992* (Qld) s105.
- <sup>51</sup> *Nature Conservation Act 1992* (Qld) s107.
- <sup>52</sup> *Nature Conservation Act 1992* (Qld) s 97.
- <sup>53</sup> *Nature Conservation Act 1992* (Qld) s 137A.
- <sup>54</sup> *Nature Conservation Act 1992* (Qld) s 67.
- <sup>55</sup> *Nature Conservation Act 1992* (Qld) s 108.
- <sup>56</sup> See *Flora and Fauna Guarantee Act 1998* (Vic), section 3 – definitions. *Secretary* means the body corporate established by Part 2 of the *Conservation, Forests and Lands Act 1987*. Section 6 of the *Conservation, Forests and Lands Act 1987* (Vic) establishes as the body corporate as “The person who is for the time being the Department Head (within the meaning of the *Public Administration Act 2004*) of the Department and the successors in office of that person are a body corporate under the name “Secretary to the Department of Environment, Land, Water and Planning””.
- <sup>57</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20.
- <sup>58</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 26(3).
- <sup>59</sup> Fitzsimons, J., *Urgent need to use and reform critical habitat listing in Australian legislation in response to the extensive 2019-2020 bushfires*, (2020), 37 EPLJ 143
- <sup>60</sup> See Victoria Department of Environment, Land Water and Planning, *Critical habitats and HCO factsheet*, available at [https://www.environment.vic.gov.au/\\_data/assets/pdf\\_file/0032/466682/Critical-habitat-and-HCO-factsheet.pdf](https://www.environment.vic.gov.au/_data/assets/pdf_file/0032/466682/Critical-habitat-and-HCO-factsheet.pdf)
- <sup>61</sup> *Flora and Fauna Guarantee Act 1988* (Vic) s 20.
- <sup>62</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20E.
- <sup>63</sup> Current information about critical habitat provisions are available on the Victorian Government website: <https://www.environment.vic.gov.au/conserving-threatened-species/victorias-framework-for-conserving-threatened-species>
- <sup>64</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 8(2). The Scientific Advisory Committee (SAC) is a committee consisting of 7-9 expert scientists in a diverse range of flora and fauna, or potentially threatening processes.<sup>64</sup> It advises the Minister on the listing of taxa or communities of flora and fauna and potentially threatening processes, and on any other flora and fauna conservation matters.
- <sup>65</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20A(1).
- <sup>66</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20A(2).
- <sup>67</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20A(3).
- <sup>68</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20A(4).
- <sup>69</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(1)(a)-(b).
- <sup>70</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(1)(c).
- <sup>71</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(2).
- <sup>72</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(2).
- <sup>73</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(3).



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- <sup>74</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(3); 'Flora and Fauna Guarantee Act 1998: Critical habitat and habitat conservation orders', Department of Environment, Land, Water and Planning (Vic) (Web Page, 2020) <[https://www.environment.vic.gov.au/\\_\\_data/assets/pdf\\_file/0032/466682/Critical-habitat-and-HCO-factsheet.pdf](https://www.environment.vic.gov.au/__data/assets/pdf_file/0032/466682/Critical-habitat-and-HCO-factsheet.pdf)>.
- <sup>75</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(3).
- <sup>76</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20B(4).
- <sup>77</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20C(2).
- <sup>78</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20C(3).
- <sup>79</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 42.
- <sup>80</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20D.
- <sup>81</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20F; s 69 agreement refers to agreements made under section 69 of the *Conservation, Forests and Lands Act 1987* (Vic).
- <sup>82</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 20F(3).
- <sup>83</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 26(3).
- <sup>84</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 27(4).
- <sup>85</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 27.
- <sup>86</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 32.
- <sup>87</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 26(1)(b).
- <sup>88</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 26(4).
- <sup>89</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 40.
- <sup>90</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 39.
- <sup>91</sup> Flora and Fauna Management Plans are prepared under Part 4 Division 3 of the *Flora and Fauna Guarantee Act 1998* (Vic).
- <sup>92</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 23(2)(e).
- <sup>93</sup> *Flora and Fauna Guarantee Act 1998* (Vic), s 4B.
- <sup>94</sup> *Flora and Fauna Guarantee Act 1998* (Vic) s 7.
- <sup>95</sup> These species are *Diomedea exulans* (Wandering Albatross) - Macquarie Island; *Lepidium ginninderrense* (Ginninderra Peppergrass) - Northwest corner Belconnen Naval Transmission Station, ACT; *Manorina melanotis* (Black-eared Miner) - Gluepot Reserve, Taylorville Station and Calperum Station, excluding the area of Calperum Station south and east of Main Wentworth Road; *Thalassarche cauta* (Shy Albatross) - Albatross Island, The Mewstone, Pedra Branca; and *Thalassarche chrysostoma* (Grey-headed Albatross) - Macquarie Island. The Register of Critical Habitat is available here: <https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl>
- <sup>96</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s270(2)(d).
- <sup>97</sup> *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(2).
- <sup>98</sup> *Environment Protection and Biodiversity Conservation Regulation 2000* (Cth), cl 7.09.
- <sup>99</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 207A(1A).
- <sup>100</sup> *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl. 7.11.
- <sup>101</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 275.
- <sup>102</sup> See <https://www.environment.gov.au/biodiversity/threatened/recovery-plans/comment>
- <sup>103</sup> *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(2).
- <sup>104</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 207A.
- <sup>105</sup> *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.10(1)(a).
- <sup>106</sup> *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.10(1)(b).
- <sup>107</sup> See <https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl>
- <sup>108</sup> *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.10; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 207A(3A).
- <sup>109</sup> *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(3)(a).
- <sup>110</sup> *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cl 7.09(3)(b).
- <sup>111</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 207B.
- <sup>112</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 207C(2).
- <sup>113</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 207C(3).